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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16349

In the Matter of **BARBARA DUKA,** **Respondent.**	**DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF**

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I. PRELIMINARY STATEMENT

In December 2010, Respondent Barbara Duka ("Duka") directed a material and undisclosed change to the ratings methodology Standard & Poor's Ratings Services ("S&P") used to rate commercial mortgage backed securities ("CMBS") transactions without following required and established internal S&P procedures. Specifically, Duka caused S&P's CMBS ratings group to switch from using a conservative "loan constant" – a key component of S&P's CMBS ratings methodology that was intended to reflect the effects of economic stress on the performance of CMBS – to using a much less conservative loan constant. This change to the CMBS ratings methodology was inconsistent with S&P's publicly-disclosed CMBS ratings criteria – the established methodology CMBS analysts were required to apply consistently across all ratings – and the practice of the CMBS ratings group, and resulted in CMBS transactions receiving higher ratings than they would have under S&P's publicly-disclosed methodology. These higher ratings, in turn, garnered more issuer-paid CMBS ratings business for S&P: Before Duka changed the CMBS ratings methodology, S&P was hired to rate only one CMBS transaction in 2010, whereas after Duka loosened the CMBS ratings methodology, S&P was hired to rate eight CMBS transactions through July of 2011. When the truth about Duka's improper conduct emerged in July 2011, S&P roiled the CMBS market by withdrawing two preliminary CMBS ratings.

The essential facts in this case are not disputed: Duka admits she directed the change in ratings methodology at the heart of this case. The change in ratings methodology dramatically reduced the credit enhancement levels required to obtain the gold standard AAA bond rating, and the transactions Duka's CMBS group rated using the altered methodology would not have earned that rating under S&P's publicly-disclosed methodology. The change in methodology did not follow S&P's internal policies and procedures for altering a ratings methodology. The change in methodology was never adequately disclosed internally at S&P, or to the investing public. Worse, S&P's public disclosures were rife with misleading metrics indicating that S&P followed its publicly-disclosed methodology, when in fact it did not.

As to matters that are disputed, the evidence adduced at the hearing compels a finding in favor of the Division and against Duka on all counts. First, the Division presented extensive evidence that the change in rating methodology Duka directed, and the related misstatements and omissions in S&P's disclosures, were material to investors. Second, Duka acted with a culpable state of mind with respect to each of the Division's claims. The Division adduced substantial evidence that Duka covertly changed the ratings methodology to get more paid ratings business, and did so in a manner calculated to avoid internal and external scrutiny. At a bare minimum, Duka, as the highest ranking analytical manager in S&P's CMBS group, acted unreasonably in effecting a sweeping change to S&P's ratings methodology without taking any steps to ensure that the change was vetted internally and disclosed externally.

The Division respectfully requests that the ALJ find in favor of the Division on all counts and grant appropriate relief to ensure that the conduct underlying this case is not repeated.

II. SUMMARY OF THE EVIDENCE

A. Background

At all times relevant to this case, S&P was a nationally recognized statistical ratings organization ("NRSRO" or "rating agency") that issued credit ratings, which were "forward-looking opinions about the creditworthiness of issuers and obligations." FOF ¶1. Like its competitors, S&P published credit ratings for various financial instruments, including CMBS.[1] FOF ¶2. As of 2009, S&P had instituted internal policies that formally separated commercial concerns from the rating process, as required by the applicable laws and regulations governing rating agencies. *See* 17 CFR § 240.17g-6. However, S&P – like all NRSROs – was paid for its ratings by the banks issuing the securities that S&P rated. FOF ¶4. In 2011, S&P earned approximately $7 million for rating six of the eight CMBS transactions at issue in this case. FOF ¶5.

At Standard & Poor's, the CMBS ratings group had two functions – rating newly-issued CMBS and formulating ratings for existing CMBS.[2] FOF ¶6. At all times relevant to this case, including 2009 through 2011, Duka oversaw the analytical team responsible for new issue ratings, and in early 2011, she began supervising the analysts responsible for surveillance ratings. *Id.*

Ratings are important to CMBS investors, whether they are conservative investors looking for the gold-standard AAA rating, or aggressive investors buying riskier tranches in the capital structure. FOF ¶7. Ratings influence the price at which CMBS trade, and help investors gauge from deal to deal whether the potential return on their investment is worth the risk. FOF ¶7. Moreover, many investors are only able to invest in CMBS rated by S&P or another particular rating agency under their firm's investment guidelines, or are limited to investing in only CMBS at or above a certain rating, *e.g.*, "AAA" or "BBB." FOF ¶8.

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[1] Commercial mortgage-backed securities, often simply called CMBS, are certificates of beneficial ownership in a trust containing one or more mortgage loans on commercial properties such as retail centers, office buildings, hotels, industrial buildings, warehouses, and multifamily properties. FOF ¶3.

[2] Ratings on newly issued CMBS are often referred to as "new issue" or "NI" CMBS ratings, whereas ratings on existing CMBS are referred to as "surveillance" CMBS ratings. FOF ¶3.

B. S&P's 2009 Criteria

In the wake of the financial crisis in 2008,[3] and after rating agencies received public criticism for their perceived lack of integrity in rating mortgage-backed securities, S&P hired new management, and among other things, revamped the methodology (or "criteria") used to rate CMBS. FOF ¶10. In June 2009, S&P published its newly-revised ratings methodology for conduit/fusion[4] CMBS transactions ("the 2009 Criteria"), after receiving numerous responses to a May 2009 "request for comment" from CMBS investors. FOF ¶11. S&P explicitly announced that it was "publishing th[e] article to help market participants better understand our approach to rating U.S. conduit/fusion CMBS transactions." FOF ¶13. Under the new methodology, S&P imposed a high credit enhancement[5] standard (generally, S&P required 19% credit enhancement for the AAA tranche of an average CMBS pool) for CMBS bonds to receive S&P's "AAA" rating. As S&P stated:

> At the core of the approach is the establishment of a 'AAA' credit enhancement level that is sufficient, in our view, to enable tranches rated at that level to withstand market conditions commensurate with an extreme economic downturn without defaulting[.] As a result of this update, we expect that 'AAA' credit enhancement levels will rise significantly from current levels.

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[3] S&P's profitability slumped after the financial crisis. Former S&P head of structured finance David Jacob testified that when he was hired in 2008, S&P's revenues had dropped from $1 billion in 2007 to about $300 million, resulting in profits plummeting from approximately $700 million to zero. FOF ¶9.

[4] Conduit/fusion CMBS, unlike single-borrower CMBS, are backed by numerous commercial loans, and are diverse as to property type, location, and borrower. FOF ¶12. Conduit/fusion CMBS comprise approximately 85% of the CMBS market. FOF ¶14.

[5] Credit enhancement (also called "credit support" or "subordination") is the term for the subordinate bonds that absorb losses before the senior class of bonds. The subordinate bonds are at the bottom of the "loss waterfall," which allocates principal losses in a specific order, from riskiest to least risky bonds. *See* FOF Glossary, at 2.

JE 2, at 4. In other words, S&P would rate AAA only those bonds with enough subordinate bonds (*i.e.*, riskier bonds that would suffer losses first) to absorb *all* losses if an economic downturn commensurate with the Great Depression were to occur. FOF ¶15. As many CMBS investors expressed to S&P in May 2009, the 2009 Criteria were widely viewed as unreasonably conservative. FOF ¶23.

Among the key metrics used to derive ratings under the 2009 Criteria was the debt service coverage ratio ("DSCR"). The DSCR is an important metric that investors and ratings agencies use to analyze whether a borrower will default on a loan. FOF ¶16. The DSCR reflects the ability of the borrower to cover its loan payments with the rental income produced by the property. Specifically, the DSCR is the ratio of the net cash flow generated by the property[6] divided by the annual debt service—*i.e.*, the amount of money the borrower has to pay every year under the terms of the loan.[7] The annual debt service is calculated by multiplying the principal amount of the loan by a "loan constant," which reflects both the interest rate and the amortization schedule on the loan.

The annual debt service used in the denominator of the DSCR calculation can be calculated in two different ways. The first is to use the actual annual debt service required under the terms of the loan. The second is to use a hypothetical, higher payment based on a "stressed" loan constant—*i.e.*, a loan constant that produces a larger loan payment than what is actually required

[6] As explained by the Division's expert, Dr. Peter Rubinstein, net cash flow or "NCF" is a conservative measure of income produced by a property securing a commercial loan, which reduces the total income by estimates of future outlays needed for leasing commissions, tenant improvements, major repairs, and capital improvements, all on an annualized basis. *See* FOF Glossary, at 2; *see also* Div. Ex. 335, ¶ 52(i).

[7] A DSCR greater than or equal to 1.0 means that there is enough money generated by the property to service the debt. A DSCR less than 1.0 means that the borrower does not have enough money to make its loan payments, and therefore may default. *See* FOF Glossary, at 2.

under the terms of the underlying loan. Rating agencies commonly apply "stress" in the analysis of CMBS transactions to simulate negative economic conditions, and S&P's decision to use a stressed loan constant lies at the heart of this case. *See* Div. Ex. 335, ¶ 52(i).

Beginning with the 2009 Criteria, S&P used hypothetical stressed loan constants to rate CMBS transactions.[8] These constants appeared in the 2009 Criteria as part a table called "Archetypical CMBS Conduit/Fusion Pool." Because this table was called "Table 1" in the criteria article, this brief will refer to the constants listed therein as "Table 1 constants." FOF ¶20. The Table 1 constants were generally higher than the actual loan constants derived from the terms of the underlying loans, which meant that applying the Table 1 constants built in an assumption that the borrowers were making higher loan payments. This additional stress meant that a borrower would be more likely to default, and thus created a need for higher credit enhancement levels to protect CMBS investors from potential losses.

From the inception of the 2009 Criteria, the Table 1 constants were in fact used by S&P analysts in rating CMBS transactions. FOF ¶21. Putting to rest any doubt on the subject, on July 31, 2009, S&P's most senior management reaffirmed that the 2009 Criteria called for the use of the Table 1 loan constants to rate ***all*** CMBS transactions, including new issuance transactions. FOF ¶22. This was not a "change" to the 2009 Criteria, or even an "interpretation" of the 2009 Criteria. Rather, S&P's management reaffirmed what had transpired since the 2009 Criteria were published – *i.e.*, that the Table 1 loan constants were used to rate all CMBS transactions. FOF ¶22.

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[8] Numerous S&P documents available to the public described the Table 1 constants as "stressed," including the eight presales that are the focus of this case and a commentary and presale issued on two 2010 CMBS transactions. FOF ¶19.

In contrast, Duka testified, despite extensive evidence to the contrary, that the 2009 Criteria required the use of "actual constants" – *i.e.*, loan constants derived from the contractual interest rate on an underlying commercial real estate loan. *See, e.g.*, Tr. 1124:6-12; 1435:23-24; 1445:1-3; 1149:25-1150:2. However, there is no evidence in the record that Duka ever expressed that view in 2010 or 2011, and she never directed her team to use actual constants to rate CMBS transactions in 2010 or 2011. In any event, whatever Duka's subjective understanding may have been regarding the intended use of the Table 1 constants, at least as of July 31, 2009, all CMBS transactions were to be rated using the loan constants in Table 1.

C. The CMBS Group Used Table 1 Constants for Surveillance and New Issue Ratings in 2009 and 2010.

S&P's CMBS group used Table 1 constants for both new issue and surveillance ratings as the CMBS market revived in 2010. FOF ¶28-30; *see also* Tr. 66:8-14, 80:25-81:19. The first new CMBS deal S&P analyzed after releasing the 2009 Criteria was JPMCC 2010-C1, a transaction S&P was not hired to rate but nonetheless published commentary on "[a]s part of its continuing efforts to provide insight to [CMBS] investors[.]" FOF ¶38. In that commentary, S&P publicly stated:

> Standard & Poor's typically evaluates a transaction's loan default probability using a stressed DSC based on 'BBB' and 'AAA' cash flow scenarios *and a stressed loan constant.* For JPMCC 2010-C1, the pool's weighted average *stressed debt constant* would equal approximately 8.33%, based primarily on the retail and office exposure, for which *our constant* is 8.25%. *The stressed DSCs based on the issuer's NCFs and our stressed constants*, ranged from 1,20x-2.73x, with a weighted average DSC of 1.50x. *The DSCs shown in table 5 are based on the issuer's NCF at issuance and Standard & Poor's stressed constants.*

Div. Ex. 230, p. 5 (emphasis added). Thus, S&P announced to investors that it would evaluate loan default probability by using the stressed Table 1 constants. Following that commentary, Duka's CMBS group was hired to rate JPMC 2010-C2, and again used and disclosed the Table 1 constants to calculate DSCRs and credit enhancement levels for that transaction. FOF ¶30.

D. In Late 2010, Duka's Team Was Losing Deals because the 2009 Criteria Were Too Conservative.

After the 2009 Criteria were adopted, the CMBS new issue market was stagnant. FOF ¶24. And when the market began to revive in 2010, S&P was largely shunned by the issuers. While S&P had 91.3% market share in 2008, its market share plummeted to 20.5% in 2010 and 18.1% in 2011.[9] *Id.* Because issuers typically hire the agency with the lowest credit enhancement levels,[10] and S&P's 2009 Criteria drove S&P's proposed credit enhancement levels for new CMBS deals substantially higher, S&P struggled to compete for business.[11] FOF ¶25-26. Indeed, Commercial Mortgage Alert highlighted this problem in a January 2011 article, noting that:

> S&P is paying the price for the 2009 overhaul of its [CMBS] criteria ... The longtime market leader was hired to rate only one of the seven multi-borrower deals in the U.S. last year... [I]ssuers didn't bypass the agency last year out of pique. S&P is evidently now demanding higher [credit enhancement] levels on multi-borrower deals than its rivals are, which would result in fewer high-priced triple-A bonds to sell. Given that choice, issuers are turning elsewhere.

Resp. Exs. 370 at 2 & 369 at 7.

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[9] There were no new CMBS transactions in the United States in 2009.

[10] As numerous witnesses testified, CMBS issuers generally prefer lower credit enhancement levels, because "the more AAA bonds you could produce ... the more profitable the deal[.]" FOF ¶25 (quoting testimony of David Jacob).

[11] In addition to the 2009 Criteria producing relatively high credit enhancement levels, certain issuers objected to engaging S&P due to the "terms and conditions" S&P required for providing ratings services and for certain issuances to which Exchange Act Rule 17g-5 applied. However, such impediments were largely resolved by December 2010, leaving the stringent 2009 Criteria as the main impediment to Duka's group securing new business. Tr. 660:12-662:6, 662:22-663:9, 1177:5-11, 1181:20-24.

Duka was acutely aware of these commercial problems, even though she was required by law and S&P policy not to allow commercial considerations to affect the ratings that her group published. FOF ¶¶26-27; ¶¶35-36. Duka provided feedback on numerous occasions to her supervisors that S&P was losing deals because of the conservative nature of the criteria. FOF ¶36. Eric Thompson, then head of CMBS Surveillance, testified as follows:

> Q: Did Ms. Duka ever express to you her belief that the 2009 criteria were generating credit enhancement levels that were too high to get the ratings engagements?
>
> A: Yes.
>
> Q: When did she express that to you?
>
> A: As co-heads of the group, we had to meet with our supervisors. We also had to prepare activity reports. Particularly in 2009/2010, as the market started to gain traction, there were several engagements we did not win ... and the belief [was that] it was attributable to the enhancement levels.
>
> ***
>
> Q: . . . Did Ms. Duka indicate to you her belief that [S&P] lost ... ratings engagements because the criteria were too conservative?
>
> A: Yes.

FOF ¶¶35, 36.

E. December 2010: Duka Loosens the CMBS Criteria.

In December 2010, Duka changed the loan constants used to rate all newly issued CMBS. FOF ¶44. This change significantly reduced the credit enhancement levels required to achieve the AAA rating. The Division's expert, Dr. Peter Rubinstein, reviewed S&P's model and opined that the change to blended constants reduced the credit enhancement levels from 437 to 750 basis points, representing an approximately 25 to 55 percent reduction in credit enhancement. FOF ¶45.

Dr. Rubinstein further determined that the credit enhancement levels derived using blended constants would have resulted in a three to four notch drop in ratings—*i.e.*, from AAA to AA- or A+—had the 2009 Criteria been faithfully applied. *Id.*

Rather than proposing a formal change to S&P's methodology to use blended constants, Duka instead maneuvered internally to loosen the criteria, in a manner likely to garner more CMBS conduit/fusion business, but without having to make any kind of disclosure to senior S&P management (including Chief Credit Officer Mark Adelson) or the investing public. Duka effected this change under the radar at S&P, by taking an informal discussion with Dr. Frank Parisi regarding the possible use of blended constants on a single transaction as "approval" to use a 50/50 blend to rate every single new CMBS.

On December 14, 2010, Duka and Eric Thompson met with Dr. Parisi, who was then S&P's Chief Criteria Officer and acting CMBS Criteria Officer, to discuss under what circumstances loan constants other than the Table 1 constants could be used. There is no written record of the meeting, which was not a formal criteria committee meeting. Dr. Parisi and Thompson both testified that the meeting was informal, that Duka made no specific proposal, and that the meeting did not result in a specific decision. FOF ¶¶37-39. Nevertheless, Duka purported to take away from the meeting approval to radically reduce the credit enhancement required for the various ratings levels, including most significantly the AAA rating level, by adopting a new methodology for calculating loan constants. Instead of using the Table 1 constants to calculate DSCRs for the loans in a CMBS pool, henceforth Duka's group would use "blended constants," or an average of the Table 1 constants and the actual constants. Duka made this change even though Thompson testified that the discussion with Dr. Parisi related to "specific loans and/or transactions, as opposed to being programmatic," while Dr. Parisi testified that if Duka had proposed an across-the-board change, he would have directed Duka "to go to criteria committee and follow the process."[12] FOF ¶41.

While Duka claims that Dr. Parisi "approved" the use of blended constants for all transactions,[13] she admits that Dr. Parisi directed her to disclose any change in methodology, and that she agreed to do so.[14] This disclosure was to appear both internally, in the summaries of rating actions known as Rating Analysis and Methodology Profiles ("RAMPs"), and externally to investors in S&P's presales. FOF ¶42.

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[12] Duka testified that Dr. Parisi's opinion had to cover all future CMBS transactions, because it didn't "make sense to apply to . . . one transaction," *see* Tr. 1140:23-25 (Duka), but Dr. Parisi disagreed, testifying that "it would be reasonable to make that kind of adjustment [to the loan constant] on a specific case rather than across the board" FOF ¶40. *See also* FOF ¶41 (Thompson).

[13] The email exchange reflected in Division Exhibit 101 does not undermine Dr. Parisi's testimony, as Duka suggests. Specifically, Duka argues that because Dr. Parisi did not specifically respond, at 11:26 p.m. on a Saturday night, to one vague sentence on the second page of an email attachment, he somehow must have "approved" the use of blended constants across all CMBS transactions in December 2010. Tr. 25:6-12 (Duka opening statement); Resp. Ex. 517 at 4 ("We are currently using a 50/50 blend" of the actual and Table 1 constants). For his part, Dr. Parisi did not recall receiving the email, did not recall reviewing the attached memo, and agreed that his response to Duka appeared to reflect an "off-the-cuff" reaction that the proposals referenced in the email exchange should "go through the [criteria change] process . . . [.]" Tr. 1522:5-1526:12; 1572:11-14 (Parisi). Even if Dr. Parisi read the memo (which is not clear from his or any other testimony), the language Duka relies upon does not, on its face, say anything about whether the use of the "50/50 blend" had been adequately documented and disclosed, or properly approved as a criteria change subsequent to Dr. Parisi's December 2010 conversation with Duka and Thompson. Indeed, there was nothing in the memo that would have alerted Dr. Parisi that Duka had implemented an across-the-board change in methodology in December 2010, concealed that change from investors, and failed to disclose or document the change internally at S&P. Moreover, any factual dispute over the substance of the meeting with Dr. Parisi is irrelevant, given Duka's admitted agreement to disclose any changes made in both the presale and the RAMP.

[14] Parisi's directive to Duka was consistent with S&P's Code of Conduct (*see* Div. Ex. 269). Sections 3.5, 3.6, and 3.10 of S&P's Code of Conduct made it clear the disclosure of methodologies, and changes to methodologies, was mandatory for all ratings decisions.

F. Duka Fails to Disclose the Switch to Blended Constants.

In the six months following the Parisi meeting, Duka led the CMBS Group to provide preliminary ratings[15] for eight transactions. One of the most important parts of completing a preliminary rating is the drafting and publication of a presale report. Presale reports are public disclosures for investors about a CMBS offering, including the assigned ratings and credit enhancement levels, and S&P's analysis of collateral underlying the CMBS. Presale reports are the collective effort of the committee responsible for rating a transaction. FOF ¶33. As leader of the CMBS Group, Duka sat on the committees for all of the ratings discussed herein. FOF ¶¶47, 61. For all eight transactions, Duka's group calculated credit enhancement using blended constants, but contrary to her promise to Dr. Parisi and to the Code of Conduct, Duka did not disclose the change of methodology.[16] FOF ¶51, 52. Instead, the presales (a) failed to disclose the use of blended constants to CMBS investors[17] and (b) specifically (and repeatedly) listed the

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[15] Preliminary ratings are the ratings that investors use in their investment decisions. Final ratings appear after transactions close. FOF ¶67.

[16] Duka has argued that the decision to switch to blended constants was "analytically sound" and thus motivated by a desire to produce better ratings. As an initial matter, this argument is beside the point. This case is not about whether Duka's drastic change to S&P's CMBS rating methodology made the ratings better or worse. It is primarily about whether that change was disclosed to investors, which it was not. However, Duka's position that the use of a 50/50 blend was "analytically sound" appears to be revisionist history. Duka offered no cogent explanation for why the 50/50 blend made sense. FOF ¶ 68 (with respect to the analytical rationale for using a 50/50 blend, Duka testified: "I can't tell you why. I don't know.") At the hearing, senior CMBS analyst James Digney attempted to justify the blend as analytically sound, but previously testified that, in 2011, he could not think of any analytical justification for using a 50/50 blend. FOF ¶69.

[17] Duka has asserted that she met the disclosure obligation through a single sentence contained deep within the text of the presales to the effect that S&P "will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our

DSCRs based on the Table 1 constants in the presales, as if Duka's group was still using the Table 1 constants to calculate DSCRs. FOF ¶¶ 52-54, 110. The Rationale, Strengths, and Top 10 Loans sections of all eight presale reports, among other sections, prominently disclosed DSCRs that were calculated with Table 1 constants, and the presales referenced the "Standard & Poor's Ratings Services loan constant" (*i.e.*, the Table 1 constants) even though the Table 1 constants *were not used to rate a single one of these eight transactions*. FOF ¶¶ 52-54, 110. Thus, while Duka testified that the presale "should reflect the numbers that were actually used," because of her change to blended constants, they did not. FOF ¶55.

Duka also failed to disclose the use of blended constants in RAMPs. FOF ¶¶57-63. Duka testified that there were hundreds of hours of meetings in connection with the eight RAMPs for these deals, but that she "did not recall" the use of blended constants, or their disclosure, being discussed. FOF ¶58.

The incorrect and incomplete disclosures in the presales and RAMPs did not occur by accident or mistake. Duka's subordinate James Digney,[18] who was one of two senior CMBS analysts reporting to Duka in 2011, testified that the publication of data based on the Table 1 constants was simply "sloppiness." *E.g.*, Tr. 818:2-8 (Digney). However, "sloppiness" is not a

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conduit/fusion criteria." FOF ¶109. This sentence added nothing to the disclosures that appeared in the presales. FOF ¶108.

[18] Digney worked in CMBS surveillance from late 2009 until approximately March of 2011 when he moved to the NI group. Tr. 419:12-420:12. Thompson supervised Digney until Thompson left S&P in early 2011, when Duka became his supervisor. *Id.* Digney learned that CMBS surveillance was using Table 1 constants when he started work in surveillance. Tr. 475:12-16, 801:9-13. When he joined new issue in 2011, new issue was using blended constants to rate CMBS, but Digney never received any memorandum concerning the use of blended constants. Tr. 801:14-23. Later in 2011, Digney worked on a memo, in accordance with the Criteria Process Guidelines, to propose using actual constants. No memo existed, to Digney's knowledge, concerning the switch from Table 1 constants to blended constants. Tr. 826:3-17.

credible explanation based on the substantial effort that was necessary to separately calculate credit enhancement levels based on blended constants. As both Digney and Duka testified, the New Issuance group had to run the models two (and "sometimes three") times for each of the presales in order to generate ratings based on blended constants alongside the DSCR data based on the stressed Table 1 constants.[19] FOF ¶65. Moreover, in some cases, the issuers of CMBS (who were paying S&P) were provided with the "real" loan constants and DSCRs used to rate the transaction, while investors were given incorrect numbers in the presales. FOF ¶64. Indeed, Duka admitted that S&P should have provided the same numbers (*i.e.*, DSCR and loan constant) to both the issuers and the investors. FOF ¶66.

By promising Dr. Parisi that she would disclose how the CMBS group was using blended constants, Duka took on the responsibility to communicate that promise to her subordinates.[20] Brian Snow, one of the CMBS analysts reporting to Duka in 2011, testified that he would have disclosed the use of blended constants had Duka directed him to do so, FOF ¶117, but Duka's subordinates were hazy on the details of how they came to understand that the blended constants should be applied but not disclosed. Digney testified about an e-mail documenting his discussions with Duka concerning the disclosures for a 2011 Goldman Sachs transaction, GSMS 2011-GC4. On July 11, 2011, prior to publishing the presale, Digney and Lucienne Fisher, another CMBS analyst reporting to Duka, exchanged emails, in which Fisher asked Digney: "Did you ever find out if BD [Duka] wants us to report the [DSC] based on the blend as well as the stressed constant?"

[19] Later in time, the NI group began to disclose actual loan constants and DSCRs in the presales, but continued to *not* disclose blended constants. *See, e.g.*, JE 68 at 4.

[20] By promising to make disclosure in the meeting with Dr. Parisi, Duka assumed responsibility to do it. However, Duka refused to acknowledge any responsibility for the disclosures. Indeed, when asked at the hearing whether she assumed any responsibility to ensure that such disclosure was in fact made, Duka claimed not to know what the word "responsibility" meant. FOF ¶116.

FOF ¶70. Digney replied approximately 45 minutes later, advising Fisher: "I spoke with her [Duka], and she wants to show both the DSC using stressed constant and the DSC using actual constant." *Id.* In other words, Duka directed her team *not* to disclose the DSCR derived by using blended constants in the Goldman Sachs presale but rather, to include only the actual and Table 1 constants, neither of which was used to rate the deal.

As an executive at S&P at the time of the controversial 2009 criteria change, Duka was well aware of the potential sensitivities involved with any further change in the 2009 CMBS Criteria, given the still-fragile CMBS market and the public pressure on S&P post-financial crisis. Accordingly, Duka would have known that any criteria change that appeared to loosen criteria could lead to criticism, either internally or externally. Thus, she had an incentive not to disclose the change to blended constants. Indeed, once senior management at S&P discovered the use of blended constants by the CMBS ratings group – as discussed below – Duka admitted in an internal meeting that "she hadn't published the blended constant or explained the blended constant, so she didn't want to have to explain why new issue was different from surveillance[.]"[21] FOF ¶72.

G. Duka Concealed Her Conduct from Internal Scrutiny.

At all relevant times, S&P had in place policies and procedures intended to ensure that the ratings process complied with S&P policy and applicable law. Primary among these controls was S&P's Code of Conduct, which was the overarching set of rules applicable to all ratings personnel. FOF ¶82. In addition to the Code of Conduct, S&P had several other internal controls functions.

[21] Even though new issue and surveillance were supposed to follow the same criteria, the surveillance group continued to use the Table 1 constants for several months after Duka caused the new issue group to use blended constants. FOF ¶72.

Of particular relevance to this case were the Criteria Process Guidelines ("CPG") and the Model Quality Review ("MQR") group.

1. The Switch to Blended Constants Did Not Follow the Criteria Process Guidelines.

S&P had written Criteria Process Guidelines which mandated that certain processes and procedures had to be followed in creating or changing criteria. FOF ¶85. The CPG provide that criteria may be modified so long as the ratings personnel advocating for the change followed the process outlined in Section 3.2 of the CPG. This process required five steps: 1) initiation of a criteria idea, 2) research of the idea, 3) presentation to and approval of the idea by a criteria committee, 4) publication and dissemination of the new criteria to the public, and 5) periodic ongoing review of the new criteria. FOF ¶86.

To get a sense for the kinds of actions that required application of the CPG, one need only review Section 3.13 of the CPG, which outlines circumstances that should involve not only the criteria committee, but in many cases more senior management. Circumstances applicable to this case include:

- Number 2 (page 12): "they [*i.e.*, the analytical issue and its related criteria] are ***inconsistent with those of another practice***" (emphasis added). The switch to blended constants applied to new issue CMBS only, while the CMBS Surveillance practice continued to use the Criteria Constants. *See* Tr. 438:6-16. S&P cited this exact issue as a reason for pulling the ratings on the GSMS 2011-GC4 deal. *See* JE 6.

- Number 3 (page 12): "they represent ***a loosening of criteria assumptions*** or removal of a specific area of analytical review" (emphasis added). As discussed above, switch to blended constants applied less stress to CMBS transaction and resulted in less credit enhancement at the various rating levels.

- Number 5 (page 12): "they involve a ***meaningful methodological change*** or the development of new tools or models" (emphasis added). The switch to blended constants was a meaningful methodological change for all the reasons discussed below with respect to materiality.

- Number 7 (page 12): "they ***may impact existing ratings by more than three notches***" (emphasis added). The switch to blended constants led S&P to give AAA ratings to some tranches that would have been rated A+ with the use of Table 1 constants, a difference of ***four notches***. Div. Ex. 335 at 50; Div. Ex. 367 at 3-4 (Rubinstein PPT).

- Number 8 (page 12): "***they may affect a large number of ratings***" (emphasis added). The switch to blended constants applied to ***all*** new issue CMBS ratings going forward and therefore had the potential to affect a large number of ratings.

- Number 3 from the second group (page 13): "***they carry meaningful franchise or reputational risk***" (emphasis added). As it turned out, the switch to using blended constants did damage S&P's reputation and franchise.

- Number 5 from the second group (page 13): "they are considered in ***response to a lack of market acceptance of our current criteria***" (emphasis added). As discussed above, there is ample evidence that S&P was unable to obtain CMBS ratings business because the Table 1 constants were generating credit enhancement levels that issuers considered to be too high.

The CPG thus plainly required that the switch to blended constants follow the full criteria change process.

The CPG stated that they "do not apply to interpretations of the application of our criteria to particular circumstances which are expected to occur as a natural by-product of our analysis and committee process." Joint Ex. 10 at § 2.1. Duka seizes on this single line in the 20-page CPG to argue that the across-the-board switch to blended constants, which dramatically diminished credit enhancement levels, was somehow an "interpretation" of criteria. This position is not credible. *First*, several witnesses testified that a criteria interpretation is a "one off" situation and that an across-the-board change in methodology, like Duka's switch to using blended constants, could not be considered an interpretation. FOF ¶90. *Second*, Duka personally participated in a much less significant criteria modification in March 2010 – the decision to use the actual constants when they were higher than the Table 1 loan constants – which largely followed the CPG process. FOF ¶91. It is not credible for Duka to claim that, less than a year later, a far more significant across-the-board change could be based on a brief, informal, undocumented conversation with a criteria officer. *Third*, in May 2011, several months after making the undisclosed and undocumented switch to blended constants, Duka and her group proposed to switch again from blended constants to actual constants. FOF ¶92. This time, the proposed change was explained in a memorandum and elevated to the criteria officer through a detailed memorandum. FOF ¶93. This exchange demonstrates that Duka well understood that a programmatic change in loan constants had to follow the CPG.

2. *The Switch to Blended Constants Was Not Disclosed to the Model Quality Review Group.*

The Model Quality Review group was responsible for reviewing models that were used in the ratings process to ensure that the model accurately implemented applicable criteria. FOF ¶94. MQR was charged with reviewing both the "Criteria application" and "assumptions" embedded in a ratings model. FOF ¶95. MQR conducted a review of the model that Duka's group used for CMBS ratings at the time that Duka caused the model to be changed to using blended constants, and during the time of the six transactions rated with the use of blended constants.

Duka, as the most senior analytical manager in the CMBS group, was responsible for making sure MQR received accurate information about the group's practices. FOF ¶97. Nevertheless, Duka never gave MQR a version of the model that used blended constants. Instead, MQR reviewed only a version of the model that was based on the Table 1 constants. FOF ¶¶98-99. Further, although Duka and MQR communicated extensively, Duka never clearly told MQR that her group was using blended constants to rate ***all*** transactions. Duka instead put forward vagaries, such as "new issuance [is] using the actual if higher but look at both if the actual is lower . . .[.]" FOF ¶100.

H. S&P Withdrew Ratings for Two CMBS Transactions after Senior Management Discovered the Switch to Blended Constants.

Ultimately, Duka's efforts to lower the credit enhancement levels through the application of blended constants were exposed – ironically, as a result of questions raised by the same investors who were in the dark about her undisclosed change to S&P's methodology for rating CMBS. FOF ¶101. In mid-July 2011, S&P issued the pre-sale report for GSMS 2011-GC4. JE 68. Several investors immediately reached out to S&P about the seeming incongruity between S&P's published materials and the credit enhancement levels for the deal, which investors readily recognized were unreasonably low. FOF ¶¶101-102. As Ethan Penner e-mailed David Jacob, in questioning the LTV, one of the visible metrics[22] in the pre-sale reports: "We both know this cannot be true." FOF ¶101. Division Exhibit 368, a spreadsheet from Goldman Sachs, shows that potential investors uniformly expressed concerns about the low CE levels when Goldman Sachs solicited interest in the deal. This document is replete with references to investors declining to participate in the transaction because of low CE levels. Comments included:

> "insufficient CE"
> "enhancement too low regardless of collateral"
> "not a fan of the enhancement levels"
> "C/E an issue"
> "not enthralled with 14.5% CE"
> "14.5% CE not sufficient"
> "not comfortable with our C/E v. other CMBS 2.0 deals"

[22] While Penner focused on LTV, he testified that his concern about the Goldman Sachs transaction "was twofold. One, I thought that the [credit enhancement] levels seemed very low by … recent historical standards and deals that immediately preceded it. … I also felt that … [LTV] didn't seem consistent with the ratings that they granted on the subordination level that they required." Tr. at 697-98. *See also* FOF ¶16; Tr. at 724 (Penner testimony as to correlation between LTV and DSCR; "the lower the loan to value [ratio], the lower the credit enhancement, the safer the loan. … So anything that implied the loan was safer should translate into less subordination or less credit risk."); Tr. 1207 (Duka acknowledging that DSC and LTV drive credit enhancement levels.)

"C/E deemed too low"
"CE biggest issue"
"low CE biggest concern"
"neg(ative) on CE"

FOF ¶101; Div. Ex. 368.

As a result, S&P management conducted an inquiry into the basis for the ratings, which led management to discover the switch to blended constants. S&P decided to withdraw the preliminary ratings for the GSMS 2011-GC4 transaction, along with another Freddie Mac transaction rated with blended constants. Adelson testified that the preliminary rating on GSMS 2011 GC-4 was withdrawn because the rating "had been determined using the blended constant, which was not part of the criteria, and therefore we couldn't – we couldn't stand behind them ...[.]" FOF ¶102.

I. S&P's Presales' Misrepresentations and Omissions Were Material.

1. Investor Testimony

Between February 2011 and July 2011, S&P's presales for newly issued CMBS transactions were sent to and reviewed by numerous CMBS investors. As the testimony at the hearing made clear, CMBS investors are often highly sophisticated, running their own models and analyses, doing substantial due diligence on the collateral, and reviewing other relevant information in the public domain. However, even for sophisticated CMBS investors, the presales were part of the total mix of information that they used for investment decisions. Accordingly, CMBS investors expected S&P's presales to be truthful and accurate, and to contain ratings that were reached through the consistent application of S&P's published methodology. Investors emphasized that the rating agency's assessment mattered in "trying to make a relative value decision" in buying CMBS. FOF ¶73. For example, investor Douglas Weih described rating agencies as "another set of eyes" in making his investment decision, and noted that unlike investors, S&P had access to proprietary materials about the quality of the underlying collateral of the deal, such as environmental reports, seismic reports, or loan files. FOF ¶74. Investors were especially interested in presales because the rating agencies had "four to six weeks to look at a transaction" while investors had just days to make an investment decision. FOF ¶75. Moreover, the agencies had the resources to visit numerous properties that secured the loans in the CMBS pools. As one investor put it, they had "boots on the ground, often times meeting with the management. So ... as a firm rating this transaction, they saw a lot more than we were able to see." *Id.*

Rating consistency was also important to investors. As Weih explained, it was important to "know that they're applying their methodology consistently across all the deals that they rate and that they rate subsequently." FOF ¶77. Investor Ethan Penner put this concern in even starker terms. Asked if consistency by rating agencies in applying their methodology was important to him as a CMBS investor, Penner replied:

> I think a big part of the CMBS foundation is a belief on the part of bond buyers [is] that there is [] consistency, in that [an] AAA rating from one deal is an analogous risk to a AAA rating from another [deal] and so on down the credit [structure]. ... I think it is ... probably the single most foundation of the industry. Otherwise, there would be no industry.

Tr. at 688:10-20. Even investors called by Duka expected that S&P would fully and prominently disclose any changes to its methodology. FOF ¶78,79 (quoting investor-witnesses Matthew Reidy, Kent Born, and Antony Wood). Respondent's expert John Richard made this point emphatically: "I think investors were concerned about consistency and the application of a methodology from the standpoint of ratings stability. I don't think investors wanted to see ratings instability ... through inconsistent application of a methodology." Tr. at 2030.

While investors expected presales to be accurate, truthful, and consistent in general, investor Weih also referred specifically to the constants at issue in this case, by testifying that he expected that S&P would use the Table 1 constants in the rating analysis. Tr. 925:5-14. More generally, investors were troubled by the fact that S&P provided "real" loan constants used to derive CE levels to issuers, while giving the published, but irrelevant, numbers to the investors in the presales. *See* FOF ¶116 (Weih: "[I]t wouldn't be ... candidly, very confidence-inspiring to have two sets of numbers ... [I]t would worry us a little ... on what set of numbers a rating agency was going to use ... [in] surveillance.") As Dr. Rubinstein opined:

> [I]nvestors want to know exactly what they are getting (*i.e.*, in buying CMBS). When they read the criteria, they form an opinion in their mind of how they view that. And then they want to see that [the criteria is] applied consistently so that they know each time a deal comes up and each time S&P rates it, they have an idea of what they're getting. In other words, they have a uniform yardstick across the market. It's kind of like an SAT test or like a FICO score. And it's the same over time, deal to deal to deal. If you change that metric midstream, and you [don't] tell people that you've changed it, then they're going to be misled into thinking they're getting one thing when, in fact, they're getting something else. [T]he biggest risk is that if you have ... less credit support, significantly less credit support, ... it means the bonds aren't as well protected as an investor might think they would be. And should we have another recession ... the bonds won't hold up as well. And that's going to impact investors.

Tr. 1620:15-1621:16.

2. *The Switch to Blended Constants Caused a Dramatic Decline in Credit Enhancement Levels.*

The credit enhancement levels in the eight 2011 CMBS transactions rated by Duka's team were lower (and the ratings higher) as a result of the use of blended constants. The Division's expert, Dr. Rubinstein, demonstrated that the credit enhancement levels for seven of the eight

CMBS[23] would have risen by 24.99% to 54.90% if the Table 1 constants were used to rate these transactions. FOF ¶¶45, 103. Accordingly, the ratings for the highest tranches of these seven CMBS would have declined significantly if the Table 1 constants were applied to the structures that the banks offered and sold, with the AAA rating sliding to anywhere from AA- to A+, *i.e.*, three to four notches lower than AAA. *Id.* As Dr. Rubinstein opined, and as the testimony of the investors echoed, this difference was material:

> Based on my experience ..., the switch to blended constants would unquestionably alter the investment decisions made by investors evaluating a CMBS transaction had they been informed of the change in the rating process. ... Further, S&P's decision to withdraw two of its ratings in July 2011 underscores how significantly the switch to blended constants compromised the ratings.[24]

FOF ¶45.

III. ARGUMENT

A. The Division's Burden of Proof

The Division bears the burden of proof by preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 96 (1981) (footnote omitted); *SEC v. Rorech*, 720 F. Supp. 2d 367, 404 (S.D.N.Y. 2010) (citations omitted). A fact has been proved by a preponderance of the evidence if 'the scales tip, however slightly, in favor of the party with the burden of proof,' as to that fact."

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[23] The credit enhancement levels for the eighth CMBS, a Freddie Mac-issued bond, did not change as a result of the application of blended loan constants. *See* Div. Ex. 335 at 50, note 137.

[24] After withdrawing the preliminary ratings on the two July deals, S&P determined to reaffirm the ratings on the six prior transactions that Duka's group had rated with blended constants. This decision is irrelevant to the materiality analysis involving those transactions. As the testimony made plain, S&P's management never deviated from the view that the ratings on those transactions did not follow criteria. Instead, the ratings were reaffirmed because a contrary decision – suspension of the ratings – would have led to even more market disruption with possibly serious impacts on investors and S&P. FOF ¶102.

Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 187 (2d Cir.1992) (citing Sand, Model Federal Jury Instructions ¶ 73.01 at 73-74 (1992)).

B. Duka Aided and Abetted, and Caused, S&P's Primary Violations of Exchange Act Rules 17g-6(a)(2) and 17g-2(a)(6), and Exchange Act Section 15E(c)(3).

The evidence demonstrates that Duka aided and abetted, and caused, S&P's primary violations[25] of Exchange Act Rule 17g-6(a)(2), which prohibits NRSROs from altering ratings methodologies to attract business, Exchange Act Rule 17g-2(a)(6), which requires NRSROs to maintain accurate books and records, and Exchange Act Section 15E(c)(3), which requires NRSROs to establish, maintain, and enforce a rigorous system of internal controls.

1. Legal Standard: Aiding and Abetting and Causing Liability

A finding of aiding and abetting liability under Exchange Act Section 20(e) requires proof of (1) a primary violation of the securities laws; (2) knowledge of the primary violation by the aider and abettor; and (3) substantial assistance by the aider and abettor in the commission of the primary violation. *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009). "The requisite scienter for liability under Section 20(e) is knowledge." *SEC v. China Northeast Petroleum Holdings Ltd.*, 27 F. Supp. 3d 379, 395 (S.D.N.Y. 2014) (citation omitted). To meet this burden, evidence of Duka's "general awareness" of her overall role in S&P's unlawful conduct is sufficient knowledge for

[25] On January 14, 2015, S&P submitted an Offer of Settlement wherein it consented to entry of an Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Sections 15E(d) and 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order") finding that S&P violated Section 15E(c)(3) of the Exchange Act and Exchange Act Rules 17g-2(a)(2)(iii) and 17g-2(a)(6) and admitted certain findings set forth in Annex A of the Order. The findings included, *inter alia*, admissions that S&P's 2011 presales and RAMPs did not disclose that the DSCRs used to rate certain CMBS in 2011 were derived using blended constants, not Table 1 or actual constants. *See* Resp. Ex. 782 at 12-13(Annex A to January 21, 2015 Order). In addition to admitting to these facts, S&P paid disgorgement of $6.2 million, prejudgment interest of $800,000, and a civil money penalty of $35 million. *See id.* at 10.

aiding and abetting liability." *SEC v. Espuelas*, 905 F. Supp. 2d 507, 518 (S.D.N.Y. 2012) (citation and internal quotation marks omitted). To demonstrate substantial assistance, "the SEC must show that the defendant in some sort associated himself with the venture, that he participated in it as in something that he wished to bring about, and that he sought by his action to make it succeed." *SEC v. Apuzzo*, 689 F.3d 204, 206 (2d Cir. 2012) (citation, internal quotation marks, and alterations omitted).

The Commission has held that causing liability under Exchange Act Section 21C(a) requires a finding that: (1) a primary violation occurred; (2) the respondent knew, or should have known, that his or her conduct would contribute to the violation; and (3) an act or omission by the respondent caused the violation. *See Robert M. Fuller*, Exchange Act Release No. 48406, 2003 WL 22016309, at *4 (Aug. 25, 2003) footnote omitted); *Erik W. Chan*, Exchange Act Release No. 45693, 2002 WL 507022, at *4 (April 4, 2002) (footnote omitted). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at 19 (Jan. 19, 2001). A respondent who aids and abets a violation is also a cause of the violation. *Zion Capital Mgmt. LLC*, Exchange Act Release No. 48904, 2003 WL 22926822, at *7 (Dec. 11, 2003) (footnote omitted).

2. *Rule 17g-6(a)(2): Improper Commercial Motive*

S&P violated Rule 17g-6(a)(2)) [17 C.F.R. § 240.17g-6(a)(2)] by "issuing ... a credit rating that is not determined in accordance with the [NRSRO's] established procedures and methodologies for determining credit ratings, based on whether the rated person . . . will purchase the credit rating[.]" As described in Section II.D. above, the Division adduced extensive evidence that the switch to blended constants was motivated by a desire to attract paid ratings business. Several witnesses testified that issuers typically hire the credit rating agency that provides the lowest credible credit enhancement for the transaction, and there is abundant evidence that S&P was losing CMBS business because the credit enhancement levels were too high relative to competing credit rating agencies. In response, Duka employed a quick and easy ploy to reverse the decline: simply change the methodology for using loan constants, and instantly her group's ratings became more competitive. After a string of rejections, S&P was engaged to rate eight CMBS transactions in the first half of 2011. Under these circumstances, the only plausible explanation for the switch to blended constants is a commercial motive, and S&P thus violated Rule 17g-6(a)(2)).[26] And, having directed the switch to blended constants herself, after repeatedly lamenting the CMBS Group's loss of business due to conservative criteria, it is manifest that Duka contributed to and/or caused S&P's violation.

3. *Rule 17g-2(a)(6): Inadequate Books and Records*

Exchange Act Rule 17g-2(a)(6) provides:

> A nationally recognized statistical rating organization must make and retain the following books and records, which must be complete and current: ... (6) A record documenting the established procedures and methodologies used by the nationally recognized statistical rating organization to determine credit ratings.

17 CFR § 240.17g-2(a)(6). S&P violated this provision in two ways: first, by failing to document the switch to blended constants as a significant modification of the 2009 Criteria and, second, by failing to document the use of blended constants in the RAMPs for the eight CMBS transactions rated by Duka's team in 2011.

[26] As noted in Section II.C., at note 11, S&P suffered from competitive disadvantages in addition to the conservative criteria, but these other impediments were resolved by the time Duka made the switch to blended constants.

As discussed in Section II.G.1 above, Duka failed to follow the CPG with respect to the switch to blended constants. If Duka had followed the CPG, any proposal to programmatically use blended constants would have been researched, presented to the criteria committee, documented internally, and publicly disclosed. Documentation would have occurred both through a criteria article or other general description of the use of blended constants, and in the RAMP for each transaction analyzed with blended constants. The lack of documentation in the RAMPs for the eight 2011 transactions was particularly important, because RAMPs were the official record of the methodology used to rate a particular CMBS transaction. FOF ¶106; *see also* Tr. 431:4-6; Order dated July 1, 2015 at 7 ("The RAMP Guidelines referred to the RAMP as the 'definitive record of the rating' and directed that the RAMP capture 'the key drivers of the issue being rated, the relevant facets of the analysis, the pertinent information considered, and the underlying criteria and applicable assumptions, as well as the committee's final decision and the rationale for the rating.").[27] Instead of complying with Rule17g-2(a)(6), the RAMPs made no reference whatsoever to the use of blended constants, and instead contained much of the same misleading data as the presales. The RAMPs also completely failed to disclose the impact that blended constants had on credit enhancement levels.

Duka's conduct directly contributed to and caused S&P's failure to document the switch to blended constants. There is no dispute that Duka promised Dr. Parisi that any change in loan constants would be documented in both the RAMP and the presale for any affected transaction.

[27] Documentation in the RAMPs was essential for the functioning of S&P's internal control functions. For example, a Quality officer reviewing the RAMPs for the eight CMBS transactions rated in 2011 would have had no way to determine that blended constants had been used to rate the transactions and thus could not readily discern whether the ratings were based on an appropriate application of criteria.

Duka's only defense with respect to the RAMPs is that she purportedly "expected" her subordinates to document the switch to blended constants. FOF ¶ 107. Yet, she personally participated in ratings committees (which spent "hundreds of hours" rating transactions apparently without once discussing the need to document the switch to blended constants) without ever instructing her team to disclose the switch to blended constants. *See Geman v. SEC*, 334 F.3d 1183, 1195-96 (10th Cir. 2003) (respondent supervisor liable for aiding and abetting recordkeeping violations when respondent knew or recklessly disregarded fact that reporting requirements were not being followed by subordinates). In short, while Duka admits the rating methodology used should have been reflected in the RAMPs and was not (FOF ¶107), she did nothing to ensure that her group followed through on documenting the switch to blended constants and, worse, affirmatively instructed her team not to disclose blended constants in the GSMS 2011-GC4 presale (a transaction for which the preliminary rating was subsequently withdrawn). She was therefore at least negligent in causing S&P's recordkeeping violations.

4. Exchange Act Section 15E(c)(3): Internal Controls

Duka also aided and abetted and caused S&P's violation of Exchange Act Section 15E(c)(3), which provides:

> Each nationally recognized statistical rating organization shall establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining ratings, taking into consideration such factors as the Commission may prescribe by rule.

15 U.S.C. § 78o-7(c)(3).

As Judge Elliot previously observed (*see* Order dated July 2, 2015 at 5), S&P's internal controls may have been undermined by placing Duka in a position to both (i) "influence the determination of the same criteria she was tasked with implementing" and (ii) shield her conduct from internal scrutiny by, among other things, failing to ensure that the switch to blended constants was documented, failing to provide the operative CMBS ratings model to MQR or otherwise accurately disclose the use of blended constants to MQR, and failing to follow the CPG by mischaracterizing the nature and scope of the proposed change in methodology to Dr. Parisi. By putting Duka in a position to both modify the 2009 Criteria and evade S&P's internal controls, S&P rendered its own internal control structure ineffective.

S&P's internal controls were not only ineffective, but Duka failed to maintain and enforce those internal controls that were in place. For example, Duka, as the highest ranking analytical manager for CMBS New Issuance, was bound by S&P's Code of Conduct to ensure, among other things, that she and her group applied published Criteria and publicly disclose modifications to the methodology. *See* Section II.E, *supra*. She instead obfuscated the nature and scope of the switch to blended constants in communications with MQR, failed to follow the CPG, and did nothing to ensure that the switch to blended constants was documented and disclosed internally or externally. *See* Section II.G, *supra*. Through this conduct, Duka was at least negligent in causing S&P's failure to maintain and enforce its internal controls.

C. The Division's Fraud Claims

The preponderance of the evidence adduced at the hearing establishes that Duka violated the antifraud provisions of the federal securities laws—Exchange Act Section 10(b) and Rules 10b-5(a) through (c), and Securities Act Section 17(a)(1) through (3).

Rule 10b-5, which implements Exchange Act Section 10(b), makes it unlawful for any person to use interstate commerce or the mails:

(a) to employ any device, scheme or artifice to defraud;

(b) to make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they are made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5(a)-(c); *see* 15 U.S.C. § 78j(b).

Section 17(a) of the Securities Act similarly makes it unlawful for any person, in the offer or sale of any security, to use interstate commerce or the mails:

(1) to employ any device, scheme or artifice to defraud, or

(2) to obtain money or property[28] by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a)(1)-(3).

The Division's fraud claims are of two types: First, Duka's conduct resulted in material misstatements and omissions in S&P publications, specifically its 2011 presales, in violation of Exchange Act Section 10(b) and Rule 10b-5(b), and Securities Section 17(a)(2). Second, Duka's

[28] As Section 17(a)(2) requires, Duka "obtain[ed] money or property" by means of the misstatements and omissions in the 2011 Presales. S&P obtained millions of dollars in fees from rating the eight transactions at issue in this case. This alone is sufficient to satisfy the statutory requirement when, as here, Duka made and used the misstatements and omissions in the course of her employment to benefit the company. *See SEC v. Stoker*, 865 F. Supp. 2d 457, 463 (S.D.N.Y. 2012) ("it is sufficient under Section 17(a)(2) for the SEC to allege that [the defendant] obtained money or property for his employer while acting as its agent, or, alternatively, for the SEC to allege that [the defendant] personally obtained money indirectly from the fraud").

conduct in switching to blended loan constants across multiple CMBS transactions without following mandated S&P procedures and without adequately disclosing the change in methodology and the resulting dramatic decrease in credit enhancement levels violated Exchange Act Section 10(b) and Rules 10b-5(a) and (c), and Securities Act Section 17(a)(1) and (3).[29]

1. The 2011 Presales Contained Numerous False and Misleading Statements and Omissions.

The eight 2011 Presales at issue in this case contained both material misstatements and material omissions in violation of Exchange Act Section 10(b) and Rule 10b-5(b) and Securities Act Section 17(a)(2). Each of these Presales was replete with material misstatements and omissions, for example:

- Each Presale omitted the fact that Duka had directed her team to switch from using the Table 1 constants, to using the more relaxed 50/50 blended loan constants (or in either case the actual constant, if higher).[30]
- Each presale further omitted ***any*** disclosure about the significant impact switching to blended loan constants had on the credit enhancement levels required to support the assigned ratings.
- Each presale also included dozens of misleading references to the Table 1constants and the DSCRs based thereon, which created the impression that the Table 1 constants had been used to calculate the DSCR for the pool when they had not.[31]

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[29] For all of the same reasons set forth herein, Duka also aided and abetted and/or caused S&P's fraud, for which she is responsible.

[30] As noted in Section II.F, note 17, the language added by Duka to the presales – *i.e.*, "Standard & Poor's will *consider both* the loan's actual debt constant and a stressed constant" – was meaningless.

Investors were thus led to believe that S&P had arrived at its ratings employing the methodology and Table 1 constants set forth in S&P's publicly-disclosed CMBS rating methodology and referenced throughout the presales, when in fact the ratings were based on less stressed blended constants.

2. *The Misrepresentations and Omissions in the Presales were Material.*

A fact is material if a reasonable investor would view its disclosure (or omission) as significantly altering the "total mix" of information made available in evaluating the merits of an investment. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 28 (2011) (citation omitted). Further, a fact is material if it "may affect the desire of investors to buy, sell, or hold the ... securities," or if it "in reasonable and objective contemplation might affect the value of the ... securities." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (citations and quotation omitted). Materiality is judged objectively – it asks what a reasonable investor would consider material – and not what any particular investors believed, or only the facts that an underwriter or issuer of securities personally found to be dispositive. *See Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 643 (D.C. Cir. 2008). "[D]ifferent investors make very different decisions" based on the same facts. *Id.*

In Section II.I above, the Division detailed the many reasons why the false and misleading statements in the presales were material. As shown in that discussion, the presales failed on all of the points that investors considered important to their investment decisions: they failed to accurately described S&P's methodology; they misrepresented the methodology that was used to

[31] The inclusion of DSCRs derived using actual loan constants alongside DSCRs based on stressed loan constants only muddied the disclosure; by referencing the higher DSCRs that resulted from using actual loan service requirements, the presales simply emphasized the stressed nature of the "Standard & Poor's loan constant." *See, e.g.*, JE 68 at 5.

rate the transactions; and they were inconsistent with the methodology used to comment upon and rate transactions in 2010, as well as to conduct surveillance on outstanding CMBS transactions. Moreover, as further described in Section II.I, the misrepresentations and omissions in the presales concerned hard data that made a huge difference to the outcome of the ratings: unbeknownst to investors, seven of the eight transactions rated using the blended constants would have required significantly higher credit enhancement if analyzed with the Table 1 constants described in the 2009 Criteria; or, alternatively, the data in the presales would have led S&P to give significantly lower ratings – by as much as three to four notches at the highest rating level – if the transactions were issued with the credit enhancement outlined in the presales. In other words, the presales failed to disclose that after touting the adoption of a conservative approach to rating CMBS, Duka found a back-door way of loosening the criteria that resulted in less protection for CMBS investors.

While it is true that investors considered the data and disclosures made by the CMBS issuers, the presales were just as clearly part of the total mix of information that investors considered as part of the investment decision-making process. Indeed, it is not credible for Duka to argue that her own work, for which S&P received millions of dollars in fees, is irrelevant to investors and other market participants. Because the presales addressed a factor that investors care about when investing – the amount of risk they take on for a given reward – they concern information that is, by definition, material.

3. *The Presales Were Published In Connection With a Purchase or Sale of Securities and In the Offer or Sale of Securities.*

Duka's conduct occurred both "in connection with" a purchase or sale of securities and "in the offer or sale" of securities.[32] Presale reports are a key link in the process for marketing and selling CMBS to investors. Presales are issued a few days before the CMBS transaction's bonds are sold to investors and constitute, with the offering circular and the annex thereto, one of only a few documents that investors can (and do) study in deciding whether to buy CMBS securities. FOF ¶¶33-34, 73. The "offer or sale" element is met even as to the two transactions that did not close because investors had already contracted to purchase the bonds before the deals were withdrawn. FOF ¶102; Div. Ex. 350 (e-mail from Goldman Sachs describing the cancellation of previously-placed trades in GSMS 2011-GC4 by Aegon and reimbursement from Goldman Sachs).

4. *Duka had the requisite mental state.*

a. *Negligence: Violations of Securities Act Section 17(a)(2)*

For its claim under Securities Act Section 17(a)(2) (and Section 17(a)(3), discussed below), the Division need only show that Duka acted negligently. *Dennis J. Malouf*, Exchange Act Release No. 78429, 2016 WL 4035575, at *11 n.74 (July 27, 2016); *see SEC v. Ginder*, 752 F.3d 569, 574 (2d Cir.2014) (citations omitted). Negligence requires a showing that the defendant failed to exercise reasonable care. *Ira Weiss*, Exchange Act Release No. 52875, 2005 WL 3273381, at *12 (Dec. 2, 2005); *SEC v. Goldsworthy*, 2008 WL 8901272, at *12 (D. Mass. June 11, 2008) ("the SEC [is] not required to present evidence of an alternative standard of care in order to support its claim of negligence"). The question is thus whether Duka failed to exercise

[32] Interstate commerce was utilized in that the presales were published by Standard & Poor's in New York and the investors were from various other states. FOF ¶115.

reasonable care "in light of what [she] knew or should have known[.]"); *Goldsworthy*, 2008 WL 8901272, at *12; *see SEC v. Hughes Capital Corp.* 124 F.3d 449, 453-54 (3d Cir. 1997) (defendant negligent in formulating and editing press releases containing false statements making the stock "appear more attractive to prospective purchasers").

Duka was at least negligent with respect to the numerous material misstatements and omissions in the 2011 presales. Duka admitted that Dr. Parisi directed her to disclose any use of blended constants in the presales and RAMPs. She further admitted that she promised to do so, and she had the authority and opportunity to carry out that promise. Duka was the highest ranking manager in the CMBS ratings group in 2011. She actively inserted herself into the presale drafting process, having supplied the vague "consider both" language that ended up in the presales, and, in July 2011, affirmatively instructing her subordinates ***not*** to disclose metrics based on the blended constants in the GSMS 2011-GC4 presale. Further, Duka sat on the ratings committees that approved the preliminary and final ratings for the eight CMBS transactions her group rated using blended constants, and admitted that she spent hundreds of hours reviewing the ratings and associated RAMPs. Yet, she never instructed her team to disclose the use of blended constants and, incredibly, claims that she never noticed the hundreds of instances of inaccurate numbers included in the presales and RAMPs – numbers that required Duka's group to run the model two or three times to generate the misleading metrics reported in presales and RAMPs.

A reasonable person in Duka's position would not promise to disclose a proposed change in methodology, and then fail to (i) convey to her subordinates that the change had to be disclosed and (ii) take any steps to review and correct the omissions and misstatements in the RAMPs and presales. Digney attributed the misstatements and omissions in the presales to "sloppiness," which in turn was caused by a complete failure on Duka's part to follow through on her commitment to Dr. Parisi. Duka thus failed to exercise the degree of care that a reasonable person in her position would bring to bear to ensure that a material change in methodology was adequately disclosed to both internally and externally.

b. Scienter: Violations of Exchange Act Section 10(b) and Rule 10b-5(b)

Section 10(b) of the Exchange Act and Rule 10b-5(b) require a finding that Duka acted with scienter. Scienter may be established by showing "'an intent to deceive, manipulate, or defraud.'" *Malouf*, 2016 WL 4035575, at *7 n.34 (quotation omitted). Scienter "includes recklessness, defined in this context as 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'" *Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *16 (Dec. 15, 2009) (quoting *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008)). "Scienter may be inferred from circumstantial evidence." *Christopher M. Gibson*, Release No. 1106, 2017 WL 371868, at *30 (Jan. 25, 2017) (citation omitted). Direct evidence of scienter is unnecessary; circumstantial evidence is sufficient. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983) ("the proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient.").

As discussed above, Duka was at least negligent in failing to disclose the switch to blended constants and including misleading metrics in the 2011 presales. But there is also ample evidence that her conduct was reckless or intentional. While the Division need not prove motive to prove scienter, *see SEC v. Egan*, 994 F. Supp. 2d 558, 565 (S.D.N.Y. 2014) (quoting *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001)), there is substantial evidence that Duka's direction to switch to blended constants was motivated by a desire to attract paid ratings business at the expense of ratings integrity. If, as Duka contends, a switch to actual constants was "analytically justified," there was no reason not to in fact switch to actual constants (versus a 50/50 blend she could not justify), subject her proposal to internal scrutiny, and publicly trumpet the improved methodology.[33] Instead, Duka drafted the vague "consider both" language and instructed her team ***not*** to disclose the metrics used to rate the GSMS 2011-GC4 transaction. Once the switch to blended constants was brought to the attention of senior S&P management – prompting S&P to roil the nascent CMBS market by withdrawing two preliminary ratings – Duka's explanation for concealing her conduct was that she did not want to have to explain to the market the difference in methodology employed by New Issuance and Surveillance.

These facts – largely undisputed – give rise to an inference of intent to mislead. Duka's actions achieved the competitive advantage of lower credit enhancements (by switching to blended constants) while still touting S&P's 2009 Criteria as so conservative that AAA bonds could withstand another "Great Depression." Given the history of ratings shopping and the complicity of ratings agencies in the 2008 financial crisis, Duka could not simply tell the market that she loosened the 2009 Criteria to be competitive.[34]

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[33] In her Wells submission, Ms. Duka explicitly stated that she did the opposite: "Ms. Duka did not trumpet the methodological change, by, for example, repeatedly noting it in the presale reports." Div. Ex. 318, p. 14 of submission; p. 19 of pdf. This admission of a party opponent is also significant in that it refers to a "methodological change" not an "interpretation."

[34] The Division's expert, Dr. Rubinstein, further explained that the commercial motivation would have been obvious had the switch to blended constants been disclosed to the CMBS market. Tr. 1914:3-1915:8. *See also* FOF ¶118 (full quotation from Dr. Rubinstein's testimony).

Duka's efforts to obfuscate the change in methodology internally are also potent evidence of intentional wrongdoing. *See, e.g., Brown v. China Integrated Energy, Inc.*, 875 F. Supp. 2d 1096, 1124 (C.D. Cal. 2012) ("evidence of concealment is strongly indicative of scienter") (citation omitted). As detailed above, Duka used an informal meeting with Dr. Parisi as cover to avoid internal scrutiny of the switch to blended constants. She never expressly disclosed the use of blended constants to MQR, and did not ensure that MQR received a copy of the CMBS ratings model that employed blended constants.

Finally, as discussed previously, Duka had the authority and opportunity to ensure that her group would disclose the switch to blended constants, and would include accurate information in the eight 2011 presales. As further discussed above, Duka affirmatively instructed her subordinates not to make accurate disclosures, evincing her intent to mislead. However, there is no question that her failure to correct omissions and misstatements in the 2011 presales "demonstrates, at a minimum, a reckless disregard of the risk of misleading investors." *Malouf*, 2016 WL 4035575, at *16.

5. Duka was the "maker" of the statements at issue.

While Duka may try to evade liability under Rule 10b-5(b) by arguing that she was not the "maker" of any misstatements or omissions under *Janus Capital Group v. First Derivative Traders,* 564 U.S. 135, 142 (2011) ("the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it"), the record is replete with evidence (including Duka's admissions) that she had responsibility for the content of all eight presales at issue in this case. Duka admitted that she told Dr. Parisi that she would disclose the use of blended constants in the presales and the RAMPs, which demonstrates that she had ultimate authority over the content of the presales. S&P analyst Snow testified that that the presales were drafted and vetted by multiple members of the CMBS group, not just the primary or secondary analyst on the transaction. Duka also acknowledged that she typically reviewed and commented on the presales, and directed inclusion of certain language. She likewise instructed her subordinates *not* to disclose the blended constants in at least one presale. In defending this case, Duka attempts to take credit for various portions of the presales, including the "consider both" language and the inclusion of the actual constants and Table 1 constants proposed by analyst Brian Snow. While the Division submits that her so-called disclosures did nothing to improve the inadequacies in the presales, Duka cannot at once contend that she authored certain portions of the presales and then attempt to evade responsibility for their content under *Janus*.

6. Duka Engaged in a Fraudulent Scheme.

This is not only a "misstatements and omissions" case. Duka's conduct also constituted a scheme for which she is liable under Exchange Act Section 10(b) and Rules 10b-5(a) and (c), and Securities Act Sections 17(a)(1) and (3).

a. Duka Violated Securities Act Section 17(a)(3).

Securities Act Section 17(a)(3) broadly prohibits engaging in "any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3). Section 17(a)(3) "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible." *Aaron v. SEC*, 446 U.S. 680, 697 (1980) (emphasis in original). Particularly pertinent here, the Commission has held that Section 17(a)(3) applies when "as a result of a defendant's negligent conduct, investors receive misleading information about the nature of an investment . . . ." *Malouf*, 2016 WL 4035575, at *12; *see also id.* at *10 (no requirement that conduct underlying Section 17(a) claim must itself be "manipulative or deceptive").

As discussed above, Duka was at least negligent in directing a sweeping change in rating methodology without following internal procedures and then failing to ensure that the change was disclosed to investors. As a result of Duka's conduct, investors received misleading information – *i.e.*, presale reports that (i) omitted any mention of a change in methodology or the use of blended constants and (ii) contained misleading references to Table 1 loan constants and DSCRs calculated using those constants.

b. Duka Violated Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rules 10b-5(a) and (c).

Duka's conduct also constituted a deceptive device or act. "[T]o employ a 'deceptive' device or to commit a 'deceptive' act is to engage in conduct that produces a false impression." *Malouf*, 2016 WL 4035575, at *6. Here, Duka intentionally created the false impression – both internally at S&P and externally in S&P's public disclosures – that S&P's CMBS ratings were based on S&P's 2009 Criteria. In particular, Duka's conduct created the false impression that the ratings were derived using the Table 1 constants, when in fact the ratings were based on an undisclosed methodology employing a 50/50 blend of Table 1 constants and actual constants. For all the reasons discussed above, Duka created this false impression deliberately in an effort to gain paid ratings engagements.

The misstatements and omissions detailed above are also actionable as a part of Duka's scheme. As the Commission noted in *Malouf*, "[deceptive] conduct encompasses 'making' a misrepresentation; it also encompasses, among other things, drafting or devising a misrepresentation." *Malouf*, 2016 WL 4035575, at *6. Duka had ultimate responsibility for the omissions and misstatements detailed above, specifically devised the misleading "consider both" language in the presales, and directed her subordinates not to disclose metrics based on blended constants in the GSMS 2011-GC4 presale. Duka's conduct therefore independently violates Rule 10b-5(a) and (c), and Section 17(a)(1).

IV. RELIEF

The Division respectfully requests that the Court order Duka to:

A. Pay a civil penalty under Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act, which authorize the Commission to impose civil monetary penalties against any person where such penalties are in the public interest and the person has violated certain provisions of the securities laws. *See* 15 U.S.C § 77h-1(g). Six factors may be considered in determining whether a penalty is in the public interest. These include: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the resulting harm to other persons; (3) any unjust enrichment and prior restitution; (4) the respondent's prior regulatory record; (5) the need to deter the respondent and other persons; and (6) such other matters as justice may require. 15 U.S.C. § 78u-2(c). There is a three-tiered system for determining the maximum civil penalty for each violation. 15 U.S.C. §77h-1(g). For the time period at issue, the maximum first, second, and third-tier penalty for each violation for a natural person is $7,500, $75,000 and $150,000, respectively. 15 U.S.C. §§ 77h-1(g); 17 C.F.R. § 201.1004 & Subpt. E, Table IV (adjusting the statutory amounts for inflation). A maximum third-tier penalty is appropriate where (1) the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and (2) such acts or omissions directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the acts or omissions. 15 U.S.C. § 77h-1(g)(2)(C). The Division submits that third-tier penalties should be imposed, given that the violations involved fraud and deceit, and that the conduct – relating to eight separate new issuances of CMBS between February and July 2011 – created a significant risk of substantial losses to investors. 15 U.S.C. § 77h-1(g)(2)(C).

B. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, ordering Duka to cease and desist from violations or future violations of Securities Act Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 15E(c)(3) of the Exchange Act, and Exchange Act Rules 17g-6(a)(2) and 17g-2(a)(6). The Commission has authority to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of those Acts or rules thereunder. In deciding whether to issue a cease-and-desist order, courts consider: (1) whether future violations are reasonably likely; (2) the seriousness of the violations at issue; (3) whether the violations are isolated or recurrent; (4) respondents' state of mind; (5) whether respondents recognize the wrongful nature of their conduct; (6) the recency of the violations; (7) "whether the violations caused harm to investors or the marketplace"; (8) "whether [respondents] will have the opportunity to commit future violations"; and (9) the "remedial function [a] cease-and-desist order would serve in the overall context of any other sanctions sought in the same proceeding." *Gordon Brent Pierce*, Securities Act Release No. 9555, 2014 SEC LEXIS 4544, at *82-83 (Mar. 7, 2014); *KPMG Peat Marwick LLP*, Administrative Proceeding File No. 43862, 2001 WL 47245, at *23-24 (Jan. 19, 2001), *recon. denied*, Exchange Act Release No. 44050, 2001 SEC LEXIS 422 (Mar. 5, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002). "Absent evidence to the contrary," a single past violation ordinarily suffices to establish a risk of future violations. *KPMG Peat Marwick LLP*, 2001 WL 47245, at *24. The showing necessary to demonstrate the likelihood of future violations is "significantly less than that required for an injunction." *Id.* at *26; and

C. Permanently refrain, pursuant to Section 15E(d) of the Exchange Act [15 U.S.C. 78o-7(d)(1)] and Section 9(b) of the Investment Company Act of 1940 [15 U.S.C. 80a-9(b)]from (i) associating with a nationally recognized statistical rating organization and (ii) serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser.

<u>Rule 450(d) Certification</u>: Undersigned counsel certifies that the above brief contains 11,675 words, exclusive of the table of contents, table of authorities, and table of record citation abbreviations.

Respectfully submitted this 17th day of February, 2017.

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CERTIFICATE OF SERVICE

On February 17, 2016, the foregoing Division's Post Hearing Brief was sent to the following parties and other persons entitled to notice as follows:

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