SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for November 2007, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act. Commissioner Campos was Commissioner from August 22, 2003 to September 18, 2007.

Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

CHRISTOPHER COX, CHAIRMAN

PAUL S. ATKINS, COMMISSIONER

ROEL C. CAMPOS, COMMISSIONER

ANNETTE L. NAZARETH, COMMISSIONER

KATHLEEN L. CASEY, COMMISSIONER

2 Documents

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 6, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12886

In the Matter of	
Inetvisionz, Inc., **Intelilabs.com, Inc.,** **Pacific Engineering Systems, Inc., and** **Rampart General, Inc.,**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**
Respondents.	

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Inetvisionz, Inc., Intelilalabs.com, Inc., Pacific Engineering Systems, Inc., and Rampart General, Inc. ("Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Inetvisionz, Inc. (CIK No. 1102997) is a void Delaware corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Inetvisionz.com, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2000, which reported that since inception, the company had not generated income from operations, had negative cash flow, and its current liabilities exceeded current assets by $1.3 million. On June 4, 2001, the company ceased operations.

2. Intelilabs.com, Inc. (CIK No. 1085257) is a Delaware corporation located in Santa Monica, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Intelilabs.com, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2000.

3. Pacific Engineering Systems, Inc. (CIK No. 1079791) is a forfeited Delaware corporation located in Anaheim, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Pacific Engineering Systems, Inc. is delinquent in its periodic filings with the Commission, having never filed any periodic reports since it filed a Form 10-SB registration statement on February 16, 1999, which reported a net loss of $1.8 million. On April 7, 2000, the company filed a Chapter 7 bankruptcy proceeding in the U.S. Bankruptcy Court for the Central District of California, and the proceeding terminated on July 6, 2001.

4. Rampart General, Inc. (CIK No. 81918) is a suspended California corporation located in Santa Ana, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Rampart General, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1993. The company's last Form 10-K, filed for the period ended March 31, 1993, reported a net loss of $599,200.

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means of verifiable delivery.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris
Secretary

Attachment

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Rampart General, Inc.					
	10-Q	06/30/02	08/14/02	Not filed	63
	10-Q	09/30/02	11/14/02	Not filed	60
	10-K	12/31/02	03/31/03	Not filed	56
	10-Q	03/31/03	05/15/03	Not filed	54
	10-Q	06/30/03	08/14/03	Not filed	51
	10-Q	09/30/03	11/14/03	Not filed	48
	10-K	12/31/03	03/30/04	Not filed	44
	10-Q	03/31/04	05/17/04	Not filed	42
	10-Q	06/30/04	08/16/04	Not filed	39
	10-Q	09/30/04	11/15/04	Not filed	36
	10-K	12/31/04	03/31/05	Not filed	32
	10-Q	03/31/05	05/16/05	Not filed	30
	10-Q	06/30/05	08/15/05	Not filed	27
	10-Q	09/30/05	11/14/05	Not filed	24
	10-K	12/31/05	03/31/06	Not filed	20
	10-Q	03/31/06	05/15/06	Not filed	18
	10-Q	06/30/06	08/14/06	Not filed	15
	10-Q	09/30/06	11/14/06	Not filed	12
	10-K	12/31/06	04/02/07	Not filed	7
	10-Q	03/31/07	05/15/07	Not filed	6
	10-Q	06/30/07	08/14/07	Not filed	3
Total Filings Delinquent	48				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pacific Engineering Systems, Inc.					
	10-QSB	12/31/06	02/14/07	Not filed	9
	10-QSB	03/31/07	05/15/07	Not filed	6
	10-QSB	06/30/07	08/14/07	Not filed	3
Total Filings Delinquent	35				
Rampart General, Inc.					
	10-Q	09/30/95	11/14/95	Not filed	144
	10-K	12/31/95	04/01/96	Not filed	139
	10-Q	03/31/96	05/15/96	Not filed	138
	10-Q	06/30/96	08/14/96	Not filed	135
	10-Q	09/30/96	11/14/96	Not filed	132
	10-K	12/31/96	03/31/97	Not filed	128
	10-Q	03/31/97	05/15/97	Not filed	126
	10-Q	06/30/97	08/14/97	Not filed	123
	10-Q	09/30/97	11/14/97	Not filed	120
	10-K	12/31/97	03/31/98	Not filed	116
	10-Q	03/31/98	05/15/98	Not filed	114
	10-Q	06/30/98	08/14/98	Not filed	111
	10-Q	09/30/98	11/16/98	Not filed	108
	10-K	12/31/98	03/31/99	Not filed	104
	10-Q	03/31/99	05/17/99	Not filed	102
	10-Q	06/30/99	08/16/99	Not filed	99
	10-Q	09/30/99	11/15/99	Not filed	96
	10-K	12/31/99	03/30/00	Not filed	92
	10-Q	03/31/00	05/15/00	Not filed	90
	10-Q	06/30/00	08/14/00	Not filed	87
	10-Q	09/30/00	11/14/00	Not filed	84
	10-K	12/31/00	04/02/01	Not filed	79
	10-Q	03/31/01	05/15/01	Not filed	78
	10-Q	06/30/01	08/14/01	Not filed	75
	10-Q	09/30/01	11/14/01	Not filed	72
	10-K	12/31/01	04/01/02	Not filed	67
	10-Q	03/31/02	05/15/02	Not filed	66

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pacific Engineering Systems, Inc.					
	10-QSB	12/31/98	02/16/99	Not filed	105
	10-QSB	03/31/99	05/17/99	Not filed	102
	10-QSB	06/30/99	08/16/99	Not filed	99
	10-KSB	09/30/99	12/29/99	Not filed	95
	10-QSB	12/31/99	02/14/00	Not filed	93
	10-QSB	03/31/00	05/15/00	Not filed	90
	10-QSB	06/30/00	08/14/00	Not filed	87
	10-KSB	09/30/00	12/29/00	Not filed	83
	10-QSB	12/31/00	02/14/01	Not filed	81
	10-QSB	03/31/01	05/15/01	Not filed	78
	10-QSB	06/30/01	08/14/01	Not filed	75
	10-KSB	09/30/01	12/31/01	Not filed	71
	10-QSB	12/31/01	02/14/02	Not filed	69
	10-QSB	03/31/02	05/15/02	Not filed	66
	10-QSB	06/30/02	08/14/02	Not filed	63
	10-KSB	09/30/02	12/30/02	Not filed	59
	10-QSB	12/31/02	02/14/03	Not filed	57
	10-QSB	03/31/03	05/15/03	Not filed	54
	10-QSB	06/30/03	08/14/03	Not filed	51
	10-KSB	09/30/03	12/29/03	Not filed	47
	10-QSB	12/31/03	02/16/04	Not filed	45
	10-QSB	03/31/04	05/17/04	Not filed	42
	10-QSB	06/30/04	08/16/04	Not filed	39
	10-KSB	09/30/04	12/29/04	Not filed	35
	10-QSB	12/31/04	02/14/05	Not filed	33
	10-QSB	03/31/05	05/16/05	Not filed	30
	10-QSB	06/30/05	08/15/05	Not filed	27
	10-KSB	09/30/05	12/29/05	Not filed	23
	10-QSB	12/31/05	02/14/06	Not filed	21
	10-QSB	03/31/06	05/15/06	Not filed	18
	10-QSB	06/30/06	08/14/06	Not filed	15
	10-KSB	09/30/06	12/29/06	Not filed	11

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Intelilabs.com, Inc.					
	10-QSB	03/31/01	05/15/01	Not filed	78
	10-KSB	06/30/01	09/28/01	Not filed	74
	10-QSB	09/30/01	11/14/01	Not filed	72
	10-QSB	12/31/01	02/14/02	Not filed	69
	10-QSB	03/31/02	05/15/02	Not filed	66
	10-KSB	06/30/02	09/30/02	Not filed	62
	10-QSB	09/30/02	11/14/02	Not filed	60
	10-QSB	12/31/02	02/14/03	Not filed	57
	10-QSB	03/31/03	05/15/03	Not filed	54
	10-KSB	06/30/03	09/29/03	Not filed	50
	10-QSB	09/30/03	11/14/03	Not filed	48
	10-QSB	12/31/03	02/17/04	Not filed	45
	10-QSB	03/31/04	05/17/04	Not filed	42
	10-KSB	06/30/04	09/28/04	Not filed	38
	10-QSB	09/30/04	11/15/04	Not filed	36
	10-QSB	12/31/04	02/14/05	Not filed	33
	10-QSB	03/31/05	05/16/05	Not filed	30
	10-KSB	06/30/05	09/28/05	Not filed	26
	10-QSB	09/30/05	11/14/05	Not filed	24
	10-QSB	12/31/05	02/14/06	Not filed	21
	10-QSB	03/31/06	05/15/06	Not filed	18
	10-QSB	06/30/06	08/14/06	Not filed	15
	10-QSB	09/30/06	11/14/06	Not filed	12
	10-KSB	12/31/06	04/02/07	Not filed	0
	10-QSB	03/31/07	05/15/07	Not filed	6
	10-QSB	06/30/07	08/14/07	Not filed	3

Total Filings Delinquent 26

Appendix 1

Chart of Delinquent Filings
In the Matter of Inetvisionz, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Inetvisionz, Inc.					
	10-QSB	03/31/01	05/15/01	Not filed	78
	10-QSB	06/30/01	08/14/01	Not filed	75
	10-QSB	09/30/01	11/14/01	Not filed	72
	10-KSB	12/31/01	04/01/02	Not filed	67
	10-QSB	03/31/02	05/15/02	Not filed	66
	10-QSB	06/30/02	08/14/02	Not filed	63
	10-QSB	09/30/02	11/14/02	Not filed	60
	10-KSB	12/31/02	03/31/03	Not filed	56
	10-KSB	03/31/03	05/15/03	Not filed	48
	10-QSB	06/30/03	08/14/03	Not filed	51
	10-QSB	09/30/03	11/14/03	Not filed	48
	10-KSB	12/31/03	03/30/04	Not filed	44
	10-QSB	03/31/04	05/17/04	Not filed	42
	10-QSB	06/30/04	08/16/04	Not filed	39
	10-QSB	09/30/04	11/15/04	Not filed	36
	10-KSB	12/31/04	03/31/05	Not filed	32
	10-QSB	03/31/05	05/16/05	Not filed	30
	10-QSB	06/30/05	08/15/05	Not filed	27
	10-QSB	09/30/05	11/14/05	Not filed	24
	10-KSB	12/31/05	03/31/06	Not filed	20
	10-QSB	03/31/06	05/15/06	Not filed	18
	10-QSB	06/30/06	08/14/06	Not filed	15
	10-QSB	09/30/06	11/14/06	Not filed	12
	10-KSB	12/31/06	04/02/07	Not filed	0
	10-QSB	03/31/07	05/15/07	Not filed	6
	10-QSB	06/30/07	08/14/07	Not filed	3

Total Filings Delinquent 26

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 30, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12895

In the Matter of	
e4L, Inc., **Luminex Lighting, Inc.,** **MD Healthshares Corp.,** **Royal Holiday Mobile Estates, Inc., and** **Sales Strategies, Inc.,**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**
Respondents.	

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents e4L, Inc., Luminex Lighting, Inc., MD Healthshares Corp., Royal Holiday Mobile Estates, Inc., and Sales Strategies, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. e4L, Inc. ("e4L") (CIK No. 70412) is a void Delaware corporation located in Van Nuys, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(b). e4L is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2000, which reported a net loss from operations of $49,447 for the prior two quarters. On March 5, 2001, the company filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the Central District of California.

2. Luminex Lighting, Inc. ("Luminex") (CIK No. 1039640) is a suspended California corporation located in Chino, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Luminex is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 8-A registration on July 22, 1998.

Document 2 of 2

3. MD Healthshares Corp. ("MD") (CIK No. 1038049) is a revoked Louisiana corporation located in Baton Rouge, Louisiana with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). MD is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 1999.

4. Royal Holiday Mobile Estates, Inc. ("Royal Holiday") (CIK No. 1111250) is a Nevada corporation located in Fontana, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Royal Holiday is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2003, which reported that the company had no assets or operations and had a net loss since inception of $20,305.

5. Sales Strategies, Inc. ("Sales Strategies") (CIK No. 1108240) is a revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Sales Strategies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2003, which reported a net loss since inception of $15,950.

B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

7. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

8. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means of verifiable delivery.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of

the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris
Secretary

Attachment

By: J. Lynn Taylor
Assistant Secretary

Appendix 1

Chart of Delinquent Filings
In the Matter of e4L, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
e4L, Inc.					
	10-Q	12/31/00	02/14/01	Not filed	81
	10-K	03/31/01	06/29/01	Not filed	77
	10-Q	06/30/01	08/14/01	Not filed	75
	10-Q	09/30/01	11/14/01	Not filed	72
	10-Q	12/31/01	02/14/02	Not filed	69
	10-K	03/31/02	07/01/02	Not filed	64
	10-Q	06/30/02	08/14/02	Not filed	63
	10-Q	09/30/02	11/14/02	Not filed	60
	10-Q	12/31/02	02/14/03	Not filed	57
	10-K	03/31/03	06/30/03	Not filed	53
	10-Q	06/30/03	08/14/03	Not filed	51
	10-Q	09/30/03	11/14/03	Not filed	48
	10-Q	12/31/03	02/17/04	Not filed	45
	10-K	03/31/04	06/29/04	Not filed	41
	10-Q	06/30/04	08/16/04	Not filed	39
	10-Q	09/30/04	11/15/04	Not filed	36
	10-Q	12/31/04	02/14/05	Not filed	33
	10-K	03/31/05	06/29/05	Not filed	29
	10-Q	06/30/05	08/15/05	Not filed	27
	10-Q	09/30/05	11/14/05	Not filed	24
	10-Q	12/31/05	02/14/06	Not filed	21
	10-K	03/31/06	06/29/06	Not filed	17
	10-Q	06/30/06	08/14/06	Not filed	15
	10-Q	09/30/06	11/14/06	Not filed	12
	10-Q	12/31/06	02/14/07	Not filed	9
	10-K	03/31/07	06/29/07	Not filed	5
	10-Q	06/30/07	08/14/07	Not filed	3
	10-Q	09/30/07	11/14/07	Not filed	0

Total Filings Delinquent 28

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Luminex Lighting, Inc.					
	10-QSB	09/30/98	11/16/98	Not filed	108
	10-KSB	12/31/98	03/31/99	Not filed	104
	10-QSB	03/31/99	05/17/99	Not filed	102
	10-QSB	06/30/99	08/16/99	Not filed	99
	10-QSB	09/30/99	11/15/99	Not filed	96
	10-KSB	12/31/99	03/30/00	Not filed	92
	10-QSB	03/31/00	05/15/00	Not filed	90
	10-QSB	06/30/00	08/14/00	Not filed	87
	10-QSB	09/30/00	11/14/00	Not filed	84
	10-KSB	12/31/00	04/02/01	Not filed	79
	10-QSB	03/31/01	05/15/01	Not filed	78
	10-QSB	06/30/01	08/14/01	Not filed	75
	10-QSB	09/30/01	11/14/01	Not filed	72
	10-KSB	12/31/01	04/01/02	Not filed	67
	10-QSB	03/31/02	05/15/02	Not filed	66
	10-QSB	06/30/02	08/14/02	Not filed	63
	10-QSB	09/30/02	11/14/02	Not filed	60
	10-KSB	12/31/02	03/31/03	Not filed	56
	10-QSB	03/31/03	05/15/03	Not filed	54
	10-QSB	06/30/03	08/14/03	Not filed	51
	10-QSB	09/30/03	11/14/03	Not filed	48
	10-KSB	12/31/03	03/30/04	Not filed	44
	10-QSB	03/31/04	05/17/04	Not filed	42
	10-QSB	06/30/04	08/16/04	Not filed	39
	10-QSB	09/30/04	11/15/04	Not filed	36
	10-KSB	12/31/04	03/31/05	Not filed	32
	10-QSB	03/31/05	05/16/05	Not filed	30
	10-QSB	06/30/05	08/15/05	Not filed	27
	10-QSB	09/30/05	11/14/05	Not filed	24
	10-KSB	12/31/05	03/31/06	Not filed	20
	10-QSB	03/31/06	05/15/06	Not filed	18
	10-QSB	06/30/06	08/14/06	Not filed	15
	10-QSB	09/30/06	11/14/06	Not filed	12
	10-KSB	12/31/06	04/02/07	Not filed	7
	10-QSB	03/31/07	05/15/07	Not filed	6
	10-QSB	06/30/07	08/14/07	Not filed	3
	10-QSB	09/30/07	11/14/07	Not filed	0

Total Filings Delinquent 37

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
MD Healthshares Corp.					
	10-QSB	06/30/99	08/16/99	Not filed	99
	10-QSB	09/30/99	11/15/99	Not filed	96
	10-KSB	12/31/99	03/30/00	Not filed	92
	10-QSB	03/31/00	05/15/00	Not filed	90
	10-QSB	06/30/00	08/14/00	Not filed	87
	10-QSB	09/30/00	11/14/00	Not filed	84
	10-KSB	12/31/00	04/02/01	Not filed	79
	10-QSB	03/31/01	05/15/01	Not filed	78
	10-QSB	06/30/01	08/14/01	Not filed	75
	10-QSB	09/30/01	11/14/01	Not filed	72
	10-KSB	12/31/01	04/01/02	Not filed	67
	10-QSB	03/31/02	05/15/02	Not filed	66
	10-QSB	06/30/02	08/14/02	Not filed	63
	10-QSB	09/30/02	11/14/02	Not filed	60
	10-KSB	12/31/02	03/31/03	Not filed	56
	10-QSB	03/31/03	05/15/03	Not filed	54
	10-QSB	06/30/03	08/14/03	Not filed	51
	10-QSB	09/30/03	11/14/03	Not filed	48
	10-KSB	12/31/03	03/30/04	Not filed	44
	10-QSB	03/31/04	05/17/04	Not filed	42
	10-QSB	06/30/04	08/16/04	Not filed	39
	10-QSB	09/30/04	11/15/04	Not filed	36
	10-KSB	12/31/04	03/31/05	Not filed	32
	10-QSB	03/31/05	05/16/05	Not filed	30
	10-QSB	06/30/05	08/15/05	Not filed	27
	10-QSB	09/30/05	11/14/05	Not filed	24
	10-KSB	12/31/05	03/31/06	Not filed	20
	10-QSB	03/31/06	05/15/06	Not filed	18
	10-QSB	06/30/06	08/14/06	Not filed	15
	10-QSB	09/30/06	11/14/06	Not filed	12
	10-KSB	12/31/06	04/02/07	Not filed	7
	10-QSB	03/31/07	05/15/07	Not filed	6
	10-QSB	06/30/07	08/14/07	Not filed	3
	10-QSB	09/30/07	11/14/07	Not filed	0

Total Filings Delinquent 34

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Royal Holiday Mobile Estates, Inc.					
	10-QSB	09/30/03	11/14/03	Not filed	48
	10-KSB	12/31/03	03/30/04	Not filed	44
	10-QSB	03/31/04	05/17/04	Not filed	42
	10-QSB	06/30/04	08/16/04	Not filed	39
	10-QSB	09/30/04	11/15/04	Not filed	36
	10-KSB	12/31/04	03/31/05	Not filed	32
	10-QSB	03/31/05	05/16/05	Not filed	30
	10-QSB	06/30/05	08/15/05	Not filed	27
	10-QSB	09/30/05	11/14/05	Not filed	24
	10-KSB	12/31/05	03/31/06	Not filed	20
	10-QSB	03/31/06	05/15/06	Not filed	18
	10-QSB	06/30/06	08/14/06	Not filed	15
	10-QSB	09/30/06	12/29/06	Not filed	11
	10-KSB	12/31/06	04/02/07	Not filed	7
	10-QSB	03/31/07	05/15/07	Not filed	6
	10-QSB	06/30/07	08/14/07	Not filed	3
	10-QSB	09/30/07	11/14/07	Not filed	0
Total Filings Delinquent	17				
Sales Strategies, Inc.					
	10-Q	09/30/03	11/14/03	Not filed	48
	10-K	12/31/03	03/30/04	Not filed	44
	10-Q	03/31/04	05/17/04	Not filed	42
	10-Q	06/30/04	08/16/04	Not filed	39
	10-Q	09/30/04	11/15/04	Not filed	36
	10-K	12/31/04	03/31/05	Not filed	32
	10-Q	03/31/05	05/16/05	Not filed	30
	10-Q	06/30/05	08/15/05	Not filed	27
	10-Q	09/30/05	11/14/05	Not filed	24
	10-K	12/31/05	03/31/06	Not filed	20
	10-Q	03/31/06	05/15/06	Not filed	18
	10-Q	06/30/06	08/14/06	Not filed	15
	10-Q	09/30/06	11/14/06	Not filed	12
	10-K	12/31/06	04/02/07	Not filed	7
	10-Q	03/31/07	05/15/07	Not filed	6
	10-Q	06/30/07	08/14/07	Not filed	3

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Sales Strategies, Inc.					
	10-Q	09/30/07	11/14/07	Not filed	0
Total Filings Delinquent	17				

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for November 2007, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

CHRISTOPHER COX, CHAIRMAN

PAUL S. ATKINS, COMMISSIONER

ANNETTE L. NAZARETH, COMMISSIONER

KATHLEEN L. CASEY, COMMISSIONER

24 Documents

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

November 1, 2007

IN THE MATTER OF	
BIMS Renewable Energy, Inc. (n/k/a Tung Ding Resources, Inc.)	**ORDER OF SUSPENSION OF TRADING**
File No. 500-1	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of BIMS Renewable Energy, Inc. (n/k/a Tung Ding Resources, Inc.), because it has not filed a periodic report since the period ended June 30, 2004.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on November 1, 2007 through 11:59 p.m. EST on November 14, 2007.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Document 1 of 24

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 1, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12883

In the Matter of	
BIMS Renewable Energy, Inc. (n/k/a Tung Ding Resources, Inc.)	**: ORDER INSTITUTING : ADMINISTRATIVE : PROCEEDINGS AND NOTICE : OF HEARING PURSUANT TO : SECTION 12(j) OF THE : SECURITIES EXCHANGE ACT : OF 1934**
Respondent.	

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

BIMS Renewable Energy, Inc. (n/k/a Tung Ding Resources) ("BIMS") (CIK No. 1083146) is a Florida corporation last reported as located in Pompano Beach, Florida. BIMS has a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). BIMS is delinquent in its periodic filings with the Commission. Its last periodic report was a 10-QSB for the quarter ended June 30, 2004, filed in August 2004. In this report, the company claimed to own proprietary technology for turning waste into energy. The company had minimal cash on hand and an accumulated deficit of $2,929,283. On April 18, 2007, the company announced that it had changed its name to Tung Ding Resources, Inc. It also announced a new business direction – gold mining in China – and effected a 1-for-150 reverse split of its shares. As of August 30, 2007, BIMS stock (symbol TGDR) was quoted on the Pink Sheets, was

"piggyback" exempt under Exchange Act Rule 15c2-11(f)(3), and had twelve active market makers.

B. DELINQUENT PERIODIC FILINGS

As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1). It has repeatedly failed to meet its obligations to file timely periodic reports and failed to heed delinquency letters sent to it by the Division of Corporation of Finance requesting compliance with its periodic filing obligations, or it did not receive such letters due to failure to keep current the company address with the Commission as required.

Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

As a result of the foregoing, Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II of this Order are true, and to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondent identified in Section II pursuant to Section 12 of the Exchange Act.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondent personally or by certified mail or by any other means permitted by the Commission's Rule of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris
Secretary

Attachment

By: Jill M. Peterson
Assistant Secretary

Appendix 1

Chart of Delinquent Filings
BIMS Renewable Energy, Inc.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
BIMS Renewable Energy, Inc.					
	10-KSB	09/30/04	12/29/04	Not filed	34
	10-QSB	12/31/04	02/14/05	Not filed	32
	10-QSB	03/31/05	05/16/05	Not filed	29
	10-QSB	06/30/05	08/15/05	Not filed	26
	10-KSB	09/30/05	12/29/05	Not filed	22
	10-QSB	12/31/05	02/14/06	Not filed	20
	10-QSB	03/31/06	05/15/06	Not filed	17
	10-QSB	06/30/06	08/14/06	Not filed	14
	10-KSB	09/30/06	12/29/06	Not filed	10
	10-QSB	12/31/06	02/14/07	Not filed	8
	10-QSB	03/31/07	05/15/07	Not filed	5
	10-QSB	06/30/07	08/14/07	Not filed	2
Total Filings Delinquent	12				

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 1, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12884

In the Matter of **MAXIMUM DYNAMICS, INC.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Maximum Dynamics, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Maximum Dynamics, Inc. (CIK No. 1166529) ("Respondent" or "Maximum") is a dissolved Colorado corporation formerly located in Colorado Springs, Colorado with a class of equity securities, no par common stock, registered with the Commission pursuant to Exchange Act Section 12(g) (Edgar File No. 0-49954). Maximum's stock previously traded on the OTC Bulletin Board ("OTCBB") under the ticker symbol "MXDY," but following the trading suspension imposed on Maximum in late February 2005, no broker/dealer filed a Form 211 to allow quotations of Maximum's securities to resume on the OTCBB or the Pink Sheets. Since February 2005, Maximum's stock has traded on a sporadic basis on the "Other OTC" market.

B. DELINQUENT PERIODIC FILINGS

2. Maximum is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004, in December 2004.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

4. As a result of the foregoing, Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke, the registration of each class of securities of the Respondent registered pursuant to Section 12 of the Exchange Act.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondent personally or by certified, registered, or Express Mail, or by other means of verifiable delivery.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232 and 270

[Release Nos. 33-8859; 34-56732; IC-28042 File No. S7-25-07]

RIN 3235-AJ81

Rulemaking for EDGAR System; Mandatory Electronic Submission of Applications for Orders under the Investment Company Act and Filings Made Pursuant to Regulation E

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We propose several amendments to rules regarding our Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. Specifically, we propose to amend our rules to make mandatory the electronic submission on EDGAR of applications for orders under any section of the Investment Company Act of 1940 ("Investment Company Act") and Regulation E filings of small business investment companies and business development companies. We also propose to amend the electronic filing rules to make the temporary hardship exemption unavailable for submission of applications under the Investment Company Act. Finally, we propose amendments to Rule 0-2 under the Investment Company Act that would eliminate the requirement that certain documents accompanying an application be notarized and the requirement that applicants submit a draft notice as an exhibit to an application.

DATES: Comments should be submitted on or before December 14, 2007.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-25-07 on the subject line; or

- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-25-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: If you have questions about the proposed rules, please contact one of the following members of our staff in the Division of Investment Management, at the Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-0506: in the Office of Legal and Disclosure, Ruth Armfield Sanders, Senior Special Counsel (EDGAR), at (202) 551-6989; in the Office of Investment Company Regulation, Nadya Roytblat, Assistant Director, at (202) 551-6821; or, in the Office of Insurance Products, Keith Carpenter, Senior Special Counsel, at (202) 551-6766; for technical questions relating to the

EDGAR system, in the Office of Information Technology, Richard D. Heroux, EDGAR Program Manager, at (202) 551-8168.

SUPPLEMENTARY INFORMATION:

The Securities and Exchange Commission ("Commission") is proposing for comment amendments to Rules 101 and 201 of Regulation S-T[1] relating to electronic filing on the EDGAR system and to Rule 0-2 under the Investment Company Act.[2]

I. BACKGROUND

Recently, we initiated a series of amendments to keep EDGAR current technologically and to make it more useful to the investing public and Commission staff. In April 2000, we adopted rule and form amendments in connection with the modernization of EDGAR.[3] In the modernization proposing release, we noted that, as the use of electronic databases grows, it becomes increasingly important for members of the public to have electronic access to our filings. We also stated that we were contemplating future rulemaking to bring more of our filings into the EDGAR system on a mandatory basis. In May 2002, we adopted rules requiring foreign private issuers and foreign governments to file most of their documents electronically.[4] In May 2003, we adopted rules requiring electronic filing of beneficial ownership reports filed

---

1 17 CFR 232.101 and 232.201.

2 17 CFR 270.0-2.

3 See Rulemaking for EDGAR System, Release No. 33-7855 (Apr. 27, 2000) [65 FR 24788] (the modernization adopting release). See also Release No. 33-7803 (Mar. 3, 2000) [65 FR 11507] (the modernization proposing release).

4 See Mandated EDGAR Filing for Foreign Issuers, Release No. 33-8099 (May 14, 2002) [67 FR 36678].

by officers, directors and principal security holders under Section 16(a) [5] of the Securities Exchange Act of 1934 ("Exchange Act").[6] In July 2005, we adopted rules requiring certain open-end management investment companies and insurance company separate accounts to identify in their EDGAR submissions information relating to their series and classes (or contracts, in the case of separate accounts) and mandating that fidelity bonds filed under Section 17(g)[7] and sales literature filed with us under Section 24(b)[8] be made by electronic submission on the EDGAR system.[9] In December 2006, we adopted amendments to the rules and forms under Section 7A of the Exchange Act requiring that the forms filed with respect to transfer agent registration, annual reporting, and withdrawal from registration be filed with the Commission electronically on EDGAR. [10]

Today, we propose to require that applicants submit electronically on the EDGAR system their applications for orders under any section of the Investment Company Act ("applications"). We make this proposal to facilitate the efficient submission of applications by applicants, to enable the public to access them more quickly and search them more easily, and to improve the Commission's ability to track and process such applications. We also propose to make revisions

---

5 15 U.S.C. 78p(a).

6 See Mandated EDGAR Filing and Web Site Posting for Forms 3, 4 and 5, Release No. 33-8230 (May 7, 2003) [68 FR 25788] (the EDGAR Section 16 release).

7 15 U.S.C. 80a-17(g).

8 15 U.S.C. 80a-24(b).

9 See Rulemaking for EDGAR System, Release No. 33-8590 (July 18, 2005) [70 FR 43558 (July 27, 2005)].

10 See Electronic Filing of Transfer Agent Forms, Release No. 34-54864 (Dec. 4, 2006) [71 FR 74698 (Dec. 12, 2006)].

to Rule 0-2 and related amendments to Regulation S-T, our electronic filing rules. In addition, we are proposing to add Regulation E filings to the list of those that must be filed electronically through EDGAR.

II. PROPOSED MANDATORY ELECTRONIC SUBMISSION OF INVESTMENT COMPANY APPLICATIONS

The rules under Regulation S-T currently provide that submissions for exemptive relief under any section of the Investment Company Act shall not be made in electronic format.[11] The only applications under the Investment Company Act that are currently mandatory EDGAR submissions are applications for deregistration filed by investment companies.[12] Applicants for orders under the Investment Company Act can include registered investment companies, affiliated persons of registered investment companies, and issuers seeking to avoid investment company status, among other entities.[13] These applications are submitted in paper and currently are available only from the Commission's public reference room or electronically from private services. Private services usually charge fees for electronic copies of applications; also, there is a delay of about thirty days between the submission of applications to the Commission and their

---

11 Current Rule 101(a)(1)(iv) and (c)(11) of Regulation S-T [17 CFR 232.101(a)(1)(iv) and (c)(11)].

12 These include applications and amendments submitted on Form N-8F [17 CFR 274.218] (EDGAR submission types N-8F and N-8F/A) and those submitted pursuant to Investment Company Act Rule 0-2 [17 CFR 270.0-2] (EDGAR submission types 40-8F-2 and 40-8F-2/A). See Release No. IC-23786 (Apr. 15, 1999) [76 19469 (Apr. 21, 1999].

13 There are several sections of the Investment Company Act pursuant to which entities may make applications for relief. For example, Section 6(c) [15 U.S.C. 80a-6(c)] provides the Commission with authority to exempt persons, securities or transactions from any provision of the Investment Company Act, or the regulations thereunder, if and to the extent that such exemption is in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Investment Company Act.

electronic availability from the private sources.

We propose to amend certain provisions of Regulation S-T and Investment Company Act Rule 0-2[14] to require electronic filing on EDGAR for the submission of applications pursuant to Rule 0-2 under the Investment Company Act. We propose to amend Rule 101(a)(1)(iv) of Regulation S-T to include within its mandatory electronic provisions any application for an order under any section of the Investment Company Act.[15]

Regulation S-T requires the electronic filing of any amendments and related correspondence and supplemental information pertaining to a document that is the subject of mandated EDGAR submission.[16] These requirements would also apply to persons who submit applications.[17]

We make this proposal, in light of the primary goals of the EDGAR system, to facilitate the rapid dissemination of financial and business information in connection with filings, including filings by investment companies. Requiring these applications to be submitted electronically would benefit members of the investing public and the financial community by making information contained in these filings readily available to them and more easily

---

14 Rule 0-2 is the Investment Company Act rule under which applications are submitted.

15 See proposed amendment to Rule 101(a)(1)(iv) under Regulation S-T. Paragraph (11) of Rule 101(c) currently provides that filings under Section 6(c) of the Investment Company Act, i.e., applications for orders, be submitted in paper format only. We also propose to remove and reserve this paragraph.

16 Regulation S-T Rule 101(a)(1) [17 CFR 232.101(a)(1)].

17 See proposed amendments to paragraphs (a)(2) and (3) of Rule 101 of Regulation S-T. Related correspondence and supplemental information are not automatically disseminated publicly through the EDGAR system but are immediately available to the Commission staff.

searchable.[18] In this age of information, we believe that filings and applications made with the Commission are more valuable to investors if they are available in electronic form and that adding applications to the EDGAR database would provide a more complete picture for the investing public. We believe that the proposals would benefit the public by making the EDGAR page of our Web site a more comprehensive resource for most information on file with us related to the operation of investment companies.

As with other entities that make submissions on EDGAR, applicants would be subject to the provisions of Regulation S-T[19] and the EDGAR Filer Manual. Regulation S-T includes detailed rules concerning mandatory and permissive electronic EDGAR submissions; it also makes clear that requests for confidential treatment must be made in paper format.[20] The regulation also covers such matters as providing for the override of formatting requirements applicable to paper submissions.[21] The EDGAR Filer Manual contains detailed technical specifications concerning EDGAR submissions. The Manual also provides technical guidance concerning how to commence submissions on EDGAR by submitting Form ID to obtain a

---

18 From time to time, an applicant may wish to submit an application for exemption under both the Investment Company Act and under the Investment Advisers Act [15 U.S.C. 80b-1 et seq.]. We are not proposing to require that Investment Advisers Act submissions be made on EDGAR. Under our proposal, any document that is intended as an application for an order under both the Investment Company Act and the Investment Advisers Act would need to be submitted separately under each Act.

19 For a comprehensive discussion of Regulation S-T and electronic filing, see "Electronic Filing and the EDGAR System: A Regulatory Overview," available on the Commission's Web site.

20 See Rule 101 of Regulation S-T [17 CFR 232.101].

21 The paper formatting requirements continue to be applicable to paper submissions made pursuant to temporary and continuing hardship exemptions under Rules 201 and 202 of Regulation S-T [17 CFR 232.201 and 202].

CIK[22] and confidential access codes and how to maintain and update company data, e.g., how to change company names and contact information.[23]

One technical specification that the EDGAR Filer Manual includes is the electronic "submission type" for each submission made on EDGAR. We expect that the EDGAR electronic submission types for applications would be designed to facilitate and expedite the review of these applications.

Currently, the applications submitted in paper typically reference the provisions of the Investment Company Act and of the rules and regulations under which the application is made. [24] Based on this information, our filer support staff assign a paper "submission type" for our internal recordkeeping of the paper application on the EDGAR system. We also disseminate this paper submission type, which indicates that the paper application has been filed with us. The current paper submission types for applications are the following: 40-APP, 40-6B, and 40-6C. We usually record paper applications under submission types 40-APP or 40-6C, except for those submitted by employees' securities companies, for which we use submission type 40-6B.

Consistent with our proposal, we expect that the EDGAR Filer Manual and the EDGARLink software would provide for three EDGAR electronic submission types for applications: 40-APP, 40-OIP, and 40-6B. Submission type 40-APP would be used for submissions typically processed by the Division's Office of Investment Company Regulation; a

---

22 A filer's CIK (or "central index key") is a ten-digit number uniquely identifying that filer.

23 We remind filers that, in the case of name changes, the changes must be made via the EDGAR filing Web site in advance; the new name would be reflected in the next EDGAR submission. The name on past submissions would not change. The CIK and file number(s) of the company would provide a link to filings under the old name.

24 See paragraph (e) of Investment Company Act Rule 0-2 [17 CFR 270.0-2].

new submission type 40-OIP would be used for submissions typically processed by the Division's Office of Insurance Products. We also would plan to use submission type 40-6B for employees' securities company applications (also processed by the Office of Investment Company Regulation), since we have historically kept records for these applicants separately. We would discontinue use of the paper submission type 40-6C; applications formerly recorded under this submission type would be submitted as either 40-APP or 40-OIP, as appropriate.

We anticipate that the EDGAR Filer Manual would provide guidance for applicants in choosing the correct submission type. Most applications would be submitted under EDGAR submission type 40-APP, the submission type designated for the Office of Investment Company Regulation. But, the following categories of applications would be transmitted under EDGAR submission type 40-OIP, the submission type for the Office of Insurance Products:

(1) applications with regard to mixed and shared funding filed under Section 6(c) of the Investment Company Act, for exemptions from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) of the Investment Company Act, [25] and Rules 6e-2(b)(15) and 6e-3(T)(b)(15); [26]

(2) applications relating to the recapture of bonus credits filed under Section 6(c) of the Investment Company Act for exemptions from the provisions of Sections 2(a)(32) and 27(i)(2)(A) of the Investment Company Act[27] and Rule 22c-1[28];

(3) applications relating to the substitution of securities held by a variable insurance separate account filed under Section 26(c) of the Investment Company Act; [29] and

---

25 15 U.S.C. 80a-9(a), 80a-13(a), 80a-15(a), 80a-15(b).

26 17 CFR 270.6e-2(b)(15), 270.6e-3(T)(b)(15).

27 15 U.S.C. 80a-2(a)(32), 80a-27(i)(2)(A).

28 17 CFR 270.22c-1.

29 15 U.S.C. 80a-26(c).

(4) applications for approval of the terms of an exchange offer involving variable insurance contracts filed under Section 11(a) of the Investment Company Act. [30]

We believe that these three submission types would facilitate and expedite the review of submissions. Our internal system will be able to quickly route the application to the appropriate office. If applicants have any questions as to the appropriate EDGAR submission type, we would encourage them to verify in advance the correct submission type so that the application can be routed automatically to the appropriate Office. We would provide contact information in the EDGAR Filer Manual and on the Commission's Web site so that, in case of doubt, applicants may contact the staff.

We request comment on whether these EDGAR submission types would be sufficient or whether other or additional submission types would be helpful to applicants or the public in connection with the submission of applications.

For applications with multiple co-applicants, the applicants would be able to submit the application with all co-applicants included in one submission. The applicants would choose one applicant to list first as the "primary" co-applicant. Then, they would include in the EDGAR template the information for all other co-applicants, i.e., the CIK of each co-applicant and, for amendments, file number of each co-applicant. Applicants could be dropped from or added to an application with each amendment submission. [31]

---

30 15 U.S.C. 80a-11(a).

31 As is the case currently with paper applications, for each application, an applicant would receive a unique file number which would begin with the prefix "812," or "813" in the case of applications made by employees' securities companies. As also is currently the case with paper filings, each co-applicant's file number would be composed of the primary applicant's file number with an appended two-digit suffix unique to that co-applicant. Each applicant or co-applicant would include this file number, in addition to its CIK, in the EDGAR template of all

We expect that the internal EDGAR system would be enhanced to allow for the upload and public dissemination via the EDGAR system of notices and orders in connection with specific applications.

We request comment on the impact of our making the submission of requests for orders under the Investment Company Act mandatory electronic submissions. Should we implement this rule? We request comment on whether it would be burdensome for us to require applicants to submit applications electronically. To which applications should the rule apply? We ask commenters to address the issue of what the transition period should be for investment companies and other applicants to prepare for the mandatory electronic submission of these applications.

We ask commenters to provide detailed information on any difficulties and considerations unique to these proposed requirements. In the event commenters believe that any aspect of the proposed requirements would be burdensome, we ask for specific details and alternative approaches.

III. PROPOSED AMENDMENTS TO RULE 0-2 AND TO TEMPORARY HARDSHIP EXEMPTION OF REGULATION S-T

Rule 0-2 currently requires that every application for an order for which a form is not specifically prescribed and which is executed by a corporation, partnership or other company and filed with the Commission contain a statement of the applicable provisions of the articles of incorporation, bylaws or similar documents, relating to the right of the person signing and filing such application to take such action on behalf of the applicant, and a statement that all such

---

amendments to the application, which would also be required electronic submissions.

requirements have been complied with and that the person signing and filing the application is fully authorized to do so. If such authorization is dependent on resolutions of stockholders, directors, or other bodies, such resolutions must be attached as an exhibit to or quoted in the application. Any amendment to the application must contain a similar statement as to the applicability of the original statement of authorization. When any application or amendment is signed by an agent or attorney, Rule 0-2 requires that the power of attorney evidencing his authority to sign shall state the basis for the agent's authority and shall be filed with the Commission. Every application subject to Rule 0-2 must be verified by the person executing the application by providing a notarized signature in substantially the form specified in the rule. Each application subject to Rule 0-2 must state the reasons why the applicant is deemed to be entitled to the action requested, the name and address of each applicant, and the name and address of any person to whom any questions regarding the application should be directed. Rule 0-2 requires that a proposed notice of the proceeding initiated by the filing of the application accompany each application as an exhibit and, if necessary, be modified to reflect any amendment to the application.

We are proposing three amendments to Rule 0-2 governing the form of applications under the Investment Company Act. First, we propose to eliminate the requirement to have verifications of applications and statements of facts made in connection with applications notarized.[32] We believe that this requirement is unnecessary in the context of an electronic filing.[33] Second, we propose to eliminate the requirement that applicants include draft notices as

---

[32] See Rule 0-2(d).

[33] Regulation S-T requires that each signatory to an electronic filing manually sign a signature page

exhibits to applications.[34] The staff has found these exhibits to be of limited value because the staff prefers to draft its own notices of applications. Finally, we also propose to amend Rule 0-2 to remove the last sentence of paragraph (b),[35] which was added in the initial EDGAR rulemaking and would be inconsistent with mandatory electronic submission of applications on EDGAR.[36] We request comment on these proposed amendments. Is there any reason we should retain the notary and draft notice requirements?

We are also proposing an amendment to Rule 201 of Regulation S-T. Rules 201 and 202[37] of Regulation S-T address hardship exemptions from EDGAR filing requirements, and Rule 13(b) of Regulation S-T[38] addresses the related issue of filing date adjustments.

A filer may obtain a temporary hardship exemption under Rule 201 if it experiences unanticipated technical difficulties that prevent the timely preparation and submission of an

---

or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form in the electronic filing. This document must be executed before or at the time the electronic filing is made, must be retained by the filer for a period of five years, and must be made available to the Commission upon request. See Rule 302(b) of Regulation S-T [17 CFR 232.302(b)]. We believe that this requirement provides sufficient assurance of the legitimacy of signatures contained in the electronic filings so that notarization is unnecessary.

34 See Rule 0-2(g).

35 The last sentence of Rule 0-2(b) currently reads as follows: "Every application for an order under any provision of the Act and every amendment to such application shall be submitted to the Commission in paper only, whether or not the applicant is otherwise required to file in electronic format, unless instructions for electronic filing are included on the form, if any, prescribed for such application.

36 See Rulemaking for EDGAR System – Investment Companies and Institutional Investment Managers, Release No. 33-6978 (Feb. 23, 1993) [58 FR 14848 (Mar. 18, 1993)].

37 17 CFR 232.202.

38 17 CFR 232.13(b).

electronic filing by filing a properly legended paper copy[39] of the filing under cover of Form TH.[40] This process is self-executing. A filer who files in paper under the temporary hardship exemption must submit an electronic format copy of the filed paper document within six business days of the filing of the paper format document.[41]

A filer may apply for a continuing hardship exemption under Rule 202 if it cannot file all or part of a filing without undue burden or expense.[42] In contrast to the self-executing temporary hardship exemption process, a filer can obtain a continuing hardship exemption only by submitting a written application, upon which the Commission, or Commission staff pursuant to delegated authority, must then act.

We are proposing to make the temporary hardship exemption unavailable for submission of applications under the Investment Company Act.[43] We are proposing to amend Rule 201(a) of Regulation S-T to make temporary hardship exemptions unavailable for these submissions, since there is generally no submission exigency or submission deadline associated with these submissions. An applicant would continue to have the ability to apply for a continuing hardship

---

39 See 17 CFR 232.201(a).

40 17 CFR 239.65, 249.447, 269.10,and 274.404.

41 See 17 CFR 232.201(b).

42 See 17 CFR 232.202(a).

43 See proposed amendment to rule 201(a) of Regulation S-T.

We have previously made unavailable the ability for filers to use the temporary hardship exemption for EDGAR submissions of beneficial ownership reports filed by officers, directors and principal security holders under Section 16(a) of the Exchange Act [15 U.S.C. 78p(a)]. See Mandated EDGAR Filing and Web Site Posting for Forms 3, 4 and 5, Release No. 33-8230 (May 7, 2003) [68 FR 25788].

exemption under Rule 202 if it cannot submit all or part of an application without undue burden or expense. Also, while we would expect the circumstances and exercise to be rare, the staff could use its delegated authority to grant a filing date adjustment pursuant to Rule 13(b) of Regulation S-T [17 CFR 232.13(b)]. While we would not expect an applicant to need a filing date adjustment in the context of an application, it would be available in the unlikely event it were needed. We ask for comment on making the temporary hardship exemption unavailable for submission of applications for orders under the Investment Company Act.

IV. PROPOSED AMENDMENTS TO MANDATE THAT CERTAIN FILINGS OF SMALL BUSINESS INVESTMENT COMPANIES AND BUSINESS DEVELOPMENT COMPANIES BE MADE ELECTRONICALLY

Regulation E[44] provides for the exemption from registration of securities issued by small business investment companies registered under the Investment Company Act and business development companies regulated under that Act, subject to the terms and conditions of the regulation. Rule 604[45] of Regulation E requires the filing of notification on Form 1-E[46] of sales of securities under Regulation E. Rule 607[47] of Regulation E requires the filing of sales material used in connection with the offering. Rule 609[48] of Regulation E requires the filing of reports of sales on Form 2-E.[49]

---

44 17 CFR 230.601 to 610a.

45 17 CFR 230.604.

46 17 CFR 239.200.

47 17 CFR 230.607.

48 17 CFR 230.609.

49 17 CFR 239.201.

Currently, these companies must make most of their filings electronically on the EDGAR system. However, they must make their Regulation E[50] filings in paper. Since these filers are already EDGAR filers and most would have available electronic copies of their Form 1-E (and any related sales material)[51] and Form 2-E, we believe that making these filings electronically on EDGAR would impose very little burden or cost on these companies. We are therefore proposing to make these filings mandatory electronic submissions.[52] We request comment on any burdens or costs that would result. Is there any reason not to require that these submissions be made electronically on the EDGAR system?

V. GENERAL REQUEST FOR COMMENT

You are invited to submit written comments relating to the rule proposals set forth in this release. We request comment not only on the specific issues we discuss in this release, but on any other approaches or issues that we should consider in connection with the submission of applications for orders and Regulation E filings on the EDGAR system. We seek comment from any interested person, including those required to file information with us on the EDGAR system, as well as investors, disseminators of EDGAR data, EDGAR filing agents, and other members of the public who have access to and use information from the EDGAR system.

---

50 17 CFR 230.601 to 610a.

51 Requiring electronic filing on EDGAR of Rule 607 sales literature would be consistent with the current requirement to file electronically on EDGAR omitting prospectuses under Rule 482 of the Securities Act of 1933 ("Securities Act") (referred to as "482 ads") and sales literature under Section 24(b) of the Investment Company Act.

52 See proposed amendments to paragraphs (a)(1)(v) and (c)(6) of Rule 101 of Regulation S-T.

VI. COST-BENEFIT ANALYSIS

We are sensitive to the costs and burdens of our rules. The rules we are proposing today would reflect the addition of applications under the Investment Company Act as mandatory electronic submissions on EDGAR. In addition, the proposals would amend Rule 0-2 and make unavailable to applicants Regulation S-T's provision for temporary hardship exemptions. In addition, the proposals would add Regulation E filings to the list of those that must be filed electronically through EDGAR.

A. Expected Benefits

We expect that the addition of applications under the Investment Company Act as mandatory electronic submissions on EDGAR would result in considerable benefits to the securities markets, investors, and other members of the public, by expanding the accessibility of information, and increasing the types of information, filed and made available for public review through the EDGAR system. The primary goal of the EDGAR system since its inception has been to facilitate the rapid dissemination of financial and business information in connection with filings, including filings by investment companies. The proposed amendments would benefit investors, financial analysts and others by increasing the efficiency of retrieving and disseminating these applications. The mandated electronic transmission of these documents would enable the public to access them more quickly and search them more easily. Instead of having to come in person or through an agent to the Commission's public reference room to conduct a search for a particular submission that is in paper or microfiche, the public would be able to find and review the application on any computer with an Internet connection by accessing

the EDGAR system through the Commission's Web site or through a third party Web site that links to EDGAR. The proposals would benefit the public by making the EDGAR page of our Web site a more comprehensive resource for most information on file with us related to the operation of investment companies. A further benefit would be to ensure that all applications are available to the public free of charge on our Web site without the cost of paying a third party for a copy.

Persons who may consider requesting a hearing on an application on the basis of a notice would be able to more easily obtain the actual application so that they could better understand the legal issues. We believe this would be a significant improvement in the applications process.

We also expect that applicants would benefit from the increased efficiencies in the filing process for these submissions resulting from the proposed amendments. By electronically transmitting these documents directly to the Commission, applicants would avoid the uncertainties and delays that can occur with the manual delivery of paper documents; we believe that it would be a simpler and more efficient means to submit applications. Applicants also would benefit from no longer having to submit multiple copies of paper documents to the Commission.

Because the Commission's staff would be able to retrieve and analyze information contained in these submissions more readily than under our current paper system, mandated electronic submission of these documents should facilitate the staff's retrieval and review of a particular document. Applicants and investors should benefit from increased efficiencies in the

Commission's storage, retrieval, and analysis of these submissions which would result from the proposed amendments.

We believe the proposal to amend Rule 0-2 would benefit applicants. Removing the notarization requirement would remove a requirement from filers that is unnecessary, and removing the requirement to include a draft notice as an exhibit will result in a cost-savings to applicants. And, we believe that making unavailable to applicants Regulation S-T's Rule 201 provision for temporary hardship exemptions would benefit applicants because applicants would not bear the cost of both submitting an application in paper and in electronic form as a confirming copy within 6 business days as required by the temporary hardship exemption rule. This is true in light of the fact that there is no deadline for the submission of an application.

We also expect that the addition of Regulation E filings as mandatory electronic submissions on EDGAR would result in benefits to the securities markets, investors, and other members of the public, by expanding the accessibility of information, and increasing the types of information, filed and made available for public review through the EDGAR system. Requiring these Regulation E filings to be submitted on EDGAR would benefit members of the investing public and the financial community by making information contained in these Commission filings more easily searchable and readily available to them. The proposals would result in the benefit to the public of the EDGAR page of our Web site being a comprehensive source from which to find filings of small business investment companies and business development companies.

We also expect that Regulation E filers would benefit from the increased efficiencies in the filing process for these submissions resulting from the proposed amendments. By

electronically transmitting these documents directly to the Commission, these filers would avoid the uncertainties and delays that can occur with the manual delivery of paper documents; we believe that it would be a simpler and more efficient means to submit these Regulation E filings. Regulation E filers also would benefit from no longer having to submit multiple copies of paper documents to the Commission.

The proposed amendments would benefit investors, financial analysts and others by increasing the efficiency of retrieving and disseminating these filings. The mandated electronic transmission of these documents would enable the public to access them more quickly. Instead of having to come in person or through an agent to the Commission's public reference room to conduct a search for a particular submission that is in paper or microfiche, the public would be able to find and review the filing on any computer with an Internet connection by accessing the EDGAR system through the Commission's Web site or through a third party Web site that links to EDGAR. The proposed amendments would also enable financial analysts and others to retrieve, analyze and disseminate more rapidly this information.

An investor would be able to more efficiently gather information of interest about Regulation E filers. Also, Regulation E filers and investors should benefit from increased efficiencies in the Commission's storage, retrieval, and analysis of these submissions which would result from the proposed amendments. Mandated EDGAR submission of these documents would result in their addition to the Commission's central electronic repository of filings that is free to anyone who has access to a computer linked to the Internet. Because the Commission's staff would be able to retrieve and analyze information contained in these Regulation E submissions more readily than under our current paper system, mandated electronic

submission of these documents should facilitate the staff's retrieval and review of a particular document.

In the Paperwork Reduction Act section we estimate that, if the proposed amendments are adopted, the total reduction in the burden would be approximately $52,550.

B. Expected Costs

We expect that, if adopted, the proposed amendments would result in some initial and ongoing costs to applicants. We also expect, however, that many applicants would not bear the full range of costs that would result from the amendments for the reasons described below. Initial costs are those associated with filing a Form ID in order to obtain the access codes needed to submit an application electronically and otherwise preparing to make an application submission.[53] In order to file a Form ID, an applicant would need to learn the related electronic filing requirements, obtain access to a computer and the Internet, use the computer to access the Commission's EDGAR Filer Management Web site, respond to Form ID's information requirements and fax to the Commission a notarized authenticating document

Ongoing costs are those associated with maintaining the framework developed through the initial costs (for example, updating information required by Form ID) and additional costs arising from each subsequent submission of an application.

---

[53] Applicants that already have EDGAR access codes would not need to file a Form ID. As further discussed in Part IX, however, we assume that a small number of applicants per year would not already have the codes.

We expect that the vast majority of applicants would need to incur few, if any, additional costs related to obtaining computer and Internet access. We believe that the vast majority of applicants already would have access to a computer and the Internet.[54]

We expect no additional costs to applicants from our proposal to amend Rule 0-2. We request comment on whether our proposed amendments to Rule 0-2 to remove the current requirements for notarization of the application and provision of a draft notice as an exhibit would result in any additional costs. We expect no additional costs to applicants from our proposal to make unavailable to applicants Regulation S-T's Rule 201 provision for temporary hardship exemption. An applicant would still be able to request a continuing hardship exemption under Regulation S-T Rule 202 under appropriate circumstances.

We believe that mandatory EDGAR submission of Regulation E filings would result in minimal cost to these filers. For the following reasons, we also expect that Regulation E filers would not bear the full range of costs frequently associated with new electronic filing requirements. Initial costs are those associated with the purchase of compatible computer equipment and software, including EDGAR software if obtained from a third-party vendor and not from the Commission's Web site. Initial costs also include those resulting from the training of existing employees to be EDGAR proficient or the hiring of additional employees or agents that are already skilled in EDGAR processing. Initial costs further include those associated with the formatting and transmission of an applicant's first document submitted on EDGAR. These

---

54 An applicant that did not already own a computer with Internet access could, for example, go to a public library to use its computer and obtain Internet access.

transmission costs may include those related to subscribing to an Internet service provider. Regulation E filers already file on EDGAR and would have minimal or no initial costs.

Ongoing costs are those associated with the electronic formatting and transmission of subsequent EDGAR filings. Regulation E filers may also incur future costs resulting from the training or hiring of employees regarding updated EDGAR filing requirements. The magnitude of these costs would depend on the filers' levels of technological proficiency and their previous familiarity with EDGAR filing requirements. Regulation E filers would incur the ongoing costs associated with formatting and transmitting their subsequent EDGAR filings. Consequently, the mandated EDGAR requirements should result only in costs related primarily to the electronic formatting of these documents in a format compatible with EDGAR, and transmission of the EDGAR formatted documents to the Commission. In any event, we believe that any costs for transmission, formatting, and education would be comparable to savings from not having to incur similar costs related to paper submissions.

C. Comment Solicited

We solicit comment on the costs and benefits of the proposed amendments. We request your views on the costs and benefits described above as well as on any other costs and benefits that could result from adoption of these proposals. Please identify any costs or benefits associated with the rule proposal for the mandatory electronic submission of applications (and related proposed amendments to Investment Company Act Rule 0-2 and Rule 201 of Regulation S-T) and Regulation E filings and any impact that the rule proposals may have on the ease of locating and using EDGAR data. How much, if any, expense would be avoided with the removal of the notary and draft notice requirements? What are the benefits that investors,

financial analysts, other members of the financial community, applicants, and small business investment company and business development company Regulation E filers should realize from these proposals? Would the proposed amendments help an investor to gather information about an applicant and its operations? What are the likely expected initial and ongoing costs of these added categories of mandated EDGAR submissions? Are there costs in addition to those discussed above? Are there unidentified costs associated with any of the proposed amendments and, if so, what are they?

We encourage commenters to identify any costs or benefits associated with the rule proposals. We also request data to quantify the costs and the benefits identified.

VII. BURDEN ON COMPETITION; PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION

Section 23(a)(2) of the Exchange Act requires us, in adopting rules under the Exchange Act, to consider the anti-competitive effects of any rules that we adopt thereunder. Furthermore, Section 2(b) of the Securities Act,[55] Section 3(f) of the Exchange Act,[56] and Section 2(c)[57] of the Investment Company Act require us, when engaging in rulemaking, and considering or determining whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation. In compliance with our responsibilities under these sections, we request comment on whether the proposals, if adopted, would burden competition and whether they would promote efficiency, competition,

---

55 15 U.S.C. 77b(b).

56 15 U.S.C. 78c(f).

57 15 U.S.C. 80a-2(c).

and capital formation. We encourage commenters to provide empirical data or other facts to support their views.

The proposed amendments regarding mandated electronic filing of applications and the related amendments to Rule 0-2 and Regulation S-T's Rule 201 are intended to simplify the requirements for submitting applications and facilitate more efficient transmission, analysis, storage and retrieval of information. This should improve the accessibility and usefulness of information available to all applicants and the public, including those wishing to request a hearing on an application. It may make the investment products offered by applicants more competitive, since all applicants would have ready access to the applications of others. The proposed rules would also improve the accessibility of information available to the public about the operation of investment companies and improve investors' ability to make informed investment decisions. We believe the proposed amendments would not impose a burden on competition and would not have an adverse impact on capital formation. The proposed amendments regarding mandated electronic filings under Regulation E by small business investment companies and business development companies are intended to facilitate more efficient transmission, analysis, storage and retrieval of information. This should improve the accessibility and usefulness of information available for use by filers, investors, and the public. It may make the investment products offered by filers more competitive, since all filers would have immediate on-line access to Regulation E filings of their competitors. We believe that the proposed rules would also improve the accessibility of information available to the public about the operation of small business investment companies and business development companies and thereby improve investors' ability to make informed investment decisions. We believe the

proposed amendments would not impose a burden on competition and would not have an adverse impact on capital formation.

We request comment on the impact the proposed rule would have on efficiency, competition and capital formation. We request comment on whether the proposed amendments, if adopted, would impose a burden on competition and whether they would promote efficiency, competition, and capital formation. We also request commenters to provide empirical data and other factual support for their views if possible.

VIII. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Initial Regulatory Flexibility Act Analysis (Analysis) has been prepared in accordance with 5 U.S.C. 603. It relates to our proposed amendments to add applications for orders under the Investment Company Act to the list of submissions that must be made electronically, including proposals to amend Rule 0-2 and make unavailable to applicants the provision for temporary hardship exemptions in Rule 201 of Regulation S-T, and to add Regulation E filings to the list of those that must be filed electronically through EDGAR.

A. Reasons for, and Objectives of, Proposed Amendments

The proposals would require applications for orders under any section of the Investment Company Act to be submitted electronically on EDGAR. The proposed amendments to Rule 0-2 would remove the requirements for notarization and provision of a draft notice, and the proposed amendments to Rule 201 of Regulation S-T would make applications ineligible for temporary hardship exemptions. We make these proposals because the absence of an electronic system for submitting applications for orders limits the usefulness of the information collected.

The proposals would add Regulation E filings made by small business investment companies and business development companies to the list of those that must be filed electronically through EDGAR. We also make this proposal because the absence of an electronic system for submitting Regulation E filings limits the usefulness of the information collected.

B. Legal Basis

We are proposing amendments to Rules 101, and 201 of Regulation S-T and Rule 0-2 under the Investment Company Act pursuant to authority set forth in Sections 6, 7, 8, 10 and 19(a) of the Securities Act [15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a)], Sections 3, 12, 13, 14, 15(d), 23(a) and 35A of the Exchange Act [15 U.S.C.78c, 78l, 78m, 78n, 78o(d), 78w(a), and 78ll], and Sections 8, 30, 31 and 38 of the Investment Company Act [15 U.S.C. 80a-8, 80a-29, 80a-30, and 80a-37].

C. Small Entities Subject to the Rule

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[58] Approximately 164 registered investment companies meet this definition.[59] Approximately 51 business development companies may be considered small entities.[60] We estimate that few, if any,

---

58 Rule 0-10(a) under the Investment Company Act [17 CFR 240.0-10(a)].

59 The estimated number of reporting investment companies that may be considered small entities is based on December 2006 data from the Commission's EDGAR database and a third-party data provider.

60 This estimate is based on analysis by the Division of Investment Management staff of information

separate accounts registered on Form N-3, N-4, or N-6 are small entities.[61]

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments would require applicants to submit requests for orders and small business investment companies and business development companies to submit Regulation E filings electronically on the EDGAR system. The Commission estimates some one-time formatting and ongoing burdens that would be imposed on all applicants and Regulation E filers, including those that are small entities. We note, however, that all Regulations E filers and many applicants currently make other filings on EDGAR. Furthermore, we believe that non-investment company applicants would have no greater burden than that of those filers of Section 16 reports or Schedules 13D and 13G[62] who would not otherwise make EDGAR filings and that the electronic submission should create only a de minimis burden.

There would be no change in reporting or recordkeeping requirements. The proposed amendments to Rule 0-2 would reduce compliance requirements to the extent that they would remove the requirements for notarization of the application and provision of a draft notice with the application.

We solicit comment on the effect the proposed amendments would have on small entities.

---

from databases compiled by third-party information providers, including Morningstar, Inc. and Lipper Inc.

61 This estimate is based on figures compiled by the Division of Investment Management staff regarding separate accounts registered on Forms N-3, N-4, and N-6. In determining whether an insurance company separate account is a small entity for purposes of the Regulatory Flexibility Act, the assets of insurance company separate accounts are aggregated with the assets of their sponsoring insurance companies. Rule 0-10(b) under the Investment Company Act [17 CFR 270.0-10(b)].

62 17 CFR 240.13d-101 and 13d-102.

E. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with the proposed amendments.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, the Commission considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed amendments for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. Different requirements for applicants or Regulation E filers that are small entities could make it more difficult for the public to locate Commission filings and disclosure documents for these applicants. We believe it is important that the benefits resulting from the proposal be provided to the public for all applications and Regulation E filings, not just the ones from those that are not considered small entities.

We have endeavored throughout the proposed amendments to minimize the regulatory burden on all applicants and Regulation E filers, including small entities, while meeting our regulatory objectives. Small entities should benefit from the Commission's reasoned approach

to the proposed amendments to the same degree as others. The Commission preliminarily believes that further clarification, consolidation, or simplification of the proposals for those that are small entities would be inconsistent with the Commission's concern for investor protection. Further clarification, consolidation, or simplification of the proposals for those that are small entities would result in less information available for them. Similarly, we preliminarily conclude that using performance rather than design standards would not be consistent with our statutory mandate of investor protection. We believe that the standard provided in the proposal (EDGAR filing) is already sufficiently clear and appropriately simple. A major goal of making these mandatory EDGAR submissions is a more complete and searchable EDGAR database of filings; we do not believe that there is a comparable performance standard that would achieve this goal.

G. Solicitation of Comments

The Commission encourages the submission of written comments with respect to any aspect of this analysis. Comment is specifically requested on the number of small entities that would be affected by the proposed amendments and the likely impact of the proposals on small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Act Analysis if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposal.

IX. PAPERWORK REDUCTION ACT

The proposed rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[63] We are submitting the

---

[63] 44 U.S.C. 3501 *et seq.*

proposed collection of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

A. Rule 0-2

The title for the collection of information is "General Requirements of Papers and Applications."[64] Provision of information under the rule is necessary to obtain a benefit. The information is not kept confidential. Respondents to the collection are applying for orders of the Commission under the Investment Company Act. Applicants for orders under the Investment Company Act can include registered investment companies, affiliated persons of registered investment companies, and issuers seeking to avoid investment company status, among other entities.[65] The Commission uses the information required by rule 0-2 to decide whether the applicant should be deemed to be entitled to the action requested by the application. The proposed amendments to rule 0-2 would eliminate the requirement to have verifications of applications and statements of facts made in connection with applications notarized[66] and would

---

64 Rule 0-2 is a collection of information currently in use without a control number. We are submitting the rule to OMB for approval under the PRA.

65 There are several sections of the Investment Company Act pursuant to which entities may make applications for relief. Section 6(c) provides the Commission with authority to exempt persons, securities or transactions from any provision of the Investment Company Act, or the regulations thereunder, if and to the extent that such exemption is in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Investment Company Act.

66 See Rule 0-2(d).

eliminate the requirement that applicants include draft notices as exhibits to applications.[67]

Burden Estimate for Rule 0-2

Applicants file applications as they deem necessary. The Commission receives approximately 125 applications per year under the Investment Company Act of 1940. Although each application typically is submitted on behalf of multiple entities, the entities in the vast majority of cases are related companies and are treated as a single applicant for purposes of this analysis.

Much of the work of preparing an application is performed by outside counsel. The cost outside counsel charges applicants depends on the complexity of the issues covered by the application and the time required for preparation. Based on conversations with applicants and attorneys, the cost ranges from approximately $7,000 for preparing a well-precedented, routine application to approximately $80,000 to prepare a complex and/or novel application. We estimate that the Commission receives 20 of the most time-consuming applications annually, 80 applications of medium difficulty, and 25 of the least difficult applications. This distribution gives a total estimated annual cost burden to applicants of filing all applications of $5,255,000 [(20x$80,000) + (80x$43,500) + (25x$7,000)].

In addition, based on conversations with applicants, we estimate that in-house counsel would spend from ten to fifty hours helping to draft and review an application. We estimate a total annual hour burden to all respondents of 3,650 hours (50 hours x 20 applications) + (30 hours x 80 applications) + (10 hours x 25 applications). We are proposing to decrease the burden associated with the existing collection of information for Rule 0-2 to reflect the proposed

---

[67] See Rule 0-2(g).

amendments. The proposed amendments to Rule 0-2 would, if adopted, eliminate the requirement to have verifications of applications and statements of facts made in connection with applications notarized. The notary service would be provided by a secretary or similar administrative employee of the applicant or the outside counsel preparing the application and would represent a negligible cost or hour burden to the applicant, so elimination of the notarization requirement would not be likely to decrease the burden measurably.

The proposed amendments would also eliminate the requirement that applicants include proposed notices as exhibits to applications. A proposed notice is merely a summary of the statements in the application. We estimate that preparation of the proposed notice by outside counsel represents approximately 1% of the cost of preparing an application. Elimination of this requirement would reduce the estimated cost burden by approximately $52,550 (1% of $5,255,000). The proposed amendments will not change the hour burden.

If the proposed amendments are adopted, we estimate the total reduction in the burden would be approximately $52,550.

B. Regulation S-T

The title for the collection of information is "General Rules and Regulations for Electronic Filing." (OMB Control No. 3235-0424). The purpose of Regulation S-T is to implement the Commission's EDGAR system. The EDGAR system enables the Commission to receive, store, process and disseminate information filed with the Commission under the provisions of the federal securities laws. The Commission's forms and rules require filings that make information available to the investing public and that permit the Commission to verify compliance with the federal securities laws. Electronic filing improves the availability to the

public and to the Commission of information filed with the Commission. Regulation S-T specifies the requirements that govern the electronic submission of documents to the Commission. Provision of the information required by the Regulation is mandatory. Responses are not kept confidential.

Burden Estimate for Regulation S-T

The proposed amendments to Regulation S-T would revise rule 101 under Regulation S-T to require electronic filing of applications for orders of the Commission under the Investment Company Act and of forms required by Regulation E under the Securities Act of 1933. The burden associated with the filing of applications under rule 0-2, as proposed to be amended, will be reflected in the collection of information entitled "General Requirements of Papers and Applications." We are not proposing to amend Regulation E. The burden associated with the filing of documents required by Regulation E is reflected in the collections of information required by Regulation E, and will not change as a result of the proposed amendments to Regulation S-T.

We are also proposing to amend rule 201 under Regulation S-T, which governs temporary hardship exemptions from electronic filing. Rule 201 is part of Regulation S-T and does not impose any burden on respondents separate from Regulation S-T. The proposed amendments to rule 201 will not change the burden of Regulation S-T. The Paperwork Reduction Act requires that we obtain OMB approval for a collection of information, whether the collection has a burden or not. Regulation S-T is a collection of information with no burden to respondents. OMB requires us to assign a burden of one hour to Regulation S-T and to indicate that the Regulation has one respondent so the automated OMB system will be able to

handle approval of the Regulation. OMB has already approved a burden of one hour for one respondent to the Regulation.

C. Form ID

The Commission estimates that each year a small number of applicants would need to file a Form ID (OMB Control Number 3235-0328) with the Commission in order to gain access to EDGAR. Form ID is used to request the assignment of access codes to file on EDGAR. Most applicants would not need to file a Form ID because any applicant that has made at least one filing with the Commission since 2002 has been entered into the EDGAR system by the Commission and would not need to file Form ID to file electronically on EDGAR. However, applicants that have never made a filing with the Commission would need to file Form ID.

The Commission estimates that it would receive approximately 10 Forms ID a year under the proposed amendments. This number fits within the current number of respondents that file a Form ID each year because the actual number of Forms ID the Commission receives is less than the current estimate.

D. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments as to: (i) whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection

techniques or other forms of information technology.

The Commission has submitted the proposed collections of information to OMB for approval. Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-0609, with reference to File No. S7-25-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-25-07, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE, Washington, DC 20549. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

X. CONSIDERATION OF IMPACT ON THE ECONOMY

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[68] a rule is "major" if it results or is likely to result in:

- an annual effect on the economy of $100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment, or innovation.

We request comment on and information regarding the potential impact of the proposed amendments on the economy on an annual basis. In particular, comments should address

---

[68] Pub. L. No. 104-21, title II, 110 Stat. 857 (1996).

whether the proposed changes, if adopted, would have a $100,000,000 annual effect on the economy, cause a major increase in costs or prices, or have a significant adverse effect on competition, investment, or innovation. We request that commenters provide empirical data to support their views.

XI. STATUTORY BASIS

We propose the rule amendments outlined above under Sections 6, 7, 8, 10 and 19(a) of the Securities Act [15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a)], Sections 3, 12, 13, 14, 15(d), 23(a) and 35A of the Exchange Act [15 U.S.C. 78c, 78l, 78m, 78n, 78o(d), 78w(a), and 78ll], and Sections 8, 30, 31 and 38 of the Investment Company Act [15 U.S.C. 80a-8, 80a-29, 80a-30, and 80a-37].

List of Subjects

17 CFR Part 232

Reporting and recordkeeping requirements, Securities.

17 CFR Part 270

Investment companies, Reporting and recordkeeping requirements, Securities.

TEXT OF THE PROPOSED RULE AMENDMENTS

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows.

PART 232 – REGULATION S-T – GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

1. The authority citation for part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll (d), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

2. Section 232.101 is amended by:

a. Revising paragraphs (a)(1)(iv) and (v), the introductory text of paragraph (a)(2), paragraph (a)(2)(i), the first sentence of paragraph (a)(3), and paragraph (c)(6); and

b. Removing and reserving paragraph (c)(11).

The revisions read as follows:

§232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(iv) Documents filed with the Commission pursuant to sections 8, 17, 20, 23(c), 24(b), 24(e), 24(f), and 30 of the Investment Company Act (15 U.S.C. 80a-8, 80a-17, 80a-20, 80a-23(c), 80a-24(b), 80a-24(e), 80a-24(f), and 80a-29) and any application for an order under any section of the Investment Company Act (15 U.S. C. 80a-1 et seq.);

(v) Documents relating to offerings exempt from registration under the Securities Act filed with the Commission pursuant to Regulation E (§§230.601 - 230.610a of this chapter);

* * * * *

(2) The following amendments to filings and applications, including any related correspondence and supplemental information except as otherwise provided, shall be submitted as follows:

(i) Any amendment to a filing or application submitted by or relating to a registrant or an applicant that is required to file electronically, including any amendment to a paper filing or application, shall be submitted in electronic format;

* * * * *

(3) Supplemental information, including documents related to applications under any section of the Investment Company Act, shall be submitted in electronic format except as provided in paragraph (c)(2) of this section. * * *

* * * * *

(c) * * *

(6) Except as provided in paragraph (a)(1)(v) of this section, filings relating to offerings exempt from registration under the Securities Act, including filings made pursuant to Regulation A (§§230.251 - 230.263 of this chapter) and Regulation D (§§230.501 - 230.506 of this chapter), as well as filings on Form 144 (§§239.144 of this chapter) where the issuer of the securities is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d), respectively);

* * * * *

3. Amend §232.201 by revising paragraph (a).

§232.201 Temporary hardship exemption.

(a) If an electronic filer experiences unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing other than a Form 3 (§249.103 of this chapter), a Form 4 (§249.104 of this chapter), a Form 5 (§249.105 of this chapter), a Form ID (§§239.63, 249.446, 269.7 and 274.402 of this chapter), a Form TA–1 (§249.100 of this chapter), a Form TA–2 (§249.102 of this chapter), a Form TA–W (§249.101 of this chapter), or an application for an order under any section of the Investment Company Act (15 U.S.C. 80a–1 et seq.), the electronic filer may file the subject filing, under cover of Form TH (§§239.65,

249.447, 269.10 and 274.404 of this chapter), in paper format no later than one business day after the date on which the filing was to be made.

* * * * *

PART 270 -- RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

4. The authority citation for Part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a-1 et seq., 80a-34(d), 80a-37, and 80a-39, unless otherwise noted.

* * * * *

5. Amend §270.0-2 by:

a. Removing the authority citation following the section;

b. Removing the last sentence in paragraph (b):

c. Revising paragraph (d);

d. Removing paragraph (g); and

e. Redesignating paragraph (h) as paragraph (g).

The revision reads as follows:

§ 270.0-2 General requirements of papers and applications

* * * * *

(d) Verification of applications and statements of fact. Every application for an order under any provision of the Act, for which a form with instructions is not specifically prescribed and every amendment to such application, and every statement of fact formally filed in support

of, or in opposition to, any application or declaration shall be verified by the person executing the same. An instrument executed on behalf of a corporation shall be verified in substantially the following form, but suitable changes may be made in such form for other kinds of companies and for individuals:

The undersigned states that he or she has duly executed the attached _____ dated ____, 20 ___ for and on behalf of _(name of company)_____; that he or she is __(title of officer)___ of such company; and that all action by stockholders, directors, and other bodies necessary to authorize the undersigned to execute and file such instrument has been taken. The undersigned further states that he or she is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his or her knowledge, information and belief.

_____

(Signature)

* * * * *

By the Commission.

Nancy M. Morris
Secretary

Dated: November 1, 2007

Florence E. Harmon
Florence E. Harmon
Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56738; File No. PCAOB-2006-03)

November 2, 2007

Public Company Accounting Oversight Board; Order Approving Proposed Rule Change and Amendment No. 1 Thereto Relating to Inspections

I. Introduction

On December 20, 2006, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") proposed rule amendments (PCAOB-2006-03) pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), relating to the Board's rules governing inspections of registered public accounting firms. On May 31, 2007, the Board amended its filing because certain of the information described in the original filing had changed. Notice of the proposed rule amendments, including Amendment No. 1 to the proposed amendments, was published in the Federal Register on October 1, 2007.[1] The Commission received no comment letters relating to the proposed rule amendments. For the reasons discussed below, the Commission is granting approval of the proposed rule amendments.

II. Description

The PCAOB adopted its initial inspection rules at its public meeting on October 7, 2003, and authorized filing the rules with the Commission. After the appropriate comment period, the Commission approved the rules on June 1, 2004. On December 19, 2006, the PCAOB adopted amendments to its inspection rules to temporarily adjust the inspection frequency requirements for firms with 100 or fewer issuer audit clients and to

---

[1] See SEC Release No. 34-56517 (Sep. 25, 2007); 72 FR 55839 (October 1, 2007).

provide for technical amendments to PCAOB Rule 4006, Duty to Cooperate with Inspectors, and PCAOB Rule 4009, Firm Response to Quality Control Defects. The PCAOB solicited public comments on the proposed amendments at that time. After reviewing the public comments received on the proposed amendments, the PCAOB adopted Amendment No. 1 to the proposed amendments and submitted an amended Form 19b-4 proposed rule change to the Commission. Pursuant to the requirements of Section 107(b) of the Act and Section 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), the Commission published the proposed amendments for public comment on October 1, 2007.

III. Discussion

The Commission received no public comments relating to the PCAOB's proposed amendments relating to its rules governing inspections of registered public accounting firms. Section 104 of the Act requires the PCAOB to conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the rules of the PCAOB, the rules of the Commission, and professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers. Section 104(b)(1)(B) of the Act requires the PCAOB to conduct an inspection, at least once every three years, of each registered firm that regularly provides audit reports for 100 or fewer issuers, and Section 104(b)(2) of the Act authorizes the PCAOB to adopt rules adjusting that frequency.

In 2003, the PCAOB adopted Rule 4003(b), which provides that the PCAOB will conduct inspections, on a triennial basis, not only of each firm that regularly provides

audit reports for 100 or fewer issuers, but also of any firm that issues any audit report or that plays a substantial role in the preparation or furnishing of an audit report. In the course of inspection planning, including in connection with the Board's budget process, the Board identified a way in which a temporary adjustment to Rule 4003 would, over time, maximize the Board's ability to allocate its inspection resources more evenly, consistently, and effectively year-to-year. The Board explained that the issue arises because the first three years of inspections, 2004 to 2006, coincided with the Board's initial growth period and, as a consequence, the resources available for and devoted to the inspections of firms with 100 or fewer issuer audit clients increased from year to year. The resources available in each year necessarily informed the extent of the inspection work performed in that year, including with respect to both the numbers of firms inspected and the size of firms inspected. This resulted in a year-to-year fluctuation that, because of the minimum frequency requirements of Rule 4003(b), the Board would to some extent be locked into repeating in succeeding three-year periods.

On December 19, 2006, the PCAOB adopted a proposed amendment to its Rule 4003 to temporarily adjust the minimum inspection frequency requirement applicable to certain firms. The Board explained that the proposed amendment will allow the Board to approach long-term inspection planning with the flexibility to eliminate the fluctuation generated in the start-up cycle, including the flexibility to make adjustments that will result in a relatively consistent, from year to year, mix of firms in terms of the size and nature of audit practice.

The proposed amendment to PCAOB Rule 4003 provides that, with respect to firms that became registered in 2003 or 2004, (1) the PCAOB need not conduct the firm's first inspection sooner than the fourth year after the firm, while registered, first issues an

audit report or plays a substantial role in an audit, and (2) the PCAOB need not conduct the firm's second inspection sooner than the fifth year after the firm, while registered, first issues an audit report or plays a substantial role. Amendment No. 1 to the proposed amendments removes a sunset provision relating to Rule 4003 from the proposed amendments, which would have caused the proposed amendment to Rule 4003 to expire on June 30, 2007. The proposed amendments also include technical amendments to make corrections to PCAOB Rules 4006 and 4009.

The proposed amendments do not limit the PCAOB's authority to conduct inspections at any time, and do not affect registered firms' obligations under the Act. Even with this adjustment, the Board expects that each U.S. firm that issued an original audit report in 2003 or 2004 after registering with the Board will have its first inspection within the three-year period after first issuing an original audit report. The flexibility provided by the adjustment would come into play principally with respect to the timing of the second inspection of some of those firms, the timing of the first two inspections of some non-U.S. firms, and the timing of inspections of firms that play a substantial role but do not issue audit reports. The adjustment would have no continuing effect on the timing of any inspections after the second inspections of firms that registered in 2003 and 2004, and would have no effect on the timing of any inspection of any firm that registered after 2004. As the Board explained, the adjustment will facilitate the reduction of certain year-to-year fluctuations in the inspection program, which otherwise could interfere with the Board's ability to implement a program consistently and effectively with relatively stable resources from year to year. The adjustment will accomplish this

while delaying only a relatively small portion of inspections, and delaying them only for a short period.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed amendments to the Board's rules governing inspections of registered public accounting firms are consistent with the requirements of the Act and the securities laws and are necessary and appropriate in the public interest and for the protection of investors.

IT IS THEREFORE ORDERED, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that the proposed rule amendments (File No. PCAOB-2006-03) be and hereby are approved.

By the Commission.

Florence E. Harmon

Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56737 / November 2, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2676 / November 2, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12885

In the Matter of

CHARLES N. WATSON,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Charles N. Watson ("Watson" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these

Document 6 of 24

proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that

1. Watson, 39 years old, is presently incarcerated and was formerly a resident of Orlando, Florida. From October 1, 2004 until March 22, 2005, Watson was a registered representative associated with an entity that was registered with the Commission as a broker-dealer and registered with the State of West Virginia as an investment adviser. At various times from January 1993 through October 2002, Watson was a registered representative associated with five other broker-dealers registered with the Commission. From November 2002 to March 2005, Watson offered and sold limited partnership interests in two different hedge funds that he formed, Global Capital Fund, Ltd. ("Global Capital") and Summit Capital Trading, LLC ("Summit").

2. On April 21, 2006, Watson pled guilty to one count of money laundering in violation of Title 18 United States Code, Section 1957, before the United States District Court for the Eastern District of Florida, in United States v. Watson, Crim. Information No. 6:06-cr-44-Orl-28KRS, and on April 26, 2006, the Court accepted his plea. On September 28, 2006, a judgment in the criminal case was entered against Watson. He was sentenced to a prison term of 50 months followed by 3 years probation and ordered to make restitution of $6,624,000.

3. The count of the criminal information to which Watson pled guilty alleged that Watson did knowingly engage and attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,000 by means of mail fraud, wire fraud, and interstate transportation of stolen property. Watson admitted in his plea agreement that he was involved in a scheme to defraud investors in Global Capital and Summit. In his plea agreement, Watson also admitted each of the following facts. From November 2002 to January 2005, he raised $6,813,500 from at least 36 investors through the offer and sale of interests in these two hedge funds. Investors in Global Capital were provided with a private placement memorandum representing that the hedge funds' assets, less certain expenses, would be used to engage in securities trading, and that Watson would receive no compensation if there was a decrease in the hedge fund's asset value. Contrary to these representations, Watson, who lost money making trades, spent $1.4 million of Global Capital's assets for his personal use, gave $745,000 to another individual associated with Global Capital and loaned a total of $841,000 to two other entities. Watson then mailed investors false financial statements containing materially inflated rates of return which failed to disclose his trading losses and misuse of investor funds. Watson used Global Capital's false rates of return to induce people to invest in Summit. Then, after losing more than 70% of Summit's assets through trading, Watson mailed investors a letter guaranteeing the return of their original investments, knowing that he did not have sufficient assets to repay these funds.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Watson's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Watson be, and hereby is barred from association with any broker, dealer or investment adviser.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56744 / November 5, 2007

Admin. Proc. File No. 3-8394

In the Matter of

VICTOR TEICHER
c/o Andrew J. Levander
Dechert, LLP
30 Rockefeller Plaza
New York, NY 10112

ORDER DENYING PETITION TO MODIFY ADMINISTRATIVE BAR ORDER

Victor Teicher, the former sole general partner of Victor Teicher & Co., L.P. ("Teicher & Co."), a former unregistered investment adviser, has petitioned to modify a Commission order imposing on Teicher a bar from association with any broker, dealer, investment company, investment adviser, or municipal securities dealer. 1/ The Division of Enforcement (the "Division") opposes Teicher's request. For the reasons set forth below, we deny Teicher's petition.

On April 6, 1990, a jury convicted Teicher and Teicher & Co. of securities fraud for trading on the basis of material non-public information that Teicher knew had been

---

1/ Teicher requests that we modify "the order entered against him on February 27, 1995," but that order was part of the initial decision of the administrative law judge. Teicher appealed the initial decision to the Commission, and once he did so, the initial decision ceased to have any force or effect. See, e.g., Richard J. Adams, 55 S.E.C. 85, 89 (2001) (stating that the initial decision of a law judge ceases to have any force or effect once the Commission grants a petition for review of that decision) (citing United States v. Alexander, 743 F.2d 472, 477 (7th Cir. 1984) ("If there is an administrative appeal, the initial decision of the administrative law judge is not the 'final agency decision.' 5 U.S.C. § 557(b)."). Accordingly, we will construe Teicher's motion as a request to modify the bar order entered by the Commission on May 20, 1998. See infra note 4 and accompanying text.

Document 7 of 24

misappropriated, fraud in connection with a tender offer, and conspiracy; Teicher also was convicted of mail fraud. 2/ Teicher was sentenced to eighteen months imprisonment, placed on five years probation and fined $200,000. Teicher & Co. was fined $600,000. On December 11, 1997, in a separate civil proceeding brought by the Commission, Teicher was enjoined by consent from violations of Sections 10(b) and 14(e) of the Securities Exchange Act of 1934, and Rules 10b-5 and 14e-3 thereunder. 3/ On the basis of the criminal conviction, we instituted administrative proceedings against Teicher. Following litigated proceedings, we barred Teicher from association with any broker, dealer, investment company, investment adviser, or municipal securities dealer. 4/

Teicher now requests that the Commission modify the administrative bar order to permit him to associate with an investment adviser. Teicher has created an unregistered entity, Ithaca Partners, that currently manages only the assets of Teicher's immediate family. Teicher is in charge of Ithaca Partners and the firm currently employs two "analyst/apprentices," a quantitative analyst, and a part-time bookkeeper.

Teicher seeks modification of the bar "to enable him to manage certain limited assets." Teicher asserts that "at least initially, the investment partnership would have less than fifteen investors, each of whom would be extremely sophisticated and each of whom would receive full disclosure of Mr. Teicher's prior criminal conviction" and disciplinary history. Teicher represents that, if the proposed modification is granted, Ithaca Partners would register as an investment adviser with the Commission and would allow regular inspections by Commission staff. In addition, Ithaca Partners also would retain an independent consultant to monitor all trading and investment activity. Ithaca Partners also would "arrange for one of its full-time employees to receive compliance training" and "designate [that person] as the partnership's compliance officer." 5/

2/ United States v. Teicher, No. 88 Cr. 796 (CSH) (S.D.N.Y.), aff'd, 987 F.2d 112 (2d Cir.), cert. denied, 510 U.S. 976 (1993).

3/ SEC v. Victor Teicher, No. 91 Civ. 1634 (MP) (S.D.N.Y. Dec. 11, 1997).

4/ Victor Teicher, 53 S.E.C. 581 (1998), aff'd in part, rev'd in part, 177 F.3d 1016 (D.C. Cir. 1999) (affirming the bar against Teicher and rejecting his contention that the Commission does not have authority to impose bars from association with unregistered investment advisers).

5/ In his reply brief, Teicher stated that, "in order to satisfy the Staff's stated concerns," Teicher "is amenable to revising the retention of [the independent consultant] from a two-year engagement to an open-ended one subject to termination only upon Commission approval, and to have Ithaca's in-house compliance officer report directly to [the independent consultant]."

As an initial matter, the Division states that Teicher's request to modify the bar order to permit him to associate with an investment adviser "is, in essence, a request for Commission consent to associate with an investment adviser." Rule 193 of the Commission's Rules of Practice governs applications by barred individuals for consent to associate with, among others, investment advisers. 6/ However, Teicher has not made an application pursuant to Rule 193. 7/ Therefore, the issue of whether the conditions Teicher proposes for his association with Ithaca Partners satisfy Rule 193 is not before us, and we express no view on that subject.

We have stated that administrative bars should "remain in place in the usual case and be removed only in compelling circumstances." 8/ This exercise of caution before modifying or lifting administrative bars "ensures that the Commission, in furtherance of the public interest and investor protection, retains its continuing control over such barred individuals' activities." 9/ Consideration of a range of factors guides the public interest and investor protection inquiry. 10/ Such factors include: the nature of the misconduct at issue in the underlying matter; the time that has passed since issuance of the administrative bar; the compliance record of the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division's response to the petition for relief; and whether there exists any other circumstances that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.

Consistent with this approach, we have determined that there are no compelling circumstances here that would warrant modifying the administrative bar order. The underlying misconduct, participation in an extensive insider trading scheme, involved serious violations of

---

6/ 17 C.F.R. § 201.193.

7/ Moreover, Teicher's current submission does not meet the requirements of Rule 193. For example, although Teicher is seeking to associate with an investment adviser, he has not provided the information required by Form ADV, 17 C.F.R. § 279.1, as set forth in Section (b)(3)(iii) of Rule 193.

8/ Edward I. Frankel, Securities Exchange Act Rel. No. 49002 (Dec. 29, 2003), 81 SEC Docket 3778, 3785; Ciro Cozzolino, Exchange Act Rel. No. 49001 (Dec. 29, 2003), 81 SEC Docket 3769, 3775; Stephen S. Wien, Exchange Act Rel. No. 49000 (Dec. 29, 2003), 81 SEC Docket 3758, 3765-66.

9/ Edward I. Frankel, 81 SEC Docket at 3785; Ciro Cozzolino, 81 SEC Docket at 3775; Stephen S. Wien, 81 SEC Docket at 3766.

10/ Edward I. Frankel, 81 SEC Docket at 3784-85; Ciro Cozzolino, 81 SEC Docket at 3775; Stephen S. Wien, 81 SEC Docket at 3765.

the antifraud provisions of the federal securities laws, as well as mail fraud. 11/ Nine years have elapsed since the imposition of the bar, a time frame that is not unduly lengthy and, taken alone, does not weigh significantly in favor of relief. 12/

Teicher represents that, since the events giving rise to the bar order, he "has scrupulously complied with the securities laws and has been an upstanding citizen in all respects." Nevertheless, we generally first grant incremental relief in our cases modifying bars. 13/ Since we imposed the bar order, Teicher has conducted investment activities through Ithaca Partners to manage assets of his immediate family. However, Teicher has not sought permission to associate with any entity regulated by the Commission since imposition of the bar and, therefore, there is no history of compliance in an associated capacity that would support modification of the bar order.

Moreover, Teicher seeks to re-enter the securities industry as the head of a firm. Although Teicher states that Ithaca Partners will retain an independent consultant and designate a compliance officer, Teicher will retain control of the firm. As we have noted previously, making a person responsible for supervising the owner of the firm creates a "difficult supervisory situation." 14/

Teicher asserts that, since we ordered the bar, he has "been unable to open accounts and obtain the services of various brokerage firms," and that this has "hampered [his] own personal trading for more than a decade." These are consequences that he should have anticipated given that the bar order was based on his criminal conviction for multiple instances of insider trading.

11/ Michael T. Studer and Castle Sec. Corp., Exchange Act Rel. No. 50411 (Sept. 20, 2004), 83 SEC Docket 2853, 2861 ("[t]he fact that a person has been enjoined from violating the antifraud provisions 'has especially serious implications for the public interest'") (quoting Marshall E. Melton, Investment Advisers Act Rel. No. 2151 (July 25, 2003), 80 SEC Docket 2812, 2825).

12/ See, e.g., Cozzolino, at 3776 ("It has been 29 years since the Commission's order issued, an amount of time that, while lengthy, does not, standing alone, weigh significantly in favor of relief."); Wien at 3767 ("It has been 21 years since the consent order issued, a time frame that is not unduly lengthy and does not weigh significantly in favor of relief.").

13/ See, e.g., Salim B. Lewis, Exchange Act Rel. No. 51817 (June 10, 2005), 85 SEC Docket 2472.

14/ Kirk A. Knapp, 50 S.E.C. 858, 860-61 (1992).

For the reasons stated above, we find that the public interest and investor protection will not be served if Teicher is permitted to associate with an investment adviser. Therefore, we decline to modify the bar against association with any broker, dealer, investment company, investment adviser, or municipal securities dealer.

Accordingly, IT IS ORDERED that the motion of Victor Teicher to modify the administrative bar order be, and it hereby is, denied.

By the Commission.

Nancy M. Morris
Secretary

Commissioner Atkins
Not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56741 / November 5, 2007

Admin. Proc. File No. 3-12443

In the Matter of the Application of

SISUNG SECURITIES CORPORATION

and

LAWRENCE J. SISUNG, JR.

For Review of Disciplinary Action Taken By

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDING

Violation of Municipal Securities Rulemaking Board Rules

Alleged Violation of "Pay-to-Play" Prohibitions

Recordkeeping and Reporting Violations

NASD member firm and firm's president appeal findings that they engaged in municipal securities business with an issuer within two years of contributions to an official of such issuer, solicited contributions to an official of an issuer with which the firm was engaging in or seeking municipal securities business, and failed to record or report contributions. Held, findings of violation and sanctions imposed sustained in part and set aside in part.

APPEARANCES:

Thomas K. Potter, III, of Burr & Forman, LLP, for Sisung Securities Corporation and Lawrence J. Sisung, Jr.

Marc Menchel, Alan Lawhead, and Gary J. Dernelle, for NASD.

Appeal filed: September 27, 2006
Last brief received: January 3, 2007

Document 8 of 24

I.

Sisung Securities Corporation ("SSC"), an NASD member firm, and Lawrence J. Sisung, Jr. ("Sisung"), SSC's president, appeal from NASD disciplinary action. 1/ NASD found that SSC violated Municipal Securities Rulemaking Board ("MSRB") Rules G-37(b), 2/ G-37(c), 3/ G-37(e), 4/ G-8, 5/ and G-9, 6/ and that Sisung violated, or was responsible for SSC's violations of, MSRB Rules G-37(c), G-8, and G-9. 7/ NASD fined SSC $20,000 for its violations of Rules G-37(b) and (c), fined Sisung $20,000 for his violations of Rule G-37(c), fined SSC and Sisung

---

1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend its Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56148 (July 26, 2007), _ SEC Docket _. Because the disciplinary action here was taken before that date, we continue to use the designation NASD.

2/ Rule G-37(b) provides that no "broker, dealer, or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by," among others, "any municipal finance professional associated with such broker, dealer, or municipal securities dealer."

3/ Rule G-37(c) prohibits a broker, dealer, municipal securities dealer, or associated municipal finance professional from soliciting any person to make any contribution, or coordinating any contributions, to an official of an issuer with which the broker, dealer, or municipal securities dealer is engaging in or pursuing municipal securities business.

4/ Rule G-37(e) provides that each broker, dealer, or municipal securities dealer shall report to the MSRB contributions to officials of issuers made by, among others, each municipal finance professional associated with such broker, dealer, or municipal securities dealer.

5/ Rule G-8 requires that every broker, dealer, or municipal securities dealer shall make and keep current, among other records, records reflecting "the contributions, direct or indirect, to officials of an issuer made by each municipal finance professional."

6/ Rule G-9 requires that every broker, dealer, or municipal securities dealer preserve records required to be kept by Rule G-8 for a period of not less than six years.

7/ NASD dismissed an allegation that SSC and Sisung violated MSRB Rule G-37(d). Rule G-37(d) prohibits any act, direct or indirect, through or by any other person or means, "which would result in a violation of sections (b) or (c) of this rule." A violation of Rule G-37(d) requires "a showing of culpable intent." Blount v. SEC, 61 F.3d 938, 948 (D.C. Cir. 1995). The conduct must be undertaken "as a means to circumvent" the requirements of Rules G-37(b) and (c). Id. NASD found no evidence Applicants engaged in conduct "in order to circumvent the proscriptions set forth in MSRB Rule G-37."

$10,000, jointly and severally, for the violations of Rules G-8 and G-9, and fined SSC $10,000 for its violations of Rule G-37(e). As discussed below, we sustain in part and set aside in part NASD's findings of violation. We base our findings on an independent review of the record.

II.

MSRB Rule G-37, the so-called "pay-to-play" rule, 8/ "seeks to insulate the municipal securities industry from the potentially corrupting influence of political contributions that are made in close proximity to the awarding of municipal securities business" by "'provid[ing] specific prohibitions to help ensure that underwriter selection is based on expertise, not on the amount of money given to a particular candidate for office.'" 9/ Rule G-37 provides "substantial benefit to the industry and the investing public by reducing the direct connection between political contributions to issuer officials and the awarding of municipal securities business." 10/

NASD found that Applicants violated Rule G-37 by engaging in municipal securities business with Louisiana political subdivisions within two years of contributions to members of the Louisiana Bond Commission (the "Bond Commission"). 11/ NASD also found that Applicants violated related recordkeeping and reporting requirements by failing to record and

---

8/ Order Approving Proposed Rule Change, Exchange Act Rel. No. 33868 (Apr. 7, 1994), 56 SEC Docket 1176 (hereinafter "Rule G-37 Order"). "Pay-to-play" practices include "a variety of ethically questionable practices" dealers use "to secure underwriting contracts." Blount, 61 F.3d at 939. "[T]hese practices substantially undermine the integrity of the municipal securities market." Rule G-37 Order, 56 SEC Docket at 1176. Rule G-37 "seeks to end 'pay to play' abuses in municipal securities underwritings." Id. at 1180.

9/ Morgan Stanley, 53 S.E.C. 379, 381 (1997) (quoting Rule G-37 Order, 56 SEC Docket at 1183). We have observed that, "[i]f underwriter selection is swayed by political contributions or influence, underwriters may be chosen based on their history of contributions or political contacts, rather than their expertise or competence." Rule G-37 Order, 56 SEC Docket at 1181. Rule G-37 therefore "further[s] merit-based competition between municipal securities dealers." Id. at 1182.

10/ Order Granting Approval of Proposed Rule Change, Exchange Act Rel. No. 47814 (May 8, 2003), 80 SEC Docket 494, 495 (hereinafter "May 2003 Order"). We have stated that Rule G-37 is intended to "make[] clear to municipal securities dealers and to officials of issuers that 'pay to play' practices should no longer be employed to obtain municipal securities business." Rule G-37 Order, 56 SEC Docket at 1182.

11/ The Louisiana Constitution defines a "political subdivision" as a "parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions." La. Const. art. VI, § 44.

report contributions to Bond Commission members as well as contributions to other Louisiana political officials. The facts of the case are largely undisputed.

Between at least February 27, 1998 and October 22, 2001, Sisung controlled, in addition to SSC, UPC, a "business and real-estate development and consulting firm," and SIMS, a registered investment adviser with approximately $1 billion under management. 12/ SSC and UPC shared an office suite, and SIMS had an office adjacent to SSC and UPC. During this period, UPC and SIMS made thirty-nine contributions, by checks drawn on their accounts and signed or authorized by Sisung, to Louisiana elected officials. According to Sisung, UPC and SIMS made the contributions to further their own, rather than SSC's, legislative agendas. 13/

Sisung delivered each contribution to the official or the official's representative personally at campaign events for the elected official. The recipients' campaign finance reports list UPC and SIMS as the contributors. Applicants admit that SSC did not record the thirty-nine contributions in its books and records or report the thirty-nine contributions to the MSRB, but contend, without dispute by NASD, that UPC and SIMS recorded the thirty-nine contributions on their own books and records.

Fourteen of the thirty-nine contributions went to the state treasurer, secretary of state, president of the state Senate, and certain members of the Louisiana state legislature. 14/ Each of

---

12/ UPC refers to both United Properties Corporation ("United Properties") and United Professionals Company, LLC ("United Professionals"). United Properties existed until March 21, 2000, when United Properties merged with United Professionals, with United Professionals as the surviving entity. SIMS refers to both Sisung Investment Management Services, Inc., ("SIMS Inc.") and Sisung Investment Management Services, LLC ("SIMS LLC"). SIMS Inc. existed until March 21, 2000, when SIMS Inc. merged with SIMS LLC, with SIMS LLC as the surviving entity.

13/ In investigative testimony, Sisung testified that UPC "makes contributions to legislators who are both senators and representatives who enact legislation and take positions which affect the business opportunities of UPC." Sisung also testified that SIMS contributes to individuals who "take[] positions and pursue[] the positions of business as it pertains to SIMS, as it relates to legislation that is going to be drawn up by the legislators." Lane Sisung, SSC's in-house counsel and Sisung's son, testified that a legislator's position as an ex officio member of the Bond Commission "had absolutely nothing to do" with UPC's or SIMS's contributions. NASD did not introduce evidence demonstrating that the contributions were not made to further the interests of UPC and SIMS.

14/ Local elected officials, such as mayors, councilmen, aldermen, sheriffs, and school board members, received the remaining twenty-five contributions.

these officials, by virtue of the offices they held, served ex officio on the Bond Commission. 15/ The Louisiana Constitution requires the Bond Commission's prior written approval before any bonds may be issued or sold by the state or by any political subdivision. All state general obligation bonds are issued and sold by the Bond Commission. Although the Bond Commission does not issue political subdivision bonds -- which are issued by the political subdivisions themselves -- under Louisiana statute the Bond Commission receives applications for bond issues from Louisiana political subdivisions and must "either approve[] or disapprove[] the application or defer[] action on the application for further discussion." 16/

Sisung testified that, after UPC and SIMS made the contributions, he consulted outside counsel regarding the effect of the contributions on SSC's ability to conduct business with the Bond Commission. Counsel advised Sisung "that contributions by [UPC] and SIMS to the campaigns of various State legislators and others serving ex officio on the [Bond Commission] might preclude SSC from conducting municipal securities business with the [Bond Commission] in its capacity as issuer, but did not preclude municipal securities business with . . . political subdivision issuers." Sisung testified that, after receiving the advice of his counsel, SSC did not conduct municipal securities business with the Bond Commission itself. SSC did, however, conduct municipal securities business with political subdivision issuers. From March 1, 1998 through December 1, 2002, SSC served as underwriter or financial adviser on twenty-one negotiated municipal bond issues of Louisiana political subdivisions. 17/

III.

Engaging in Municipal Securities Business Within Two Years of Contributions

NASD found that SSC violated MSRB Rule G-37(b) by engaging in municipal securities business with the Louisiana political subdivisions within two years of the contributions made by

---

15/ The members of the Bond Commission include the governor, lieutenant governor, state treasurer, secretary of state, attorney general, president of the Senate, speaker of the House of Representatives, Senate Finance Committee chairman, Senate Revenue and Fiscal Affairs Committee chairman, House Ways and Means Committee chairman, House Appropriations Committee chairman, commissioner of administration, and two members of the legislature -- one to be appointed by the president of the Senate and one to be appointed by the speaker of the House of Representatives. All members are thus first elected to a position that qualifies them for membership on the Bond Commission, except the commissioner of administration, who is appointed to that post by the governor. All Bond Commission members may enable another person to serve in their stead by proxy.

16/ La. Admin. Code tit. 71, Part III, § 101(D).

17/ Under Rule G-37(g)(vii), municipal securities business includes acting as an underwriter or financial adviser with respect to a negotiated primary offering of municipal securities.

UPC and SIMS to state elected officials who were members of the Bond Commission. 18/ Rule G-37(b) provides that no broker, dealer, or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by, among others, any municipal finance professional associated with such broker, dealer, or municipal securities dealer. We agree with NASD that the contributions at issue here were made by a municipal finance professional, Sisung, who was associated with a municipal securities dealer, SSC. 19/ Although Applicants argued before NASD, as they contend here, that Rule G-37(b) does not cover the contributions at issue in this case because the contributions were made by UPC and SIMS rather than Sisung, NASD found that "Sisung's imprimatur of each of the fourteen contributions made to Bond Commission members created, at a minimum, the appearance and perception that the contributions were being given by him." Thus, NASD found the contributions "attributable to Sisung for purposes of Rule G-37(b)." We consider NASD's analysis persuasive because interpretive guidance issued by the MSRB, which NASD found "decisive," provides that where, as here, a municipal finance professional signs or authorizes checks and delivers such contributions to an official personally, the contributions should be attributed to the municipal finance professional. 20/

We therefore need to determine whether the contributions attributable to Sisung, a municipal finance professional, were made to an "official of an issuer," as defined in Rule G-37, with whom SSC engaged in municipal securities business. Rule G-37(g)(vi) defines "official of an issuer" as any person who was, at the time of the contribution, an incumbent or candidate

---

18/ As noted, NASD also found that SSC and Sisung violated Rule G-37(c) by soliciting the contributions. As discussed below, our analysis regarding NASD's findings related to Rule G-37(b) is applicable to the findings related to Rule G-37(c).

19/ A municipal finance professional includes, among others, "any associated person . . . who solicits municipal securities business." Rule G-37(g)(iv). Applicants stipulated that Sisung was a municipal finance professional as defined in Rule G-37(g)(iv).

20/ See Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business: Rule G-37, MSRB Man. (CCH) ¶ 3681, at 5420 (Feb. 16, 1996) (stating that if "a municipal finance professional signs a check, whether the check was drawn on a joint account or not, and submits it as a contribution to an issuer official, then the municipal finance professional is deemed to have made the full contribution"); Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the MSRB Relating to Interpretation of Rule G-37, Exchange Act Rel. No. 36857 (Feb. 16, 1996), 61 SEC Docket 953, 954 (stating the MSRB's view that "if a municipal finance professional has his or her name associated with a contribution, then this creates, at the very least, the appearance that the contribution is being given by the municipal finance professional").

> (A) for elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer, or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer, or municipal securities dealer for municipal securities business by an issuer. 21/

NASD acknowledged that Bond Commission members did not qualify as issuer officials under subsection (A) of the rule because they did not hold an "elective office of the issuer" of the bond offerings involved. 22/ NASD found, however, that Bond Commission members came within the language of subsection (B) because they "possess[ed] the requisite authority to influence the outcome of the hiring of a dealer or financial advisor for municipal securities business by a political subdivision issuer." 23/ In reaching this conclusion, NASD determined that it was "not necessary for statewide executive and legislative officials to possess the power to appoint someone to a political subdivision's issuing body to be considered an 'official of such issuer.'" 24/

We acknowledge that the language of subsection (B) could be subject to different interpretations. Nevertheless, we believe that the more appropriate interpretation is that, to be an official of an issuer for purposes of subsection (B), a person must be an incumbent or candidate for an office with the authority to appoint another person who (a) is responsible for the hiring of a broker, dealer, or municipal securities dealer, or (b) can influence the outcome of the hiring of a broker, dealer, or municipal securities dealer. Thus, an official covered by this part of the Rule

---

21/ Rule G-37(g)(vi) (emphasis added).

22/ NASD noted that there is "no dispute that the Bond Commission members that received contributions from Sisung were not elected officials of the political subdivision issuers for which Sisung Securities conducted municipal securities business." We agree with NASD that Bond Commission members do not satisfy subsection (A) of the rule with respect to offerings issued by political subdivisions.

23/ NASD acknowledged that SSC "did not seek or conduct any municipal securities business concerning bond issues for which the Bond Commission possessed the authority to select the financial professionals." It nonetheless found that Bond Commission members possessed the requisite authority over the awarding of municipal securities business by the political subdivision issuers with whom SSC did seek and conduct municipal securities business to render them officials of such issuers.

24/ NASD's Hearing Panel had dismissed the allegation that SSC violated Rule G-37(b) on the ground that, with respect to political subdivision issuers, Bond Commission members did not constitute "officials of such issuers" such that the contributions prohibited SSC from engaging in municipal securities business with the subdivisions.

must have the identified appointing authority, that is, the power to appoint a person who has responsibility for or influence over the selection of a municipal securities dealer. The ability of the official to influence the selection is not itself sufficient. We believe that is the more natural reading of the language of subsection (B). It is consistent with the release adopting subsection (B), which stated that subsection (B) "addresses situations in which an elected official may appoint someone to an issuer position." 25/ It is also consistent with the structure of the preceding clause (A), which uses the identical phrase, "is directly or indirectly responsible for, or can influence the outcome of, the hiring," in its entirety to modify the word "office," while clause (B) uses that same phrase to modify the word "person" in the phrase "has the authority to appoint any person."

NASD's conclusion that Bond Commission members were issuer officials with respect to political subdivision issuers effectively read out of the definition the requirement that the elected official have the power to appoint a person with responsibility for or influence over the awarding of municipal securities business. We believe the language of subsection (B) requires the elected official to have such appointment authority and that, in the absence of such authority, Bond Commission members are not issuer officials of political subdivision issuers under the rule. 26/ Thus, the contributions at issue here did not subject SSC to a two-year ban on engaging in municipal securities business with Louisiana political subdivisions. The contributions also did not violate Rule G-37(c)'s prohibition against soliciting or coordinating contributions "to an official of an issuer" with which SSC was "engaging or seeking to engage in municipal securities business." We therefore set aside the findings that SSC violated Rule G-37(b), and that SSC and Sisung violated G-37(c), as well as the related sanctions.

25/ Exchange Act Rel. No. 37928 (Nov. 6, 1996), 63 SEC Docket 475, 478 (emphasis in original). "For example, a state may have certain issuing authorities whose boards of directors are appointed by the governor." Id. Subsection (A) does not render the governor an official of these issuing authorities, however, because "the governor, in this illustration, is not an incumbent or candidate for 'elective office of the issuer' (i.e., the state authority)." Thus, under subsection (A), a "contribution to the governor would not prohibit a dealer from engaging in business with the state authority." Id. Subsection (B) "was intended to include the governor as an official of the issuer [the state authority] in such circumstances." Id. Contributions to the governor would therefore prohibit a dealer from engaging in municipal securities business with the state authority under subsection (B) because the governor appointed the members of the board of directors of that issuer.

26/ NASD declined to adopt, and does not pursue before us, the argument advanced by its enforcement staff that the president of the Louisiana Senate, who received contributions and had the authority to appoint a member of the Bond Commission, see supra note 15, satisfied the requirements of subsection (B). According to NASD, it did not adopt this theory because the member appointed by the Senate president "possess[ed] no greater or lesser authority than the other members of the Bond Commission."

Although we are setting aside certain of NASD's findings of violations of Rule G-37, we wish to reemphasize our view that "Rule G-37 serves a compelling government interest" 27/ and "is essential to diminish pay-to-play practices in the municipal securities market." 28/ We also wish to express our concern about the potential for improper influence that the kinds of contributions at issue in this case present. Although the record here contains no evidence that the contributions actually influenced the awarding of municipal securities business, it is nevertheless conceivable to us that they could. We consequently encourage the MSRB to consider whether it may be appropriate to amend the rules at issue to address the kind of situation presented here. 29/

Violations of Recordkeeping and Reporting Requirements

NASD also found that SSC, acting through Sisung, violated MSRB Rules G-8 and G-9, and that SSC violated Rule G-37(e), by failing to record and report the thirty-nine contributions. 30/ Rule G-8 requires that every broker, dealer, or municipal securities dealer make and keep current, among others, records reflecting "the contributions, direct or indirect, to officials of an issuer made by each municipal finance professional." Rule G-9 requires that these records be preserved for a period of not less than six years. Rule G-37(e) requires that each broker, dealer, or municipal securities dealer report to the MSRB contributions to officials of issuers made by, among others, each municipal finance professional associated with the broker, dealer, or municipal securities dealer.

NASD found that SSC violated Rules G-8 and G-9, holding that "contributions by any person or entity, including an affiliated company of the dealer or its employees, that are directed by a dealer or its municipal finance professionals must be reflected in the dealer's books and records" under Rule G-8(a)(xvi). NASD held Sisung responsible for these violations because Sisung was SSC's president and because he was responsible for the firm's books and records.

27/ Morgan Stanley, 53 S.E.C. at 381.

28/ May 2003 Order, 80 SEC Docket at 495.

29/ In making this observation, we are mindful of the limits the Constitution places on restrictions related to political speech. See Blount, 62 F.3d at 947 (upholding Rule G-37 against constitutional challenge based on finding that it restricts a "narrow range" of underwriter activities); Rule G-37 Order, 56 SEC Docket at 1183 (stating that Rule G-37 "minimizes any undue burdens on the protected speech" of municipal securities dealers and municipal finance professionals because it is "narrowly crafted in terms of the conduct it prohibits, the persons who are subject to the restriction, and the circumstances under which it is triggered"). We therefore recognize that the MSRB must be careful, in considering any amendment to the rule, to consider constitutional limitations.

30/ NASD's complaint did not charge Sisung with responsibility for SSC's violation of Rule G-37(e).

NASD found that SSC violated Rule G-37(e) on the ground that Rule G-37(e) "requires that a dealer report to the Board those contributions that are required to be recorded pursuant to MSRB Rule G-8(a)(xvi)" and thus "those contributions indirectly effected by a dealer's municipal finance professionals through affiliated entities."

We agree with NASD's findings of recordkeeping and reporting violations. Rules G-8 and G-9 require a dealer to record contributions made by affiliated companies where, as here, a municipal finance professional associated with the dealer directed the contributions. 31/ Rule G-37(e) requires that such contributions be reported to the MSRB. 32/ Rules G-8, G-9, and G-37(e) apply to any "official of an issuer" and are not restricted to officials of issuers with which the municipal securities dealer has engaged in municipal securities business. Applicants do not dispute that Bond Commission members constitute issuer officials with respect to municipal securities issued by the Bond Commission. Applicants also do not dispute that the recipients of the other twenty-five contributions, although not members of the Bond Commission, were also issuer officials and that, therefore, those contributions triggered recording and reporting obligations by SSC. As noted, SSC admittedly did not record the contributions in its books and records or report the contributions to the MSRB.

Applicants contend that SSC did not violate Rules G-8 and G-9 because "Rule G-8(b) allowed SSC to rely on the on-premises records maintained by UPC and SIMS without having to make extra copies to keep next to them." We agree with NASD's conclusion that Rules G-8 and G-9 required SSC's own records to contain information on the contributions. Although Rule G-8(b) states that a municipal securities dealer need not "maintain the books and records required by this rule in any given manner," the rule does not provide that they may be maintained by a different entity. The MSRB has stated in an interpretive letter, moreover, that a record "that can only be put together on request" from information maintained by another entity does not satisfy the requirements of the rule. 33/ Indeed, as NASD noted, NASD did not, and could not, discover the contributions through an examination of SSC's books and records. An NASD examiner discovered the contributions only by reviewing campaign finance reports. The failure to record contributions directed by a municipal finance professional associated with a municipal securities dealer in the dealer's own books and records thwarts the purpose of the recordkeeping provisions

---

31/ Rule G-37 Order, 56 SEC Docket at 1180 (stating that Rule G-8 and G-9 do not require dealers to maintain a list of contributions by, among others, "affiliate companies," "unless the contributions were directed by persons or entities," such as a municipal finance professional -- which Sisung was -- "subject to . . . rule G-37") (emphasis added).

32/ See Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business, MSRB Man. (CCH) ¶ 3681, at 5430 (May 24, 1994) (stating that the contributions required to be reported include "the contributions, direct or indirect, to officials of an issuer made by each municipal finance professional").

33/ MSRB Man. (CCH) ¶ 3536.53, at 3671.

"to facilitate compliance and examinations with the goal of promoting investor confidence in the integrity of the municipal securities market." 34/

Applicants contend further that "Rules G-8 and G-9 apply only to brokers, dealers and municipal securities dealers, but not to individual [municipal finance professionals]; thus, NASD erred by holding Sisung individually liable for their violation." Sisung, however, was SSC's president. We have held that the "president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his duties." 35/ The evidence established that Sisung did not delegate this responsibility but, in fact, was SSC's designated principal responsible for books and records. Under the circumstances, we agree with NASD's conclusion that Sisung was "responsible for the Firm's violations of MSRB Rules G-8 and G-9." 36/

Although MSRB Rule D-11 states that the terms broker, dealer, and municipal securities dealer "shall refer to and include their respective associated persons" unless a rule of the Board otherwise specifically provides, Applicants argue that Rule G-8(a)(xvi)(I) excludes associated persons from liability for a municipal securities dealer's failure to maintain the records required by Rules G-8 and G-9 because Rule G-8(a)(xvi)(I) states that the "[t]erms used in this paragraph (xvi) have the same meaning as in rule G-37," and rule G-37 states that "[t]he term broker, dealer, or municipal securities dealer . . . does not include its associated persons." Rule G-8(a)(xvi)(I), however, relates only to the type of information that must be maintained pursuant to paragraph (xvi). Rule G-8(a)(xvi)(I) does not contradict Rule D-11 or relieve associated persons with responsibility for the firm's books and records from complying with Rule G-8. 37/

Applicants also contend that "the contributions [effected through UPC and SIMS] need not have been reported" because "Rule G-37(e)'s reporting requirement sets out a specific list of

---

34/ Rule G-37 Order, 56 SEC Docket at 1176.

35/ Steven P. Sanders, 53 S.E.C. 889, 904 (1998); Kirk A. Knapp, 50 S.E.C. 858, 862 (1992).

36/ James Michael Brown, 50 S.E.C. 1322, 1325-26 (1992) (finding firm's president responsible for firm's failure to comply with recordkeeping requirements), aff'd, 21 F.3d 1124 (11th Cir. 1994) (Table); see also Mark James Hankoff, 48 S.E.C. 705, 707-08 (1987) (finding firm's president responsible for firm's recordkeeping violations); cf. SEC v. Softpoint, Inc., 958 F. Supp. 846, 866 (S.D.N.Y. 1997) ("As President of Softpoint, Stoecklein was responsible for the accuracy of Softpoint's books and records."), aff'd, 159 F.3d 1348 (2d Cir. 1998) (Table).

37/ Cf. Nicholas A. Codispoti, 48 S.E.C. 842, 844 n.8 (1987) ("The obligations imposed on dealers in municipal securities by the MSRB's rules are also applicable to associated persons.").

those whose contributions must be reported" and does not include affiliated companies or "contain the 'indirect' language found in Rule G-8(a)(xvi)." The MSRB, in question-and-answer guidance, however, has stated that the contributions which must be disclosed to the MSRB are those contributions "required to be recorded pursuant to rule G-8(a)(xvi)." 38/ As discussed, Rule G-8(a)(xvi) requires recording "contributions, direct or indirect, to officials of an issuer made by each municipal finance professional."

Although Applicants argue that the question-and-answer guidance "cannot supersede the language of the Rule itself," the MSRB filed this question-and-answer guidance with the Commission as a "proposed rule change to provide interpretative guidance concerning rule G-37." 39/ According to the MSRB, it filed the proposed rule change as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Board." 40/ The Board stated that it "determined to publish this notice of interpretation which provides, in question-and-answer format, general guidance on rule G-37" in order "to assist the municipal securities industry and, in particular, brokers, dealers and municipal securities dealers in understanding and complying with the provisions of the rule." 41/ The MSRB filed this question-and-answer guidance with the Commission on May 24, 1994, and published this question-and-answer guidance in the June 1994 issue of the MSRB Reports, approximately two months after Rule G-37 became effective. 42/ The question-and-answer guidance, therefore, is a longstanding interpretation of the requirements of Rule G-37(e). 43/ We thus agree with NASD's conclusion that SSC "violated MSRB Rule G-37(e) by failing to report the relevant contributions to the Board."

38/ Questions and Answers Concerning Political Contributions and Prohibitions on Municipal Securities Business, MSRB Man. (CCH) ¶ 3681, at 5430 (May 24, 1994).

39/ See Notice of Filing and Immediate Effectiveness of Proposed Rule Change, Exchange Act Rel. No. 34161 (Jun. 6, 1994), 56 SEC Docket 2679, 2679 & n.1 (hereinafter "June 1994 Notice") and MSRB Reports, Vol. 14, No. 3, at 16.

40/ June 1994 Notice, 56 SEC Docket at 2679.

41/ Id.

42/ See June 1994 Notice, 56 SEC Docket at 2679 n.1; MSRB Reports, Vol. 14, No. 3, at 16.

43/ See also MSRB Rule A-8(b) (stating that opinions and interpretations of rules of the MSRB rendered by the Board "shall represent the Board's intent in adopting the rules which are the subject of such opinions and interpretations").

IV.

Applicants claim that the Equal Access to Justice Act (the "EAJA") applies to this proceeding. Under the EAJA, an "agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 44/ As relevant here, an "adversary adjudication" is an adjudication under Section 554 of the Administrative Procedure Act "in which the position of the United States is represented by counsel or otherwise." 45/ "It is beyond cavil that the NASD is not a government agency; it is a private, not-for-profit corporation." 46/ "[T]he Administrative Procedure Act does not apply to proceedings before the NASD." 47/ The position of the United States, moreover, is not represented in NASD proceedings. 48/ The EAJA thus does not apply here because, as we have stated, "the [EAJA] does not apply to proceedings before self-regulatory organizations." 49/

V.

Section 19(e)(2) of the Securities Exchange Act of 1934 requires that we sustain NASD's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 50/ As noted, we are unable to find violations of MSRB Rules G-37(b) or (c) on this record, and thus have set aside NASD's sanctions with respect to these alleged violations. With respect to the fines NASD imposed for the violations of Rules G-8, G-9, and G-37(e), which we sustain, we conclude that, on the facts of this case, those sanctions are not excessive or

---

44/ 5 U.S.C. § 504(a)(1).

45/ Id. § 504(b)(1)(C).

46/ United States v. Shvarts, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000), abrogated on other grounds by United States v. Coppa, 267 F.3d 132 (2d Cir. 2001).

47/ First Choice Sec. Corp., 50 S.E.C. 1167, 1172 (1992).

48/ D.L. Cromwell Invs. v. NASD Regulation, 279 F.3d 155, 162 (2d Cir. 2002) ("[N]or does the government appoint [NASD] members or serve on any NASD board or committee."); Desiderio v. NASD, 191 F.3d 198, 206 (2d Cir. 1999) (same).

49/ Equal Access to Justice Act Rules, Exchange Act Rel. No. 18349 (Dec. 18, 1981), 24 SEC Docket 436, 436.

50/ 15 U.S.C. § 78s(e)(2). Applicants do not claim, and the record does not show, that NASD's sanctions impose an unnecessary or inappropriate burden on competition.

oppressive and appropriately protect investors and the public interest by deterring Applicants and other municipal securities dealers from engaging in similar misconduct in the future.

NASD imposed a $10,000 fine, jointly and severally, on SSC and Sisung for the violations of Rules G-8 and G-9 and a $10,000 fine on SSC for the violations of Rule G-37(e). The Sanction Guideline for Rule G-8 recommends a monetary fine of $1,000 to $10,000 or, in egregious cases, $10,000 to $100,000, as well as, in appropriate cases, a suspension, bar, or expulsion. 51/ No separate guideline exists for violations of Rule G-9. NASD thus "impose[d] a unitary sanction for violations of both rules" using the guideline for Rule G-8. NASD found "the absence of culpable intent, the aberrant nature of the Firm's misconduct, and the Firm's regulatory cooperation to be mitigative" in imposing the $10,000 fine and in declining to impose additional sanctions. The Sanction Guideline for Rule G-37(e) recommends a monetary fine of $1,000 to $5,000 for a failure to report and, in egregious cases, a suspension. 52/ NASD "impose[d] a monetary sanction above the range recommended in lieu of a suspension of the Firm."

Applicants do not address the sanctions in their briefs, and we believe, with consideration for the public interest and the protection of investors, that the fines that NASD imposed are not excessive or oppressive. Exchange Act Section 15A(b)(7) authorizes NASD to impose fines, among other sanctions, in response to violations of the rules of the MSRB. 53/ As noted with respect to the Commission's authority to impose civil money penalties in its own enforcement actions, the ability to impose fines for securities law violations "greatly increase[s] deterrence, while also providing . . . the flexibility to tailor a remedy to the gravity of a violation." 54/ Fines, therefore, may be appropriate to enable NASD, after finding that a specific firm violated

---

51/ NASD Sanction Guidelines 34 (2001 ed.). The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. Id. at 1. Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. Id. The Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidelines for NASD Adjudicators -- which the Guidelines define as Hearing Panels and the National Adjudicatory Council. Id. Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

52/ Id. at 80.

53/ 15 U.S.C. § 78*o*-3(b)(7).

54/ H.R. Rep. No. 101-616, at 17 (1990), as reprinted in 1990 U.S.C.C.A.N. 1379, 1384.

the securities laws, to deter that firm -- and the responsible firm personnel -- from committing future violations without imposing sanctions unnecessary to remedy the misconduct. 55/

Applicants violated the MSRB's recordkeeping and reporting requirements. These requirements "facilitate enforcement of rule G-37's 'pay-to-play' restrictions and, independently, . . . function as a public disclosure mechanism to enhance the integrity of and public confidence in municipal securities underwritings." 56/ However, SSC and Sisung failed to record or report thirty-nine political contributions between 1998 and 2002. As noted above, NASD did not impose a suspension, expulsion, or bar. The fines imposed by NASD will encourage Applicants' compliance with the recordkeeping and reporting requirements that, as noted above, facilitate enforcement of Rule G-37 and enhance the integrity of and public confidence in municipal securities underwritings.

"The public interest requires that appropriate sanctions be imposed to secure compliance with the rules, regulations, and policies of both NASD and SEC," 57/ as well as, as here, those of the MSRB. The fines that NASD imposed here protect investors and the public interest by ensuring that Applicants, who remain in the municipal securities business, as well as others in the industry, take their responsibilities to record and report contributions seriously in the future. Under the circumstances, we find the relatively lenient sanctions that NASD imposed necessary in the public interest and for the protection of investors and neither excessive nor oppressive.

An appropriate order will issue. 58/

By the Commission (Chairman COX and Commissioners NAZARETH and CASEY); Commissioner ATKINS not participating.

Nancy M. Morris
Secretary

55/ Situations exist where, for some firms, a censure may provide relatively little deterrence against future violations, but a suspension or expulsion of the firm's membership would impose hardship on the firm's customers, public shareholders, and innocent employees. Through the imposition of a fine, NASD can impose a sanction "more severe than a slap on the wrist" without the unwarranted adverse consequences of a suspension or expulsion. Cf. H.R. Rep. No. 101-616, at 18.

56/ Rule G-37 Order, 56 SEC Docket at 1180.

57/ Boruski v. SEC, 289 F.2d 738, 740 (2d Cir. 1961).

58/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56741 / November 5, 2007

Admin. Proc. File No. 3-12443

In the Matter of the Application of

SISUNG SECURITIES CORPORATION

and

LAWRENCE J. SISUNG, JR.

For Review of Disciplinary Action Taken By

NASD

ORDER SUSTAINING IN PART AND SETTING ASIDE IN PART DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that NASD's findings that Sisung Securities Corporation and Lawrence J. Sisung, Jr. violated Rules G-37(b) and (c) of the Municipal Securities Rulemaking Board be, and they hereby are, set aside; and it is further

ORDERED that the sanctions imposed for these findings of violation be, and they hereby are, set aside; and it is further

ORDERED that NASD's findings that Sisung Securities Corporation violated Rules G-8, G-9, and Rule G-37(e) of the Municipal Securities Rulemaking Board, and that Lawrence J. Sisung, Jr. was responsible for the violations of Rules G-8 and G-9, and the sanctions imposed by NASD for these violations be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris
Secretary

Commissioner Atkins Disapproved

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56756 / November 6, 2007

Admin. Proc. File No. 3-11893

In the Matter of David A. Finnerty, Donald R. Foley, II, Scott G. Hunt, Thomas M. Murphy, Jr., Kevin M. Fee, Frank A. Delaney, IV, Freddy DeBoer, Todd J. Christie, James V. Parolisi, Robert W. Luckow, Patrick E. Murphy, Robert A. Johnson, Jr., Patrick J. McGagh, Jr., Joseph Bongiorno, Michael J. Hayward, Richard P. Volpe, Michael F. Stern, Warren E. Turk, Gerard T. Hayes, and Robert A. Scavone, Jr.	ORDER DENYING MOTION TO SEVER

On May 30, 2007, Donald R. Foley, II, a respondent in this proceeding, moved to sever the causes of action against him from those against the other named respondents pursuant to Commission Rule of Practice 201(b). 1/ Rule of Practice 201(b) provides in pertinent part that "any proceeding may be severed with respect to some or all parties," and provides further that "[a]ny motion to sever . . . must include a representation that a settlement offer is pending before

1/ 17 C.F.R. § 201.201(b).

Document 9 of 24

the Commission or otherwise show good cause." 2/ As discussed below, we have determined to deny Foley's motion because he has not satisfied the standard set forth in Rule 201(b).

The Order Instituting Proceedings ("OIP") in this matter charges twenty registered specialists employed by five specialist firms with improper trading on the floor of the New York Stock Exchange ("NYSE") between 1999 and 2003. The OIP alleges that each of the respondents violated the federal securities laws and related rules by executing orders for their firms' proprietary accounts ahead of executable public customer or "agency" orders, thereby taking unfair advantage of their position as specialists. 3/ The OIP alleges that the named respondents engaged in improper trading practices known as "interpositioning" and "trading ahead" to give their firms an improper advantage over their public customers. 4/ Foley and three other respondents were employed by Fleet Specialists, Inc. ("Fleet"). 5/

The Division of Enforcement ("the Division") states that, at a prehearing conference with the Administrative Law Judge, the parties "generally expressed consent to a two-stage hearing, in which the first stage [("Stage I")] would involve issues common to all [r]espondents (including, without limitation, the admission into evidence of the data underlying the Division's charges) . . . ." Foley states that, in Stage I, the parties will "present common issues of fact before the [law judge] (i.e., the function of the specialist system, the authenticity and admissibility of certain records)." Foley does not move to be severed from Stage I of the hearing but seeks severance from the second stage ("Stage II"), which, the Division states, "would address specific conduct of [r]espondents, and would be organized sequentially by groups according to the firms that employed [r]espondents."

2/ Id.

3/ The OIP charges each respondent with violating Securities Act of 1933 Section 17(a), 15 U.S.C. § 77q(a), Exchange Act of 1934 Sections 10(b) and 11(b), 15 U.S.C. §§ 78j(b) and 78k(b), Rules 10b-5 and 11b-1, 17 C.F.R. §§ 240.10b-5 and 240.11b-1, thereunder. The OIP also charges each respondent with violating NYSE Rules 104, 92, 123B, and 401.

4/ As the OIP states, in "interpositioning, a specialist participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction." The OIP describes "trading ahead" as "the specialist fill[ing] one agency order through a proprietary trade for the specialist firm's proprietary account -- and thereby improperly . . . 'trad[ing] ahead' of the agency order -- simply to allow the specialist firm to take advantage of market conditions promptly."

5/ Fleet is now known as Banc of America Specialists, Inc.

In applying Rule of Practice 201(b) to a request for severance, we first determine whether the allegations brought against the respondents were properly consolidated. 6/ If so, we then examine whether there exists good cause for severance. 7/ Foley claims that consolidation here is highly prejudicial because "it creates the inference that Mr. Foley's conduct was more widespread than it actually was." He argues that "[s]everance is necessary to prevent tarring Mr. Foley with evidence of purported wrongdoing that has nothing to do with Mr. Foley." 8/ Moreover, he claims that "[t]here will be no efficiencies gained by grouping any of the defendants, because, after Stage [I], each will need to tell his own story, and the Division will be obligated to prove the liability of each," with the result that "[t]he total time taken up by the respondents will be the same whether each is tried seriatim, or all put in their defenses seriatim in a joint hearing."

The Division responds that the standards for proper consolidation under Rule 201(a) are clearly met here because Foley "has been charged with identical conduct, giving rise to identical

---

6/ John A. Carley, Securities Exchange Act Rel. No. 50695 (Nov. 18, 2004), 84 SEC Docket 434 ("Carley I").

7/ Foley argues that precedent applying the Federal Rules of Civil Procedure compels the conclusion that the causes of action against the respondents were improperly consolidated because they do not arise from the same transaction or occurrence. The provisions of the Federal Rules of Civil Procedure and our own Rules of Practice regarding consolidation or joinder differ significantly in that, "under the Federal Rules, joinder of claims is appropriate when the claims arise out of the same transaction or occurrence and there is at least one common question of law or fact, [but] . . . the Commission requires only . . . a common issue of law or fact" for consolidation. Carley I, 84 SEC Docket at 434-35. In any event, precedent applying the Federal Rules of Civil Procedure is not binding in our administrative proceedings since the Federal Rules do not govern these proceedings. John A. Carley, Exchange Act Rel. No. 50954 (Jan. 3, 2005), 84 SEC Docket 2317, 2318 n.6 ("[O]ur proceedings are not governed by the Federal Rules . . . .") ("Carley II").

8/ Among other asserted disadvantages, Foley specifically claims his defense will suffer "because . . . other specialists . . . but not Mr. Foley . . . made statements reflected in the OIP such as 'f--k the DOTS';" and because the OIP charges Foley "with a tiny percentage of improperly executed trades, other respondents . . . are accused [of improper trading] almost four times more frequently . . . ; . . . the specialists worked with different clerks . . . ; [and] . . . specialists had very different beliefs as to the priority of execution for public orders arriving via the [NYSE's] automated delivery system . . . ." (emphasis in original).

violations . . . as the other respondents." 9/ The allegations, according to the Division, "give rise to common legal questions as those facing the other Respondents" and "substantial common factual issues." Moreover, these common issues extend beyond those to be addressed in Stage I of the proceedings. The Division asserts that Foley "ignores the substantial, common factual issues the proceeding against him will have with the other Respondents who also worked at his firm, Fleet, and which further demonstrates the necessity of keeping the Stage [II] proceedings consolidated." These issues include Fleet's training of specialists, internal policies and procedures, and compensation. 10/ In addition, the Division argues that the requested severance "would clearly result in duplicative evidence and testimony, and a tremendous waste of judicial resources."

Consolidation in this proceeding was proper under Rule of Practice 201(a). The OIP charges each respondent with violating the same provisions of the federal securities laws and related rules. Consequently, many legal issues are common to all respondents. Foley himself admits that the issues to be addressed in Stage I of the hearing involving the work of specialists and related evidentiary issues are common to all the respondents; that, without more, establishes that consolidation was proper under Rule of Practice 201(a). As to Stage II of the hearing, there will be numerous common issues of fact with respect to Foley and the three other respondents employed by Fleet. 11/

9/ In David A. Finnerty, Exchange Act Rel. No. 52207 (Aug. 4, 2005), 85 SEC Docket 4448 ("Finnerty Order"), we stated "we believe there are common legal, factual, and evidentiary issues in these proceedings." The Division argues that the Finnerty Order in which another respondent in this proceeding was denied severance is law of the case and, as such, disposes of Foley's motion. The law of the case doctrine provides that "once an appellate court either expressly or by necessary implication decides an issue, the issue will be binding upon all subsequent proceedings in the same case." Key v. Sullivan, 925 F.2d 1056, 1060 (7th Cir. 1991). The Finnerty Order, however, did not address the issue of whether there is good cause to sever Foley from this proceeding and thus does not govern our consideration of this motion.

10/ Finnerty Order, 85 SEC Docket at 4449.

11/ Id. It appears from the parties' respective briefs that there is an additional issue of fact that can best be addressed in a consolidated Stage II hearing. The OIP alleges that some of the specialists sent electronic messages to each other allegedly expressing contempt for the NYSE's rules governing its automated order delivery system (e.g. "screw the DOTS"). Foley denies that he was responsible for any such messages, while the Division states that it "believes the evidence will show that it was [Foley] himself who was the source for that particularly revealing comment."

Foley does not submit that there is a settlement of the charges pending before the Commission and has not demonstrated good cause for severance. We are not persuaded by Foley's assertion that he will be unfairly prejudiced by having his case considered in a group with the other specialists who had been employed by Fleet. At the hearing, "the law judge, who is legally trained and judicially oriented, should have little difficulty in judging movant['s] case[] solely on the basis of the evidence adduced with respect to [him], without regard to the conduct of other respondents." 12/ We also are not likely to be "confused by the complexities of this case, nor to impute improperly any greater wrongdoing to Foley than the record will support," should we be required to review the decision of the law judge. 13/

Moreover, as we have stated, "considerations of adjudicatory economy carry great weight in the analysis of [a] motion [to sever]." 14/ It seems likely that Foley's Stage II hearing would require testimony pertinent to his employment at Fleet, which would duplicate the evidence presented at the Stage II hearing with respect to the other Fleet respondents. As we determined in an earlier severance request made by another respondent in this proceeding, the common legal, factual, and evidentiary issues in these proceedings "indicate[] that a single proceeding will be more efficient than separate trials from the standpoint of judicial economy and financial resources." 15/ Nothing justifies a different conclusion here.

Accordingly, IT IS ORDERED that the motion to sever filed by Donald R. Foley, II be, and it hereby is, denied.

By the Commission.

Nancy M. Morris
Secretary

12/ Id. at 4450.

13/ Carley I, 84 SEC Docket at 436.

14/ Id. at 435.

15/ Finnerty Order, 85 SEC Docket at 4450.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56755 / November 6, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2749 / November 6, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-11211

In the Matter of Warren Martin, CPA	: ORDER GRANTING APPLICATION FOR : REINSTATEMENT TO APPEAR AND PRACTICE : BEFORE THE COMMISSION AS AN ACCOUNTANT : RESPONSIBLE FOR THE PREPARATION OR : REVIEW OF FINANCIAL STATEMENTS REQUIRED : TO BE FILED WITH THE COMMISSION

On August 8, 2003, Warren Martin, CPA ("Martin") was denied the privilege of appearing or practicing as an accountant before the Commission as a result of settled public administrative proceedings instituted by the Commission against him pursuant to Rule 102(e) of the Commission's Rules of Practice.[1] Martin consented to the entry of the order without admitting or denying the findings therein. This order is issued in response to Martin's application for reinstatement to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

The Commission found that Martin, in his role as the engagement partner of the audits of MicroStrategy, Inc. ("MicroStrategy"), caused PricewaterhouseCoopers to issue audit reports containing unqualified opinions filed with the Company's inaccurate financial statements for the fiscal years 1998 and 1999. Prior to the issuance of the audit reports, Martin did not develop sufficient competent evidentiary support for certain revenue recognition issues and failed to consider properly language in certain MicroStrategy contracts that conflicted with the Company's recognition of revenue. He also failed to consider properly concerns raised by his own accounting firm that should have alerted him to the audit failures.

In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Martin

[1] *See* Accounting and Auditing Enforcement Release No. 1835 dated August 8, 2003. Martin was permitted, pursuant to the order, to apply for reinstatement after two years upon making certain showings.

attests that he will undertake to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, while practicing before the Commission in this capacity. Martin is not, at this time, seeking to appear or practice before the Commission as an independent accountant. If he should wish to resume appearing and practicing before the Commission as an independent accountant, he will be required to submit an application to the Commission showing that he has complied and will comply with the terms of the original suspension order in this regard. Therefore, Martin's suspension from practice before the Commission as an independent accountant continues in effect until the Commission determines that a sufficient showing has been made in this regard in accordance with the terms of the original suspension order.

Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."[2] This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Martin, it appears that he has complied with the terms of the August 8, 2003 order suspending him from appearing or practicing before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Martin, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, has shown good cause for reinstatement. Therefore, it is accordingly,

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Warren Martin, CPA is hereby reinstated to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

By the Commission.

Nancy M. Morris
Secretary

[2] Rule 102(e)(5)(i) provides:

"An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown." 17 C.F.R. § 201.102(e)(5)(i).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 7, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12887

In the Matter of **Ames Department Stores, Inc.,** **Bradlees, Inc.,** **Caldor Corp.,** **Homeplace of America, Inc., and** **Stuarts Department Stores, Inc.,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Ames Department Stores, Inc., Bradlees, Inc., Caldor Corp., Homeplace of America, Inc., and Stuarts Department Stores, Inc. ("Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Ames Department Stores, Inc. ("Ames") (CIK No. 006071) is a forfeited Delaware corporation located in Rocky Hill, Connecticut with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Ames is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 4, 2002, which reported a net loss of over $43 million for the prior thirteen weeks. On August 20, 2001, Ames filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the Southern District of New York, and the case is still pending. As of November 5, 2007, the company's common stock (symbol "AMESQ") was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

2. Bradlees, Inc. ("Bradlees") (CIK No. 887356) is a Massachusetts corporation located in Braintree, Massachusetts with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Bradlees is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 28, 2000, which reported a net loss of over $18 million for the prior thirteen weeks. On December 26, 2000, Bradlees and its subsidiaries filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the Southern District of New York, and the case is still pending. As of November 5, 2007, the company's common stock (symbol "BLEEQ") was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

3. Caldor Corp. ("Caldor") (CIK No. 857954) is a dissolved Delaware corporation located in Norwalk, Connecticut with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Caldor is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 31, 1998, which reported a net loss of over $27 million for the prior thirteen weeks. On September 18, 1995, Caldor filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the Southern District of New York, and the case was dismissed on November 8, 2001. As of November 5, 2007, the company's common stock (symbol "CLDRQ") was quoted on the Pink Sheets, had five market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

4. Homeplace of America, Inc. ("Homeplace") (CIK No. 1115841) is a void Delaware corporation located in Myrtle Beach, South Carolina with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Homeplace is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended August 26, 2000, which reported a net loss of over $1.9 million for the prior thirteen weeks. On January 1, 2001, Homeplace filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was closed on October 30, 2007. The company's common stock is not publicly quoted or traded.

5. Stuarts Department Stores, Inc. ("Stuarts") (CIK No. 0744795) is a void Delaware corporation located in Franklin, Massachusetts with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Stuarts is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 28, 1995, which reported a net loss of over $17 million for the prior thirty-nine weeks. On May 16, 1995, Stuarts filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Massachusetts, which was converted to Chapter 7, and the case was closed on July 26, 2006. As of November 5, 2007, the company's common stock (symbol "SRTDQ") was quoted on the Pink Sheets, had two market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

7. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

8. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified or Express Mail, or by other means permitted by the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris
Secretary

Attachment

Appendix 1
Chart of Delinquent Filings by
Ames Department Stores, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Rec'd	Months Delinquent (rounded up)
Ames Department Stores, Inc.					
	10-Q	08/03/02	09/17/02	Not filed	62
	10-Q	11/02/02	12/17/02	Not filed	59
	10-K	02/01/03	05/02/03	Not filed	54
	10-Q	05/03/03	06/17/03	Not filed	53
	10-Q	08/02/03	09/16/03	Not filed	50
	10-Q	11/01/03	12/16/03	Not filed	47
	10-K	01/31/04	04/30/04	Not filed	43
	10-Q	05/01/04	06/15/04	Not filed	41
	10-Q	07/31/04	09/14/04	Not filed	38
	10-Q	10/30/04	12/14/04	Not filed	35
	10-K	01/29/05	04/29/05	Not filed	31
	10-Q	04/30/05	06/14/05	Not filed	29
	10-Q	07/30/05	09/13/05	Not filed	26
	10-Q	10/29/05	12/13/05	Not filed	23
	10-K	01/28/06	04/28/06	Not filed	19
	10-Q	04/29/06	06/13/06	Not filed	17
	10-Q	07/29/06	09/12/06	Not filed	14
	10-Q	10/28/06	12/12/06	Not filed	11
	10-K	01/27/07	04/27/07	Not filed	7
	10-Q	04/28/07	06/12/07	Not filed	5
	10-Q	07/28/07	09/11/07	Not filed	2
Total Filings Delinquent	21				
Bradlees, Inc.					
	10-K	02/03/01	03/20/01	Not filed	80
	10-Q	05/05/01	06/19/01	Not filed	77
	10-Q	08/04/01	09/18/01	Not filed	74
	10-Q	11/03/01	12/18/01	Not filed	71
	10-K	02/02/02	03/19/02	Not filed	68
	10-Q	05/04/02	06/18/02	Not filed	65
	10-Q	08/03/02	09/17/02	Not filed	62
	10-Q	11/02/02	12/17/02	Not filed	59
	10-K	02/01/03	05/02/03	Not filed	54
	10-Q	05/03/03	06/17/03	Not filed	53

Company Name	Form Type	Period Ended	Due Date	Date Rec'd	Months Delinquent (rounded up)
Bradlees, Inc.					
	10-Q	08/02/03	09/16/03	Not filed	50
	10-Q	11/01/03	12/16/03	Not filed	47
	10-K	01/31/04	04/30/04	Not filed	43
	10-Q	05/01/04	06/15/04	Not filed	41
	10-Q	07/31/04	09/14/04	Not filed	38
	10-Q	10/30/04	12/14/04	Not filed	35
	10-K	01/29/05	04/29/05	Not filed	31
	10-Q	04/30/05	06/14/05	Not filed	29
	10-Q	07/30/05	09/13/05	Not filed	26
	10-Q	10/29/05	12/13/05	Not filed	23
	10-K	01/28/06	04/28/06	Not filed	19
	10-Q	04/29/06	06/13/06	Not filed	17
	10-Q	07/29/06	09/12/06	Not filed	14
	10-Q	10/28/06	12/12/06	Not filed	11
	10-K	01/27/07	04/27/07	Not filed	7
	10-Q	04/28/07	06/12/07	Not filed	5
	10-Q	07/28/07	09/11/07	Not filed	2
Total Filings Delinquent	27				
Caldor Corp.					
	10-K	01/30/99	04/30/99	Not filed	103
	10-Q	05/01/99	06/15/99	Not filed	101
	10-Q	07/31/99	09/14/99	Not filed	98
	10-Q	10/30/99	12/14/99	Not filed	95
	10-K	01/29/00	04/28/00	Not filed	91
	10-Q	04/29/00	06/13/00	Not filed	89
	10-Q	07/29/00	09/12/00	Not filed	86
	10-Q	10/28/00	12/12/00	Not filed	83
	10-K	02/03/01	05/04/01	Not filed	78
	10-Q	05/05/01	06/19/01	Not filed	77
	10-Q	08/04/01	09/18/01	Not filed	74
	10-Q	11/03/01	12/18/01	Not filed	71
	10-K	02/02/02	05/03/02	Not filed	66
	10-Q	05/04/02	06/18/02	Not filed	65
	10-Q	08/03/02	09/17/02	Not filed	62
	10-Q	11/02/02	12/17/02	Not filed	59
	10-K	02/01/03	05/02/03	Not filed	54
	10-Q	05/03/03	06/17/03	Not filed	53
	10-Q	08/02/03	09/16/03	Not filed	50

Company Name	Form Type	Period Ended	Due Date	Date Rec'd	Months Delinquent (rounded up)
Caldor Corp.					
	10-Q	11/01/03	12/16/03	Not filed	47
	10-K	01/31/04	04/30/04	Not filed	43
	10-Q	05/01/04	06/15/04	Not filed	41
	10-Q	07/31/04	09/14/04	Not filed	38
	10-Q	10/30/04	12/14/04	Not filed	35
	10-K	01/29/05	04/29/05	Not filed	31
	10-Q	04/30/05	06/14/05	Not filed	29
	10-Q	07/30/05	09/13/05	Not filed	26
	10-Q	10/29/05	12/13/05	Not filed	23
	10-K	01/28/06	04/28/06	Not filed	19
	10-Q	04/29/06	06/13/06	Not filed	17
	10-Q	07/29/06	09/12/06	Not filed	14
	10-Q	10/28/06	12/12/06	Not filed	11
	10-K	01/27/07	04/27/07	Not filed	7
	10-Q	04/28/07	06/12/07	Not filed	5
	10-Q	07/28/07	09/11/07	Not filed	2
Total Filings Delinquent	35				
Homeplace of America, Inc.					
	10-Q	11/25/00	01/09/01	Not filed	82
	10-K	02/24/01	05/25/01	Not filed	78
	10-Q	05/26/01	07/10/01	Not filed	76
	10-Q	08/25/01	10/09/01	Not filed	73
	10-Q	11/24/01	01/08/02	Not filed	70
	10-K	02/23/02	05/24/02	Not filed	66
	10-Q	05/25/02	07/09/02	Not filed	64
	10-Q	08/24/02	10/08/02	Not filed	61
	10-Q	11/23/02	01/07/03	Not filed	58
	10-K	02/22/03	05/23/03	Not filed	54
	10-Q	05/24/03	07/08/03	Not filed	52
	10-Q	08/23/03	10/07/03	Not filed	49
	10-Q	11/22/03	01/06/04	Not filed	46
	10-K	02/28/04	05/28/04	Not filed	42
	10-Q	05/29/04	07/13/04	Not filed	40
	10-Q	08/28/04	11/26/04	Not filed	36
	10-Q	11/27/04	01/11/05	Not filed	34
	10-K	02/26/05	05/27/05	Not filed	30
	10-Q	05/28/05	07/12/05	Not filed	28

Company Name	Form Type	Period Ended	Due Date	Date Rec'd	Months Delinquent (rounded up)
Homeplace of America, Inc.					
	10-Q	08/27/05	10/11/05	Not filed	25
	10-Q	11/26/05	01/10/06	Not filed	22
	10-K	02/25/06	05/26/06	Not filed	18
	10-Q	05/27/06	07/11/06	Not filed	16
	10-Q	08/26/06	10/10/06	Not filed	13
	10-Q	11/25/06	01/09/07	Not filed	10
	10-K	02/24/07	05/25/07	Not filed	6
	10-Q	05/26/07	07/10/07	Not filed	4
	10-Q	08/25/07	10/09/07	Not filed	1
Total Filings Delinquent	28				
Stuarts Department Stores, Inc.					
	10-K	01/27/96	04/26/96	Not filed	139
	10-Q	04/27/96	06/11/96	Not filed	137
	10-Q	07/27/96	09/10/96	Not filed	134
	10-Q	10/26/96	12/10/96	Not filed	131
	10-K	02/01/97	05/02/97	Not filed	126
	10-Q	05/03/97	06/17/97	Not filed	125
	10-Q	08/02/97	09/16/97	Not filed	122
	10-Q	11/01/97	12/16/97	Not filed	119
	10-K	01/31/98	05/01/98	Not filed	114
	10-Q	05/02/98	06/16/98	Not filed	113
	10-Q	08/01/98	09/15/98	Not filed	110
	10-Q	10/31/98	12/15/98	Not filed	107
	10-K	01/30/99	04/30/99	Not filed	103
	10-Q	05/01/99	06/15/99	Not filed	101
	10-Q	07/31/99	09/14/99	Not filed	98
	10-Q	10/30/99	12/14/99	Not filed	95
	10-K	01/29/00	04/28/00	Not filed	91
	10-Q	04/29/00	06/13/00	Not filed	89
	10-Q	07/29/00	09/12/00	Not filed	86
	10-Q	10/28/00	12/12/00	Not filed	83
	10-K	02/03/01	05/04/01	Not filed	78
	10-Q	05/05/01	06/19/01	Not filed	77
	10-Q	08/04/01	09/18/01	Not filed	74
	10-Q	11/03/01	12/18/01	Not filed	71

Company Name	Form Type	Period Ended	Due Date	Date Rec'd	Months Delinquent (rounded up)
Stuarts Department Stores, Inc.					
	10-K	02/02/02	05/03/02	Not filed	66
	10-Q	05/04/02	06/18/02	Not filed	65
	10-Q	08/03/02	09/17/02	Not filed	62
	10-Q	11/02/02	12/17/02	Not filed	59
	10-K	02/01/03	05/02/03	Not filed	54
	10-Q	05/03/03	06/17/03	Not filed	53
	10-Q	08/02/03	09/16/03	Not filed	50
	10-Q	11/01/03	12/16/03	Not filed	47
	10-K	01/31/04	04/30/04	Not filed	43
	10-Q	05/01/04	06/15/04	Not filed	41
	10-Q	07/31/04	09/14/04	Not filed	38
	10-Q	10/30/04	12/14/04	Not filed	35
	10-K	01/29/05	04/29/05	Not filed	31
	10-Q	04/30/05	06/14/05	Not filed	29
	10-Q	07/30/05	09/13/05	Not filed	26
	10-Q	10/29/05	12/13/05	Not filed	23
	10-K	01/28/06	04/28/06	Not filed	19
	10-Q	04/29/06	06/13/06	Not filed	17
	10-Q	07/29/06	09/12/06	Not filed	14
	10-Q	10/28/06	12/12/06	Not filed	11
	10-K	01/27/07	04/27/07	Not filed	7
	10-Q	04/28/07	06/12/07	Not filed	5
	10-Q	07/28/07	09/11/07	Not filed	2

Total Filings Delinquent 47

FC 17

Chairman Cox
Not Participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56770 / November 8, 2007

Admin. Proc. File No. 3-12566

CORRECTED

In the Matter of the Application of

CHARLES C. FAWCETT, IV
c/o Thomas P. Puccio, Esq.
Law Offices of Thomas P. Puccio
230 Park Avenue, Suite 301
New York, NY 10169

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firm of registered securities association asserted the privilege against self-incrimination in response to association's request for information and testimony. Held, association's findings of violation and imposition of sanctions are sustained.

APPEARANCES:

Thomas P. Puccio, of the Law Offices of Thomas P. Puccio, for Charles C. Fawcett, IV.

Marc Menchel, Alan Lawhead, and Gary J. Dernelle, for NASD.

Appeal filed: February 9, 2007
Last brief received: April 30, 2007

Document 12 of 24

I.

Charles C. Fawcett, IV, a former registered investment company and variable contracts representative and principal of Federated Securities Corporation ("Federated" or the "Firm"), an NASD member, 1/ appeals from NASD disciplinary action. 2/ NASD found that Fawcett failed to comply with requests to provide NASD staff with information and testimony in connection with an NASD investigation concerning Fawcett's conduct while associated with Federated. NASD found that Fawcett thereby violated NASD Procedural Rule 8210 and Conduct Rule 2110, 3/ barred Fawcett from associating with any NASD member in any capacity, and ordered him to pay costs in the amount of $1,522.15. We base our findings on an independent review of the record.

II.

This case deals with the circumstances surrounding Fawcett's failure to respond to requests for information and testimony made by NASD in January and February 2004. Those requests by NASD followed an earlier investigation by the Attorney General of the State of New York ("NYAG") concerning possible misconduct involving improper "market timing" and "late trading." 4/

1/ Fawcett entered the securities industry in 1986 and was employed by Federated until the company terminated his employment on November 24, 2003. Fawcett is not presently associated with any NASD member.

2/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 Fed. Reg. 42,190 (Aug. 1, 2007) (SR-NASD-2007-053). Because the disciplinary action here was taken before that date, we continue to use the designation NASD.

3/ NASD Procedural Rule 8210 requires members and associated persons to provide testimony in connection with any NASD investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade. General Rule 115 extends the applicability of NASD rules governing members to their associated persons.

4/ "Market timing" includes "frequent buying and selling of shares of the same fund" and "buying or selling fund shares in order to exploit inefficiencies in fund pricing." Mut. Fund Redemption Fees, Investment Company Act Rel. No. 26782 (Mar. 11, 2005), 84 SEC Docket 4144, 4147 n.4. "Late trading" is the "illegal practice of permitting a

(continued...)

A. Fawcett's Actions While at Federated

On August 29, 2003, the NYAG issued a subpoena to Federated requiring the Firm to produce documents and information "concerning Late Trading and/or [Market] Timing Capacity," including "communications with any Person relating directly or indirectly" to late trading or timing capacity, and "all agreements, understandings and/or arrangements (including drafts thereof)" relating to timing capacity or late trading. On September 8, 2003, Fawcett deleted nine e-mails from his computer and later admitted that he did so.

On September 9, 2003, the day after Fawcett deleted the e-mails, Federated distributed to its employees a memorandum advising them that the NYAG had "brought civil action against Canary Partners, LLC" and related entities, and that the "charges are part of a $40 million settlement involving allegations of wrongdoing concerning late trading and market timing" in several mutual fund families. The memorandum further informed employees that Federated had "received a Subpoena as part of this investigation from the Attorney General's office for information and numerous documents" and that the United States Attorney's Office in New York and the Commission were planning their own parallel investigations. The memorandum instructed all employees to maintain all documents, including, but not limited to, "letters, e-mails, memoranda, notes . . . concerning any actual or proposed Late Trading and/or Timing Capacity" with any of a series of entities specified in the memorandum, or with "any other person not so identified."

Thereafter, Federated retained outside counsel to conduct an internal investigation. Federated's outside counsel interviewed Fawcett on October 3, 2003. Joseph Cobetto, one of the outside lawyers retained by Federated to investigate the matter, was present at this initial interview with Fawcett. According to Cobetto, Fawcett stated that he had "been involved in discussions with a particular firm" that was "interested in bringing some money to Federated . . . [that] might be moved in various ways" and was "interested in having discussions about what they would or wouldn't be allowed to do with respect to trading" in Federated funds. 5/ Fawcett failed to disclose during the interview that he had deleted any e-mails.

Two weeks later, on October 16, 2003, Fawcett contacted Federated's outside counsel and requested another meeting, noting that he had additional information "that he wasn't sure . . . was relevant or not" to the investigation. According to Cobetto, Fawcett disclosed at this second

---

4/ (...continued)
purchase or redemption order received after the 4:00 p.m. pricing time to receive the share price calculated as of 4:00 p.m. that day." Amendments to Rules Governing Pricing of Mut. Fund Shares, Investment Co. Act Rel. No. 26288 (Dec. 11, 2003), 81 SEC Docket 3176, 3177.

5/ According to the record in this case, the brokerage firm with whom Fawcett had these discussions did not ultimately invest any money in Federated funds.

meeting that he had deleted "a couple" of e-mails because he had "panicked when all this came about" and was "embarrassed about what they said." Fawcett also apparently disclosed at this meeting that, three days before he deleted the e-mails in question, he learned from Tom Donahue, Federated's chief financial officer and Fawcett's superior, that "Federated [had] received a subpoena." However, according to notes that Cobetto wrote during the interview, Fawcett told outside counsel that Donahue did not specify "what subpoena." 6/ Cobetto testified that during the interview there was "never any discussion" by Fawcett or anyone else about the breadth or scope of the subpoena. 7/

The e-mails Fawcett deleted were ultimately recovered by the Firm and admitted into the record. Federated determined that three of the deleted e-mails were outside the scope of the NYAG's subpoena. The remaining six relate to the preparation for another firm of a spreadsheet listing certain Federated equity and international mutual funds as "available," the percentage of fund assets that could be "redeemed in 5 consecutive business days," and the number of "round trips per annum" that could be permitted in the funds. Federated stated in correspondence with NASD that, in the course of the Firm's internal investigation, Fawcett disclosed that he had deleted "several e-mails involving potential market timing arrangements." On November 24, 2003, Federated terminated Fawcett and reported to NASD on a Form U5 that it had done so because Fawcett "intentionally delet[ed] e-mail correspondence relevant to a regulatory investigation." 8/

6/ In an affidavit offered by Respondent and accepted into evidence, Donahue averred that he recalled the conversation with Fawcett but stated, "I do not believe that I told Mr. Fawcett that Federated had received a subpoena." In January 2004, Federated made the same representation to NASD investigators, noting in a written response to an NASD request for information that, "[a]ccording to Mr. Fawcett, . . . Donahue stated that Federated had received a subpoena from the NYAG. Mr. Donahue recalls the conversation but does not believe that he made such a statement."

7/ Cobetto also testified that he "did not draw the connection that [Fawcett] was deleting e-mails because of a subpoena." Cobetto said that he believed Fawcett panicked "in general," because Fawcett was "embarrassed about a couple of e-mails in the files."

8/ NASD Conduct Rule 3070 requires an NASD member to report to NASD when, among other things, an associated person has been the subject of any disciplinary action taken by the member involving suspension or termination.

B. Fawcett's Response to NASD's Requests for Information

Between December 2003 and March 2004, NASD sent Fawcett three letters pursuant to Rule 8210 requesting information about the conduct disclosed by Federated. 9/ All the requests were properly served and received by Fawcett. The first letter, dated December 19, 2003, requested that Fawcett provide information and documents "relating to the allegations [Federated] made in a report filed with NASD that he had deleted e-mail transmissions that were relevant to a regulatory inquiry." Fawcett did not provide the requested information by the deadline of January 2, 2004 but, in a letter dated January 7, 2004, Fawcett's attorney asked for a ninety-day extension to comply with the request because Fawcett was "under investigation by the NYAG and the SEC relating to the alleged e-mail deletions." On or about February 4, 2004, NASD staff informed Fawcett's attorney telephonically that the extension would not be granted. On February 10, 2004, NASD sent its second request for information with a response deadline of February 24, 2004. Again Fawcett failed to provide the information, and again, on February 26, 2004, NASD received a letter from Fawcett's attorney stating that Fawcett was "unable to respond at that time because he was under criminal investigation." NASD informed Fawcett in a letter dated on or about March 1, 2004 that any pending criminal investigation would have no bearing upon Fawcett's responsibility to provide information to NASD pursuant to Rule 8210. NASD sent its third request on March 4, 2004, in which NASD required Fawcett to appear to testify under oath and to produce certain documents. Fawcett did not appear to testify and did not provide – and has still not provided – any of the information requested by NASD.

On June 22, 2004, NASD's Department of Enforcement filed a complaint against Fawcett, alleging that Fawcett "failed to appear to testify or provide NASD any of the requested information or documents." 10/ NASD conducted a hearing at which only Cobetto testified. Fawcett, although present, declined to testify; his attorney stated, "[Fawcett] is not going to testify and he's invoking his Fifth Amendment right at this time." The NASD hearing panel

---

9/ Although copies of these letters, and Fawcett's two replies thereto, were not introduced into the record, Fawcett admitted in his answer that NASD sent, and that he received, the NASD requests described in the complaint. Fawcett has not at any stage in the proceeding contested his receipt of the letters or the description of the content of either NASD's letters or his replies. We therefore accept for purposes of this opinion the descriptions of the letters set out in NASD's complaint.

10/ The complaint also alleged that Fawcett deleted six e-mails when he knew, or had reason to know or believe, that they were within the scope of the NYAG's subpoena. NASD's hearing panel dismissed this portion of the complaint because it found that the e-mails were not clearly within the scope of the NYAG's subpoena and that Enforcement did not present evidence that Fawcett knew when he deleted the e-mails that they were subject to subpoena. Because Enforcement did not appeal this determination to NASD's National Adjudicatory Council ("NAC"), and the NAC did not call the matter for review on its own motion, this issue is not before the Commission.

found that Fawcett had failed to respond to NASD's requests for information and, based on that finding, barred Fawcett.

NASD's National Adjudicatory Council ("NAC") affirmed the hearing panel's decision, finding that there was no dispute over the facts that NASD sent Fawcett three requests for information, that Fawcett received each of these requests, and that Fawcett refused to comply with any of them. The NAC therefore held that Fawcett, who had a duty as an associated person to cooperate fully and completely with NASD's requests, violated Procedural Rule 8210 and Conduct Rule 2110 by failing to do so. The NAC rejected Fawcett's argument that the Fifth Amendment excused him from providing documents and testimony to NASD because NASD is inherently a state actor and concluded that Fawcett's argument was "directly contrary to well-settled law." The NAC barred Fawcett from association with any NASD member firm in any capacity. This appeal followed.

III.

Fawcett has admitted throughout these proceedings that he failed to provide information and to appear for testimony as requested by NASD. Such failure establishes a prima facie violation of NASD Procedural Rule 8210. 11/ Violations of NASD rules, such as NASD Procedural Rule 8210, constitute conduct inconsistent with just and equitable principles of trade and therefore also establish a violation of NASD Conduct Rule 2110. 12/

A. Applicability of the Fifth Amendment Privilege Against Self-Incrimination

Fawcett argues that "NASD's investigation into and subsequent disciplinary activity against Mr. Fawcett can be fairly attributed to the state," and that he was therefore "fully entitled to invoke his Fifth Amendment privilege[] without being penalized for his invocation by being expelled from his profession." According to Fawcett, three factors demonstrate that NASD is inherently a state actor, giving rise to a right against self-incrimination for respondents that

---

11/ See, e.g., Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 690-91; cf. Warren E. Turk, Exchange Act Rel. No. 55942 (June 22, 2007), 90 SEC Docket 2802, 2805 (stating that a failure to appear for testimony establishes a prima facie violation of analogous NYSE rule).

12/ See, e.g., Elliot M. Hershberg, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 495 n.1 (holding that the failure to provide information requested by NASD constitutes a failure to observe high standards of commercial honor and just and equitable principles of trade), aff'd, 210 Fed. Appx. 125 (2d Cir. 2006); E. Magnus Oppenheim & Co., Exchange Act Rel. No. 51479 (Apr. 6, 2005), 85 SEC Docket 475, 478 (holding that a violation of an NASD rule is also a violation of NASD Conduct Rule 2110); Chris Dinh Hartley, Exchange Act Rel. No. 50031 (July 16, 2004), 83 SEC Docket 1239, 1244 (same); Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999) (same).

should shield him from liability. First, in investigating Fawcett, NASD was "exercising a public function delegated to it by Congress," i.e., to enforce compliance with the securities laws and ethical standards. Next, Fawcett argues, NASD has "complete control over an individual's right to practice in the securities field," which stems from NASD's "entwinement with federal law and policies." Finally, Fawcett argues, "the government is inextricably entwined with the management and control of the NASD."

Fawcett's position, however, is directly contrary to established precedent, and we find no basis in this case for departing from that precedent. As the Second Circuit has held, "NASD is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee." 13/ Although Fawcett urges that NASD is a state actor because it exercises a "public function," "has complete control over an individual's right to practice in the securities field," and is "closely supervised by the Commission," courts have repeatedly considered and rejected similar arguments: although "NASD plays an important part in the highly regulated securities industry and is subject to SEC oversight[,] . . . 'even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.'" 14/ Moreover, the "existence of an effective private monopoly does not create

---

13/ D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002) (citing Desiderio v. NASD, 191 F.3d 198, 206 (2d Cir. 1999); see also Perpetual Sec., Inc. v. Tang, 290 F.3d 132, 138 (2d Cir. 2002) (citing Desiderio and stating, "It is clear that NASD is not a state actor . . . ."); Graman v. NASD, Inc., No. 97-1556-JR, 1998 U.S. Dist. LEXIS 11624, at *9 (D.D.C. Apr. 27, 1998) ("Every court that has considered the question has concluded that NASD is not a governmental actor.") (citing First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 698, 699 n.5 (3d Cir. 1979); Shrader v. NASD, Inc., 855 F. Supp. 122, 124 (E.D.N.C. 1994), aff'd, 54 F.3d 774 (4th Cir. 1995); Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997); Datek Sec. Corp. v. NASD, Inc., 875 F. Supp. 230, 234 (S.D.N.Y. 1995); First Heritage Corp. v. NASD, Inc., 785 F. Supp. 1250, 1251 (E.D. Mich. 1992); Bahr v. NASD, Inc., 763 F. Supp. 584, 589 (S.D. Fla. 1991); United States v. Bloom, 450 F. Supp. 323, 330 (E.D. Pa. 1978)).

14/ Graman, 1998 U.S. Dist. LEXIS 11624, at *8 (citing San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 544 (1987)); see also Marchiano v. NASD, Inc., 134 F. Supp. 2d 90, 95 (D.D.C. 2001) ("[T]he court is aware of no case . . . in which NASD Defendants were found to be state actors either because of their regulatory responsibilities or because of any alleged collusion with criminal prosecutors."); Vladislav Steven Zubkis, 53 S.E.C. 794, 797 n.2 (1998) (stating that privilege against self-incrimination does not apply in SRO disciplinary proceedings).

governmental action, even when the monopoly is powerful enough to influence decisions of government itself." 15/

Fawcett argues that Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 16/ a Supreme Court case involving a private corporation organized to regulate interscholastic athletics among public and private schools, overturns the well-settled case law holding that NASD is generally not a state actor. Brentwood holds that a private party not otherwise subject to the Fifth Amendment may be deemed to have engaged in state action sufficient to give rise to Constitutional protections, as when there is such a "close nexus between the State and the challenged action" that the seemingly private behavior "may be fairly treated as that of the State itself." 17/ Facts tending to "bear on the fairness of such an attribution" include whether a challenged activity "results from the State's exercise of its 'coercive power'"; whether "the State provides 'significant encouragement, either overt or covert'"; or whether "a private actor operates as a 'willful participant in the joint activity with the State or its agents.'" 18/

Fawcett, however, does not argue or present any facts tending to show that, in his case, there was the kind or degree of cooperation or interaction between NASD and the government that would justify a finding that NASD effectively engaged in state action. Nor does our review of the proceedings below suggest that NASD or a governmental authority engaged in any conduct that would cause NASD to be accorded something other than its usual private-actor status. Fawcett also cites three appellate court decisions in support of his argument that NASD is a state actor for purposes of applying the Fifth Amendment, but none of these cases establishes that

---

15/ Graman, 1998 U.S. Dist. LEXIS 11624, at *9 (citing Nat'l Collegiate Athletic Assoc. v. Tarkanian, 488 U.S. 179, 198-99 (1988)).

16/ 531 U.S. 288 (2001).

17/ Brentwood Acad., 531 U.S. at 295; see also Turk, 90 SEC Docket at 2807 (stating that SROs generally are not state actors but can be subject to the Fifth Amendment when, under the circumstances, they engage in "state action"); Frank P. Quattrone, Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155, 2163 n.22 (noting that the Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be "fairly attributable" to the government) (citing D.L. Cromwell Invs., Inc., 279 F.3d at 161 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982))).

18/ Brentwood Acad., 531 U.S. at 296 (citations omitted).

proposition. 19/ We therefore find no basis upon which to conclude that Fawcett was entitled to invoke the Fifth Amendment in answer to NASD's requests for information and testimony.

B. Relevance of the E-Mails to NASD's Investigation

Fawcett also argues that "[t]here is not a shred of evidence connecting the six e-mails to the NYAG subpoena, and thus Enforcement's Rule 8210 letters requested information irrelevant to their inquiry." Fawcett argues that he cannot, therefore, "be sanctioned for non-cooperation with a request for wholly irrelevant information." 20/ We find Fawcett's argument to be without merit. Whether or not the e-mails fell within the scope of the subpoena, the e-mails, and information and testimony about why Fawcett deleted them, were clearly relevant to Enforcement's inquiry into the reasons for his termination by Federated. Moreover, even assuming that the e-mails were not within the scope of the subpoena – a finding we need not and do not make – it does not fall to the recipient of an NASD information request to decide for himself whether his compliance would assist NASD's investigation. As we have often noted, recipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot. They may not refuse such requests on the grounds of relevance or otherwise set

---

19/ Blount v. SEC, 61 F.3d 938, 941 (D.C. Cir. 1995), noted that Municipal Securities Rulemaking Board ("MSRB") Rule G-37, which restricts the ability of municipal securities professionals to contribute to political campaigns of state officials from whom they obtain business, is "governmental action of the purest sort"; however, Blount is inapposite: the court specifically declined to address the issue of whether the Congressionally-chartered MSRB is a state actor, and NASD's status was not an issue before the court. Fawcett also cites Austin Mun. Sec., Inc. v. NASD, Inc., 757 F.2d 676 (5th Cir. 1985), and P'ship Exch. Sec. Co. v. NASD, Inc., 169 F.3d 606 (9th Cir. 1999). In both cases, the courts determined that NASD was entitled to immunity from civil suit; however, neither court based its decision on a finding that NASD is a state actor. These cases do not controvert the numerous decisions that squarely hold that NASD is a private actor. See supra notes 13-14.

20/ In support of his conclusion that the e-mails are "irrelevant information," Fawcett asserts that, in dismissing the charge of the complaint that alleged he had deleted e-mails subject to regulatory subpoena, see supra note 10, the NASD hearing panel concluded that "Enforcement failed to provide even an iota of evidence that the information it sought from Mr. Fawcett was relevant to the investigation."

Fawcett mischaracterizes the hearing panel's decision. The hearing panel concluded that Enforcement did not demonstrate that the e-mails fell within the scope of the NYAG's subpoena or that Fawcett knew when he deleted them they were subject to that subpoena; nevertheless, the hearing panel found that "it is clear that the information [NASD sought from Fawcett] was directly relevant to the NASD staff's investigation of possible rule violations by Respondent."

conditions on their compliance, 21/ and NASD is not required to justify its information requests in order to obtain compliance from members and their associated persons. 22/

As explained above, it is undisputed that Fawcett failed to respond to the requests, and his proffered reason for refusal, as NASD advised Fawcett, was meritless. We therefore sustain NASD's finding that Fawcett violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

IV.

Exchange Act Section 19(e)(2) directs us to sustain NASD's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 23/ We sustain the sanctions imposed by NASD because, as explained below, we conclude that Fawcett's complete failure, without mitigation, to respond to the NASD requests for testimony and other information in this case demonstrates that he poses too great a risk to the markets and investors protected by the self-regulatory system to be permitted to remain in the securities industry. We also conclude that the sanctions imposed on Fawcett will have the salutary effect of deterring others from engaging in the same serious misconduct.

We initially observe that NASD's determination to bar Fawcett was consistent with its Sanction Guidelines. 24/ The Sanction Guidelines provide that, for violations of Rule 8210, "[i]f

---

21/ See Rooney A. Sahai, Exchange Act Rel. No. 55046 (Jan. 5, 2007), 89 SEC Docket 2402, 2406 n.11 (citing Michael David Borth, 51 S.E.C. 178, 182 (1992)); Robert Fitzpatrick, 55 S.E.C. 419, 424-25 & nn.11 & 16 (2001), aff'd, 63 Fed. Appx. 20 (2d Cir. 2003).

22/ See, e.g., Sahai, 89 SEC Docket at 2406 n.12 (citing Joseph Patrick Hannan, 53 S.E.C. 854, 860 (1998)); Fitzpatrick, 55 S.E.C. at 425 n.16 (citing Hannan).

23/ 15 U.S.C. § 78s(e)(2). Fawcett does not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

24/ The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. NASD Sanction Guidelines 1 (2006 ed.). Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. Id. The Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD Adjudicators – which the Guidelines define as Hearing Panels and the National Adjudicatory Council. Id. Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

the individual did not respond in any manner, a bar should be standard." 25/ The Guidelines further provide that "[w]here mitigation exists, or the person did not respond in a timely manner, [the Adjudicator should] consider suspending the individual in any or all capacities for up to two years." 26/ This reflects the judgment that, in the absence of mitigating factors, a complete failure to cooperate with NASD requests for information or testimony is so fundamentally incompatible with NASD's self-regulatory function that the risk to the markets and investors posed by such misconduct is properly remedied by a bar. 27/

We agree. Because of limited Commission resources, Congress has given NASD and other securities industry self-regulatory organizations significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations. As we have repeatedly emphasized, it is vitally important to the self-regulatory system that NASD investigators be able to obtain information and testimony from NASD member firms and associated persons. 28/ Because NASD lacks subpoena power, however, it "must rely upon Procedural Rule 8210 in connection with its obligation to police the activities of its members and associated persons." 29/ Vigorous enforcement of Rule 8210, therefore, helps ensure the continued strength of the self-regulatory system–and thereby enhances the integrity of the securities markets and protects investors–by making it more likely that members and their associated persons will provide prompt and full cooperation with NASD investigations. 30/ Although lesser sanctions may be a sufficient remedy for an incomplete or dilatory response to requests for information or a failure to respond

---

25/ NASD Sanction Guidelines at 39.

26/ Id.

27/ It bears emphasis that the sanction guideline for violations of Rule 8210 is one of only three (out of approximately eighty) that propose a bar as the standard sanction for the underlying rule violation. The other two are the sanction guidelines applicable to the conversion of customer funds (see Sanction Guidelines at 38) and cheating during broker-dealer qualification examinations (see id. at 43). In each case, the misconduct (absent mitigating factors) poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry, and a bar is therefore an appropriate remedy.

28/ See, e.g., Hershberg, 87 SEC Docket at 498; Fitzpatrick, 55 S.E.C. at 423-24; Borth, 51 S.E.C. at 180.

29/ Hannan, 53 S.E.C. at 858-59; see also Michael J. Rouse, 51 S.E.C. 581, 584 (1993) (finding rule requiring NASD members and associates to comply with its information requests to be "a key element in the NASD's effort to police its members").

30/ Hannan, 53 S.E.C. at 859 ("Failure to comply is a serious violation justifying stringent sanctions because it subverts NASD's ability to execute its regulatory functions.").

where mitigating circumstances exist, we conclude that, in the absence of such factors, barring an individual who completely fails to respond is the appropriate remedy and not "excessive or oppressive" within the meaning of Section 19(e)(2). 31/

As noted previously, Fawcett has admitted throughout these proceedings that he did not respond to NASD's requests for information and testimony. We also find, as did NASD, that no factors mitigate the severity of that violative conduct. 32/ Fawcett urges that he was "faced with a Hobson's choice: either provide testimony that might incriminate him in then-pending proceedings before the [Commission] and [the NYAG], or be barred by [NASD] from practicing his profession." As we have explained, however, Fawcett had no legitimate basis for refusing to provide that testimony. Instead, aware of the consequences, Fawcett refused to comply with NASD's requests in contravention of his duty to cooperate fully and promptly with those requests. 33/ In these circumstances, we concur in NASD's determination that Fawcett's misconduct demonstrates that he poses too great a risk to the self-regulatory system – and the markets and investors it protects – to be permitted to remain in the securities industry. We conclude, therefore, that the sanctions imposed by NASD to redress that risk serve the public interest and are neither excessive nor oppressive. The bar NASD imposed is also appropriate because it will serve as a deterrent to others who may be inclined to ignore NASD's information requests, thereby protecting the investing public by encouraging the timely cooperation that is essential to the prompt discovery and remediation of industry misconduct. 34/ We

---

31/ See PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (stating that Exchange Act Section 19(e)(2) authorizes "'expulsion not as a penalty but as a means of protecting investors . . . . The purpose of the order is remedial, not penal'") (quoting Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940)).

32/ Fawcett argues that he is deserving of a lesser sanction because "the information demanded by Enforcement was not reasonably related to their inquiry." This argument fails because, as discussed above, NASD's inquiries requested information that was relevant to its investigation and, in any event, Fawcett may not "second guess" NASD's need for the requested information. See supra notes 20-22 and accompanying text.

33/ Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000) (stating that, by registering with NASD, respondent "agreed to abide by its rules which are unequivocal with respect to an associated person's duty to cooperate with NASD investigations") (citing Barry C. Wilson, 52 S.E.C. 1070, 1073 (1996); Borth, 51 S.E.C. at 180).

34/ In making this determination, we are mindful that although "'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'" PAZ Sec., 494 F.3d at 1066 (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

sustain NASD's findings of violation and its order imposing on Fawcett a bar from association with any NASD member in any capacity and an assessment of hearing costs in the amount of $1,522.15.

An appropriate order will issue. 35/

By the Commission (Commissioners ATKINS, NAZARETH, and CASEY); Chairman COX not participating.

Nancy M. Morris
Secretary

35/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56770 / November 8, 2007

Admin. Proc. File No. 3-12566

In the Matter of the Application of

CHARLES C. FAWCETT, IV
c/o Thomas P. Puccio, Esq.
Law Offices of Thomas P. Puccio
230 Park Avenue, Suite 301
New York, NY 10169

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Charles C. Fawcett, IV, and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris
Secretary

Chairman Cox
Not Participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56768 / November 8, 2007

Admin. Proc. File No. 3-12529

CORRECTED

In the Matter of the Application of

MORTON BRUCE ERENSTEIN
c/o John J. Phelan, III, Esq.
2385 NW Executive Center Drive, #100
Boca Raton, FL 33431

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Violation of Conduct Rules

Failure to Cooperate

Conduct Inconsistent with Just and Equitable Principles

Registered representative of member firm of registered securities association who failed to respond to question during on-the-record interview and failed to timely respond to request for information appealed association's sanction. Held, association's findings of violations and sanctions are sustained.

APPEARANCES:

John J. Phelan, III, for Morton Bruce Erenstein.

Marc Menchel, Alan Lawhead, and Leavy Mathews III, for NASD.

Appeal filed: January 9, 2007
Last brief received: April 18, 2007

Document 13 of 24

I.

Morton Bruce Erenstein, a registered representative associated with Cullum & Burks Securities, Inc., an NASD member firm, seeks review of NASD action. 1/ NASD found that Erenstein failed to answer a question about his tax returns during an on-the-record interview ("OTR") and failed to timely respond to a written request for information in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. 2/ As a result of his failure to respond, NASD suspended Erenstein from associating with any NASD member in any capacity for one year. We base our findings on an independent review of the record.

II.

In March 2003, NASD received a customer complaint letter about Erenstein. The letter accused Erenstein of misrepresenting investments, recommending unsuitable transactions, and converting $10,000 of the customer's money for Erenstein's personal use that had been given to Erenstein for the purpose of investing. In May 2003, NASD staff sent a letter to Erenstein requesting that he provide written responses to several questions regarding the accusations in the customer letter. Erenstein's counsel provided the requested information to NASD in June 2003.

In September 2003, NASD staff sent Erenstein a letter requesting that he appear for an OTR to answer questions about the customer complaint. In October 2003, Erenstein, represented by counsel, appeared at the OTR and provided testimony. During the OTR, Erenstein answered all of NASD's questions with one exception. In response to questions about the alleged conversion of customer funds, Erenstein stated that, by mutual agreement, he had received the

---

1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was taken before that date, we continue to use the designation NASD.

2/ NASD Procedural Rule 8210 requires members and associated persons to provide information if requested by NASD as part of an investigation, complaint, examination, or proceeding. Conduct Rule 2110 requires that "a member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Violations of NASD rules such as NASD Procedural Rule 8210 constitute conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110. See, e.g., Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 686 n.1 (holding that a violation of NASD Procedural Rule 8210 constitutes conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110).

$10,000 as compensation for Erenstein's assistance in helping the customer liquidate a large number of old United States savings bonds. He claimed that he had orally disclosed this arrangement to his firm, but admitted he did not obtain written approval for this alleged outside business activity. NASD staff asked whether he had any documentation showing the amount of time he had spent and the specific work he had done to assist his customer with redeeming the bonds, specifying several sources of documents that might help verify Erenstein's assertion that he earned the money, rather than converted it. When Erenstein replied that he did not have any of these documents, the staff followed up by asking Erenstein whether he reported the $10,000 on his income tax return. Although Erenstein's counsel had not objected to the previous question, he objected to this question on grounds of relevance and Erenstein, accordingly, refused to answer. 3/

On the same date as the OTR, NASD staff sent Erenstein a written request for information pursuant to Procedural Rule 8210. Among other things, the letter requested copies of Erenstein's "complete State and Federal tax returns for calendar years 1998, 1999, and 2000."

3/ This is the exchange at the OTR:

Q: Do you have any documentation that would show the amount of time you spent on this, or any work you performed in cashing the bonds, like mailing envelopes, receipts, any sort of documentation, letters, anything that would show what you did, besides your testimony, confirming what you did for [Erenstein's customer] in terms of cashing of the bonds?
A: No.
Q: The $10,000 that you received from [Erenstein's customer] for this service, did you declare that money on your income tax returns?
Erenstein's counsel (EC): Objection. Irrelevant. He won't answer that question.
Q: I think it's relevant. Did you declare that money on your income tax return in 1998, 1999, or 2000?
EC: Don't answer the question.
Q: Are you refusing to answer the question?
A: Yes.
EC: On the grounds of relevance. Nothing to do with your case.
Q: We would advise you -- Do you have the advisory for the 8210? I want to readvise you, Mr. Erenstein, that under 8210 the Association has the right to require a member, or person subject to the Association's jurisdiction to provide information orally, in writing or electronically at a location to be specified by the Association staff. Your failure to provide information as requested by the staff could result in a recommendation for disciplinary action against you. Do you understand that?
A: Yes.
Q: It's your position you will not answer that question?
A: On advice of counsel, I will not answer it.

The request also stated that, if the $10,000 in question was reported on any other tax returns, Erenstein must provide copies of those returns to the staff. In a letter to Erenstein dated October 17, 2003, NASD staff advised Erenstein that "failure to provide the requested documents by the due date of October 31, 2003, may result in disciplinary action against [him]."

On October 31, 2003, Erenstein's counsel wrote to NASD advising it that Erenstein would not be furnishing the requested tax returns. In his letter, counsel again objected to the staff's request on the basis of relevance and argued that income tax returns are subject to a heightened standard of relevance. The letter "invite[d] [the staff] to make a showing of relevance" whereupon Erenstein would "reconsider" his position.

On November 3, 2003, an NASD staff investigator had a telephone conversation with Erenstein's counsel regarding the October 31, 2003 letter. During this conversation, the staff investigator told Erenstein's counsel that the staff "needed to see the tax return in order to make [its] determination as to whether or not this [payment] constituted a conversion of monies, which would be a felony, . . . or whether or not it was an outside activity in violation of NASD Conduct Rule 3030[; . . . [a]nd without that tax return, [the staff] couldn't make that determination." 4/ He explained that, if the 1998 tax return showed the $10,000 as declared, then the staff would not need to see the 1999 or 2000 tax returns, but that if the money was not declared in 1998, the staff would need the subsequent returns to see if any amendments had been filed. According to the

---

4/ NASD Conduct Rule 3030 provides that no associated person "shall be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member." This Conduct Rule was adopted "to address the securities industry's growing concern about preventing harm to the investing public or a firm's entanglement in legal difficulties based on an associated person's unmonitored outside business activities." Joseph Abbondante, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 222-23, petition denied, 298 Fed. Appx. 6 (2d Cir. 2006) (unpublished). In approving NASD's enactment of this rule, we "agreed with NASD's conclusion that 'it was appropriate for member firms to receive prompt notification of all outside business activities so that [concerns] could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law.'" Id. (quoting Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Outside Business Activities of Associated Persons, Exchange Act Rel. No. 26063 (Sept. 6, 1988), 41 SEC Docket 1254, 1254).

investigator, Erenstein's counsel responded "we're not producing any tax documents, period, . . . you're not entitled to them and you're not going to get them." 5/

On that same day, NASD staff sent Erenstein a letter informing him that he was "currently in violation of NASD Procedural Rule 8210 for failure to produce the requested tax returns, which may subject [him] to disciplinary action." The letter noted that "the fact that either [Erenstein] and/or [his] attorney believes that the requested tax returns are not relevant is no defense for failure to respond to a request made pursuant to NASD Procedural Rule 8210 since staff determines the relevancy of any and all documents that are requested."

On June 2, 2004, NASD staff sent Erenstein a Wells notice informing him that the staff intended to recommend that NASD issue a complaint alleging that Erenstein violated Procedural Rule 8210 and Conduct Rule 2110, by refusing to answer the question during the OTR and failing to produce the tax returns requested by NASD staff. 6/ On June 21, 2004, Erenstein submitted his response to the Wells notice, and in addition produced a copy of his 1998 federal income tax return and an amendment to the 1998 return dated October 2003 that reflected additional income of $10,000 for 1998. In his cover letter, Erenstein noted that the production was being made "under protest" and that neither his 1999 nor his 2000 tax return contained any entries relating to the $10,000 in question. Erenstein explained that the 1998 return had been amended in 2003 because the $10,000 was "initially overlooked . . . since there was, naturally, no 1099 from [Erenstein's customer]."

On August 6, 2004, NASD Department of Enforcement ("Enforcement") filed a two-cause complaint against Erenstein. The first cause alleged that Erenstein violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to the tax question during his OTR. The second cause alleged that Erenstein violated Rules 8210 and 2110 by failing to timely respond to the staff's written request for copies of Erenstein's income tax returns. Erenstein filed an answer denying that he violated the NASD rules.

A hearing was held on December 14, 2004. On May 4, 2005, before the NASD Hearing Panel issued its decision, Erenstein notified the Panel that he had filed for bankruptcy protection and advised the Hearing Panel that, pursuant to the bankruptcy code, all proceedings against Erenstein were automatically stayed. On August 24, 2005, the Bankruptcy Court issued a discharge order prohibiting any attempt to collect debts from Erenstein. On November 7, 2005,

---

5/ Erenstein challenges this version of the November 3 conversation on the basis that the investigator could not recall the conversation verbatim. Erenstein's counsel, who was informed by the Hearing Panel that he could testify as to his own recollection of the conversation if he so chose, did not do so.

6/ There is no evidence in the record of any communication between Erenstein (or his attorney) and NASD from November 3, 2003 through June 2, 2004, nor is there an explanation in the record for this extended period of non-communication.

Enforcement filed a motion informing the Hearing Panel of the discharge of Erenstein's bankruptcy and requesting that the Hearing Panel not impose monetary sanctions against Erenstein.

On December 8, 2005, the Hearing Panel issued its decision, finding that Erenstein had violated Procedural Rule 8210 and Conduct Rule 2110, and barring him from associating with an NASD member in any capacity. In its decision, the Hearing Panel erroneously stated that Enforcement "argues that a bar is the appropriate sanction in this case." In fact, Enforcement had consistently sought a one-year suspension. Upon being advised of this error by Erenstein's counsel, the Hearing Panel issued a "Corrected Hearing Panel Decision" on December 15, 2005. The corrected decision stated that "[a]fter Respondent's counsel brought this error to the Hearing Officer's attention, she consulted with the other Panelists in the proceeding[, and] [t]he Panel confirmed that a bar was the appropriate sanction in this proceeding, regardless of Enforcement's recommendation."

Erenstein appealed the decision to NASD's National Adjudicatory Council ("NAC"), which issued its decision on December 18, 2006. The NAC affirmed the Hearing Panel's finding that Erenstein violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to a question during an OTR and by failing to timely respond to a written request for information. For purposes of assessing the sanctions, the NAC aggregated the two counts of the complaint, reasoning that they related to the failure to provide the same information, i.e., whether Erenstein had reported the $10,000 as income for tax purposes. 7/ The NAC concluded that, because Erenstein eventually produced the requested tax return after receiving the Wells notice, and because Erenstein's initial refusal was based on his attorney's "apparently good-faith objection," it would reduce the Hearing Panel's sanction to a one-year suspension.

III.

Pursuant to Section 19(e) of the Exchange Act, 8/ we will sustain NASD's decision if the record shows that Erenstein engaged in conduct that NASD found to have violated its rules and that NASD applied its rules in a manner consistent with the purposes of the Act. The essential facts establishing the violation of NASD's Rule 8210 are not disputed: NASD sought Erenstein's on-the-record testimony and production of documents, including tax returns, pursuant to its authority under Rule 8210. Erenstein refused to answer one of the questions at the OTR, and to produce his tax return until more than seven months after it was initially requested.

7/ The NASD Sanction Guidelines authorize the aggregation of violations for purposes of determining sanctions if, among other things, "the violations resulted from a single systemic problem or cause that has been corrected." NASD Sanction Guidelines 6 (General Principles Applicable To All Sanction Determinations, No. 4) (2006).

8/ 15 U.S.C. § 78s(e).

NASD Rule 8210(a) grants NASD the authority to "require a member, person associated with a member, or person subject to [NASD's] jurisdiction to provide information . . . if requested" and to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in [an NASD] investigation, complaint, examination, or proceeding." NASD has consistently interpreted the term "books, records, and accounts" to include records such as tax returns. 9/ Whether a requested record is "with respect to any matter involved in" an NASD investigation, is a determination made by the NASD staff. The rule does not require that NASD explain its reasons for making the information request or justify the relevance of any particular request. 10/ We note that the Hearing Panel below responded to Erenstein's contention that NASD staff refused to provide Erenstein any guidance on the issue of relevance by saying that staff should be forthright and cooperative in its interactions with counsel, and we endorse that view. However, it is well established that a member or an associated person may not "second guess[]" an NASD information request 11/ or "set conditions on their compliance." 12/ A belief that NASD does not need the requested information "provides no excuse for a failure to provide it." 13/ As we have held, a member or an associated person has "an obligation to respond to an NASD request even if his response [is] a statement that he believed he had already provided the NASD with the information it had requested." 14/

While Rule 8210 does not require that NASD establish the relevancy of its request, we agree with NASD that Erenstein's treatment on his tax return of the $10,000 he received from his customer is relevant. As a result of its inquiries, NASD had a reasonable basis to investigate further whether Erenstein had, as his customer claimed, not invested the customer's money for her benefit but rather taken it as his own or had engaged in outside business activities. Erenstein

---

9/ See, e.g., Dennis Sturm, Complaint No. CAF000033 (N.A.S.D.R. Mar. 21, 2002), 2002 WL 461468, at *4 (holding that Rule 8210 request for documents encompasses tax returns and, as NASD is not a state actor, associated person's constitutional right to privacy is not implicated by NASD's request); Roger Harry Chlowitz, Complaint No. C02980025 (N.A.S.D.R. Nov. 4, 1999), 1999 WL 1489027, at *3 (finding that associated person's tax returns were within scope of Rule 8210 and rejecting his assertion of right to privacy as reason not to comply).

10/ Rooney A. Sahai, Exchange Act. Rel. No. 55046 (Jan. 5, 2007), 89 SEC Docket 2402, 2406.

11/ Dennis A. Pearson, Jr., Exchange Act Rel. No. 54913 (Dec. 11, 2006), 89 SEC Docket 1627, 1635 (citation omitted); Michael David Borth, 51 S.E.C. 178, 181 (1992).

12/ Sahai, 89 SEC Docket at 2406.

13/ Pearson, 89 SEC Docket at 1635; Borth, 51 S.E.C. at 181.

14/ Ashton Noshir Gowadia, 53 S.E.C. 786, 790 (1998).

had stated that he had no other documentary evidence that could support his contention that he earned the money, rather than converted it. If Erenstein omitted the $10,000 amount from his income declaration on his tax returns, the omission could have supported the inference that the money had been obtained improperly, such as by converting his customer's funds. On the other hand, if this amount had been reported, it would be evidence that the money was earned income from an outside business activity.

Erenstein argues that his conduct did not violate Rule 8210 because income tax returns are private communications between the Internal Revenue Service and the taxpayer not subject to disclosure under Rule 8210. Alternatively, Erenstein contends that NASD effectively denied him his right to counsel because when his counsel objected to NASD's request for his tax return, the "objection [was] treated [by NASD] as a violation of the obligation to cooperate and [Erenstein was] told repeatedly that reliance on the advice of his counsel is no defense to the charge," thus effectively making the right "illusory and non-existent." He also argues that he should be deemed to have satisfied NASD's request in a timely manner when he finally turned over the returns "because of the good faith objection [his attorney made to the request] and attempts to discuss and negotiate." 15/

In support of his contention that his tax returns were not subject to disclosure under Rule 8210, Erenstein cites our recent decision in Frank P. Quattrone 16/ for the proposition that "there are limits to the NASD's ability to compel information from members and registered persons." Erenstein also points to our statement in Jay Alan Ochanpaugh that "the scope of Rule 8210, while necessarily broad, does have limits." 17/ Erenstein extrapolates from Quattrone and Ochanpaugh that NASD's authority under Rule 8210 is circumscribed by "the uniform position of all courts . . . that tax returns are confidential communications between the taxpayer and the taxing authority," and accordingly their discoverability is permissible only if "they are clearly relevant to the matter under review and . . . if there is no other available source of the information requested." 18/ He argues that neither test is met here, noting that "[t]he NASD Staff are not tax

---

15/ Erenstein also raises a number of non-substantive objections, such as NASD's misstatement in its brief of Erenstein's name (calling him "Bruce Erenstein," rather than "Morton Bruce Erenstein") and its incorrect statement of Erenstein's counsel as associated with a particular law firm. These are harmless errors.

16/ Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155.

17/ Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2658-59.

18/ Erenstein cites Moore's Federal Practice, which notes that "[p]ublic policy disfavors disclosure of tax returns," that the policy articulated by courts in civil litigation "is founded in provisions of the Internal Revenue Code declaring that federal tax returns are confidential communications between the taxpayer and the government," and that,

(continued...)

auditors" and that the "extortionate effect" of such a request is to "terrorize one's adversary, perhaps into dropping a meritorious claim or defense out of fear of having some tax issue become the subject of IRS attention."

Neither Quattrone nor Ochanpaugh is applicable here. The issue in Quattrone was a narrow one -- whether NASD's grant of summary disposition on the issue of Quattrone's liability was appropriate and in accordance with NASD's rules. We concluded that summary disposition was not proper because Quattrone had alleged sufficient specific facts to raise a genuine issue of material fact on the question of whether NASD had acted in accordance with its rules in making its information request to Quattrone. We declined to rule on Quattrone's claim that he was not required to respond to NASD's information request because of his constitutional right against self-incrimination. In Ochanpaugh, we concluded that NASD had exceeded its authority under Rule 8210 because NASD had failed to show that the documents it had requested were "books, records, and accounts of" the associated person, as required by the rule. Here, in contrast, there is no question that the tax returns requested were Erenstein's or that the information was in his possession.

Erenstein's reliance on the policy enunciated judicially with respect to the discovery of tax returns in civil litigation misperceives the nature of the relationship between NASD and its members, and the aegis under which Rule 8210 operates. As we noted in Ochanpaugh, "NASD's authority to request documents pursuant to Rule 8210 stems from the contractual relationship entered into voluntarily by NASD members and associated persons with NASD." Erenstein's contractual relationship with NASD, entered into when he became an associated person with an NASD member, included his agreement to abide by all its rules. Rule 8210, one of those rules, expressly permits NASD to inspect and copy "books, records and accounts of" associated persons, and associated persons are on notice that tax returns fall within this category. 19/

Moreover, nothing in NASD's request for Erenstein's tax returns here was inconsistent with the judicial policy cited by Erenstein. Courts have made clear that, consistent with a federal policy against indiscriminate disclosure of tax returns, production of tax returns may be compelled either where the taxpayer has waived his confidentiality by making an issue of his income or where they are relevant and the information contained therein is not readily available

---

18/ (...continued)
therefore, the policy "is not a function of the definition of 'relevance' for discovery purposes." ¶ 26-41[8][b] (3d ed. 2007).

19/ See supra n.9, and accompanying text. In Ochanpaugh, we noted that the applicant's personal financial records, such as income tax returns, would have been a more appropriate source of the information sought by NASD. 88 SEC Docket at 2657 & 2662.

from another source. 20/ Erenstein's insistence that discovery of tax returns is impermissible unless they are "clearly relevant" and "if there is no other available source of the information requested" is not supported by the authorities he cites. 21/

As discussed above, the record shows that Erenstein made his income an issue by asserting as a defense to his customer's claim of conversion that the money he received from her was his legitimate income. Accordingly, the tax returns were relevant to assisting NASD in determining whether the money received by Erenstein constituted a conversion of the customer's funds, or whether it was income received by Erenstein. Given Erenstein's statement during the OTR that he had no other documentary evidence supporting his claim that he earned the money

---

20/ United States v. Certain Real Prop. Known as and Located at 6469 Polo Pointe Way, Delray Beach, Fla., 444 F. Supp. 2d 1258, 1264-65 (S.D. Fla. 2006) (holding that tax returns are discoverable as they were found to be relevant to claimant's claim of lack of involvement with alleged fraudulent activities, the information contained therein was not otherwise readily available, and the claimant had placed his income at issue by testifying in the manner in which he did); United States v. Bonanno Organized Crime Family of La Costa Nostra, 119 F.R.D. 625, 627 (E.D.N.Y. 1988); SEC v. Cymaticolor Corp., 106 F.R.D. 545, 547 (S.D.N.Y. 1985). See also Johnson v. Kraft Foods N. Am., Inc., 236 F.R.D. 535, 539 (D. Kan. 2006) (holding that once party seeking discovery of tax return establishes its relevancy, the burden shifts to the party opposing production to show that other sources exist from which the information is readily obtainable).

21/ See Bonanno, 119 F.R.D. at 627-28 (permitting discovery of tax returns where court found "that the returns are relevant to the subject matter of the action . . . [and] that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable"); Premium Servs. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) (holding that tax returns do not enjoy absolute privilege from discovery, but public policy disfavors unnecessary public disclosure which would discourage taxpayers from filing accurate returns); Yancy v. Hooten, 180 F.R.D. 203, 215 (D. Conn. 1998) (holding that tax returns may be protected from discovery, even if they contain some relevant financial information, if the party seeking protection demonstrates good cause to uphold its expectation of confidentiality, as well as the availability of reliable financial information from other sources); Payne v. Howard, 75 F.R.D. 465, 470 (D.D.C. 1977) (holding that "access to defendant's tax returns . . . [was] not essential to discovering relevant information that [was] not obtainable by other means," but noting that they are discoverable where taxpayer waives his confidentiality by making an issue of his income).

by performing services for the customer, the information sought by NASD was not readily available from another source. 22/

With respect to Erenstein's alternative arguments concerning the impact of his counsel's objections on Erenstein's liability, although NASD procedural rules "permit the participation of counsel, 'there is no constitutional or statutory right to counsel in NASD disciplinary proceedings.'" 23/ Moreover, "reliance on counsel is immaterial to an associated person's obligation to supply requested information to the NASD." 24/ As discussed below, however, NASD appropriately considered counsel's good faith interposition of his objections in determining the appropriate sanction. We therefore reject Erenstein's assertions that NASD's requests for information and testimony denied him his right to counsel and that his counsel's objection to the request excused his initial failure to comply with the requests.

Accordingly, we find that Erenstein violated Rules 8210 and 2110 by failing to provide a timely response to requests concerning his tax returns.

IV.

A. Erenstein argues that the Hearing Panel violated Procedural Rule 9268(a) by failing to issue its decision within sixty days of Erenstein's last post-hearing filing on January 5, 2005. He charges that, as a result of this failure, it is "likely that . . . no Panelist looked at this matter from the hearing on December 14, 2004 until very near the December 8, 2005 decision date." Erenstein's reading of Rule 9268(a) is incorrect. Rule 9268(a) directs that the Hearing Officer "prepare" a written decision "[w]ithin 60 days after the final date allowed for filing proposed findings of fact, conclusions of law, and post-hearing briefs, or by a date established at the discretion of the Chief Hearing Officer." The rule does not require that the Hearing Panel issue its decision within sixty days. As we have observed, Rule 9268 "addresses the timing of the Hearing Officer's preparation of a decision (which must then be distributed to other members

---

22/ We also note that, although Erenstein challenges the testimony of the NASD investigator that the relevance of the tax return was explained to his counsel in a November 3, 2003 telephone call, our review of the transcript of the OTR leading up to the request for the tax returns shows that the relevance of the request was patent from the context of the questions.

23/ Sundra Escott-Russell, 54 S.E.C. 867, 874 n.18 (quoting Falcon Trading Group, Ltd., 52 S.E.C. 554, 559 (1995), aff'd, 102 F.3d 579 (D.C. Cir. 1996)).

24/ Escott-Russell, 54 S.E.C. at 867, 872-73 (quoting Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994)).

of the Hearing Panel), and not the issuance of the decision." 25/ There is no evidence in the record that the Hearing Officer failed to prepare the decision within the requisite time. There is also no evidence supporting Erenstein's surmise that the Hearing Panel did look at the decision until near the December 8, 2005 decision date.

B. Erenstein claims that he was prejudiced by the lengthy period that it took the Hearing Panel to decide this proceeding, and that this delay warrants dismissal of the case. In support, he argues that the delay affected the ability of the Panel to evaluate the credibility of witnesses. However, he does not challenge any credibility determinations made by the Panel affecting the NAC's analysis of the case.

Erenstein also asserts that the delay resulted in numerous erroneous factual findings in the Hearing Panel's decision. He argues that these findings in turn led the Hearing Panel, and then the NAC, to incorrectly find that he had violated Procedural Rule 8210 and to impose an excessive sanction. He points out, for example, that the Hearing Panel decision incorrectly stated that he had failed to provide the complete tax returns, and that NASD staff had been forced to bring charges and conduct a hearing when, in fact, he had provided his tax return prior to the filing of the complaint against him. Erenstein asserts that these factual errors "led the Panel to perceive Applicant wrongly as a 'bad guy' and to deal with him far more severely than the actual charges and evidence justify."

Erenstein also challenges numerous other aspects of the Hearing Panel's decision. Erenstein notes that the Hearing Panel erroneously stated that Erenstein had not objected to the admission of Enforcement's exhibits when, in fact, the record shows that he had objected to the admission of several exhibits. Next, he points to the statement in footnote 26 of the Hearing Panel decision that "there was an insufficient record to establish" Erenstein's contention that "Enforcement refused to respond to requests for clarification by [Erenstein's] counsel." Erenstein disputes the Hearing Panel decision's statements that he had failed "to respond to a written request for information until notified that disciplinary charges were going to be filed," and that "NASD should not have to initiate disciplinary proceedings to obtain a response to a request for information under Rule 8210." He asserts, first of all, that his October 31, 2003 letter to Enforcement was a "response," and that the Hearing Panel "demonstrate[d] a stunning lack of understanding" by characterizing the Wells notice as the commencement of the disciplinary proceeding. He further argues that the decision ignored the long delay between Enforcement's November 3, 2003 letter to Erenstein and its Wells notice letter of June 2004.

25/ Daniel Richard Howard, 55 S.E.C. 1096, 1103-04 (2002), aff'd, 77 Fed. Appx. 2 (1st Cir. 2003) (unpublished). We also note that the Hearing Panel was required to stay its proceedings for several months because of Erenstein's bankruptcy filing.

However, as we recently emphasized, "it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review." 26/ The NAC conducted a de novo review of the record and made its own independent findings from the record. Moreover, in its opinion, the NAC acknowledged and considered the errors identified by Erenstein. 27/ Regarding Erenstein's assertion that the Hearing Panel's errors may have prejudiced the NAC against him, Erenstein has not demonstrated that he was prejudiced by these errors. In fact, the NAC specifically determined to reduce the sanction significantly based in part on its recognition that the Hearing Panel erred in imposing a bar for an untimely response to a Rule 8210 request. In any event, the review of the Hearing Panel decision by the NAC and our review mitigate any harm that may have resulted. 28/

V.

Our review of NASD's sanction is governed by Section 19(e)(2) of the Exchange Act. 29/ Section 19(e)(2) provides that the Commission will sustain NASD's sanction unless it finds, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition. 30/

26/ Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17.

27/ In its opinion, the NAC stated:

> We owe "'no special deference' to hearing panel 'inferences and conclusions that do not hinge upon findings of credibility,'" and none of the purported errors Erenstein raises relate to credibility determinations by the Hearing Panel [citation omitted]. . . . While we find that Erenstein has identified language in the Hearing Panel's decision that is either erroneous or ambiguous, this is precisely why NASD's procedural rules provide for de novo appellate review.

28/ See Davrey Fin. Servs., Inc., Exchange Act Rel. No. 51780 (June 2, 2005), 85 SEC Docket 2057, 2067 n.26 (stating that even if NASD Hearing Panel had acted prejudicially against respondent, NAC's and Commission's subsequent reviews "attenuate any such prejudice"); Frank J. Custable, 51 S.E.C. 855, 862 (1993) (stating that de novo review by NASD appellate panel and Commission "dissipates any harm" that may have resulted from staff irregularities).

29/ 15 U.S.C. § 78s(e)(2).

30/ Erenstein does not claim, and we do not find, that NASD's action imposed an unnecessary or inappropriate burden on competition.

The appropriate sanctions depend on the facts and circumstances of each case. 31/ We sustain the sanction imposed by NASD here because we conclude that, on the facts of this case, the sanction appropriately remedies the risk of harm to the markets and investors posed by Erenstein and will help deter him and others from engaging in the same serious misconduct.

Erenstein claims that the sanction, even as reduced by the NAC, is excessive. 32/ He argues that, given that "all requests were met and . . . any issue of untimeliness is due to Applicant's counsel making good faith objections [to NASD's request for his tax return,] . . . the sanction here is, on its face, extreme, excessive and unreasonable." He argues that "[t]his is NOT a worst case" and points out that his objections "were made in a polite and respectful fashion . . . supported by legal authority."

We are not persuaded. Because of limited Commission resources, Congress has given NASD and other securities industry self-regulatory organizations significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations. Rule 8210 is an essential tool for carrying out that responsibility. As we have repeatedly emphasized, it is critically important to the self-regulatory system that members and their associated persons cooperate with NASD investigations by complying with information requests. 33/ In this connection, we have observed that, "because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate." 34/

Under NASD's Sanction Guidelines, if a member or associated person fails to "respond in any manner" to a request pursuant to Rule 8210, the maximum recommended sanction is a bar or

---

31/ Michael F. Flannigan, 56 S.E.C. 8, 21 (2003); Donald R. Gates, 54 S.E.C. 292, 300 (1999). Accordingly, we reject Erenstein's claim that his sanction is disparate from those in other cases.

32/ As argued by Erenstein, "[f]or this Applicant, a 76 year old man, it is almost the functional equivalent of a bar."

33/ See, e.g., Elliott M. Hershberg, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 498 aff'd, No. 06-1086 (2d Cir. 2006); PAZ Sec., Inc., Exchange Act Rel. No. 52693 (Oct. 28, 2005), 86 SEC Docket 1880, 1889, rev'd on other grounds, 494 F.3d 1059 (D.C. Cir. 2007); Robert J. Langley, Exchange Act Rel. No. 50917 (Dec. 22, 2004), 84 SEC Docket 1959, 1963 n.15; Robert Fitzpatrick, 55 S.E.C. 419, 423-24 (2001); Borth, 51 S.E.C. at 180; see also Richard J. Rouse, 51 S.E.C. 581, 584 (1993) (finding rule requiring NASD members and associates to comply with its information requests to be "a key element in the NASD's effort to police its members").

34/ Sahai, 89 SEC Docket at 2406 (citation omitted); Pearson, 89 SEC Docket at 1635, 1639-40.

a $50,000 fine. 35/ If the violation is one in which "mitigation exists, or the person did not respond in a timely manner" to a request pursuant to Rule 8210, the maximum recommended sanction is a two-year suspension and a $25,000 fine. 36/ In determining the appropriate sanction, the guideline directs that consideration be given to "[w]hether the requested information has been provided and, if so, . . . the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response." This guidance reflects the judgment that, while a complete failure to cooperate with NASD requests for information or testimony is so fundamentally incompatible with NASD's self-regulatory function that the risk to the markets and investors posed by such misconduct may only properly be remedied by a permanent bar, lesser sanctions may be a sufficient remedy when an incomplete or dilatory response to requests for information or mitigating circumstances exist.

We believe that, on the facts of this case, the sanction imposed by NASD strikes the proper balance between the seriousness of the conduct at issue and a sanction that will provide an appropriate remedy on the one hand, and the mitigating circumstances on the other. Although Erenstein did not fail to "respond in any manner" to NASD's request, his response was untimely. NASD was forced by Erenstein's initial refusal to make numerous requests for the information and then to send Erenstein a Wells notice. Erenstein's failure to respond in a timely manner frustrated NASD's ability to investigate the claim made by Erenstein's customer that Erenstein had converted funds for his personal use or had engaged in outside business activities. Erenstein was warned repeatedly that his failure to respond could have regulatory consequences, and that his attorney's belief that he should not be required to respond was not a defense for his conduct, and yet he ignored these warnings for a protracted period of time. This conduct indicates a risk to the regulatory system -- and the markets and investors it protects -- requiring a sanction that will impress upon Erenstein the seriousness of his conduct and deter him from similar future misconduct.

The NAC specifically considered in mitigation of the violation that Erenstein eventually produced the required information and that Erenstein's attorney's objections to NASD's requests

---

35/ NASD Sanction Guidelines 39 (2001 ed.). The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. NASD Sanction Guidelines 1 (2006 ed.). Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. Id. The Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD Adjudicators—which the Guidelines define as Hearing Panels and the National Adjudicatory Council. Id. Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

36/ Id.

were made in good faith. Moreover, NASD found it appropriate to aggregate the two causes of action for purposes of determining sanctions. Accordingly, the NAC imposed a sanction significantly less than the permanent bar recommended by the Hearing Panel and significantly less than the maximum recommended by the Sanction Guidelines for a violation in which "mitigation exists, or the person did not respond in a timely manner" to a request pursuant to Rule 8210. 37/

In these circumstances, we concur in NASD's determination that a one-year suspension will serve to deter Erenstein from similar future misconduct and accordingly will serve the public interest without being excessive or oppressive. The sanction is also appropriate because it will serve as a deterrent to others who may be inclined to ignore NASD's information requests, thereby protecting the investing public by encouraging the timely cooperation that is essential to the prompt discovery and remediation of industry misconduct. 38/ We therefore sustain NASD's findings of violation and its order suspending Erenstein from associating with any NASD member in any capacity for one year.

An appropriate order will issue. 39/

By the Commission (Commissioners ATKINS, NAZARETH and CASEY); Chairman COX not participating.

Nancy M. Morris
Secretary

37/ We reject any suggestion that Erenstein's age should mitigate the sanctions still further; Erenstein has not indicated that he no longer intends to participate in the industry due to his age, and the risk to the investing public posed by an individual who thwarts the regulatory process may be the same regardless of that individual's age.

38/ In making this determination, we are mindful that although "'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'" PAZ Sec., Inc., 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

39/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56768 / November 8, 2007

Admin. Proc. File No. 3-12529

In the Matter of the Application of

MORTON BRUCE ERENSTEIN
c/o John J. Phelan, III, Esq.
2385 NW Executive Center Drive, #100
Boca Raton, FL 33431

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NASD

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Morton Bruce Erenstein be, and it hereby is, sustained.

By the Commission.

Nancy M. Morris
Secretary

Chairman Cox and Commissioner Nazareth Not Participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56769 / November 8, 2007

Admin. Proc. File No. 3-12564

In the Matter of the Application of

NAVISTAR INTERNATIONAL CORPORATION

c/o Charles W. Mulaney Jr., Esq.
Skadden, Arps, Slate, Meágher & Flom LLP
333 West Wacker Drive
Chicago, Illinois 60606

For Review of Action Taken by

NEW YORK STOCK EXCHANGE LLC

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- DELISTING FROM THE NEW YORK STOCK EXCHANGE

Failure to Meet Continued Listing Requirements

National securities exchange removed securities from exchange listings because the securities issuer was not in compliance with the timely filing requirement and failed to return to compliance within the twelve-month cure period. Held, the application for review is dismissed.

APPEARANCES:

Steven K. Covey, of Navistar International Corporation, for Navistar International Corporation, and Charles W. Mulaney Jr., Colleen P. Mahoney, Laura D. Cullison, and Alison Rhoten, of Skadden, Arps, Slate, Meagher & Flom LLP, for Navistar International Corporation.

Douglas W. Henkin and Kylie Davidson, of Milbank, Tweed, Hadley & McCloy LLP, for New York Stock Exchange LLC and NYSE Regulation, Inc.

Appeal filed: February 8, 2007
Last brief received: May 16, 2007

Document 14 of 24

I.

Navistar International Corporation ("Navistar" or the "Company"), an issuer formerly listed on the New York Stock Exchange LLC (the "NYSE") and the NYSE Arca, Inc. (collectively, the "Exchange"), appeals the decision of the NYSE Regulation Board of Directors Committee for Review (the "Review Committee") to remove the entire class of common stock and the entire class of convertible junior preference stock, series D (collectively, "Listed Securities"), of Navistar from listing and registration on the Exchange. The Review Committee determined that Navistar's Listed Securities were no longer eligible for listing on the Exchange because the Company failed to file its annual report for fiscal year 2005 with the Commission and was unable to return to compliance within the twelve-month cure period. We base our findings on an independent review of the record.

II.

Navistar, formerly known as International Harvester Company, is a holding company and defense contractor that produces military vehicles, commercial trucks, diesel engines, and school buses. Section 13(a) of the Securities Exchange Act of 1934 requires issuers to file periodic and other reports with the Commission containing such information as the Commission's rules prescribe. 1/ Pursuant to Exchange Act Section 13(a), the Commission has promulgated Rules 13a-1 and 13a-13, which require issuers to file annual and quarterly reports with the Commission. 2/

NYSE Listed Company Manual Rule 802.01E ("Rule 802.01E") requires Exchange-listed companies to file timely their annual report filings with the Commission as a condition of continued listing on the Exchange. When a listed company becomes delinquent in filing its annual report, Rule 802.01E provides for an automatic six-month grace period from the filing due date during which the late-filing company's securities are permitted to continue trading on the Exchange while NYSE staff monitors the company and the status of the filing until the annual report is filed. 3/ The Exchange adds the company to the late filer list on the NYSE website and appends the initials "LF," indicating a late filer, to the company's profile page and

---

1/ 15 U.S.C. § 78m.

2/ 17 C.F.R. §§ 240.13a-1 and 13a-13.

3/ Rule 802.01E ¶ 4. Other factors "which may lead to a company's delisting" include the "failure of a company to make timely, adequate, and accurate disclosures of information to its shareholders and the investing public." NYSE Listed Company Manual Rule 802.01D.

makes the information available on the consolidated tape. 4/ If the company fails to file its annual report within the six-month grace period, the NYSE, in its sole discretion, may permit the company's securities to continue trading on the Exchange for up to an additional six-month period. 5/ Absent extraordinary circumstances, if the company fails to file its annual report by the end of the second six-month extension, the Exchange begins suspension and delisting procedures.

Navistar failed to file its Form 10-K annual report for the fiscal year ending October 31, 2005 (the "2005 Form 10-K" or "2005 annual report") with the Commission by the January 17, 2006 filing deadline. In a press release issued on that date announcing its failure to file, the Company stated that it was "still in discussions with its outside auditors about a number of open items."

When NYSE staff contacted Navistar in February 2006 to discuss the status of the Company's 2005 Form 10-K, Navistar informed the staff that the Company expected to complete its 2005 annual report in late May or early June 2006. However, Navistar soon realized it would not be able to file within the first six-month grace period. In April 2006, Navistar notified NYSE staff that it was replacing its independent auditor, and in June 2006, Navistar issued a press release announcing that the Company planned to file the 2005 Form 10-K by mid-January 2007.

On July 6, 2006, Navistar submitted a formal request and supporting materials to NYSE staff seeking an additional six-month trading period, through February 1, 2007, to allow the Company to complete and file the 2005 Form 10-K. NYSE staff granted this request by letter dated July 21, 2006, "subject to reassessment on an ongoing basis." The letter cautioned that if Navistar did "not complete its October 31, 2005 Form 10-K filing with the [Commission] by February 1, 2007, the NYSE [would] move forward with the initiation of suspension and delisting procedures." The NYSE letter also noted that, in addition to the delay in filing the 2005 Form 10-K, Navistar was delinquent in filing its Forms 10-Q for the quarters ending January 31, 2006 and April 30, 2006.

At some point, it became evident that Navistar might not be able to make the February 1, 2007 deadline for its filing. During Navistar's ongoing discussions with NYSE staff, the possible availability of an exception to the Exchange's delisting requirements, the so-called "national interest" exception, arose. That exception is set forth in Rule 802.01E ¶ 7:

> In certain unique circumstances, a listed company that is delayed in filing its annual report beyond the twelve-month period described above . . . because its

---

4/ See, e.g., Order Granting Approval to Proposed Rule Change Relating to Section 802.01E of the Listed Company Manual, Securities Exchange Act Rel. No. 53152 (Jan. 19, 2006), 87 SEC Docket 516.

5/ Rule 802.01E ¶ 4.

financial statements have not yet been completed may have a position in the market (relating to both the nature of its business and its very large publicly-held market capitalization) such that its delisting from the Exchange would be significantly contrary to the national interest and the interests of public investors.

If these threshold requirements are met, and the Exchange believes that the company remains suitable for listing based on additional criteria, 6/ then the Exchange, "in its sole discretion, may determine to allow the listed company to continue listing beyond" the maximum twelve-month cure period. This exception expires on December 31, 2007. 7/ The only company to be granted this exception to date is the Federal National Mortgage Association ("Fannie Mae").

During an October 12, 2006 meeting between NYSE staff and Navistar, NYSE staff informed Navistar that the NYSE had been having discussions with the Commission regarding the "national interest" exception, and that the Commission "was uncomfortable in having open-ended judgment applied to the Exchange" and had discussed "potentially removing that exception" from NYSE rules. NYSE staff informed Navistar that, accordingly, "none of our late filers at [that] point in time would be considered for the ['national interest'] exception." 8/

On October 20, 2006, NYSE staff again spoke to Navistar regarding the submission of a revised timeline for completion of the delinquent filings and agreed to meet on November 8, 2006. However, on November 7, 2006, Navistar cancelled that meeting, informing NYSE staff that the Company had decided instead to seek Commission support for Navistar's continued listing on the NYSE market.

Navistar met with staff of the Commission's Division of Market Regulation ("Market Regulation") on December 5, 2006 to make a formal presentation outlining the Company's

---

6/ These criteria include continued compliance with applicable quantitative and qualitative listing standards, the continued ability to meet current debt obligations and adequately finance operations, reported progress on completing financial statements, public transparency regarding status, and the reasonable expectation that the company will be able to resume timely filings in the future. The parties do not dispute that Navistar satisfies these additional criteria.

7/ See Order Approving Proposed Rule Change Amending Annual Report Timely Filing Requirements, Exchange Act Rel. No. 55198 (Jan. 30, 2007), 89 SEC Docket 3029. If a company listed under this exception fails to file its periodic annual report by December 31, 2007, the Exchange will commence suspension and delisting proceedings against the company. Rule 802.01E ¶ 8.

8/ On December 14, 2006, the New York Stock Exchange, Inc. filed a notice that it was amending Rule 802.01E to provide for the expiration of the "national interest" exception. See supra note 7.

position that Navistar was eligible for the "national interest" exception. According to Navistar, following the Company's presentation, Market Regulation staff stated at the meeting that "the matter was one for the NYSE to determine in the first instance." The next day, Navistar contacted NYSE staff to brief the NYSE on the Company's meeting with Market Regulation staff and provided NYSE staff with a copy of the presentation that the Company had made to Market Regulation staff. NYSE staff learned upon reviewing the presentation materials that Navistar had attempted to persuade the Commission that the Company was eligible for the "national interest" exception. 9/

In a December 14, 2006 telephone call, Navistar informed NYSE staff that the Company would be unable to file its 2005 Form 10-K by February 1, 2007. According to the NYSE, NYSE staff informed Navistar during that call that the Company did not meet the threshold criteria to be considered for the "national interest" exception, although Navistar disputes that this disclosure was made during this or any other communication with NYSE staff. NYSE staff also told Navistar that the NYSE would proceed with suspension and delisting procedures.

NYSE staff confirmed that it would commence these procedures in a letter to Navistar dated December 15, 2006, noting that the Company had "announced that completion of its 2005 financial statements [would] extend beyond February 1, 2007," and that this was "beyond the maximum 12-month period otherwise available to complete the filing as permitted under the NYSE's rules." Under NYSE Listed Company Manual Rule 804, if an issuer wishes to challenge the NYSE staff's delisting determination, the issuer may request a hearing before a committee of the Exchange's board of directors. Navistar promptly requested Exchange review of the NYSE staff's decision on the basis that Navistar was eligible for the "national interest" exception and that NYSE staff had failed to consider the availability of that exception in determining to delist the Listed Securities. During the pendency of the Exchange review process, the NYSE agreed to permit the Company's stock to continue to trade on the Exchange. 10/

9/ According to the NYSE, although Navistar had asked NYSE staff about the "national interest" exception on an informal basis, the Company had not asserted that it qualified for that exception and had not submitted directly any evidence supporting that position to NYSE staff. Navistar asserts, however, that NYSE staff "continued to maintain that they could not consider an additional extension given the Commission's negative attitude towards such additional extensions."

10/ On December 15, 2006, Standard & Poor's announced that it was removing Navistar's stock from the Standard & Poor's 500 Composite Stock Price Index ("S&P 500") effective "after the close of trading" on December 19, 2006. According to a declaration submitted to the Review Committee by NYSE Regulation, Inc. senior management, the chairman of the S&P Index Committee informed NYSE Regulation, Inc. senior management in a December 20, 2006 telephone conversation that Standard & Poor's

(continued...)

On January 17, 2007, Navistar filed a Form 12b-25 Notification of Late Filing with the Commission stating that the Company would be unable to file its Form 10-K for the fiscal year ending October 31, 2006 either by the due date of January 16, 2007 or within the fifteen-day extension provided by Exchange Act Rule 12b-25(b). 11/ On January 30, 2007, the Review Committee held its review hearing. Prior to the hearing, the parties submitted briefs, witness statements, and other documentation in support of their respective positions. At the hearing, the Review Committee heard oral argument and extensive witness testimony concerning whether Navistar was eligible for the "national interest" exception.

Citing its $2.5 billion total market capitalization and its role as a defense contractor, Navistar argued at the hearing that, in terms of size and the nature of its business, it qualified for the "national interest" exception. Navistar's chief executive officer testified, however, that the delisting would not have any impact on Navistar's government contracts. While expressing concern that delisting could jeopardize the Company's "trade credit . . . if there's any confidence lost in the [C]ompany," he admitted that Navistar was "a liquid company [that could] withstand" the anticipated impact of the Company's suppliers collecting on the trade debt owed them by Navistar. In addition, he conceded that "[h]ow much of a threat" delisting would be to the Company "is always debatable." He conceded further that Navistar was "a fundamentally sound company with good cash balances, et cetera." Navistar's chief financial officer ("CFO") admitted to the Review Committee that the delisting would not trigger any defaults in the Company's outstanding debt and that Navistar would not have to raise additional capital in the market. He related how Navistar's most recent refinancing syndication was "oversubscribed, [by] 2.7 billion" when the Company sought to refinance $1.5 billion.

Navistar also argued that the "national interest" exception could not be limited solely to Fannie Mae. Navistar expressed concern that "what we really have here is what has been effectually known as the Fannie Mae rule created for Fannie Mae and applied to Fannie Mae and no one else."

The NYSE staff argued that, although Navistar was a large company, "it was not amongst even the largest, not even the top thousand, at the time the decision that [NYSE] staff came to was made." 12/ Richard Ketchum, chief executive officer of NYSE Regulation, Inc., testified

---

10/ (...continued)
believed that Navistar's market capitalization was not representative of the "large cap" market.

11/ 17 C.F.R. § 240.12b-25(b).

12/ The NYSE staff cited figures showing that, during the relevant period, Navistar's market capitalization would have placed it only in the top forty percent of Exchange-listed

(continued...)

that "a company not only has to be of extraordinary size, it must also for a variety of factors truly create the risk of . . . the delisting impinging on a national interest." Ketchum explained that "in [his] analysis throughout this process, in discussions with the [NYSE] staff, in reviewing what they indicated they [had] been provided by Navistar, . . . [he] did not believe [that the Rule 802.01E] standards were met, either from the standpoint of Navistar being truly one of the largest companies listed on the [Exchange]," or that the Company's delisting "would have a fundamental, profound, systemic effect on the national interest." Distinguishing Navistar's situation from that of Fannie Mae, Ketchum observed that Fannie Mae's position in the market was such that "a significant lack of confidence with respect to [Fannie Mae] would create a meaningful risk and meaningful impact on the national economy." He stated further that the "national interest" exception would apply to "extremely large" companies other than Fannie Mae, which "because of their positioning and potential exposure, [would] create[] very real impacts to the national economy, . . . systemic risk in some way or other to the national economy as a result of their failure."

Glenn Tyranski, NYSE Regulation, Inc.'s senior vice president of financial compliance, testified that, "in internal discussions" with Ketchum and other NYSE senior management prior to NYSE staff's determination to delist Navistar's Listed Securities, NYSE staff concluded that, although Navistar likely met "all of the secondary criteria [of the Rule 802.01E exception]," from "a threshold standpoint they don't make it on all of it. In other words, you need that to get into the qualifying round. And that was our conclusion at the senior management level, that that was in fact not met." In response to questioning by the Review Committee, Tyranski testified further that an issuer must meet both of the threshold requirements in order to qualify for the "national interest" exception, stating that "it is national interest and substantial size. So in order to move from that, you have to satisfy both sides of the 'and.'" Tyranski also testified that, while "[a]t no point during this process was any formal request made for national interest," NYSE staff communicated to Navistar during the December 14, 2006 conference call that the Company did not qualify for the "national interest" exception.

On February 6, 2007, the Review Committee affirmed the NYSE staff's decision to suspend and delist Navistar's Listed Securities, finding the determination consistent with NYSE rules and the purposes of the securities laws. The Review Committee stated that "the Company was given a full opportunity to present oral argument, witness testimony, and any additional evidence it wished to present regarding whether its circumstances did, in fact, qualify it for continued listing under [Rule] 802.01E." The Review Committee also noted that Navistar presented evidence in support of the Company's assertion that it met the threshold criteria of the "national interest" exception, as well as evidence relating to the Company's continued suitability for listing in light of the specific criteria listed in Rule 802.01E. The Review Committee stated

---

12/ (...continued)
companies and that the average market capitalization of Exchange-listed companies was $9.4 billion.

that, in reaching its decision to delist Navistar, it "fully considered all of the evidence presented to it by the Company and NYSE Regulation . . . ." 13/ This appeal followed. 14/

On February 14, 2007, the NYSE suspended trading in Navistar's Listed Securities. On February 16, 2007, Navistar's Listed Securities were delisted from the Exchange. Those securities currently are quoted on the Pink Sheet Electronic Quotation Service (the "Pink Sheets"). Attached to Navistar's Form 8-K filed on June 28, 2007 is a press release dated June 26, 2007 stating that the Company "expects to file its fiscal 2005 Form 10-K . . . by the end of September" 2007. 15/ The press release also states that Navistar "expects to complete and file Form 10-Ks for the fiscal years ending October 31, 2006 and 2007, by March 31, 2008." 16/ We take official notice that, to date, Navistar has not filed its 2005 Form 10-K.

III.

Our review is governed by Exchange Act Section 19(f), 17/ which provides that we will dismiss Navistar's appeal if we determine that the specific grounds on which the delisting is based exist in fact, that the delisting is in accordance with the applicable NYSE rules, and that those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. 18/

13/ The Review Committee found that the "record in this matter . . . establishe[d] that NYSE Regulation Staff did consider the Company's possible qualification for the 'national interest' exception and determined that the Company did not meet the threshold criteria for application of the exception."

14/ On February 13, 2007, the Commission denied Navistar's motion for an expedited stay of the Review Committee's determination. See Order Denying Stay, Exchange Act Rel. No. 55304 (Feb.13, 2007), 89 SEC Docket 3384.

15/ Navistar Int'l. Corp. Current Report (Form 8-K), Ex. No. 99.1, at E-1 (June 28, 2007). Among the twenty-two accounting issues currently under review in Navistar's restatement process are "the adequacy of amounts recorded for asbestos liabilities," "the timing of revenue recognition," "inventory valuations," and "the accounting and reporting for derivatives."

16/ Id.

17/ 15 U.S.C. § 78s(f).

18/ Id. See also Fog Cutter Capital Group, Inc., Exchange Act Rel. No. 52993 (Dec. 21, 2005), 86 SEC Docket 3164, petition denied, 474 F.3d 822 (D.C. Cir. 2007) (NASD); Outsource Int'l, Inc., 55 S.E.C. 382, 390-91 (2001) (NASD).

A. Specific Grounds Exist in Fact

We find that the Review Committee based its delisting determination on specific grounds existing in fact. 19/ There is no dispute that Navistar failed to file its 2005 Form 10-K timely or within the twelve-month cure period that ended on February 1, 2007. Navistar's 2005 Form 10-K is now more than twenty months delinquent. In addition, Navistar has not filed a Form 10-Q since September 2005 and was unable to file its 2006 Form 10-K within the time permitted. We conclude that the specific factual grounds exist for the Review Committee's delisting determination.

B. The Delisting was in Accordance with NYSE Rules

We find that the delisting was in accordance with the applicable NYSE rules and that the NYSE properly applied Rule 802.01E. Having been given two six-month extensions, Navistar was warned that its failure to file the 2005 Form 10-K by February 1, 2007 would lead to delisting procedures. Navistar subsequently notified the NYSE that the Company would be unable to file its 2005 annual report by the end of the second six-month extension.

Thus, the only alternative for continued listing of Navistar's Listed Securities was the "national interest" exception. Under Rule 802.01E, the "national interest" exception is to be construed narrowly. The Rule states that the circumstances triggering the exception must be "unique" and requires satisfaction of two factors: the size of the listed company's publicly-held market capitalization and the nature of its business. These two factors combined must evidence that a delisting will be "significantly contrary to the national interest and the interests of public investors." 20/

Even assuming that Navistar had met the threshold requirements for continued listing on the Exchange pursuant to Rule 802.01E ¶ 7, the rule provides that the determination to allow the Company to continue listing beyond the twelve-month period rests with the "sole discretion" of the Exchange. In approving the rule change creating the "national interest" exception, however, we stated expressly that the "limited discretion" permitting a filing extension beyond the twelve-month cure period would be "available only in certain very rare circumstances." 21/ We also acknowledged the NYSE's concern that "'the effective functioning of certain companies is of particular importance to the national interest and that a disruption in the orderly market for their

---

19/ See, e.g., SC&T Int'l, Inc., 54 S.E.C. 320, 325 (1999) (concluding that delisting determination was based on specific factual grounds where company failed to file its quarterly and annual reports in a timely manner) (NASD).

20/ Rule 802.01E ¶ 7.

21/ Order Granting Approval to Proposed Rule Change Relating to Section 802.01E, 87 SEC Docket at 517.

securities would have serious implications not just for those companies and their shareholders but also for the country as a whole.'" 22/

Navistar does not meet the threshold requirements for the "national interest" exception. According to Navistar, its total market capitalization of $2.5 billion during the relevant period placed it in the top seventeen percent of all publicly-traded companies in the United States. However, Standard and Poor's removed Navistar's stock from the S&P 500 stock price index because Navistar's market capitalization was not representative of the "large cap" market. Thus, although Navistar is a large company, its size is not extraordinary.

Further, the record does not establish that the nature of Navistar's business is such that the delisting of the Company's Listed Securities would have a systemic effect on the national interest. Navistar's business includes the production of military and commercial vehicles. However, from the record, it does not appear that Navistar's role in the market for military and commercial vehicles has been or will be disrupted by Navistar's delisting. Navistar's chief executive officer conceded at the hearing that the delisting would not have any impact on Navistar's government contracts. Navistar's CFO admitted that the delisting of the Company's Listed Securities would not trigger any defaults in its outstanding debt and that Navistar would not have to raise additional capital in the market. He further testified that the Company's then most recent refinancing of $1.5 billion in debt was oversubscribed by $2.7 billion.

Navistar points out that Exchange Act Section 6(b)(5) prohibits unfair discrimination among issuers, 23/ and argues that, implicit in the Commission's approval of the changes to Rule 802.01E was the Commission's finding that the proposed changes did not run afoul of the anti-discrimination requirement. 24/ Navistar then suggests that, because the NYSE applied Rule 802.01E ¶ 7 as though it applied only to Fannie Mae, the NYSE's action in denying Navistar the "national interest" exception was not in accordance with Rule 802.01E.

Navistar adverts to the hearing testimony of Dina Maher, an NYSE Regulation, Inc. compliance director. Maher stated that she had informed the Company at the October 12, 2006 meeting between NYSE staff and Navistar "about the discussions then taking place between the Commission and the NYSE about eliminating the 'Fannie Mae exception,'" and that "the Commission was 'uncomfortable' with the discretion granted the NYSE" by the rule. Accordingly, Maher informed Navistar that none of the late filers at that point would be

---

22/ Id.

23/ 15 U.S.C. § 78f(b)(5).

24/ See Credit Suisse First Boston Corp., 400 F.3d 1119, 1130 (9th Cir. 2005) (recognizing that the "ultimate approval of a proposed [self-regulatory organization] rule reflects the Commission's determination that the proposed rule is consistent with the purposes of the Exchange Act").

considered for the exception. Navistar also cites the 2006 testimony of Commission Chairman Christopher Cox before the Senate Committee on Banking, Housing and Urban Affairs, in which he referred to Rule 802.01E ¶ 7 as a "unique exception for Fannie Mae" and reported that the Commission had encouraged the NYSE to amend the rule "to put an expiration date on this exception." 25/ Navistar contends that the NYSE's failure to grant the Company the "national interest" exception constituted an abuse of discretion because "there is no principled, non-discriminatory basis to distinguish between Fannie Mae and Navistar with respect to eligibility for an extension under Rule 801.01E ¶ 7 [sic]." 26/ Navistar notes that the successful effort to eliminate the exception as of December 31, 2007 does not alter the fact that Rule 802.01E ¶ 7 currently is in "full force and effect."

Navistar's arguments fail. Both the Review Committee and we considered Navistar's qualifications for the "national interest" exception on the merits. 27/ As the Review Committee decision stated, Navistar was given full opportunity at the hearing "to present oral argument, witness testimony, and any additional evidence it wished to present" in pursuit of the "national interest" exception. We have reviewed the record de novo. For the reasons stated above, we have concluded that the "national interest" exception is not available to Navistar.

We also disagree with Navistar's argument that the NYSE's determination with respect to Fannie Mae cannot be properly distinguished from the Review Committee's determination here. Fannie Mae's market capitalization during the relevant period was more than twenty-one times that of Navistar's. Ketchum testified before the Review Committee that Fannie Mae's position in the market is so unique that a loss of investor confidence in that institution would have a meaningful impact on the national economy. As the NYSE points out, "[t]he concern with Fannie Mae was the potential impact that delisting Fannie Mae might have had on the market for home mortgages and on obligations other than Fannie Mae common stock, and the potential

---

25/ Accounting Irregularities at Fannie Mae: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs, 109th Cong. (2006) (statement of Christopher Cox, Chairman of the Securities and Exchange Commission).

26/ Navistar also asserts that Fannie Mae's financial statements required restatement due to fraud, while Navistar's restatement of its financial statements was not the result of misconduct.

27/ Navistar contends that NYSE staff neither considered the applicability of the "national interest" exception to Navistar nor communicated its conclusion that the Company did not qualify for the exception. This argument is beside the point: it is the determination of the Review Committee that is before us here. Cf. James B. Chase, 56 S.E.C. 149, 160 n.26 (2003) (stating that the National Adjudicatory Council's decision was under review, not the NASD hearing panel's determination).

derivative impact on the national housing market and the economy generally." 28/ Ketchum testified that, while Rule 802.01E ¶ 7 would apply to other very large companies comparable in size and economic influence to Fannie Mae, Navistar does not fall into that category of companies whose delisting would have a "fundamental, profound, systemic effect on the national interest."

Navistar concedes that the NYSE granted Fannie Mae the additional listing extension because of the potential derivative impact on the national housing market and the national economy. However, Navistar contends that the risk to the national interest is more acute in Navistar's case because the Company's business is capital-intensive and faces foreign competition, whereas Fannie Mae's domestic competitors could "easily have filled any void" that might have resulted if Fannie Mae had been delisted. Navistar claims that, because there is less competition in its industry than in the financial services industry in which Fannie Mae operates, any impairment of Navistar's business would likely result in a net loss for the national economy. Navistar argues that there is no principled way to conclude that home mortgages are more important to the national interest than military vehicles, school buses, fire trucks, and ambulances. The difficulty with all of these arguments is that they are all premised on the threshold assumption that delisting will seriously impair Navistar's business, and Navistar has not produced any evidence that delisting has had or will have such an effect. As discussed above, the evidence adduced by Navistar at the hearing indicates the opposite – that delisting will not have much if any negative impact on Navistar's business, much less a negative systemic effect on the national economy. 29/ Thus, the effect of the impact on the national economy of any impairment to Navistar's business is moot.

The application of Rule 802.01E ¶ 7 hinges on a company's position in the market based on both the nature of its business and its very large publicly-held market capitalization. As discussed previously, Navistar did not meet that threshold criteria for application of the exception. Having considered all the evidence, the Review Committee found that the "factual record support[ed] the specific grounds" for the decision to delist rather than grant a "national interest" exception. The evidence is so heavily weighted in favor of denying Navistar the "national interest" exception that we see no error in the Review Committee's determination.

28/ NYSE's Memorandum of Opposition to Navistar's application for review before us. Navistar suggests that it is "entirely possible" that no actual harm would have occurred if Fannie Mae had been delisted, referencing the fact that the housing market has not collapsed. Because Fannie Mae was not delisted, Navistar's contention is purely speculative.

29/ We observe that, soon after commencing trading on the Pink Sheets, Navistar's common stock rose approximately thirty percent. See Bob Tita, Navistar shares defy gravity; Takeover talk buoys stock despite delisting, Crain's Chicago Business, Feb. 26, 2007, at 2. To date, Navistar common stock's fifty-two-week price range is $27.27 - $74.60 and its three-month average trading volume is 439,729 shares.

C. The Rules were Applied in a Manner Consistent with the Exchange Act

We find that the applicable NYSE rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. The availability of current financial information is critical to the proper operation of the financial markets. 30/ For this reason, we believe that the "national interest" exception must be available only on the most limited basis. Exchange Act reporting requirements "are a crucial element in the federal government's efforts to maintain the integrity of the nation's financial markets." 31/ We have stated previously that investors are "entitled to assume" that public companies will comply "promptly . . . with their reporting obligations under the Exchange Act." 32/ The failure "to provide timely reports and adequate financial information [is] offensive to the central purpose of the periodic reporting system Congress established through the Exchange Act. For the system to work properly the information reported must be both current and adequate." 33/ Accordingly, Rule 802.01E ¶ 7 has always been intended to be a narrowly-construed exception to the usual requirement of timely filing. The subsequent determination to "sunset" the "national interest" exception was based on the recognition that even the narrow exception afforded by Rule 802.01E ¶ 7, upon reconsideration, was too broad. 34/

Navistar contends further that, because the securities of late filers are identified by the "LF" designation, the continued listing of Navistar's Listed Securities would not cause any investor confusion regarding the Company's filing status. This argument assumes that the only harm engendered by Navistar's continued listing is the confusion concerning its filing status.

30/ SEC v. Savoy Indus. Inc., 587 F.2d 1149, 1165 (D.C. Cir. 1978) (stating that Exchange Act reporting provisions are "clear and unequivocal" and are "satisfied only by the filing of complete, accurate, and timely reports") (internal citations omitted); SEC v. Beisinger Indus. Corp., 552 F.2d 15, 18 (1st Cir. 1977) (stating that Exchange Act reporting requirements are the "primary tool which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities"); see also Gateway Int'l Holdings, Exchange Act Rel. No. 53907 (May 31, 2006), 88 SEC Docket 430, 437 (deregistration proceeding based on issuer's failure to keep current on reporting requirements, stating that "[i]mplicit in [Exchange Act reporting] provisions is the requirement that the reports accurately reflect the issuer's financial condition and operating results").

31/ SEC v. Beisinger Indus. Corp., 421 F. Supp. 691, 694 (D. Mass. 1976), aff'd, 552 F.2d 15 (1st Cir. 1977).

32/ SC&T Int'l, Inc., 54 S.E.C. at 326.

33/ Beisinger Indus. Corp., 421 F. Supp. at 695.

34/ See supra note 7.

We have stated previously that the "purpose of the periodic filing requirements is to supply investors with current and accurate financial information about an issuer so that they may make sound decisions." 35/ Investors therefore are entitled to timely reports and adequate financial information. 36/ The "LF" designation is no substitute for the timely reporting of adequate financial information.

Navistar also argues that its present and future shareholders would be better served if its securities remained listed on the Exchange and be subjected to continued monitoring by NYSE staff, instead of trading on the "essentially unregulated" Pink Sheets. We have held previously that, "while exclusion from a quotation system may hurt existing investors, primary emphasis must be placed on the interests of prospective future investors." 37/ Given the importance of current, accurate information from periodic reports properly filed with the Commission, potential future investors would not be well-served if Navistar were permitted to retain the imprimatur of a listed company without those filings. "Prospective investors are entitled to assume that the securities listed" on the Exchange "meet the system's listing standards." 38/ We have stated that the "'inclusion of a security . . . entail[s] an element of judgment given the expectations of investors and the imprimatur of listing on a particular market.'" 39/ Because Navistar does not meet the Exchange's listing standards, we believe that future shareholders would be better served if Navistar's Listed Securities were delisted.

Navistar concedes that delisting a company that fails to meet an exchange's continued listing requirements is consistent with the purposes of the Exchange Act. However, Navistar claims that, except for its delay in filing the 2005 Form 10-K, the Company meets all the

---

35/ Gateway Int'l Holdings, 88 SEC Docket at 441 (administrative law judge proceeding holding that revocation of registration of issuer's securities would "further the protection of investors including both current and prospective investors").

36/ SC&T Int'l, Inc., 54 S.E.C. at 326. This concern applies equally to current and prospective investors. Cf. Gateway Int'l Holdings, 88 SEC Docket at 441.

37/ DHB Capital Group, Inc., 52 S.E.C. 740, 745 (1996) (denying application for securities to be included in the Nasdaq SmallCap Market); Biorelease Corp., 52 S.E.C. 219, 224 (1995) (upholding delisting from Nasdaq SmallCap Market); Midland Res., Inc., 46 S.E.C. 861, 864 (1977) (stating that a delisting's "adverse effect on present [share]holders must yield to" the "protection of future investors who rely on listing as an indication that the securities meet the qualifications which such listing suggests").

38/ Biorelease Corp., 52 S.E.C. at 224.

39/ Fog Cutter Capital Group, Inc., 86 SEC Docket at 3174 n.29 (quoting DHB Capital Group, Inc., 52 S.E.C. at 744).

requirements for continued listing on the Exchange. This is incorrect. Navistar has not filed its 2006 Form 10-K and has stated previously that it will not be able to do so before March 2008. 40/

We observe that, under the terms of the "sunset" provision of amended Rule 802.01E, any issuer that is not current on its filings of annual reports by December 31, 2007 will be subject to delisting. Thus, even if we directed the NYSE to grant Navistar the "national interest" exception now, Navistar's Listed Securities would be delisted again at the beginning of next year if its 2005 and 2006 Forms 10-K have not been filed by that time. Navistar has failed to explain how such an anomalous result could be consistent with the purposes of the Exchange Act.

We find that a factual basis exists to delist Navistar's Listed Securities from the Exchange; that the NYSE acted in accordance with its applicable rules in delisting Navistar's Listed Securities; and that those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. Accordingly, we dismiss this review proceeding.

An appropriate order will issue. 41/

By the Commission (Commissioners ATKINS and CASEY); Chairman COX and Commissioner NAZARETH not participating.

Nancy M. Morris
Secretary

40/ Navistar Int'l. Corp. Current Report (Form 8-K), Ex. No. 99.1, at E-1 (June 28, 2007).

41/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56769 / November 8, 2007

Admin. Proc. File No. 3-12564

In the Matter of the Application of

NAVISTAR INTERNATIONAL CORPORATION

c/o Charles W. Mulaney Jr., Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
333 West Wacker Drive
Chicago, Illinois 60606

For Review of Action Taken by

NEW YORK STOCK EXCHANGE LLC

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION OF NATIONAL SECURITIES EXCHANGE

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review of action taken by the New York Stock Exchange LLC against Navistar International Corporation be, and it hereby is, dismissed.

By the Commission.

Nancy M. Morris
Secretary

Commissioner Nazareth
Not Participating

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56779; File No. S7-26-07]

Nov. 9, 2007

NOTICE OF APPLICATION OF THE NATIONAL ASSOCIATION OF REALTORS FOR EXEMPTIVE RELIEF UNDER SECTIONS 15 AND 36 OF THE EXCHANGE ACT AND REQUEST FOR COMMENT

The National Association of Realtors® ("NAR") has requested an exemption pursuant to Sections 15(a)(2) and 36(a) of the Securities Exchange Act of 1934 ("Exchange Act") from the broker-dealer registration requirements of Section 15(a)(1) and the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)), and the rules and regulations thereunder, that apply to a broker or dealer that is not registered with the Commission. Subject to the conditions specified in NAR's application ("Application") and discussed below, the requested exemption would permit a licensed real estate agent or broker who is predominantly engaged in and has substantial experience in the commercial real estate market and the real estate brokerage firm with which such agent or broker is licensed to receive compensation in the form described below for the sale of a TIC Security, as defined below.

In order to provide an opportunity for interested persons to comment on the Application, the Commission is publishing this notice and request for comment pursuant to Rule 0-12 under the Exchange Act. The Commission will carefully consider all comments submitted, and, should it determine to issue an exemption, could eliminate or add to, or modify, the conditions discussed below.

BACKGROUND

Section 15(a)(1) of the Exchange Act generally requires any broker or dealer who makes use of the mails or any instrumentality of interstate commerce to effect transactions in, or induce the purchase or sale of, any security to register with the Commission. Section 3(a)(4)(A) of the Exchange Act generally defines a "broker" as "any person engaged in the business of effecting

transactions in securities for the account of others." Absent an exemption, a licensed real estate agent or real estate broker who receives compensation for the sale of a TIC Security would be required to be registered as a broker with the Commission or to be a registered associated person of a registered broker-dealer. Similarly, a real estate brokerage firm that receives compensation for the sale of a TIC Security would be required to register as a broker-dealer.

Section 15(a)(2) of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt from the broker-dealer registration requirements of Section 15(a)(1) any broker or dealer or class of brokers or dealers, by rule or order, as it deems consistent with the public interest and the protection of investors.[1] Similarly, but more broadly, Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[2]

SUMMARY OF THE APPLICATION

NAR requests an exemption to allow any licensed real estate agent or broker who is predominantly engaged in and has substantial experience[3] in the sale of commercial real estate[4]

---

1 See 15 U.S.C. 78o(a)(2).

2 See 15 U.S.C. 78mm.

3 The Application defines "substantial experience" to mean a Commercial Real Estate Professional who (1) has received a Certified Commercial Investment Member designation from the Commercial Investment Real Estate Institute, a designation from the Society of Industrial and Office REALTORS®, or an Accredited Land Consultant designation from the REALTORS® Land Institute; (2) has education and transaction experience that is equivalent to those required to obtain those designations; or (3) has participated in at least five commercial real estate transactions having an aggregate value of at least $3 million in the prior five years or at least 10 commercial real estate transactions having an aggregate value of at least $10 million in the prior

("Commercial Real Estate Professional") and the real estate brokerage firm with which he or she is licensed ("Real Estate Firm") (collectively, a "RE Participant") to receive a real estate advisory fee ("Real Estate Advisory Fee") from a purchaser of an undivided tenant-in-common interest in real property ("TIC Interest")[5] that is offered and sold together with other arrangements that cause it to be deemed to be a security under the federal securities laws ("TIC Security").[6]

Under NAR's exemptive request, a Real Estate Advisory Fee could be paid by the purchaser directly or on behalf of the purchaser by the sponsor or issuer of the TIC Security, which could, thereby, reduce the commission or other compensation received by a registered broker-dealer involved in the TIC Security transaction. The Real Estate Advisory Fee generally would be paid to the Real Estate Firm with which the Commercial Real Estate Professional is licensed. The Firm would distribute all or a previously agreed upon percentage of the Real

---

10 years, including 3 transactions in the prior 3 years. Alternatively, the Application provides that a Commercial Real Estate Professional will satisfy the "substantial experience" requirement based on a combination of at least two of the following factors: education in commercial real estate; the length of time during which the person has engaged in commercial real estate transactions; the dollar value of commercial real estate transactions in which the individual has participated; and the number of commercial real estate transactions in which the individual has participated.

[4] For purposes of the Application, "commercial real estate" includes all real estate categories other than single-family and one- to four-unit residential dwellings, including office, retail, raw land, multifamily (i.e., greater than four dwellings), industrial and others. It does not include TIC Securities.

[5] TIC Interests are generally offered as a replacement property to individuals seeking to complete tax-deferred exchange transactions pursuant to Section 1031 of the Internal Revenue Code of 1986, as amended.

[6] TIC Securities are sold by a sponsor through a registered broker-dealer acting as a placement agent ("Lead Placement Agent"). Such Lead Placement Agent may be the sole distributor of the TIC Securities or may enter into an agreement with one or more other registered broker-dealers to sell the TIC Securities as participating brokers (each, a "Selling Broker-Dealer"). A Lead Placement Agent also may act as a Selling Broker-Dealer.

Estate Advisory Fee to the Commercial Real Estate Professional that signed a buyer's agent agreement with the client and to any other Commercial Real Estate Professional or Real Estate Firm that was added to the agreement with the consent of the client.

As proposed by NAR, in order for any Commercial Real Estate Professional or any Real Estate Firm with which such person is licensed to receive or share in a Real Estate Advisory Fee in reliance on the requested exemption, the Commercial Real Estate Professional, the Real Estate Firm, the Selling Broker-Dealer and the Lead Placement Agent for the TIC Security transaction would comply with the following conditions, as applicable:

(1) General Conditions

a. A Real Estate Advisory Fee shall only be paid to or shared with a Commercial Real Estate Professional who is predominantly engaged in sales of real estate other than TIC Securities, has substantial experience in commercial real estate,[7] is appropriately licensed in compliance with the applicable state real estate laws, and is identified in the buyer's agent agreement (as further described below) with the client.[8]

b. Each client of the RE Participant purchasing a TIC Security must receive at closing a deed representing his or her undivided fractional interest in the TIC Security property and the TIC Security must qualify as a "replacement property" for purposes of an IRC Section 1031 exchange, regardless of whether the client is purchasing the TIC Security for that purpose.

---

[7] See note 3.

[8] Although not proposed as a condition to NAR's requested exemption, NAR states in its application that it "believes" the buyer's agent agreement "should include" a representation that the Commercial Real Estate Professional who receives or shares a Real Estate Advisory Fee has substantial experience in commercial real estate.

c. The TIC Security transaction must be effected through a registered broker-dealer.

(2) Buyer's Agent Agreement and Introduction to Selling Broker-Dealer

a. Prior to the Commercial Real Estate Professional discussing a specific TIC Security property with his or her client, the client must enter into a written buyer's agent agreement with the RE Participant, which shall obligate the RE Participant to solely represent the client in connection with the purchase of a TIC Security.

b. The buyer's agent agreement must identify any other RE Participant who is to receive or share in the Real Estate Advisory Fee and any such other RE Participant may only be added to the buyer's agent agreement with the consent of the client.

c. The buyer's agent agreement must state the aggregate maximum amount of the Real Estate Advisory Fee to be paid by the client to all RE Participants, including any RE Participant that is added to the agreement, which shall be expressed as either a fixed dollar amount or as a dollar amount that is determined in accordance with a predetermined formula (e.g., a fixed percentage of the property's full purchase price or a fixed percentage of the cash paid for the property).

d. The aggregate maximum amount of Real Estate Advisory Fee that is actually paid by the client to all RE Participants, including any RE Participant that is added to the buyer's agent agreement, will not exceed the amount of the contracted Real Estate Advisory Fee even if the client, the sponsor, or another person is willing to pay a higher fee.

e. The Commercial Real Estate Professional may discuss the real estate characteristics of a TIC Security property with the client and arrange for the client to inspect a TIC Security property and any other non-securities property before

introducing the client to the Selling Broker-Dealer, but shall arrange such introduction upon the client advising the Commercial Real Estate Professional that he or she is considering the purchase of a specific TIC Security property.

(3) Restrictions on Conduct of the RE Participant

A RE Participant that, directly or indirectly, receives a portion of a Real Estate Advisory Fee will not:

a. list or otherwise advertise the availability of TIC Securities or advertise that the RE Participant represents clients in connection with the purchase of TIC Securities;

b. share a Real Estate Advisory Fee with any person not permitted to receive such Fee under the requested exemption;

c. handle customer funds or securities in a TIC Security transaction;

d. negotiate the terms and conditions of the purchase of any TIC Security on behalf of the client with a broker-dealer or sponsor selling a TIC Security or have any power to bind the client in the TIC Security transaction, but may transmit documents and information between the parties and may attend meetings between the Lead Placement Agent, Selling Broker-Dealer, and the sponsor and the client (solely in order to assist the client);

e. represent the client as a "purchaser representative," as defined in Rule 501(h) of the Securities Act of 1933;

f. participate in the structuring of a TIC Security investment offered to the client;

g. have the authority to close a purchase of a TIC Security on a client's behalf; or

h. assist a client that purchases a TIC Security to obtain financing, except to provide a list of potential lenders.

(4) Other Obligations of the RE Participant

a. The RE Participant must deliver a copy of the executed buyer's agent agreement to the Lead Placement Agent at closing.

b. Any Commercial Real Estate Professional that is to receive, directly or indirectly, a portion of a Real Estate Advisory Fee must not be subject to any "statutory disqualification," as that term is defined in Section 3(a)(39) of the Exchange Act (other than subparagraph (E) of that section), and will deliver a representation in writing to that effect to the Lead Placement Agent at closing. To the extent the statutory disqualification representation is included in the buyer's agent agreement, it must be updated at closing with respect to each Commercial Real Estate Professional that may, directly or indirectly, receive any portion of a Real Estate Advisory Fee.

(5) Obligations of the Selling Broker-Dealer and Lead Placement Agent

a. Before the TIC Security transaction is effected, the Selling Broker-Dealer must perform a suitability analysis of the TIC Security transaction in accordance with the rules of the Selling Broker-Dealer's applicable self-regulatory organization ("SRO") as if the Selling Broker-Dealer had recommended the TIC Security transaction and must deliver a representation in writing to that effect to the Lead Placement Agent at closing or, if the Selling Broker-Dealer is the Lead Placement Agent, must make a representation in writing to that effect at closing.

b. The Selling Broker-Dealer will inform the customer if the Selling Broker-Dealer determines that the TIC Security transaction to be effected for the customer is not suitable under the rules of the Selling Broker-Dealer's applicable SRO, and will not effect the TIC Security transaction unless it obtains the customer's written

affirmation that the customer wants to proceed with the TIC Security transaction notwithstanding the Selling Broker-Dealer's determination. The Selling Broker-Dealer must deliver the written affirmation to the Lead Placement Agent at closing or, if the Selling Broker-Dealer is the Lead Placement Agent, must maintain the written affirmation as specified below.

c. The Lead Placement Agent must maintain a copy of each of the documents that is to be made and/or delivered at closing pursuant to the requested exemption (i.e., the buyer's agent agreement, the statutory disqualification representations, the suitability representation, and, if applicable, the customer's written affirmation), the relevant part of the real estate closing documents that evidences the amount of the Real Estate Advisory Fee paid to any RE Participant involved in the TIC Security transaction, and any other records that are required to be maintained in accordance with the recordkeeping requirements of the federal securities laws for a period of three (3) years in accordance with Exchange Act Rule 17a-4(f).

SUMMARY OF REASONS FOR THE EXEMPTION

NAR states that the requested exemption would allow a potential purchaser of a TIC Security to benefit from the real estate expertise of a Commercial Real Estate Professional, while receiving necessary protections afforded by federal and state securities laws and regulations. NAR states that the proposed conditions would limit the role of a Commercial Real Estate Professional and Real Estate Firm with which such person is licensed that would receive a Real Estate Advisory Fee. As a result, NAR states that an exemption from registration and regulation of the Commercial Real Estate Professional and the Real Estate Firm with which such person is licensed as a broker-dealer would be appropriate in the public interest and consistent with the protection of investors.

NAR has waived its request for confidential treatment and the Application is available on the Commission's Web site (http://www.sec.gov/rules/other.shtml) and at the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm.

REQUEST FOR COMMENT

The Commission invites any person to submit comments or other information that relates to the exemptions requested in the Application, including whether the exemption should be granted, whether the conditions are appropriate, and whether conditions should be added, eliminated, or modified. In particular, the Commission requests comment as to the following:

- Is the Application's definition of "substantial experience in commercial real estate" appropriate? Should "substantial experience in commercial real estate" be defined differently? If so, how?
- Should a Commercial Real Estate Professional be considered to have "substantial experience in commercial real estate" if he or she meets a combination of two subjective factors (such as education and dollar value of transactions), or should substantial experience only be demonstrated by the specific education or transactional benchmarks enumerated in the Application?
- Should the quantitative factors included in the Application's definition of "substantial experience in commercial real estate" be periodically adjusted for inflation? If so, how often and which measure of inflation should be used?
- Are there education and experience designations from groups other than those affiliated with NAR that would be appropriate to name specifically as evidencing "substantial experience in commercial real estate"?

- Should the exemption include a quantitative threshold to describe when a Commercial Real Estate Professional would be "predominantly engaged" in the sale of real estate other than TIC Securities? If so, what should that threshold be? For example, should 85 percent of the dollar value of a Commercial Real Estate Professional's sales during one or more prior calendar years be in real estate other than TIC securities in order to meet the predominance requirement?
- Should the exemption be conditioned on the buyer's agent agreement including a representation that the Commercial Real Estate Professional who receives or shares a Real Estate Advisory Fee has substantial experience in commercial real estate?
- Is there a possibility that the exemption, if granted, could create an incentive for Commercial Real Estate Professionals to sell TIC Securities instead of non-security forms of commercial real estate investments to their clients? Are there countervailing factors that would mitigate or neutralize any such incentive? Should the possibility of any such incentive be addressed by one or more conditions, for example, by requiring Commercial Real Estate Professionals to disclose in the buyer's agent agreement the various fees they would receive for selling TIC Securities and non-security forms of commercial real estate investments? Are there other conditions that could address this incentive?
- Are the proposed conditions that would impose obligations on registered broker-dealers appropriate? Would they be sufficient to accomplish the desired goals, including maintaining investor protection? Should any be eliminated or modified, or should additional conditions be included? Commenters are invited to suggest conditions and explain their purpose.

For further information, contact Catherine McGuire, Chief Counsel; Brian Bussey, Assistant Chief Counsel; or Michael Hershaft, Special Counsel, at (202) 551-5550, Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-6628.

Submission of Comments:

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. S7-26-07 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. S7-26-07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/other.shtml). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. S7-26-07 and should be submitted on or before [insert date 30 days after date of publication in the Federal Register]. The Commission will take final action on the Application no earlier than [insert date 31 days after date of publication in the Federal Register].

PAPERWORK REDUCTION ACT ANALYSIS

Certain provisions of the requested exemption contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[9] The Commission has submitted these information collections to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(c) and 5 CFR 1320.10. These collections of information under the requested exemption are new, and OMB has not yet assigned a control number for them. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.[10]

A. Delivery of the Buyer's Agent Agreement to the Lead Placement Agent at Closing

1. Collection of Information

The requested exemption would be conditioned on the RE Participant delivering a copy of the executed buyer's agent agreement to the Lead Placement Agent at closing.

2. Proposed Use of the Information

The proposed buyer's agent agreement is designed to assist in implementing the requested exemption and monitoring for compliance. The proposed delivery requirement is designed to ensure that the Lead Placement Agent has a copy of the buyer's agent agreement in order to comply with its recordkeeping obligations discussed below, which would facilitate monitoring compliance with the requested exemption.

---

9 44 U.S.C. 3501, et seq.

10 44 U.S.C. 3512.

3. Respondents

The proposed collection of information would apply to RE Participants who rely on the requested exemption.

4. Reporting and Recordkeeping Burden

The Commission estimates that approximately 800 RE Participants[11] would rely on the requested exemption and each RE Participant would on average deliver to the Lead Placement Agent a copy of an executed buyer's agent agreement 6.63 times[12] a year. Based on these estimates, the Commission estimates that this requirement would result in approximately 5,304 disclosures[13] per year. The Commission also estimates that a RE Participant would spend approximately five minutes per disclosure to the Lead Placement Agent. Thus, the estimated

---

[11] Based on discussions with industry participants on the number of registered representatives currently involved in TIC Security transactions, the Commission estimates that approximately 800 Commercial Real Estate Professionals would rely on the requested exemption. Although this collection of information covers RE Participants, which includes Commercial Real Estate Professionals and the real estate brokerage firms with which they are licensed, the Commission expects that the Commercial Real Estate Professionals, and not the firms, would actually fulfill the delivery requirement.

[12] Based on discussions with industry representatives, we understand that there were approximately 312 TIC Security offerings in 2006 and approximately 17 participants per offering for a total of 5,304 TIC Security transactions. For purposes of calculating the reporting and recordkeeping burden, the Commission estimates that all TIC Security transactions would be conducted pursuant to the requested exemption. The Commission recognizes that it is highly unlikely that all TIC Security transactions would involve a RE Participant pursuant to the requested exemption in light of the existing broker-dealer sales channel for TIC Securities. However, the Commission does not have sufficient information to estimate participation rates of less than 100 percent, and thus has chosen the most conservative estimate for calculating the reporting and recordkeeping burden. Accordingly, 5,304 TIC Security transactions/800 RE Participants = 6.63. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some respondents would deliver to the Lead Placement Agent a copy of an executed buyer's agent agreement six times a year, and others would do so seven times a year.

[13] 6.63 x 800 = 5,304.

total annual reporting and recordkeeping burden for this requirement is 442 hours[14] for the RE Participants.

5. Collection of Information is Mandatory

This proposed collection of information would be mandatory for RE Participants who rely on the requested exemption.

6. Confidentiality

The proposed collection of information would be provided by the RE Participant to the Lead Placement Agent and would be available for inspection by the Commission and the applicable SRO.

7. Record Retention Period

The requested exemption does not contain a separate record retention period.[15]

B. Delivery of the Statutory Disqualification Representation at Closing

1. Collection of Information

The requested exemption would require any Commercial Real Estate Professional that is to receive, directly or indirectly, a portion of a Real Estate Advisory Fee to not be subject to any "statutory disqualification," as defined in Section 3(a)(39) of the Exchange Act (other than subparagraph (E) of that section), and to deliver a representation in writing to that effect to the Lead Placement Agent at closing.[16]

---

[14] 5,304 TIC Security transactions x five minutes per transaction = 26,520/60 = 442.

[15] The Lead Placement Agent, as a registered broker-dealer, would be subject to the record retention provisions of Exchange Act Rule 17a-4. OMB has approved the collection of information related to these record retention provisions. See OMB control number 3235-0279.

[16] Although the requested exemption would require a Commercial Real Estate Professional to update the "statutory disqualification" representation at closing, if the "statutory disqualification" notice were already included in the buyer's agent agreement, there would be no requirement to include the representation in the buyer's agent agreement. Commercial Real

2. Proposed Use of the Information

The proposed "statutory disqualification" representation would be used in implementing the requested exemption and monitoring its use. The proposed delivery requirement is designed to ensure that the Lead Placement Agent has a copy of the statutory disqualification representation in order to comply with its recordkeeping obligations discussed below, which would facilitate monitoring compliance with the exemption.

3. Respondents

The proposed collection of information would apply to Commercial Real Estate Professionals who would receive, directly or indirectly, a portion of a Real Estate Advisory Fee pursuant to the requested exemption.

4. Reporting and Recordkeeping Burden

The Commission estimates that approximately 800 Commercial Real Estate Professionals[17] would rely on the requested exemption and each Commercial Real Estate Professional would on average deliver the written statutory disqualification representation 6.63 times[18] a year. Based on these estimates, the Commission anticipates that this requirement would result in 5,304 disclosures[19] per year. The Commission estimates that approximately 95 percent of Commercial Real Estate Professionals would spend approximately five minutes for

---

Estate Professionals would have only one "statutory disqualification" representation disclosure requirement per transaction.

17 See note 11.

18 See note 12. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some respondents would deliver to the Lead Placement Agent a written statutory disqualification representation six times a year, and others would do so seven times a year.

19 See note 13.

each representation to the Lead Placement Agent. The Commission also estimates that approximately five percent of Commercial Real Estate Professionals[20] would spend approximately 30 minutes for their first representation to the Lead Placement Agent,[21] and five minutes for each of the 5.63 subsequent representations. Thus, the estimated total annual reporting and recordkeeping burden for these requirements is 458.67 hours[22] for Commercial Real Estate Professionals.

5. Collection of Information is Mandatory

This proposed collection of information would be mandatory for Commercial Real Estate Professionals who rely on the requested exemption.

6. Confidentiality

The collection of information would be provided by the Commercial Real Estate Professional to the Lead Placement Agent and to the customer and would be available for inspection by the Commission and the applicable SRO.

---

[20] Based on the Commission's experience with disciplinary disclosures by registered representatives on Forms U-4, the Commission estimates that five percent of Commercial Real Estate Professionals could be subject to a statutory disqualification and would require more time to make such a determination.

[21] The Commission estimates that these Commercial Real Estate Professionals would spend 25 minutes to determine whether they would be subject to a statutory disqualification and to generate the representation, and five minutes to disclose the representation.

[22] 800 x .95 x 6.63 x 5 = 25,194/60 = 419.90 total burden hours for 95 percent of the Commercial Real Estate Professionals. 800 x .05 x 1 x 30 = 1,200/60 = 20 hours for the first representation by five percent of the Commercial Real Estate Professionals. 800 x .05 x 5.63 x 5 = 1,126/60 = 18.77 hours for the second and third representations by five percent of the Commercial Real Estate Professionals. Thus total burden hours would be 419.90 + 20 + 18.77 = 458.67. The Commission has rounded its calculations to two decimal places.

7. Record Retention Period

The requested exemption does not contain a separate record retention period.[23]

C. Suitability Determination by the Selling Broker-Dealer

1. Collection of Information

The requested exemption would require a Selling Broker-Dealer to deliver a representation in writing that the Selling Broker-Dealer performed a suitability analysis to the Lead Placement Agent at closing, or, if the Selling Broker-Dealer is the Lead Placement Agent, to make such a representation in writing at closing.

2. Proposed Use of the Information

The proposed suitability representation would be used in implementing the requested exemption and monitoring its use. The proposed delivery requirement is designed to ensure that the Lead Placement Agent has a copy of the suitability analysis in order to comply with its recordkeeping obligations discussed below, which would facilitate monitoring compliance with the exemption.

3. Respondents

The proposed collection of information would apply to Selling Broker-Dealers, who deliver or make a suitability determination pursuant to the requested exemption.

4. Reporting and Recordkeeping Burden

The Commission estimates that approximately 150 Selling Broker-Dealers[24] would either deliver or make a representation at closing and each Selling Broker-Dealer would on average

---

[23] See note 15.

[24] The approximate number of Selling Broker-Dealers is based on discussions with industry participants.

deliver or make such a representation 33.59 times[25] a year. Based on the simplicity of the record to be created, the Commission also estimates that a Selling Broker-Dealer would spend approximately five minutes on each disclosure. Thus, the estimated total annual reporting and recordkeeping burden for this requirement is 419.90 hours[26] for Selling Broker-Dealers.

5. Collection of Information is Mandatory

This proposed collection of information would be mandatory for Selling Broker-Dealers who rely on the requested exemption.

6. Confidentiality

The proposed collection of information would be provided by the Selling Broker-Dealer to the Lead Placement Agent, or if the Selling Broker-Dealer is the Lead Placement Agent, to create the collection of information and would be available for inspection by the Commission and the applicable SRO.

7. Record Retention Period

The requested exemption does not contain a separate record retention period.[27]

---

[25] The Commission estimates that there would be approximately 5,304 TIC Security transactions a year. See note 12. The Commission estimates that approximately five percent of all proposed TIC Security transactions would be determined to be not suitable for a customer under the requested exemption. This estimate is based on discussions with industry, which indicated that currently approximately five percent of proposed TIC Security transactions are determined to be not suitable for a potential purchaser. Accordingly, the Commission estimates that Selling Broker-Dealers would make or deliver a suitability determination in approximately 95 percent of all transactions. Thus, a Selling Broker-Dealer would make or deliver approximately ((5,304 x .95)/150) = 33.59 determinations. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some respondents would make or deliver a suitability representation 33 times a year, and others would do so 34 times a year.

[26] (5,304 x .95) x five minutes per transaction = 25,194/60 = 419.90.

[27] See note 15.

D. Customer Affirmation by the Selling Broker-Dealer

1. Collection of Information

The requested exemption would require a Selling Broker-Dealer that determines that a TIC Security transaction is not suitable to obtain a written affirmation that the customer wants to proceed with the TIC Security transaction notwithstanding the Selling Broker-Dealer's determination. It also would require the Selling Broker-Dealer to deliver the written affirmation to the Lead Placement Agent at closing or, if the Selling Broker-Dealer is the Lead Placement Agent, to maintain the written affirmation consistent with the record retention provisions of Exchange Act Rule 17a-4.

2. Proposed Use of the Information

This proposed information is designed to ensure that the customer is informed if a Selling Broker-Dealer determines a transaction is not suitable, and, if the customer wants to proceed with the transaction, that the customer has made such a decision in light of the broker-dealer's determination. In addition, the proposed delivery requirement is designed to ensure that the Lead Placement Agent has a copy of the customer affirmation in order to comply with its recordkeeping obligations discussed below, which would facilitate monitoring compliance with the exemption.

3. Respondents

The proposed collection of information would apply to Selling Broker-Dealers who deliver or maintain a customer affirmation determination pursuant to the requested exemption.

4. Reporting and Recordkeeping Burden

The Commission estimates that there are approximately 150 Selling Broker-Dealers that are potential respondents, those Selling Broker-Dealers would obtain and then deliver or

maintain a written affirmation from 265.20 customers who are clients[28] of Commercial Real Estate Participants a year, and each Selling Broker-Dealer would on average obtain and then deliver or maintain such an affirmation 1.77[29] times a year. The Commission also estimates that a customer would spend approximately 30 minutes on each disclosure and the Selling Broker-Dealer would spend approximately 35 minutes on each disclosure.[30] Thus, the estimated total annual reporting and recordkeeping burden for this proposed requirement is an aggregate of 132.60 hours for customers[31] and 154.70 hours for the Selling Broker-Dealers.[32]

---

[28] As discussed in note 25, the Commission estimates that approximately five percent of all proposed TIC Security transactions would be determined to be not suitable. 5,304 x .05 = 265.20. The Commission has rounded its calculation to two decimal places. In other words, in any given year the Commission estimates there would be either 265 or 266 customers whose Selling Broker-Dealer determines that a TIC Security transaction is not suitable.

[29] The Commission estimates that there would be approximately 5,304 TIC Security transactions under the requested exemption. See note 12. The Commission estimates that Selling Broker-Dealers would obtain and then deliver or maintain the customer affirmation in five percent of all transactions under the requested exemption. This estimate is based on discussions with industry, which indicated that currently approximately five percent of proposed TIC Security transactions are determined to be not suitable for a potential purchaser. For purposes of calculating the reporting and recordkeeping burden, the Commission estimates that all customers whose Selling Broker-Dealer determines that a TIC Security transaction is not suitable would provide a written affirmation pursuant to the requested exemption. The Commission recognizes that it is highly unlikely that all customers would provide a written affirmation in the face of a Selling Broker-Dealer's determination that a TIC Security transaction is not suitable. However, the Commission does not have sufficient information to estimate affirmation rates of less than 100 percent, and thus has chosen the most conservative estimate for calculating the reporting and recordkeeping burden. Thus, a Selling Broker-Dealer would obtain approximately ((5,304 x .05)/150) = 1.77 affirmations a year. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some respondents would obtain an affirmation one time a year, and others would do so two times a year.

[30] We estimate that it would take the Selling Broker-Dealer 30 minutes to explain to its customer that the transaction is not suitable, and to discuss with and obtain the subsequent affirmation from the customer, and five minutes to deliver or maintain the affirmation.

[31] 265.20 TIC Security transactions (5,304 x .05) x 30 minutes per transaction = 7956/60 = 132.60.

5. Collection of Information is Mandatory

This collection of information would be mandatory for Selling Broker-Dealers who rely on the requested exemption.

6. Confidentiality

The proposed collection of information would be provided by the Selling Broker-Dealer to the Lead Placement Agent, or retained as a record, if the Selling Broker-Dealer is the Lead Placement Agent, and would be available for inspection by the Commission and the applicable SRO.

7. Record Retention Period

The requested exemption does not contain a separate record retention period.[33]

E. Recordkeeping by the Lead Placement Agent

1. Collection of Information

The requested exemption would require the Lead Placement Agent to maintain a copy of each of the documents that is to be made and/or delivered at closing, as discussed above (i.e., the buyer's agent agreement, the statutory disqualification representations, the suitability representation, and, if applicable, the customer's written affirmation), and the relevant part of the real estate closing documents that evidences the amount of the Real Estate Advisory Fee paid to any RE Participant involved in the TIC Security transaction.[34]

---

[32] 265.20 TIC Security transactions (5,304 x .05) x 35 minutes per transaction = 9282/60 = 154.70.

[33] See note 15.

[34] The requested exemption also would require the Lead Placement Agent to maintain a copy of any other records that are required to be maintained in accordance with the recordkeeping requirements of the federal securities laws. See note 15.

2. Proposed Use of the Information

The proposed use of this information is to facilitate monitoring compliance with the exemption by compelling the Lead Placement Agent to maintain records of all documents that are required to be delivered at closing.

3. Respondents

The proposed collection of information would apply to Lead Placement Agents that act pursuant to the requested exemption.

4. Reporting and Recordkeeping Burden

The Commission estimates that approximately 45 Lead Placement Agents[35] would act pursuant to the requested exemption. On average, a Lead Placement Agent would maintain copies of the relevant documents for approximately 117.87 TIC Security transactions[36] a year. The Commission also estimates that a Lead Placement Agent would spend 10 minutes per closing to maintain a copy of these documents. Thus, the estimated total annual reporting and recordkeeping burden for this requirement is 884 hours.[37]

5. Collection of Information is Mandatory

This proposed collection of information would be mandatory for Lead Placement Agents that act pursuant to the requested exemption.

---

35 Based on discussions with industry representatives, the Commission estimates that there are 45 sponsors of TIC Security transactions and that each would have a Lead Placement Agent.

36 5,304 TIC Security transactions/45 Lead Placement Agents = 117.87. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some Lead Placement Agents would maintain copies of the relevant documents for 117 transactions a year, and others would do so for 118 transactions a year.

37 5,304 TIC Security transactions x 10 minutes = 53,040/60 = 884.

6. Confidentiality

The proposed collection of information does not address the confidentiality of information prepared under this rule; however, the collection of information would be available for inspection by the Commission and the applicable SRO.

7. Record Retention Period

As specified, the Lead Placement Agent would be required to maintain copies of these documents for a period of three years in accordance with its existing obligations under Exchange Act Rule 17a-4(f).

F. Request For Comment

Pursuant to 44 U.S.C. 3506(c)(2)(A), the Commission solicits comments to:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;

(2) Evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those required to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on the proposed collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy of their comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-

1090, and refer to File No. S7-26-07. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this notice in the Federal Register. Therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7-26-07, and be submitted to the Securities and Exchange Commission, Branch of Records Management, 100 F Street, NE, Washington, DC 20549-1110.

By the Commission.

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56782 / November 13, 2007

Admin. Proc. File No. 3-9077

In the Matter of TUDOR INVESTMENT CORPORATION	ORDER VACATING SEPTEMBER 12, 1996 CEASE-AND-DESIST ORDER

Tudor Investment Corporation ("Tudor") has petitioned to vacate a cease-and-desist order entered against it by the Commission. The Division of Enforcement does not oppose Tudor's motion. As set forth below, we have determined to grant Tudor's petition.

On September 12, 1996, we ordered Tudor to cease and desist from committing or causing any violations or future violations of Exchange Act Section 10(a) 1/ and Exchange Act Rule 10a-1. 2/ The cease-and-desist order was incorporated in an Order Instituting Proceedings that was simultaneously instituted and settled against Tudor (the "OIP"). 3/ In the OIP, we stated that, on March 15 and 16, 1994, Tudor caused four investment funds to sell short over 1,743,500 shares in violation of Exchange Act Rule 10a-1. 4/ This rule "provide[d], inter alia, that short sales (i.e., sales of a security that the seller does not own) of exchange-listed securities may be effected only at a price above the price at which the immediately preceding sale was effected ('plus tick')," or "at a price equal to the last sale if the last preceding transaction at a different price was at a lower price ('zero plus tick'), established by reference to the reported last sale

---

1/ 15 U.S.C. § 78j(a)(1). This provision is designed to prevent manipulative sales of a security for the purpose of accelerating a decline in the price of such security.

2/ 17 C.F.R. § 240.10a-1 (repealed 2007). Rule 10a-1 imposed certain price test restrictions, commonly described as the "tick test," on short sales.

3/ Order Instituting Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, Securities Exchange Act Rel. No. 37669 (Sept. 12, 1996), 62 SEC Docket 2312.

4/ Id. at 2313.

price." 5/ For purposes of determining whether a holder is long or short a particular security, the holder "must aggregate its long and short positions together." 6/ We concluded that, "[b]ecause it failed to aggregate its long and short positions, Tudor sold stock with a market value of over $98 million in violation of [Rule 10a-1] in 174 separate transactions on those two days." 7/ Accordingly, we found that Tudor violated Exchange Act Section 10(a) and Exchange Act Rule 10a-1 and we ordered Tudor to "cease and desist from committing or causing any violation or future violation of" those provisions. 8/

On July 3, 2007, we repealed Exchange Act Rule 10a-1. 9/ Tudor asserts that "the continued existence of the [cease-and-desist order] creates an issue as to whether Tudor may sell short on other than a 'plus tick' or 'zero plus tick', short sales that may be lawfully effected due to the repeal of Rule 10a-1." Tudor thus seeks repeal of the cease-and-desist order "[t]o eliminate any ambiguity and to clarify that Tudor may participate in the same lawful short-selling activities as other market participants." Tudor's motion for an order vacating the cease-and-desist order is unopposed. Under all the circumstances, we deem it appropriate to vacate the cease-and-desist order.

Accordingly, IT IS ORDERED that the unopposed motion of Tudor Investment Corporation for an order vacating the cease-and-desist order issued in this proceeding on September 12, 1996 be, and it hereby is, granted.

By the Commission.

Nancy M. Morris
Secretary

5/ Id.

6/ Id.

7/ Id.

8/ Id. at 2320.

9/ Regulation SHO and Rule 10a-1, Exchange Act Rel. No. 55970 (June 28, 2007), 90 SEC Docket 2883 (effective July 3, 2007).

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56789 / November 15, 2007

Admin. Proc. File No. 3-12658

In the Matter of Laminaire Corp. (n/k/a Cavico Corp.), TAM Restaurants, Inc. (n/k/a Aerofoam Metals, Inc.), and Upside Development, Inc. (n/k/a Amorocorp)	ORDER DENYING MOTION FOR RECONSIDERATION

The Division of Enforcement ("the Division") previously moved to amend the order instituting proceedings ("OIP") in this matter to strike "TAM Restaurants, Inc. (n/k/a Aerofoam Metals, Inc.)" ("AMI") as a party. On October 22, 2007, we denied the Division's motion. The Division now seeks reconsideration of that October 22, 2007 determination.

On June 13, 2007, we instituted administrative proceedings against three Delaware corporations, including AMI, pursuant to Section 12(j) of the Securities Exchange Act of 1934 1/ to determine whether to revoke or suspend the registration of these corporations. The OIP alleged that the three issuers were delinquent in their required Exchange Act periodic filings with the Commission. 2/

On August 3, 2007, the Division moved pursuant to Rule of Practice 200(d) 3/ to amend the OIP to strike AMI as a party and leave "TAM Restaurants, Inc." ("TAMRI") as the remaining party ("the August 3 Motion"), on the basis that AMI is not the successor to TAMRI. The

---

1/ 15 U.S.C. § 78*l*(g).

2/ Laminaire Corp. (n/k/a Cavico Corp.) and Upside Development, Inc. (n/k/a Amorocorp) each consented to the entry of our orders revoking the registration of each class of their securities registered pursuant to Exchange Act Section 12. See Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 as to Laminaire Corp. (n/k/a Cavico Corp.), Securities Exchange Act Rel. No. 55968 (June 27, 2007), 90 SEC Docket 2881; Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 as to Upside Development, Inc. (n/k/a Amorocorp), Exchange Act Rel. No. 56019 (July 6, 2007), 91 SEC Docket 31.

3/ 17 C.F.R. § 201.200(d).

Division asserted that, after the OIP was instituted, AMI advised the Division that "it was the victim of mistaken identity and that it had acquired a different and unrelated TAM Restaurants, Inc.," a Delaware corporation incorporated in March 2006. TAMRI opposed the Division's motion arguing that dismissal of AMI as a party would be "premature and may result in prejudice" to TAMRI, as the Division's motion "was based on incomplete facts." TAMRI requested that we stay this proceeding "pending a resolution of the actual corporate issue."

It was unclear to us after reviewing the pleadings and exhibits furnished by the parties what AMI's relationship is to TAMRI. Accordingly, on October 22, 2007, we denied the Division's motion to amend the OIP and directed that the record with respect to AMI's relationship to TAMRI be further developed. 4/ On October 25, 2007, the law judge set a hearing date of November 19, 2007 to address our directive to further develop the facts surrounding AMI's relationship to TAMRI.

On the same day that the law judge set the hearing date, the Division submitted a motion seeking reconsideration of the October 22, 2007 order denying the Division's motion to amend the OIP. TAMRI opposes the Division's motion. In its motion for reconsideration, the Division asserts that our issuance of the October 22, 2007 order "sua sponte is unusual without briefing by the parties." However, we explained in the October 22, 2007 order that Commission Rule of Practice 200(d)(2) provides a law judge with authority to amend an order instituting proceedings only to "include new matters of fact or law that are within the scope of the original order instituting proceedings." 5/ The amendment sought by the August 3 Motion, to dismiss AMI from the proceeding, was not within the scope of the original OIP, could not be decided by the law judge, and thus was properly decided by the Commission. 6/ Accordingly, after reviewing

---

4/ See Order Denying Motion to Amend Order Instituting Proceedings, Exchange Act Rel. No. 56685 (Oct. 22, 2007), __ SEC Docket __.

5/ 17 C.F.R. § 201.200(d)(2).

6/ See Order Denying Motion to Amend Order Instituting Proceedings, Exchange Act Rel. No. 56685 (Oct. 22, 2007), __ SEC Docket __.

The Division suggests that its motion does not seek to dismiss a respondent because TAMRI remains a respondent, and AMI was mistakenly named in the OIP as TAMRI's successor. AMI was named and has been treated as a party. We also note that, on the same day that we instituted this proceeding, when we temporarily suspended the trading of securities of "TAM Restaurants, Inc. (n/k/a Aerofoam Metals, Inc.)" from June 13, 2007 through June 26, 2007, it was AMI whose trading was suspended. See Order of Suspension of Trading, Exchange Act Rel. No. 55902 (June 13, 2007), 90 SEC Docket 2539; Archive of Press Releases Issued by Aerofoam Metals, Inc., Mistaken Identity for Aerofoam Metals Incorporated, http://www.aerofoammetals.com/Press%20release%20-

(continued...)

the briefs and exhibits submitted by the Division, AMI, and TAMRI, we issued our October 22, 2007 order denying the motion.

In its motion for reconsideration, the Division reiterates its argument in the August 3, 2007 motion to amend the OIP to strike AMI as a party on the basis that AMI is not the successor to TAMRI. The Division asserts that AMI, "which is not a separate and distinct respondent, was simply captioned with [TAMRI]." In support of its argument, the Division refers for the first time to Exchange Act Rule 12b-2, 7/ which defines "succession" as

> the direct acquisition of the assets comprising a going business, whether by merger, consolidation, purchase, or other direct transfer; or the acquisition of control of a shell company in a transaction required to be reported on Form 8-K (§249.308 of this chapter) in compliance with Item 5.01 of that Form or on Form 20-F (§249.220f of this chapter) in compliance with Rule 13a-19 (§240.13a-19) or Rule 15d-19 (§240.15d-19). Except for an acquisition of control of a shell company, the term does not include the acquisition of control of a business unless followed by the direct acquisition of its assets. The terms succeed and successor have meanings correlative to the foregoing.

The Division argues that the relationship between AMI and TAMRI does not meet the requirements of Exchange Act Rule 12b-2 and that AMI therefore is not the successor to TAMRI.

We consider the Division's motion for reconsideration under Commission Rule of Practice 470. 8/ Reconsideration is an extraordinary remedy designed to correct manifest errors of law or fact or permit the introduction of newly discovered evidence. 9/ Motions for reconsideration are not to be used to reiterate arguments previously made or to cite authorities previously available. 10/ The Division's motion does not meet this rigorous standard. The Division does not identify any manifest error of law or fact or present newly discovered evidence.

6/ (...continued)
%20June%2014,%202007.htm, at *1 (issued June 14, 2007) (acknowledging the suspension of trading in AMI's securities on June 13, 2007).

7/ 17 C.F.R. § 240.12b-2.

8/ 17 C.F.R. § 201.470.

9/ See The Rockies Fund, Inc., Exchange Act Rel. No. 56344 (Sept. 4, 2007), __ SEC Docket __ (citing Philip A. Lehman, Exchange Act Rel. No. 54991 (Dec. 21, 2006), 89 SEC Docket 2006).

10/ See Id. at __ (citing Feeley & Willcox Asset Mgmt. Corp., 56 S.E.C. 1264, 1267 & n.8 (2003)).

The Division's motion does, however, raise a new basis on which to evaluate AMI's relationship to TAMRI.

Our October 22, 2007 order denying the Division's motion to amend the OIP to strike AMI as a party was premised on the ambiguity surrounding AMI's relationship to TAMRI. We therefore directed the parties to further develop the record on that issue. The law judge has set a hearing date of November 19, 2007 to follow that directive. We believe that the Division's observations regarding Exchange Act Rule 12b-2 merit further consideration at the hearing.

Accordingly, IT IS ORDERED THAT the Division of Enforcement's motion for reconsideration in this matter be, and it hereby is, denied.

By the Commission.

Nancy M. Morris
Secretary

Florence E Harman

By: Florence E Harmon
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 230, 239, 240 and 249

[Release Nos. 33-8860; 34-56803; File No. S7-27-07]

RIN 3235-AJ98

CONCEPT RELEASE ON MECHANISMS TO ACCESS DISCLOSURES RELATING TO BUSINESS ACTIVITIES IN OR WITH COUNTRIES DESIGNATED AS STATE SPONSORS OF TERRORISM

AGENCY: Securities and Exchange Commission.

ACTION: Concept Release.

SUMMARY: The Securities and Exchange Commission is soliciting comment about whether to develop mechanisms to facilitate greater access to companies' disclosures concerning their business activities in or with countries designated as State Sponsors of Terrorism.

DATES: Comments should be received on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/concept.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-27-07 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-27-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/concept.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: James Lopez, Division of Corporation Finance at (202) 551-3536; U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The U.S. Department of State publishes a list of countries that the Secretary of State has designated as State Sponsors of Terrorism.[1] The five countries the U.S. Secretary of State currently designates as State Sponsors of Terrorism are Cuba, Iran, North Korea, Sudan and Syria. Over the last several years, a large number of state governments, universities, pension

[1] State sponsors of terrorism are designated under three laws: Export Administration Act of 1979, 50 U.S.C. App. § 2405(j) (2000), Arms Export Control Act, 22 U.S.C. § 2780(d) (2000), and Foreign Assistance Act of 1961, 22 U.S.C. § 2371(a) (2000).

funds, and other institutional investors, as well as individual investors, have sought information relating to public company business activities in or with State Sponsors of Terrorism in furtherance of their desire to ensure that their invested funds do not directly or indirectly support terrorism.[2]

The Commission's Office of Global Security Risk routinely monitors public company disclosure of material business activities in or with State Sponsors of Terrorism. On June 25, 2007, the Commission added a feature to its Web site that provided direct access to public companies' 2006 annual report disclosures concerning past, current or anticipated business activities in or with one or more of these countries.[3] The sole purpose of the Web site feature was to provide direct access to company disclosures on this topic.

The web feature was constructed as a tool to assist investors seeking to view companies' disclosures regarding business activities in or with any of the five State Department-designated State Sponsors of Terrorism. It was not based on a simple keyword search of the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. The web tool was the result of a staff review of company disclosure including any reference to a State Sponsor of Terrorism. This disclosure review allowed the web tool to exclude disclosure unrelated to a company's activities in or with any of these countries (e.g., generic references to a country; references to a State Sponsor of Terrorism in the context of an executive officer's or director's experience and educational background; or generic descriptions of risk associated with the possibility of war[4]).

---

[2] See, e.g., Letter from 50 trustees of state treasurers to the State Department, Commerce Department, Treasury Department and Securities and Exchange Commission (June 3, 2005), available at http://www.cii.org/site_files/pdfs/letters/Joint%20Ltr%2050%20pf%20to%20US%20govt%2006-03-05.pdf.

[3] Press Release, SEC Adds Software Tool for Investors Seeking Information on Companies' Activities in Countries Known to Sponsor Terrorism (June 20, 2007).

[4] For example, the web posting excluded generic references to hostilities or discord between North Korea and South Korea.

It also permitted the web tool to exclude companies whose disclosures stated that they did not conduct business in or with State Sponsors of Terrorism. The Commission's staff did not apply any other filter in screening disclosure content. In order to provide proper context, all of the company disclosures available through the web tool were linked directly to the full text of the company's annual report. Our Web site analytics indicated that visitors typically clicked through a company name to the text of a company's own disclosure. Moreover, the SEC provided no commentary on the company's own disclosures except to state that the existence of a disclosure by a company concerning activities in one of the State Sponsors of Terrorism does not, in itself, mean that the company directly or indirectly supports terrorism or is otherwise engaged in any improper activity.

The construction and operation of the web tool generated many comments, both positive and negative, based on exceptionally high traffic. A number of the negative comments raised serious concerns about the lack of updated information beyond what a company had included in its most recent annual report. Other concerns included the possible negative connotation that could attach to a company when its disclosure was presented, even though the company's disclosure concerned benign activities such as news reporting within a State Sponsor of Terrorism or immaterial activities that the company voluntarily disclosed. The comments received have been extremely useful to the Commission in evaluating the performance and appropriateness of the web tool.

Because of the importance the SEC places on complete, accurate, and timely disclosure, comments about the web tool's inability to access more current information about a company's business activities in or with a State Sponsor of Terrorism since the date of the company's most recent annual report were of particular concern to the agency. Because more recent disclosure

might include, for example, the fact that a company had completely terminated its activities in a country, the more recent information could be material to a complete understanding of the disclosure in the last annual report. We also question whether a company's disclosure of legitimate or immaterial business activity should lead to its being identified through a web tool that highlights connections to State Sponsors of Terrorism.

To address these and related concerns, on July 20, 2007, the web tool was indefinitely suspended. The July 20, 2007 suspension announcement indicated that the Commission staff would consider whether to recommend a Concept Release on the question of how best to make public company disclosure of business activities in or with a State Sponsor of Terrorism more accessible.[5] The Commission is issuing this Concept Release as a result of that process, in order to solicit public comment on these important issues in a more formal way. Engaging the public's input on these issues is particularly appropriate to the extent that we contemplate novel approaches to investor access to company disclosures. The Commission hopes that this process will afford the best opportunity to address all legitimate concerns.

II. DISCLOSURE OF BUSINESS ACTIVITIES IN OR WITH COUNTRIES DESIGNATED AS STATE SPONSORS OF TERRORISM

The federal securities laws do not impose a specific disclosure requirement that addresses business activities in or with a country based upon its designation as a State Sponsor of Terrorism. However, the federal securities laws do require disclosure of business activities in or with a State Sponsor of Terrorism if this constitutes material information that is necessary to make a company's statements, in the light of the circumstances under which they are made, not

[5] Press Release, Statement by Securities and Exchange Commission Chairman Christopher Cox Concerning Companies' Activities in Countries Known to Sponsor Terrorism (July 20, 2007).

misleading.[6] The term "material" is not defined in the federal securities laws. Rather, the Supreme Court has determined information to be material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision or if the information would significantly alter the total mix of available information.[7]

The materiality standard applicable to a company's activities in or with State Sponsors of Terrorism is the same materiality standard applicable to all other corporate activities. Any such material information not covered by a specific rule or regulation must be disclosed if necessary to make the required statements, in the light of the circumstances under which they are made, not misleading. The materiality standard's extensive regulatory and judicial history helps companies and their counsel to interpret and apply it consistently, and we remain committed to employing this standard to company disclosure regarding business activities in or with State Sponsors of Terrorism.

Although the Commission is well positioned to review disclosure relating to business activities regardless of the country in which they are conducted, we do not have the expertise or information necessary to identify the particular countries whose governments have funded, sponsored, provided a safe haven for, or otherwise supported terrorism. Nor is it the Commission's role to determine the degree to which a public company's business activities may support terrorism or may be inconsistent with U.S. foreign policy or U.S. national interests.

Information that companies provide regarding their business activities in or with State Sponsors of Terrorism is currently available in various public filings they make with the

---

[6] Rule 408 of Regulation C, [17 CFR 230.408] and Rule 12b-20 under the Securities Exchange Act of 1934 [17 CFR 240.12b-20].

[7] TSC Industries v. Northway, Inc., 426 U.S. 438 (1976). It has also held that materiality of contingent or speculative events or information depends on balancing the probability that the event will occur and the expected magnitude of the event. Basic v. Levinson, 485 U.S. 224, 238 (1988).

Commission. Searching for and comparing such disclosure can be difficult and time consuming using the EDGAR system, although we have recently made it easier by adding an advanced full-text search function.[8] The Commission seeks public comment on whether easier access to this information is appropriate.

Request for Comment

1. The Commission does not provide enhanced access to disclosures concerning other specific subject areas. Should we do so in this case? Why or why not?
2. Would providing easier access to companies' disclosures of business in or with State Sponsors of Terrorism place appropriate emphasis on that issue or would it place undue emphasis? Would providing for easier access to such disclosures be consistent with the Commission's mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation?
3. Regardless of the particular approach that the Commission might pursue to provide investors with easier access to companies' disclosures concerning their business in or with State Sponsors of Terrorism, are there potential unintended consequences of providing easier access to company disclosures in this area that the Commission should consider? If so, what are they? Are there steps the Commission could take to minimize them?
4. Would providing easier investor access to companies' disclosures concerning their business in or with State Sponsors of Terrorism disproportionately impact U.S. or foreign private issuers? If so, how?

---

[8] By accessing EDGAR, the page titled "EDGAR Full-Text Search," and clicking on "Advanced Search," the user can search for, among other terms, the names of the countries designated as State Sponsors of Terrorism, and limit the results to certain filings and documents, such as annual reports (e.g., Form 10-K or 20-F) or company correspondence ("CORRESP") with the Commission's staff.

5. Would providing easier investor access to U.S. listed companies' disclosures concerning their business in or with State Sponsors of Terrorism positively or negatively impact the competitiveness of U.S. financial markets?

6. The Commission's staff, when reviewing disclosure related to business activities in or with a State Sponsor of Terrorism, interprets materiality in the same way it does when reviewing disclosure relating to any other corporate activities not covered by a specific rule or regulation. We nevertheless seek comment raising any opposing views and alternatives. Commenters should discuss in detail the bases for their views and recommendations.

7. Is the information currently available in public company filings regarding business activities in or with State Sponsors of Terrorism sufficient?

8. Do investors find the information that public companies currently disclose about their business activities in or with State Sponsors of Terrorism important in making investment decisions?

III. MEANS OF PROVIDING EASIER ACCESS TO EXISTING COMPANY DISCLOSURES

In seeking public comment on whether providing easier access to such disclosure is appropriate, the Commission seeks additional comment on whether it should pursue one of the following alternative means to accomplish this end.

IMPROVEMENTS TO THE WEB TOOL

The web tool we discuss in Section I, and previously available on the Investor Information section of the SEC Web site, contained the names of companies that disclosed in their 2006 annual reports business activities in or with one or more of the five State Sponsors of Terrorism. After accessing the web tool and clicking on one of the five countries, an investor

could click on the name of a company that appeared under the country name to view the relevant portion of its 2006 annual report. The disclosure page included a link to the company's entire 2006 annual report as well as all of its other filings, including those it filed after its annual report. As discussed above, company disclosure referencing a State Sponsor of Terrorism that was unrelated to business activities was not available through the web tool.[9] However, company disclosure indicating that the company was in the process of terminating business activities in or with one of the countries was made available through the web tool. Similarly, company disclosure of business activities regardless of their materiality, nature, or legality was made available through the web tool. The inclusion of company disclosure regardless of the amount or nature of business activities in or with a State Sponsor of Terrorism was designed to avoid any indication that a conclusion had been reached about or any advice provided regarding the propriety of a company's activities. Instead, the tool was designed to provide easier access to information that would allow an investor to come to his or her own conclusion regarding a company's business activities in or with State Sponsors of Terrorism. This approach raised concerns, however. Companies named on the SEC's Web site maintained that inclusion of a company's disclosure via the web tool, regardless of the appropriateness of the activity, created a negative impression and might cause them reputational harm.

The Commission seeks public comment on whether it should reinstate a web tool and, if so, how to address the shortcomings that were present in the prototype. Some have suggested that, at a minimum, the following issues would need to be addressed: broadening the universe of available disclosure documents; including a company's most recent filings to ensure that the Web site information is timely; and displaying the methodology used to select the companies for

[9] As such, companies were excluded if the disclosure stated that the company did not do business in or with the particular country.

the Web site and the frequency of updates, including a description of the limitations on the information such as the fact that a company might disclose more than is required under the securities laws. Of the above list, the most difficult recommendation to implement would be the requirement that Commission staff constantly update the universe of current and periodic report and other filing disclosure available through the web tool, in order to keep the information timely. Doing this would require a significant and indefinite commitment of agency personnel, with concomitant impacts on the SEC budget and on the other work of the Commission, particularly within the Division of Corporation Finance. The recommendations listed above may not address all of the concerns that the web tool raised.

Request for Comment

9. Do the recommendations listed above adequately address the concerns with the prototype web tool? What specific improvements could be made to address those concerns? Are there additional concerns that need to be addressed?
10. Should the Commission reinstitute the web tool, with improvements? If so, what specific improvements should we make to the web tool before we once again make it publicly available?
11. If the Commission were to reinstitute the web tool, how frequently should it update the database of documents containing relevant disclosure?
12. Could the implementation of a web-based tool have adverse consequences, such as reducing the amount of information, not otherwise subject to disclosure under the federal securities laws, which a company chooses to make available to investors?
13. Is the concept of a web tool that begins with a Commission-generated list of companies inherently flawed?

DATA TAGGING BY COMPANIES THEMSELVES

Since 2004, the Commission has devoted increasing attention and resources to the possibility of making periodic reports companies file with the Commission, including financial statements, interactive. Through the use of data tags – computer labels written in the XBRL computer language – users of company disclosure documents could more easily search, retrieve, and analyze information. For nearly two years, the Commission has had a pilot program underway in which companies voluntarily tag their financial statement information using XBRL labels. Over 40 companies, with a market capitalization of over $2 trillion, now participate in the program. At the same time, the Commission is currently developing web-based tools that take advantage of the power of interactive data technology. One such tool, which we expect to make available soon, will let investors compare executive compensation across 500 of the nation's largest public companies.

One means of enhancing the searchability and comparability of company disclosures concerning business activities in State Sponsors of Terrorism would be for a company to apply data tags to identify the nature of the disclosure. The Commission seeks public comment on whether it should consider the use of data tagging to enhance access to public company information about business activities in or with the State Sponsors of Terrorism.

When the Commission released a web tool on June 25, 2007 that provided direct access to public companies' disclosures about their business activities in or with the State Sponsors of Terrorism, we stated that "[t]he existence of a disclosure by a company concerning activities in one of the listed countries does not, in itself, mean that the company directly or indirectly supports terrorism or is otherwise engaged in any improper activity."[10] Nonetheless, several of

[10] Press Release, SEC Adds Software Tool for Investors Seeking Information on Companies' Activities in Countries Known to Sponsor Terrorism (June 20, 2007).

the companies whose disclosures were identified in the web tool stated that the information in their annual reports was not indicative of their doing business in a State Sponsor of Terrorism, or alternatively that it was not indicative of their doing a material amount of business in such a country, or that it did not concern the kinds of business activities with which investors normally would be concerned. The common theme to these various comments was, in other words, that company disclosures had been mislabeled. One way to directly address this concern would be to authorize the companies themselves to use data tags that would determine how their disclosures would be called up in response to web-based searches.

Were this approach to be adopted, a further potential benefit would be to eliminate any Commission role in characterizing a company's disclosure with a web tool. Because companies would apply the tags themselves to their own disclosures, the information that a web search tool would highlight for investor scrutiny would be determined not by the Commission but by each company.

The use of company data tagging also has the potential to address concerns about the timeliness of information the web tool displays. Rather than relying upon a company's most recent annual report, the web tool would rely on data tags attached to any company filing, including, for example, current reports on Form 8-K. As a result, the web tool would display information to any user the moment it was electronically filed with the Commission.

Finally, the use of company data tagging would substantially reduce the necessity to dedicate significant Commission staff resources on an ongoing basis, since the companies, not the Commission staff, would determine what disclosures the web tool would display.

In order for the Commission to adopt this approach, it would first be necessary to prepare a simple taxonomy of XBRL data tags which companies could apply to the various kinds of

disclosure that they make with respect to business activities in or with State Sponsors of Terrorism. A recent example of how this might be done is the specialized taxonomy that was prepared for mutual fund performance data by the Investment Company Institute, and that is currently being reviewed by XBRL US, the independent private sector standard setter for interactive data tags. Once the taxonomy was completed, the data tags would then be published on the web and made available, free of charge, to every public company. The Commission seeks public comment on whether it should seek to provide investors easier access to public companies' disclosure about business activities in or with State Sponsors of Terrorism through the use of interactive data tags in the XBRL language that companies would apply themselves.

Request for Comment

14. Should the Commission consider proposing a requirement that companies use XBRL data tags to identify various types of disclosure regarding business activities in or with State Sponsors of Terrorism? Alternatively, should the use of XBRL data tags be voluntary?
15. If the Commission were to pursue data tagging, who should define the various categories of disclosure?
16. If the Commission were to pursue data tagging, to which categories of disclosure should the data tags correspond? For example, should there be a category for business activities that the company considers immaterial to its business, but which it chooses to disclose voluntarily? Or for business activities in State Sponsors of Terrorism that are perceived as benign, such as news gathering or humanitarian work? Should there be a category for business activity that has ceased? Or for disclosure that no business activities with any State Sponsor of Terrorism have ever existed? What other categorization would be necessary to promote clarity and ease of use?

17. If the Commission were to pursue data tagging, what types of information should it require companies to tag? For example, should a company be required to tag only that disclosure which relates to ongoing business activities in or with a State Sponsor of Terrorism? Should it also tag data relating to disclosure of business activities that ceased during the period of the report, or during a certain time period prior to that?

18. If the Commission were to pursue data tagging, which reports and filings with the SEC should include this tagged disclosure?

19. Should the Commission consider options other than data tagging or a web tool? If so, what?

IV. GENERAL REQUEST FOR COMMENTS

In addition to the areas for comment identified above, we are interested in any other issues that commenters may wish to address that are related to the Commission's consideration of providing improved investor access to disclosures concerning public companies' business activities in or with State Sponsors of Terrorism. We are also interested in any issues that commenters may wish to address relating to the relative benefits and costs of providing improved access to public company disclosures in this area. Please be as specific as possible in your discussion and analysis of any additional issues. Where possible, please provide empirical data or observations to support or illustrate your comments.

Nancy M. Morris

By the Commission.

Nancy M. Morris
Secretary

Dated: November 16, 2007.

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56823 / November 20, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2677 / November 20, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12893

In the Matter of

Andrew A. Srebnik,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Andrew A. Srebnik ("Respondent").

Document 19 of 24

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Srebnik, 36 years old, is a resident of New York, New York.

2. From March 1999 through August 2006, Srebnik was a registered representative associated with Bear, Stearns & Co., Inc., a broker-dealer and investment adviser registered with the Commission.

3. On November 14, 2007, a final judgment was entered by consent against Srebnik, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Guttenberg, et al., Civil Action Number 07 CV 1774, in the United States District Court for the Southern District of New York.

4. The Commission's complaint alleged that, from at least March 2002 through June 2002, and while a registered representative at Bear Stearns, Srebnik engaged in an illegal insider trading scheme in which he used material, nonpublic information concerning upcoming analyst recommendations by UBS Securities LLC to purchase and sell securities in his personal brokerage account.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Srebnik's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Srebnik be, and hereby is barred from association with any broker, dealer, or investment adviser.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 232, 239, and 274

[Release Nos. 33-8861; IC-28064; File No. S7-28-07]

RIN 3235-AJ44

ENHANCED DISCLOSURE AND NEW PROSPECTUS DELIVERY OPTION FOR REGISTERED OPEN-END MANAGEMENT INVESTMENT COMPANIES

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing amendments to the form used by mutual funds to register under the Investment Company Act of 1940 and to offer their securities under the Securities Act of 1933 in order to enhance the disclosures that are provided to mutual fund investors. The proposed amendments, if adopted, would require key information to appear in plain English in a standardized order at the front of the mutual fund statutory prospectus. The Commission is also proposing rule amendments that would permit a person to satisfy its mutual fund prospectus delivery obligations under Section 5(b)(2) of the Securities Act by sending or giving the key information directly to investors in the form of a summary prospectus and providing the statutory prospectus on an Internet Web site. Upon an investor's request, mutual funds would also be required to send the statutory prospectus to the investor. The proposals are intended to improve mutual fund disclosure by providing investors with key information in plain English in a clear and concise format, while enhancing the means of delivering more detailed information to investors.

DATES: Comments should be submitted on or before [**INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-28-07 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-28-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Kieran G. Brown, Senior Counsel; Sanjay Lamba, Senior Counsel; Tara R. Buckley, Branch Chief; or Brent J. Fields, Assistant Director, Office of Disclosure Regulation, Division of Investment Management, at (202) 551-6784, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5720.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") is proposing for comment amendments to rules 159A,[1] 482,[2] 485,[3] 497,[4] and 498[5] under the Securities Act of 1933 ("Securities Act") and rules 304[6] and 401[7] of Regulation S-T.[8] The Commission is also proposing for comment amendments to Form N-1A,[9] the form used by open-end management investment companies to register under the Investment Company Act of 1940 ("Investment Company Act") and to offer securities under the Securities Act; Form N-4,[10] the form used by insurance company separate accounts organized as unit investment trusts and offering variable annuity

---

1 17 CFR 230.159A.

2 17 CFR 230.482.

3 17 CFR 230.485.

4 17 CFR 230.497.

5 17 CFR 230.498.

6 17 CFR 232.304.

7 17 CFR 232.401.

8 17 CFR 232.10 et seq.

9 17 CFR 239.15A and 274.11A.

10 17 CFR 239.17b and 274.11c.

contracts to register under the Investment Company Act and to offer securities under the Securities Act; and Form N-14,[11] the form used by registered management investment companies and business development companies to register under the Securities Act securities to be issued in business combinations.

---

[11] 17 CFR 239.23.

Table of Contents

I. BACKGROUND

II. DISCUSSION

A. Proposed Amendments to Form N-1A

B. New Delivery Option for Mutual Funds

C. Technical and Conforming Amendments

D. Compliance Date

III. GENERAL REQUEST FOR COMMENTS

IV. SPECIAL REQUEST FOR COMMENTS FROM INVESTORS

V. PAPERWORK REDUCTION ACT

VI. COST/BENEFIT ANALYSIS

VII. CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION

VIII. INITIAL REGULATORY FLEXIBILITY ANALYSIS

IX. CONSIDERATION OF IMPACT ON THE ECONOMY

X. STATUTORY AUTHORITY

TEXT OF PROPOSED RULE AND FORM AMENDMENTS

APPENDIX

I. BACKGROUND

Millions of individual Americans invest in shares of open-end management investment companies ("mutual funds"),[12] relying on mutual funds for their retirement, their children's education, and their other basic financial needs.[13] These investors face a difficult task in choosing among the more than 8,000 available mutual funds.[14] Fund prospectuses, which have been criticized by investor advocates, representatives of the fund industry, and others as long and complicated, often prove difficult for investors to use efficiently in comparing their many choices.[15] Current Commission rules require mutual fund prospectuses to contain key information about investment objectives, risks,

---

12 An open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer. See Sections 4 and 5(a)(1) of the Investment Company Act [15 U.S.C. 80a-4 and 80a-5(a)(1)].

13 Investment Company Institute, 2007 Investment Company Fact Book, at 57 (2007), available at: http://www.icifactbook.org/pdf/2007_factbook.pdf (96 million individuals own mutual funds).

14 Id. at 10 (as of year-end 2006, there were 8,726 mutual funds).

15 See William D. Lutz, Ph.D., Professor of English, Rutgers University, Transcript of U.S. Securities and Exchange Commission Interactive Data Roundtable, at 69 (June 12, 2006), available at: http://www.sec.gov/spotlight/xbrl/xbrlofficialtranscript0606.pdf ("June 12 Roundtable Transcript") (stating that current mutual fund prospectus is "unreadable"); Don Phillips, Managing Director, Morningstar, Inc., id. at 26 (stating that current prospectus is "bombarding investors with way more information than they can handle and that they can intelligently assimilate"). A Webcast archive of the June 12 Interactive Data Roundtable is available at: http://www.connectlive.com/events/secxbrl/. See also Investment Company Institute, Understanding Preferences for Mutual Fund Information, at 8 (Aug. 2006), available at: http://ici.org/pdf/rpt_06_inv_prefs_summary.pdf ("ICI Investor Preferences Study") (noting that sixty percent of recent fund investors describe mutual fund prospectuses as very or somewhat difficult to understand, and two-thirds say prospectuses contain too much information); Associated Press Online, Experts: Investors Face Excess Information (May 25, 2005) ("There is broad agreement . . . that prospectuses have too much information . . . to be useful." (quoting Mercer Bullard, President, Fund Democracy, Inc.)); Thomas P. Lemke and Gerald T. Lins, The "Gift" of Disclosure: A Suggested Approach for Managed Investments, The Investment Lawyer, at 19 (Jan. 2001) (stating that the fund prospectus "typically contains more information than the average investor needs").

and expenses that, while important to investors, can be difficult for investors to extract. Prospectuses are often long, both because they contain a wealth of detailed information, which our rules require, and because prospectuses for multiple funds are often combined in a single document. Too frequently, the language of prospectuses is complex and legalistic, and the presentation formats make little use of graphic design techniques that would contribute to readability.

Numerous commentators have suggested that investment information that is key to an investment decision should be provided in a streamlined document with other more detailed information provided elsewhere.[16] Furthermore, recent investor surveys indicate

---

[16] See Charles A. Jaffe, Improving Disclosure of Funds Can Be Done, The Fort Worth Star-Telegram (May 7, 2006) ("Bring back the profile prospectus, and make its use mandatory. . . . A two page-summary of [the] key points [in the profile] – at the front of the prospectus – would give investors the bare minimum of what they should know out of the paperwork."); Experts: Investors Face Excess Information, supra note 15 (stating "a possible middle ground in the disclosure debate is to rely more heavily on so-called profile documents which provide a two-page synopsis of a fund" (attributing statement to Mercer Bullard, President, Fund Democracy, Inc.)); Mutual Funds: A Review of the Regulatory Landscape, Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the Comm. on Financial Services, U.S. House of Representatives, 109th Cong. (May 10, 2005), at 24 ("To my mind, a new and enhanced mutual fund prospectus should have two core components. It should be short, addressing only the most important factors about which typical fund investors care in making investment decisions, and it should be supplemented by additional information available electronically, specifically through the Internet, unless an investor chooses to receive additional information through other means." (Testimony of Barry P. Barbash, then Partner, Shearman & Sterling LLP)); Thomas P. Lemke and Gerald T. Lins, The "Gift" of Disclosure: A Suggested Approach for Managed Investments, supra note 15, at 19 (information that is important to investors includes goals and investment policies, risks, costs, performance, and the identity and background of the manager).

In addition, a mutual fund task force organized by the National Association of Securities Dealers, Inc. ("NASD") supported the use of a "profile plus" document, on the Internet, that would include, among other things, basic information about a fund's investment strategies, risks, and total costs, with hyperlinks to additional information in the prospectus. See NASD Mutual Fund Task Force, Report of the Mutual Fund Task Force: Mutual Fund Distribution (Mar. 2005), available at: http://www.finra.org/web/groups/rules_regs/documents/rules_regs/p013690.pdf.

that investors prefer to receive information in concise, user-friendly formats.[17]

Similar opinions were voiced at a roundtable held by the Commission in June 2006, at which representatives from investor groups, the mutual fund industry, analysts, and others discussed how the Commission could change the mutual fund disclosure framework so that investors would be provided with better information. Significant discussion at the roundtable concerned the importance of providing mutual fund investors with access to key fund data in a shorter, more easily understandable format.[18] The participants focused on the importance of providing mutual fund investors with shorter disclosure documents, containing key information, with more detailed disclosure documents available to investors and others who choose to review additional information.[19] There was consensus among the roundtable participants that the key

---

17 See ICI Investor Preferences Study, supra note 15, at 29 ("Nearly nine in 10 recent fund investors say they prefer a summary of the information they want to know before buying fund shares, either alone or along with a detailed document . . . . Just 13 percent prefer to receive only a detailed document."); Barbara Roper and Stephen Brobeck, Consumer Federation of America, Mutual Fund Purchase Practices, at 13-14 (June 2006), available at: http://www.consumerfed.org/pdfs/mutual_fund_survey_report.pdf (survey respondents more likely to consult a fund summary document rather than a prospectus or other written materials).

18 See, e.g., Henry H. Hopkins, Vice President and Chief Legal Counsel, T. Rowe Price Group, Inc., June 12 Roundtable Transcript, supra note 15, at 31 ("[S]hareholders prefer receiving a concise summary of fund information before buying."); William D. Lutz, Ph.D., Professor of English, Rutgers University, id. at 88 (stating that "investors [should] be able to find quickly and easily the information they want").

19 See Don Phillips, Managing Director, Morningstar, Inc., id. at 27 (stating that mutual fund investors need two different documents, including a simplified print document and a tagged electronic document); Paul Schott Stevens, President and Chief Executive Officer, Investment Company Institute, id. at 72-73 (urging the Commission to consider permitting mutual funds to "deliver a clear concise disclosure document . . . much like the profile prospectus" with a statement that additional disclosure is available on the funds' website or upon request in paper); Elisse B. Walter, Senior Executive Vice President, NASD, id. at 41 (noting that the industry-recommended disclosure document, the "profile plus," would include hyperlinks to the statutory prospectus, which would enable investors to "choose for themselves the level of detail they want").

information that investors need to make an investment decision includes information about a mutual fund's investment objectives and strategies, risks, costs, and performance.[20]

The roundtable participants also discussed the potential benefits of increased Internet availability of fund disclosure documents, which include, among other things, facilitating comparisons among funds and replacing "one-size-fits-all" disclosure with disclosure that each investor can tailor to his or her own needs.[21] In recent years, access to the Internet has greatly expanded,[22] and significant strides have been made in the speed

---

20 See Barbara Roper, Director of Investor Protection, Consumer Federation of America, June 12 Roundtable Transcript, supra note 15, at 20 (noting that there is "agreement to the point of near unanimity about the basic factors that investors should consider when selecting a mutual fund. These closely track the content of the original fund profile with highest priority given to investment objectives and strategies, risks, costs, and past performance particularly as it relates to the volatility of past returns."). See also Paul G. Haaga, Jr., Executive Vice President, Capital Research and Management Company, id. at 90 (stating that the Commission should "specify some minimum amounts of information" to provide investors with "something along the lines of the [fund] profile"); Henry H. Hopkins, Vice President and Chief Legal Counsel, T. Rowe Price Group, Inc., id. at 31 ("The profile is an excellent well organized disclosure document whose content requirements were substantiated by SEC-sponsored focus groups and an industry pilot program."); William D. Lutz, Ph.D., Professor of English, Rutgers University, id. at 88 (noting that the information that mutual fund investors want has not changed substantially since the adoption of the profile); Elisse B. Walter, Senior Executive Vice President, NASD, id. at 40-41 (noting that NASD's "profile plus" builds on the profile and includes key information about a fund's objectives, risks, fees, and performance, as well as information about dealer fees and conflicts of interest).

21 See Paul Schott Stevens, President and Chief Executive Officer, Investment Company Institute, id. at 70-71 (stating that the Internet can serve as "far more than a stand-in for paper documents . . . . It can . . . put investors in control when it comes to information about their investments."); Don Phillips, Managing Director, Morningstar, Inc., id. at 49 (discussing "the ability to use the Internet as a tool for comparative shopping"); Elisse B. Walter, Senior Executive Vice President, NASD, id. at 41 (noting that the Internet "doesn't force disclosure into one size fits all").

22 Recent surveys show that Internet use among adults is at an all time high with approximately three quarters of Americans having access to the Internet. See A Typology of Information and Technology Users, Pew Internet & American Life Project, at 2 (May 2007), available at: http://www.pewinternet.org/pdfs/PIP_ICT_Typology.pdf; Internet Penetration and Impact, Pew Internet & American Life Project, at 3 (Apr. 2006),

and quality of Internet connections.[23] The Commission has already harnessed the power of these technological advances to provide better access to information in a number of areas. Recently, for example, we created a program that permits issuers, on a voluntary basis, to submit to the Commission financial information and, in the case of mutual funds, key prospectus information, in an interactive data format that facilitates automated retrieval, analysis, and comparison of the information.[24] Earlier this year, we adopted rules that provide all shareholders with the ability to choose whether to receive proxy materials in paper or via the Internet.[25] As suggested by the participants at the roundtable, advances in technology also offer a promising means to address the length and

---

available at: http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf. Further, while some have noted a "digital divide" for certain groups, see, e.g., Susannah Fox, Digital Divisions, Pew Internet & American Life Project, at 1 (Oct. 5, 2005) (noting that certain groups lag behind in Internet usage, including Americans age 65 and older, African-Americans, and those with less education), others have noted that this divide may be diminishing for those groups. See, e.g., Mutual Fund Shareholders' Use of the Internet, 2006, Investment Company Institute, Research Fundamentals, at 7 (Oct. 2006), available at: http://www.ici.org/stats/res/1fm-v15n6.pdf ("Recent increases in Internet access among older shareholders . . . have narrowed the generational gap considerably. Today, shareholders age 65 or older are more than twice as likely to have Internet access than in 2000."); Michel Marriott, Blacks Turn to Internet Highway, And Digital Divide Starts to Close, THE NEW YORK TIMES (Mar. 31, 2006), available at: http://www.nytimes.com/2006/03/31/us/31divide.html?ex=1301461200&en=6fd4e942aaaa04ad&ei=5088 ("African-Americans are steadily gaining access to and ease with the Internet, signaling a remarkable closing of the 'digital divide' that many experts had worried would be a crippling disadvantage in achieving success.").

[23] See John B. Horrigan, Home Broadband Adoption 2007, Pew Internet & American Life Project, at 1 (June 2007), available at: http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf (47% of all adult Americans had a broadband connection at home as of early 2007).

[24] See Securities Act Release No. 8823 (July 11, 2007) [72 FR 39290 (July 17, 2007)] (adopting rule amendments to enable mutual funds voluntarily to submit supplemental tagged information contained in the risk/return summary section of their prospectuses); Securities Act Release No. 8529 (Feb. 3, 2005) [70 FR 6556 (Feb. 8, 2005)] (adopting rule amendments to enable registrants voluntarily to submit supplemental tagged financial information).

[25] Exchange Act Release No. 56135 (July 26, 2007) [72 FR 42222 (Aug. 1, 2007)].

complexity of mutual fund prospectuses by streamlining the key information that is provided to investors, ensuring that access to the full wealth of information about a fund is immediately and easily accessible, and providing the means to present all information about a fund online in an interactive format that facilitates comparisons of key information, such as expenses, across different funds and different share classes of the same fund.[26] Technology has the potential to replace the current one-size-fits-all mutual fund prospectus with an approach that allows investors, their financial intermediaries, third party analysts, and others to tailor the wealth of available information to their particular needs and circumstances.

We are proposing an improved mutual fund disclosure framework that is intended to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that is available today. The foundation of the proposal is the provision to all investors of streamlined and user-friendly information that is key to an investment decision. More detailed information would be provided both on the Internet and, upon an investor's request, in paper or by e-mail.

To implement this improved disclosure framework, we are proposing amendments to Form N-1A that would require every prospectus to include a summary section at the front of the prospectus, consisting of key information about the fund, including investment objectives and strategies, risks, costs, and performance. This key information has been identified by the participants in the roundtable, by investor research,

---

[26] A mutual fund may issue more than one class of shares that represent interests in the same portfolio of securities with each class, among other things, having a different arrangement for shareholder services or the distribution of securities, or both. See rule 18f-3 under the Investment Company Act [17 CFR 270.18f-3].

and by a variety of commentators as information that is important to most investors in selecting mutual funds.[27] The key information would be required to be presented in plain English in a standardized order. Our intent is that this information would be presented succinctly, in three or four pages at the front of the prospectus.

We are also proposing a new option for satisfying prospectus delivery obligations with respect to mutual fund securities under the Securities Act. Under the proposed option, key information would be sent or given to investors in the form of a summary prospectus ("Summary Prospectus"), and the statutory prospectus would be provided on an Internet Web site.[28] Upon an investor's request, funds would also be required to send the statutory prospectus to the investor. Our intent in proposing this option is that funds take full advantage of the Internet's search and retrieval capabilities in order to enhance the provision of information to mutual fund investors.

Today's proposals have the potential to revolutionize the provision of information to the millions of mutual fund investors who rely on mutual funds for their most basic financial needs. The proposals are intended to help investors who are overwhelmed by the choices among thousands of available funds described in lengthy and legalistic documents to readily access key information that is important to an informed investment decision. At the same time, by harnessing the power of technology to deliver information in better, more usable formats, the proposals can help those investors, their intermediaries, third party analysts, the financial press, and others to locate and compare facts and data from the wealth of more detailed disclosures that are available.

---

27 See supra notes 16 and 20.

28 A "statutory prospectus" is a prospectus that meets the requirements of Section 10(a) of the Securities Act [15 U.S.C. 77j(a)].

II. DISCUSSION

A. Proposed Amendments to Form N-1A

We are proposing amendments to Form N-1A that would require the statutory prospectus of every mutual fund to include a summary section at the front of the prospectus consisting of key information presented in plain English in a standardized order. This presentation is intended to address investors' preferences for concise, user-friendly information. The proposed summary section in a fund's prospectus would provide investors with key information about the fund that investors could use to evaluate and compare the fund. This summary would be located in a standardized, easily accessible place and would be available to all investors, regardless of whether the fund uses a Summary Prospectus and regardless of whether the investor is reviewing the prospectus in a paper or electronic format.

Our proposal builds upon the risk/return summary that is currently required at the front of every mutual fund prospectus.[29] The risk/return summary presents a mutual fund's investment objectives and strategies, risks, and costs, in a standardized order at the front of the prospectus. The risk/return summary has, to a significant extent, functioned effectively to convey this information to investors. As a result, the current risk/return summary serves as the centerpiece of the proposed prospectus summary section.

We are, however, proposing to modify the front portion of the prospectus in two significant ways in order to make it more useful to investors. First, we are proposing to require that brief additional information be included in the summary section of the

---

29 Items 2 and 3 of Form N-1A. See Investment Company Act Release No. 23064 (Mar. 13, 1998) [63 FR 13916, 13919-25 (Mar. 23, 1998)] (adopting risk/return summary requirement).

prospectus so that this section will function as a more comprehensive presentation. The information required in the summary section of the prospectus would be the same as that required in the new Summary Prospectus, and it is key information that is important to an investment decision. This approach differs from that used in the current risk/return summary. When the Commission adopted the risk/return summary, it simultaneously permitted funds to offer their shares pursuant to a "profile" that summarizes key information about the fund.[30] While the risk/return summary items were included in the profile, the profile also included additional information. We believe that the key information that is important to an investment decision is the same, whether an investor is reviewing the summary section of a statutory prospectus or a short-form disclosure document; and, for that reason, we are proposing to require the same information in the summary section of the statutory prospectus and in the Summary Prospectus. In each case, our intent is for funds to prepare a concise summary (on the order of three or four pages) that will provide comprehensive key information.

Second, we are proposing to require that the summary information be presented separately for each fund covered by a multiple fund prospectus and that the information for multiple funds not be integrated.[31] This requirement is intended to assist investors in finding important information regarding the particular fund in which they are interested. Currently, in presenting the risk/return summary information, multiple fund prospectuses may present all of the investment objectives, investment strategies, and risks for multiple funds, followed by the performance information for those funds, and, finally, the fee

---

30 Investment Company Act Release No. 23065 (Mar. 13, 1998) [63 FR 13968 (Mar. 23, 1998)]. Our proposed amendments would eliminate the profile.

31 Proposed General Instruction C.3.(c)(ii) of Form N-1A.

tables for those funds.[32] Unfortunately, in practice, this flexibility has too frequently resulted in lengthy presentations that are not summary in nature and from which an investor would have considerable difficulty extracting the information about the particular fund in which he or she is interested. In practice, multiple fund prospectuses have integrated information for as many as 40 funds, and we are concerned that it would be extremely difficult, if not impossible, to achieve our goal of short summaries on the order of three or four pages if those summaries were permitted to contain information about multiple funds.

The proposed requirement that summary information be separately presented for each fund in a multiple fund prospectus is intended to address the problem of lengthy, complex multiple fund prospectuses in the least intrusive manner possible. Multiple fund prospectuses contribute substantially to prospectus length and complexity, which act as barriers to investor understanding. Rather than eliminate altogether the ability to use multiple fund prospectuses, which could have more significant cost and other implications than our proposal, we concluded that it was preferable to propose to require a self-contained summary section for each fund.

The Commission is committed to encouraging statutory prospectuses that are simpler, clearer, and more useful to investors. The proposed prospectus summary section is intended to provide investors with streamlined disclosure of key mutual fund information at the front of the statutory prospectus, in a standardized order that facilitates comparisons across funds. We are proposing the following amendments to Form N-1A in order to implement the summary section.

---

[32] General Instruction C.3.(c) of Form N-1A.

1. General Instructions to Form N-1A

We are proposing amendments to the General Instructions to Form N-1A to address the proposed new summary section of the statutory prospectus. These proposed amendments address plain English and organizational requirements.

We propose to amend the General Instructions to state that the summary section of the prospectus must be provided in plain English under rule 421(d) under the Securities Act.[33] Rule 421(d) requires an issuer to use plain English principles in the organization, language, and design of the front and back cover pages, the summary, and the risk factors sections of its prospectus.[34] The amended instruction would serve as a reminder that the new prospectus summary section is subject to rule 421(d). The use of plain English principles in the new summary section will further our goal of encouraging funds to create usable summaries at the front of their prospectuses. The prospectus, in its entirety, also would remain subject to the requirement that the information be presented in a clear, concise, and understandable manner.[35]

We are also proposing amendments to the organizational requirements of the General Instructions. The proposals would require mutual funds to disclose the summary

---

33 Proposed General Instruction B.4.(c) of Form N-1A; 17 CFR 230.421(d).

34 Rule 421(d) requires the use of the following plain English principles: (1) short sentences; (2) definite, concrete, everyday words; (3) active voice; (4) tabular presentation or bullet lists for complex material, wherever possible; (5) no legal jargon or highly technical business terms; and (6) no multiple negatives.

35 Pursuant to rule 421(b), the following standards must be used when preparing prospectuses: (1) present information in clear, concise sections, paragraphs, and sentences; (2) use descriptive headings and subheadings; (3) avoid frequent reliance on glossaries or defined terms as the primary means of explaining information in the prospectus; and (4) avoid legal and highly technical business terminology. 17 CFR 230.421(b).

information in numerical order at the front of the prospectus and not to precede this information with any information other than the cover page or table of contents.[36] Information included in the summary section need not be repeated elsewhere in the prospectus. While a fund may continue to include information in the prospectus that is not required, a fund may not include any such additional information in the summary section of the prospectus.[37]

As noted above, we are also proposing that a multiple fund prospectus be required to present all of the summary information for each fund sequentially and not integrate the information for more than one fund.[38] That is, a multiple fund prospectus would be required to present all of the summary information for a particular fund together, followed by all of the summary information for each additional fund. For example, a multiple fund prospectus would not be permitted to present the investment objectives for several funds followed by the fee tables for several funds. A multiple fund prospectus would be required to clearly identify the name of the particular fund at the beginning of the summary information for the fund.

As is the case with the current risk/return summary, the proposed instructions would permit a fund with multiple share classes, each with its own cost structure, to present the summary information separately for each class, to integrate the information for multiple classes, or to use another presentation that is consistent with disclosing the

---

36 Proposed General Instruction C.3.(a) to Form N-1A.

37 Proposed General Instruction C.3.(b) of Form N-1A.

38 Proposed General Instruction C.3.(c)(ii) of Form N-1A; see supra note 31 and accompanying text.

summary information in a standard order at the beginning of the prospectus.[39] Generally, this flexibility has resulted in effective presentations of class-specific cost and performance information that facilitate comparisons among classes.

Finally, we are proposing to eliminate the provisions of Form N-1A that permit a fund to omit detailed information about purchase and redemption procedures from the prospectus and to provide this information in a separate document that is incorporated into and delivered with the prospectus.[40] This option appears to be unnecessary in light of the proposed new Summary Prospectus which could be used, at a fund's option, along with any additional sales materials, including a document describing purchase and redemption procedures.[41] In addition, the option to provide a separate purchase and redemption document has been used infrequently since its adoption. We are also proposing to eliminate a similar provision in the requirements for the statement of additional information ("SAI").[42] The proposed elimination of these provisions does not otherwise alter the information about purchase and redemption procedures that must appear in the fund's prospectus and SAI, and this information would continue to be required in those documents.

We request comment on the proposed amendments to the General Instructions, and in particular on the following issues:

---

39 Proposed General Instruction C.3.(c)(ii) of Form N-1A.

40 Instruction 6 to Item 1(b) of Form N-1A; Item 6(g) of Form N-1A; Investment Company Act Release No. 23064, supra note 29, 63 FR at 13932-33.

41 See infra notes 87 through 90 and accompanying text.

42 Instruction to Item 18(a) of Form N-1A; proposed Item 24(a) of Form N-1A (redesignating current Item 18(a) and eliminating Instruction).

- Are the proposed revisions to the General Instructions appropriate? Will they be helpful in encouraging prospectus summary sections that address investors' preferences for concise, user-friendly information?
- Should we amend the General Instructions to Form N-1A in other respects? For example, should we impose any formatting requirements on the summary section of the prospectus, such as limitations on page length (e.g., three or four pages) or required font sizes or layouts? Would any such formatting requirements further the goal of making the summary section a user-friendly presentation of information?
- Is it appropriate to prohibit a fund from including information in the summary section that is not required?
- Are the proposed requirements for the order of information appropriate? Will they contribute to more readable prospectuses and summary information that is easy to evaluate and compare?
- Is it helpful for the prospectus to have a separate summary section?
- Are the requirements with respect to multiple fund and multiple class prospectuses appropriate? Should we prohibit multiple fund or multiple class prospectuses altogether? Should we provide greater or lesser flexibility in the presentation of multiple fund or multiple class prospectuses? If we permit greater flexibility, how can we do so consistent with the goal of achieving concise, readable summaries? For example, if we permit integrated multiple fund summary presentations for some or all funds, should we also impose a

maximum page limit on a summary section that integrates the information for multiple funds?

- Should we eliminate or otherwise modify the optional separate purchase and redemption document? What, if any, purpose will this option serve if we adopt the new Summary Prospectus?
- Are there alternatives we should consider that would achieve our goal of providing enhanced disclosures to investors in a more cost effective manner?

2. Information Required in Summary Section

The summary section of a mutual fund statutory prospectus would consist of the following information: (1) investment objectives; (2) costs; (3) principal investment strategies, risks, and performance; (4) top ten portfolio holdings; (5) investment advisers and portfolio managers; (6) brief purchase and sale and tax information; and (7) financial intermediary compensation. This information is largely drawn from the current risk/return summary and fund profile.

Investment Objectives and Goals

Like the current risk/return summary, the proposed summary section would begin with disclosure of a fund's investment objectives or goals. A fund also would be permitted to identify its type or category (e.g., that it is a money market fund or balanced fund).[43]

---

[43] Proposed Item 2 of Form N-1A; Item 2(a) of Form N-1A; rule 498(c)(2)(i). See Investment Company Act Release No. 23064, supra note 29, 63 FR 13919-20 (adopting investment objectives or goals disclosure requirement in Item 2(a) of Form N-1A).

Fee Table

The fee table and example, which are drawn from the current risk/return summary and which disclose the costs of investing, would immediately follow the fund's investment objectives.[44] In order to address continuing concerns about investor understanding of mutual fund costs,[45] we are proposing several modifications to the current fee table that are intended to provide greater prominence to the cost disclosures and make the table more understandable.

We are proposing to move the fee table forward from its current location, which follows information about investment strategies, risks, and past performance. Contrary to our intent in including the fee table in the risk/return summary, this information has sometimes appeared fairly deep within the prospectus, particularly in multiple fund prospectuses covering a large number of funds. The proposed change to the location of the fee table, together with the proposed requirement that the summary section for each fund be provided separately, should serve to enhance the prominence of the cost information. The fee table and example are designed to help investors understand the costs of investing in a fund and to compare those costs with the costs of other funds. Placing the fee table and example at the front of the summary information reflects the importance of costs to an investment decision.[46]

---

44 Proposed Item 3 of Form N-1A; Item 3 of Form N-1A; rule 498(c)(2)(iv).

45 See Barbara Roper, Director of Investor Protection, Consumer Federation of America, June 12 Roundtable Transcript, supra note 15, at 21; James J. Choi, David Laibson, & Brigitte C. Madrian, National Bureau of Economic Research, Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds, at 6 (May 2006), available at: http://www.nber.org/papers/w12261.pdf.

46 For example, a 1% increase in annual fees reduces an investor's return by approximately 18% over 20 years.

We are proposing several additional amendments to the fee table that are intended to improve the disclosure that investors receive regarding fees and expenses of the fund. First, we are proposing that mutual funds that offer discounts on front-end sales charges for volume purchases (so-called "breakpoint discounts") include brief narrative disclosure alerting investors to the availability of those discounts.[47] Several years ago, the Commission and NASD staffs identified concerns regarding the extent to which mutual fund investors were receiving breakpoint discounts to which they were entitled. The Commission adopted enhanced prospectus disclosure requirements regarding breakpoint discounts at that time.[48] We believe that investor awareness of the availability of these discounts may be heightened further by requiring brief narrative disclosure about the availability of these discounts at the beginning of the fee table.

Second, we are proposing to revise the heading "Annual Fund Operating Expenses" in the fee table. Specifically, we propose to revise the parenthetical following the heading to read "ongoing expenses that you pay each year as a percentage of the value of your investment" in place of "expenses that are deducted from Fund assets." In recent years, we have taken significant steps to address concerns that investors do not understand that they pay ongoing costs every year when they invest in mutual funds, including requiring disclosure of ongoing costs in shareholder reports.[49] Our proposed

---

47 Proposed Item 3 of Form N-1A; proposed Instruction 1(b) to proposed Item 3 of Form N-1A.

48 See Investment Company Act Release No. 26464 (June 7, 2004) [69 FR 33262 (June 14, 2004)].

49 Item 22(d)(1) of Form N-1A; Investment Company Act Release No. 26372 (Feb. 27, 2004) [69 FR 11244 (Mar. 9, 2004)] (adopting disclosure of ongoing costs in shareholder reports). See also General Accounting Office report on Mutual Fund Fees: Additional Disclosure Could Encourage Price Competition, at 66-81 (June 2000), available at:

revision further addresses those concerns by making clear that the expenses in question are paid by investors as a percentage of the value of their investments in the fund.

Third, for funds other than money market funds, the proposal would require the addition of brief disclosure regarding portfolio turnover immediately following the fee table example.[50] A fund would be required to disclose its portfolio turnover rate for the most recent fiscal year, as a percentage of the average value of its portfolio. This numerical disclosure would be accompanied by a brief explanation of the effect of portfolio turnover on transaction costs and fund performance. The prospectus currently is required to include the portfolio turnover rate in the financial highlights table as well as narrative information about portfolio turnover,[51] and the effect of transaction costs is reflected in fund performance. Nonetheless, some concerns have been expressed in recent years regarding the degree to which investors understand the effect of portfolio turnover, and the resulting transaction costs, on fund expenses and performance.[52] Our proposal to require brief portfolio turnover disclosure in the summary section of the prospectus is intended to address these concerns.

---

http://www.gao.gov/archive/2000/gg00126.pdf (discussing lack of investor awareness of the fees they pay and investor focus on mutual fund sales charges rather than ongoing fees).

50 Proposed Instruction 5 to proposed Item 3 of Form N-1A.

51 Instruction 7 to Item 4(b)(1) of Form N-1A; Item 8(a) of Form N-1A; Item 11(e) of Form N-1A. The portfolio turnover rate that would be required to be disclosed in the summary section would be calculated in the same manner that is currently required in Form N-1A.

52 See Investment Company Act Release No. 26313 (Dec. 18, 2003) [68 FR 74820 (Dec. 24, 2003)] (request for comment regarding ways to improve disclosure of transaction costs); Report of the Mutual Fund Task Force on Soft Dollars and Portfolio Transaction Costs (Nov. 11, 2004), available at: http://www.finra.org/web/groups/rules_regs/documents/rules_regs/p012356.pdf.

Finally, we are proposing to amend the requirement that a fund disclose in its fee table gross operating expenses that do not reflect the effect of expense reimbursement or fee waiver arrangements, which result in reduced expenses being paid by the fund.[53] While gross operating expenses may provide investors with a more accurate understanding of the potential long-term costs of an investment in the fund, they may also overstate the actual, current expenses. In addition, gross operating expenses may overstate long-term expenses because any expense increase due to the termination of an expense reimbursement or fee waiver arrangement may be offset by reduced expenses that accompany economies of scale resulting from asset growth.

To address these issues, we are proposing to permit a fund to place two additional captions directly below the "Total Annual Fund Operating Expenses" caption in cases where there were expense reimbursement or fee waiver arrangements that reduced fund operating expenses and that will continue to reduce them for no less than one year from the effective date of the fund's registration statement.[54] One caption would show the amount of the expense reimbursement or fee waiver, and a second caption would show the fund's net expenses after subtracting the fee reimbursement or expense waiver from the total fund operating expenses. Funds that disclose these arrangements would also be required to disclose the period for which the expense reimbursement or fee waiver arrangement is expected to continue, and briefly describe who can terminate the arrangement and under what circumstances. Further, in computing the fee table example,

---

53 Instructions 3(d)(i) and 5(a) to Item 3 of Form N-1A. In an expense reimbursement arrangement, the adviser reimburses the fund for expenses incurred. Under a fee waiver arrangement, the adviser agrees to waive a portion of its fees in order to limit fund expenses.

54 Proposed Instructions 3(e) and 6(b) to proposed Item 3 of Form N-1A.

a fund would be permitted to reflect any expense reimbursement or fee waiver arrangements that reduced any fund operating expenses during the most recently completed calendar year and that will continue to reduce them for no less than one year from the effective date of the fund's registration statement.[55] This adjustment could be reflected only in the periods for which the expense reimbursement or fee waiver arrangement is expected to continue. For example, if such an arrangement were expected to continue for one year, then, in the computation of 10-year expenses in the fee table example, the arrangement could only be reflected in the first of the 10 years.

Investments, Risks, and Performance

Following the fee table and example, we are proposing that a fund disclose its principal investment strategies and risks,[56] in the same manner required in the current risk/return summary.[57] This would include the current risk/return bar chart and table illustrating the variability of returns and showing the fund's past performance.

---

55 Proposed Instruction 4(a) to proposed Item 3 of Form N-1A. We also propose a technical amendment to the instructions to the expense example to eliminate language permitting funds to reflect the impact of the amortization of initial organization expenses in the expense example numbers. Id. This language is unnecessary because initial organization expenses must be expensed as incurred and may no longer be capitalized. See American Institute of Certified Public Accountants, Statement of Position 98-5, Reporting on the Costs of Start-Up Activities (Apr. 3, 1998).

56 Proposed Item 4 of Form N-1A. To conform to other changes we are proposing to Form N-1A, the Instructions to proposed Item 4 contain technical revisions that (1) amend cross-references to other Items in Form N-1A; and (2) eliminate language related to the presentation of performance information for more than one fund, given the proposed requirement that information for each fund be presented separately. Proposed Instructions 2(e) and 3 to proposed Item 4(b)(2) of Form N-1A.

57 Items 2(b) and (c) of Form N-1A.

Portfolio Holdings

The proposed summary section would next need to include a list of the 10 largest issues contained in the fund's portfolio, in descending order, together with the percentage of net assets represented by each.[58] Information concerning portfolio holdings may provide investors with a greater understanding of a fund's stated investment objectives and strategies and may assist investors in making more informed asset allocation decisions. It was suggested at our roundtable that it may be appropriate to include this information, which currently is not contained in the prospectus, in a short summary of key fund information.[59] In addition, many funds and third party analysts include top 10 portfolio holdings in fund summaries distributed to investors and prominently on their Web sites, suggesting significant investor interest in this information. While complete portfolio holdings information currently is available in Commission filings on Form N-CSR and Form N-Q on a quarterly basis,[60] we believe that the top 10 holdings may be important information in the summary section of the prospectus, which is intended to bring together, in a single, readily accessible place, key information that is important to an investment decision.

Mutual funds would be required to provide their top 10 portfolio holdings as of the end of the most recent calendar quarter.[61] In determining their top 10 holdings, funds

---

58 Proposed Item 5 of Form N-1A.

59 See Henry H. Hopkins, Vice President and Chief Legal Counsel, T. Rowe Price Group, Inc., June 12 Roundtable Transcript, supra note 15, at 32 (suggesting that the current profile be amended to include the top 10 portfolio holdings).

60 Form N-CSR [17 CFR 249.331; 17 CFR 274.128]; Form N-Q [17 CFR 249.332; 17 CFR 274.130].

61 Proposed Instruction 1 to proposed Item 5 of Form N-1A.

would be required to aggregate and treat as a single issue (1) all fully collateralized repurchase agreements; and (2) all securities of any one issuer (other than fully collateralized repurchase agreements).[62] The U.S. Treasury and each agency, instrumentality, or corporation, including each government-sponsored entity, that issues U.S. government securities would be treated as a separate issuer.[63]

We are proposing an exclusion to the requirement to list the top 10 holdings that is similar to an exclusion in the current requirements for quarterly disclosure of a fund's complete portfolio holdings.[64] Funds rely on this exclusion to guard against the premature release of certain positions that could lead to front-running and other predatory trading practices.[65] Currently, a fund's complete portfolio schedule filed with the Commission on Form N-CSR or Form N-Q may list an amount not exceeding five percent of the total value of the portfolio holdings in one amount as "Miscellaneous securities," provided that securities so listed are not restricted, have been held for not more than one year prior to the date of the related balance sheet, and have not previously been reported by name to the shareholders, or set forth in any registration statement, application, or annual report or otherwise made available to the public.

---

62 This proposed aggregration provision is the same as that currently applicable for purposes of determining whether the value of an issue exceeds one percent of net asset value in the summary portfolio schedule that may be included in a fund's report to shareholders. Schedule VI of Regulation S-X [17 CFR 210.12-12C] (Summary of Schedule of Investments in Securities of Unaffiliated Issuers).

63 Proposed Instruction 2 to proposed Item 5 of Form N-1A.

64 Note 1 to Schedule I of Regulation S-X [17 CFR 210.12-12] (Schedule of Investments in Securities of Unaffiliated Issuers); Note 5 to Schedule VI of Regulation S-X [17 CFR 210.12-12C] (Summary of Schedule of Investments in Securities of Unaffiliated Issuers).

65 Investment Company Act Release No. 26372, supra note 49, 69 FR at 11250.

Under the proposal, in listing the top 10 holdings, any securities that would be required to be listed separately or included in a group of securities that is listed in the aggregate as a single issue could be listed in one amount as "Miscellaneous securities," provided that the securities so listed are eligible to be categorized by the fund as "Miscellaneous securities" in a complete portfolio schedule dated as of the end of the most recent calendar quarter. However, if any security that is included in "Miscellaneous securities" would otherwise be required to be included in a group of securities that is listed in the aggregate as a single issue in the top 10 portfolio holdings, the remaining securities of that group must nonetheless be listed in the top 10 portfolio holdings, even if the remaining securities alone would not otherwise be required to be listed in this manner (e.g., because the combined value of the security listed in "Miscellaneous securities" and the remaining securities of the same issuer is sufficient to cause them to be among the 10 largest issues, but the value of the remaining securities alone is not sufficient to cause the remaining securities to be among the 10 largest issues). A brief footnote explaining the term "Miscellaneous securities" would be required. [66]

Management

The next item in the proposed prospectus summary section would be the name of each investment adviser and sub-adviser of the fund, followed by the name, title, and length of service of the fund's portfolio managers.[67] These items are similar to disclosures currently required in a fund profile, as well as in the fund's prospectus.[68]

---

66 Proposed Instruction 3 to proposed Item 5 of Form N-1A.

67 Proposed Item 6 of Form N-1A.

68 Item 5 of Form N-1A; rule 498(c)(2)(v). Additional disclosures regarding investment advisers and portfolio managers that are currently required in the prospectus would

As in the current profile, a fund would not be required to identify a sub-adviser whose sole responsibility is limited to day-to-day management of the fund's cash instruments unless the fund is a money market fund or other fund with a principal investment strategy of regularly holding cash instruments.[69] Also as in the current profile, a fund having three or more sub-advisers, each of which manages a portion of the fund's portfolio, would not be required to identify each sub-adviser, except that the fund would be required to identify any sub-adviser that is (or is reasonably expected to be) responsible for the management of a significant portion of the fund's net assets.[70] We believe that, as in the current profile, a significant portion of the fund's net assets for this purpose generally should be deemed to be 30% or more of the fund's net assets.[71] The portfolio managers required to be listed would be the same ones with respect to which information is currently required in the prospectus.[72]

Purchase and Sale of Fund Shares

The proposed summary section would next disclose the fund's minimum initial or subsequent investment requirements and the fact that the fund's shares are redeemable, and would identify the procedures for redeeming shares (e.g., on any business day by

---

continue to be required, but not in the summary section. Proposed Item 11(a) of Form N-1A.

69 Proposed Instruction 1 to proposed Item 6(a) of Form N-1A; rule 498(c)(2)(v)(B)(1). A fund would continue to be required to provide the name, address, and experience of all sub-advisers elsewhere in the prospectus. Proposed Item 11(a)(1)(i) of Form N-1A.

70 Proposed Instruction 2 to proposed Item 6(a) of Form N-1A; rule 498(c)(2)(v)(B)(2).

71 This proposed exception would be consistent with the requirements of the current profile. Rule 498(c)(2)(v)(B)(2).

72 Item 5(a)(2) of Form N-1A.

written request, telephone, or wire transfer).[73] This disclosure would be the same as that required in the current rule 498 profile except that we are not proposing to include certain fee disclosures that are also covered by the fee table, including a fund's sales loads, breakpoints, and charges upon redemption.[74]

Tax Information

Our proposals would require a mutual fund to state, as applicable, that it intends to make distributions that may be taxed as ordinary income or capital gains or that the fund intends to distribute tax-exempt income. A fund that holds itself out as investing in securities generating tax-exempt income would be required to provide, as applicable, a general statement to the effect that a portion of the fund's distributions may be subject to federal income tax.[75] This proposed disclosure is a streamlined version of the tax disclosure required in the current rule 498 profile.[76]

---

73 Proposed Item 7 of Form N-1A.

74 See rules 498(c)(2)(vi) and (vii) (profile purchase and sale disclosures).

75 Proposed Item 8 of Form N-1A.

76 See rule 498(c)(2)(viii). The current rule 498 profile also requires (1) a description of how frequently the fund intends to make distributions and what options for reinvestment of distributions are available to investors; (2) a statement that distributions may be taxable at different rates depending on the length of time that the fund holds its assets; and (3) that if a fund expects that its distributions primarily will consist of ordinary income or capital gains, disclosure to that effect be provided. This disclosure would continue to be required in the statutory prospectus. Proposed Items 12(d) and (f)(1)(i) (redesignating current Items 6(d) and (f)(1)(i)).

Financial Intermediary Compensation

The proposed summary section of the prospectus would conclude with the following statement, which could be modified provided that the modified statement contains comparable information.[77]

> "Payments to Broker-Dealers and Other Financial Intermediaries
>
> If you purchase the Fund through a broker-dealer or other financial intermediary (such as a bank), the Fund and its related companies may pay the intermediary for the sale of Fund shares and related services. These payments may influence the broker-dealer or other intermediary and your salesperson to recommend the Fund over another investment. Ask your salesperson or visit your financial intermediary's Web site for more information."

This disclosure would be new to fund prospectuses and would identify the existence of compensation arrangements with selling broker-dealers or other financial intermediaries, alert investors to the potential conflicts of interest arising from these arrangements, and direct investors to their salesperson or the financial intermediary's Web site for further information. It is intended to address, in part, concerns that mutual fund investors lack adequate information about certain distribution-related costs that create conflicts for broker-dealers and their associated persons.[78]

---

77 Proposed Item 9 of Form N-1A.

78 The Commission has recognized these concerns in a separate initiative in which the Commission proposed to require, among other things, disclosure of mutual fund distribution-related costs and conflicts of interest by selling broker-dealers and other financial intermediaries at the point of sale. Securities Act Release No. 8544 (Feb. 28, 2005) [70 FR 10521 (Mar. 4, 2005)]; Securities Act Release No. 8358 (Jan. 29, 2004) [69 FR 6438 (Feb. 10, 2004)]. One commenter to that proposal recommended use of a short-form disclosure document that would include, among other things, basic information about such potential conflicts of interest. Comment Letter of NASD, dated March 31, 2005, available at: http://www.sec.gov/rules/proposed/s70604/nasd033005.pdf (supporting the use of a "profile plus" document on the Internet). See also supra note 16.

We request comment generally on the information proposed to be included in the summary section of the statutory prospectus, and in particular on the following issues:

- Does the proposed summary section encourage prospectuses that are simpler, clearer, and more useful to investors? Would the proposed summary section help investors to better compare funds?
- Should each of the proposed items be included in the summary section? Should any additional disclosure items currently required in Form N-1A be included in the summary section? Should we consider disclosure items that are not currently in Form N-1A? If so, what types of additional disclosures should we consider including in the summary section?
- How would the required narrative explanations of various items contribute to readability and length of the summary section? Should each of these explanations be required, permitted, or prohibited in the summary section? Should any of these explanations be required to appear in the prospectus, but outside the summary section?
- Is the proposed order of the information appropriate, or should it be modified? If so, how should it be modified?
- Should we also require a fund to disclose whether its objective may be changed without shareholder approval in the summary section?
- Are our proposed revisions to the fee table and example appropriate? Are there any other revisions to the fee table or example that we should consider?

- Is the proposed disclosure at the beginning of the fee table regarding discounts on front-end sales charges for volume purchases (i.e., breakpoint discounts) appropriate?
- Should we consider any other revisions to headings in the fee table to make them more understandable to investors? For example, should the terms "load" or "12b-1" be eliminated? Do investors generally understand these terms, or are there clearer terms that we should require?
- How, if at all, should expense reimbursement and fee waiver arrangements be reflected in the fee table and expense example and accompanying disclosures?
- Should funds be required to disclose the detailed fee table information in the summary section or would it be more useful to investors to require disclosure of total shareholder fees and total annual fund operating expenses in the summary section and require disclosure of the detailed fee table outside the summary section? Are there any details regarding fund fees or expenses that should be included only outside the summary section? For example, the fee table currently permits "Other Expenses" to be subdivided into no more than three subcaptions that identify the largest expense or expenses comprising "Other Expenses."[79] Should we permit this detail in the summary section of the prospectus, or should we require that funds providing this level of detail include it outside the summary section?
- Are there any revisions to the fee table example that would make it more useful for investors? For example, should the fee table example separately

---

79 Instruction 3(c)(iii) to Item 3 of Form N-1A.

break out one-time charges, such as sales loads, and recurring expenses, such as management and 12b-1 fees? Should the required narrative explanation of the purpose of the fee table example be modified or eliminated?

- Should the proposed disclosure regarding a fund's portfolio turnover rate be included in the summary section? Should the proposed portfolio turnover narrative disclosure be modified or should funds be required to disclose their portfolio turnover in the summary section without any narrative explanation? Should any additional information regarding a fund's portfolio turnover rate be required to be disclosed as part of the summary section, for example, information about a fund that engages in active and frequent trading of portfolio securities and the tax consequences to shareholders and effects on fund performance of increased portfolio turnover?[80] Should funds be required to provide an explanation of the effect of portfolio turnover on transaction costs and fund performance? Should new funds (e.g., funds with less than six months or one year of operations) be required to include information about portfolio turnover in the summary section given their limited period of operations? Is the portfolio turnover rate meaningful enough for a new fund that it should be required in the summary section?
- Should we consider any revisions to the bar chart or table disclosing a fund's returns? For example, should we modify or eliminate the required explanation that this information illustrates the variability of a fund's returns?

---

[80] Cf. Instruction 7 to Item 4 of Form N-1A.

- Are there additional performance measures, such as past performance adjusted for the impact of inflation, that should be required in the summary section?
- Should we require disclosure regarding portfolio holdings in the summary section? If so, what information should be required, e.g., top five holdings, top 10, top 25? If we require portfolio holdings disclosure, should any funds be exempt from the requirement, e.g., money market funds or exchange-traded funds? Should new funds be exempt from this requirement? Are there circumstances where this disclosure might not be useful to investors or where additional information regarding a fund's investment exposures would be necessary to make the portfolio holdings information useful, for example, where the top 10 holdings represent a relatively small percentage of the fund's total holdings? Should we require funds to disclose additional information such as the percentage of a fund's net assets represented by the combined top 10 holdings? Should we require a fund to disclose its holdings that represent a specified percentage of the fund's holdings?
- Would the proposed exception to the requirement to list the top 10 holdings that would permit a fund to list an amount not exceeding five percent of the total value of the portfolio holdings in one amount as "Miscellaneous securities" adequately guard against the premature release of certain positions that could lead to front-running and other predatory trading practices? If not, what other protections would be necessary? Is the "Miscellaneous securities" exception necessary and appropriate?

- Should we require funds to present tables, charts, or graphs that depict portfolio holdings by reasonably identifiable categories (e.g., industry sector, geographic region, credit quality, maturity, etc.) either instead of, or in addition to, top 10 portfolio holdings?[81]
- Should, as proposed, a fund having three or more sub-advisers be required to identify only those sub-advisers that are (or are reasonably expected to be) responsible for the management of a significant portion of the fund's net assets? Are there situations where this would result in the disclosure of no sub-advisers and, if so, would this be appropriate? Should we, as proposed, provide that a "significant portion" of a fund's net assets generally would be deemed to be 30% or more of a fund's net assets? Should a higher or lower percentage or some other measure or standard be used?
- Should any or all of the information that we propose to require in the summary section regarding the purchase and sale of fund shares be permitted rather than required? Should any of this information be prohibited from being included in the summary section?
- Should any additional information regarding the purchase and sale of fund shares be required to be disclosed in the summary section? For example, should information regarding policies and procedures with respect to frequent purchases and redemptions of fund shares be disclosed in the summary, or is it

---

81 Cf. Item 22(d)(2) of Form N-1A; Investment Company Act Release No. 26372, supra note 49, 69 FR at 11251-52 (requiring similar disclosures in shareholder reports).

appropriate to maintain the location of this information elsewhere in the prospectus?

- Is there any additional tax information that should be included in the summary section?
- Should we require disclosure regarding the compensation of broker-dealers, banks, and other financial intermediaries in the summary section? Should we permit this disclosure to be omitted or modified in any context? For example, should a fund be permitted to omit this disclosure if the fund is marketed directly to investors or where a transaction is initiated by an investor and not on the basis of a financial intermediary's recommendation? Should funds be permitted to modify this disclosure to reflect the fact that some transactions may be initiated by an investor and not on the basis of a financial intermediary's recommendation?
- In addition or as an alternative to directing customers to ask salespersons or visit a financial intermediary's Web site for more information about intermediary compensation, should the summary prospectus direct customers to other sources of information? Do all financial intermediaries that distribute mutual funds have Internet Web sites? Is information typically available on the Web sites of financial intermediaries? Should the Commission require that such information be made available on intermediaries' Web sites?
- Should we require or permit a fund to include its ticker symbol in the summary section? Alternatively, should we require or permit a fund to

include its ticker symbol on the front or back cover page of the statutory prospectus or SAI or elsewhere in those documents?

3. Conforming and Technical Amendments to Form N-1A

The proposed amendments to Form N-1A would require adding new items to the form and revising and renumbering certain existing items. We are proposing conforming amendments to Form N-1A in order to update the table of contents and the various references to Form N-1A items contained within the form. We are also proposing technical amendments to Form N-1A to update the Commission's telephone number and address.[82]

B. New Delivery Option for Mutual Funds

1. Use of Summary Prospectus and Satisfaction of Statutory Prospectus Delivery Requirements

The Commission is proposing to replace rule 498, the current voluntary profile rule, with a new rule that would permit the obligation under the Securities Act to deliver a statutory prospectus with respect to mutual fund securities to be satisfied by sending or giving a Summary Prospectus and providing the statutory prospectus online. In addition, the new rule would require a fund to send the statutory prospectus in paper or by e-mail upon request. The Summary Prospectus would be required to contain the key information that is included in the new summary section of the statutory prospectus in the same order that would be required in the statutory prospectus. As discussed above, the proposal is intended to take advantage of technological developments and the expanded use of the Internet in order to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that

---

[82] Proposed Item 1(b)(3) of Form N-1A.

is available to investors today. The proposal provides for a layered approach to disclosure in which key information is sent or given to the investor and more detailed information is provided online and, upon request, is sent in paper or by e-mail.

The proposed new rule would provide that any obligation under Section 5(b)(2) of the Securities Act[83] to have a statutory prospectus precede or accompany the carrying or delivery of a mutual fund security in an offering registered on Form N-1A is satisfied if (1) a Summary Prospectus is sent or given no later than the time of the carrying or delivery of the fund security;[84] and, if any other materials accompany the Summary Prospectus, the Summary Prospectus is given greater prominence than those materials and is not bound together with any of those materials;[85] (2) the Summary Prospectus that is sent or given satisfies the rule's requirements at the time of the carrying or delivery of the Fund security; and (3) the conditions set forth in the rule, which require a fund to provide the statutory prospectus and other information on the Internet in the manner specified in the rule, are satisfied.[86] Section 5(b)(2) of the Securities Act makes it unlawful to deliver a security for purposes of sale or for delivery after sale "unless accompanied or preceded" by a statutory prospectus. Under the rule, delivery of the statutory prospectus for purposes of Section 5(b)(2) would be accomplished by sending

---

83 15 U.S.C. 77e(b)(2).

84 A fund could rely upon existing Commission guidance, which typically requires affirmative consent from individual investors, to send or give a Summary Prospectus by electronic means. See Securities Act Release No. 7233 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)]; Securities Act Release No. 7856 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)].

85 Cf. 17 CFR 240.17a-5(c)(5)(ii) (requiring a financial disclosure document to be "given prominence in the materials delivered to customers of the broker or dealer").

86 Proposed rule 498(c).

or giving a Summary Prospectus and by providing the statutory prospectus and other required information online. Failure to comply with the rule's requirements for sending or giving a Summary Prospectus and providing the statutory prospectus and other information online would mean that the rule could not be relied on to meet the Section 5(b)(2) prospectus delivery obligation. Absent satisfaction of the Section 5(b)(2) obligation by other means, a Section 5(b)(2) violation would result. The rule would also require a fund to send the statutory prospectus upon request. This requirement would not be a condition to reliance on the rule, and failure to send the requested statutory prospectus would result in a violation of the rule (as opposed to a violation of Section 5(b)(2)).

The proposed rule also would provide that a communication relating to an offering registered on Form N-1A that is sent or given after the effective date of a mutual fund's registration statement (other than a prospectus permitted or required under Section 10 of the Securities Act) shall not be deemed a prospectus under Section 2(a)(10) of the Securities Act if (1) it is proved that prior to or at the same time with the communication a Summary Prospectus was sent or given to the person to whom the communication was made; and, if any other materials accompany the Summary Prospectus, the Summary Prospectus is given greater prominence than those materials and is not bound together with any of those materials; (2) the Summary Prospectus that was sent or given satisfies the rule's requirements at the time of the communication; and (3) the conditions set forth in the rule, which require a fund to provide the statutory prospectus and other information

on the Internet in the manner specified in the rule, are satisfied.[87] This provision is similar to Section 2(a)(10)(a) of the Securities Act, which provides that a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of Section 10) shall not be deemed a prospectus if it is proved that prior to or at the same time with the communication a written prospectus meeting the requirements for a statutory prospectus at the time of the communication was sent or given to the person to whom the communication was made.[88] Pursuant to this provision, communications that would otherwise be considered "prospectuses" subject to the liability provisions of Section 12(a)(2) of the Securities Act are not deemed prospectuses and are not subject to Section 12(a)(2) if they are preceded or accompanied by the statutory prospectus.[89] Similarly, under our proposal, communications that are preceded or accompanied by a Summary Prospectus would not be deemed to be prospectuses and would not be subject to Section 12(a)(2) if all the conditions of the proposed rule are met. These communications would remain subject to the general antifraud provisions of the federal securities laws.[90]

---

87 Proposed rule 498(d). This provision would be limited to a mutual fund Summary Prospectus that satisfies the terms of the proposed rule and would not apply in the case of any issuer other than a mutual fund.

88 15 U.S.C. 77b(a)(10)(a).

89 15 U.S.C. 77l(a)(2). Section 12(a)(2) of the Securities Act imposes liability for materially false or misleading statements in a prospectus or oral communication, subject to a reasonable care defense.

90 See, e.g., Section 17(a) of the Securities Act [15 U.S.C. 77q(a)]; Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. 78j(b)]; Section 34(b) of the Investment Company Act [15 U.S.C. 80a-33(b)].

The current proposal is intended to create a disclosure regime that is tailored to the unique needs of mutual fund investors in a manner that provides ready access to the information that investors need, want, and choose to review in connection with a mutual fund purchase decision. In crafting this proposal, the Commission has drawn upon recent initiatives that have harnessed technology in order to provide investors with better access to information.[91] The current proposal provides for a layered approach to disclosure in which key information is sent or given to the investor and more detailed information is provided online and, upon request, is sent in paper or by e-mail. This is intended to provide investors with better ability to choose the amount and type of information to review, as well as the format in which to review it (online or paper). In addition, the provision of a Summary Prospectus containing key information about the fund, coupled with online provision of more detailed information, should aid investors in comparing funds. The requirement that the Summary Prospectus be given greater prominence than, and not be bound together with, accompanying materials is intended to prevent the Summary Prospectus from being obscured by accompanying sales materials and highlight for investors the concise, balanced presentation of the Summary Prospectus. In short, we believe that the proposal has the potential to result in funds providing investors with more usable information than they receive today in a format that investors are more likely to use and understand. Under the proposal, an investor could choose to receive the statutory prospectus in the same paper format that would be provided today.

---

[91] Exchange Act Release No. 56135, supra note 25, 72 FR 42222 (shareholder choice regarding proxy materials); Exchange Act Release No. 55146 (Jan. 22, 2007) [72 FR 4148 (Jan. 29, 2007)] (Internet availability of proxy materials); Securities Act Release No. 8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)] (securities offering reform).

We request comment generally on the proposed prospectus delivery option for mutual funds and specifically on the following issues:

- Should we permit mutual funds to meet their prospectus delivery obligations in the manner provided in the proposed rule? Does this approach adequately protect investors and provide them with material information about the fund? Does the proposed approach adequately protect investors who have no Internet access or limited Internet access or who prefer not to receive information about mutual fund investments over the Internet? Should we make any other changes with respect to prospectus delivery obligations?
- Are there other approaches that would provide mutual fund investors with key information in a user-friendly format?
- Should we permit mutual funds to meet their prospectus delivery obligations by filing with the Commission and/or by posting online without giving or sending a Summary Prospectus?
- Should mutual fund investors have the ability to opt out of the rule permanently and thereafter receive a paper copy of any statutory prospectus? How could this be implemented in practice? For example, how would a mutual fund that had no prior relationship with an investor be apprised of the investor's decision to opt out? Could such an opt-out provision be implemented on a fund or fund complex basis?
- Should we require that the Summary Prospectus be given greater prominence than other materials that accompany the Summary Prospectus and that the Summary Prospectus not be bound together with any of those materials? Are

any clarifications of these requirements needed? Are the requirements workable in all situations? Should we permit a Summary Prospectus to be included within a newspaper or magazine? Should we impose additional requirements to encourage the prominence and separateness of a Summary Prospectus, when provided in paper, at an Internet Web site, or by e-mail, such as requiring that the Summary Prospectus be at the top of a list of documents provided electronically or on top of a group of documents provided in paper?

2. Content of Summary Prospectus

The proposed rule sets forth the content requirements that a Summary Prospectus must satisfy.[92] Similar to a current profile, a Summary Prospectus meeting the requirements of the rule would be deemed to be a prospectus that is authorized under Section 10(b) of the Securities Act and Section 24(g) of the Investment Company Act for the purposes of Section 5(b)(1) of the Securities Act.[93] A Summary Prospectus meeting these content requirements could be used to offer securities of the fund pursuant to Section 5(b)(1) even if the other conditions of the rule were not satisfied. The failure to satisfy these other conditions would, however, preclude the use of the Summary

---

92 Proposed rule 498(b). Proposed rule 498(a) would define terms used in the rule. The Appendix to this release contains a hypothetical Summary Prospectus, which is provided solely for illustrative purposes.

93 Proposed rule 498(b); rule 498(a)(2) [17 CFR 230.498(a)(2)]. Section 10(b) of the Securities Act authorizes the Commission to adopt rules permitting the use of a prospectus for the purposes of Section 5(b)(1) that summarizes information contained in the statutory prospectus. Section 24(g) of the Investment Company Act authorizes the Commission to permit the use of a prospectus under Section 10(b) of the Securities Act to include information the substance of which is not included in the statutory prospectus. 15 U.S.C. 77j(b); 15 U.S.C. 77e(b)(1); 15 U.S.C. 80a-24(g).

Prospectus for the other purposes described in proposed rule 498, including for purposes of satisfying, in part, a fund's obligation under Section 5(b)(2) to deliver a statutory prospectus. In these circumstances, the Section 5(b)(2) obligation to deliver a fund's statutory prospectus would have to be met by means other than the proposed rule or a Section 5(b)(2) violation would result.

General

The proposal generally would require the Summary Prospectus to include the same information as the summary section of the statutory prospectus in the same order as would be required in the statutory prospectus.[94] This key information about investment objectives, costs, and risks would form the body of the Summary Prospectus.

The Summary Prospectus would not be permitted to omit any of the required information or to include additional information except as described below. A document that omits information required in a Summary Prospectus or includes additional information not permitted by the rule would not be a Summary Prospectus under the proposed rule and could not be used under the proposed rule for any purpose, including meeting the obligation to deliver a fund's statutory prospectus.[95]

In addition, a Summary Prospectus would be permitted to describe only one fund, but could describe multiple classes of a single fund.[96] These restrictions are similar to

---

94 Proposed rule 498(b)(2)(i).

95 A Summary Prospectus that omits certain information required by the proposed rule or includes additional information not permitted by the proposed rule could be deemed to be a prospectus under Section 10(b) of the Securities Act for purposes of Section 5(b)(1) of the Securities Act pursuant to rule 482 under the Securities Act [17 CFR 230.482] if the conditions of that rule are met.

96 Proposed rule 498(b)(4).

restrictions with respect to the proposed summary section of the statutory prospectus.[97] Like those restrictions, they are intended to result in a presentation of key fund information that is concise and easy to read.

Cover Page or Beginning of Summary Prospectus

The proposed Summary Prospectus would be required to include the following information on the cover page or at the beginning of the Summary Prospectus:

- the fund's name and the share classes to which the Summary Prospectus relates;
- a statement identifying the document as a "Summary Prospectus"; and
- the approximate date of the Summary Prospectus's first use.

In addition, the cover page or beginning of the Summary Prospectus would be required to include the following legend:

> "Before you invest, you may want to review the Fund's prospectus, which contains more information about the Fund and its risks. You can find the Fund's prospectus and other information about the Fund online at [_____]. You can also get this information at no cost by calling [_____] or by sending an e-mail request to [_____]."[98]

In addition, the legend could include a statement to the effect that the Summary Prospectus is intended for use in connection with a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code, a tax-deferred arrangement under Section 403(b) or 457 of the Internal Revenue Code, or a

---

97 See supra introductory text to Section II.A. and Section II.A.1.

98 Proposed rule 498(b)(1).

variable contract as defined in Section 817(d) of the Internal Revenue Code and is not intended for use by other investors.[99]

The legend would be required to provide an Internet address, toll free (or collect) telephone number, and e-mail address that investors can use to obtain the statutory prospectus and other information.[100] The legend would also be permitted to indicate that the statutory prospectus and other information are available from a financial intermediary (such as a broker-dealer or bank) through which shares of the fund may be purchased or sold. The Internet address at which the statutory prospectus and other information are available would not be permitted to be the address of the Commission's Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR").[101] The address would be required to be specific enough to lead investors directly to the statutory prospectus and other required information, rather than to the home page or other section of the Web site on which the materials are posted.[102] The Web site could be a central site with prominent links to each required document.[103]

---

99 Proposed rule 498(b)(1)(iv)(B).

100 Proposed rule 498(b)(1)(iv)(A).

101 Cf. rule 14a-16(b)(3) under the Exchange Act [17 CFR 240.14a-16(b)(3)] (similar requirement in rules relating to Internet availability of proxy materials).

102 For a description of the information required to be available at the Web site and a discussion of the manner in which such information must be available, see infra Section II.B.3.

103 Cf. Exchange Act Release No. 55146, supra note 91, 72 FR at 4153-54 n. 79 (use of central site with prominent links in electronic delivery of proxy materials).

Updating Requirements

The proposed Summary Prospectus rule, similar to the current voluntary profile rule, would require that average annual total returns and yield be provided as of the end of the most recent calendar quarter prior to the Summary Prospectus's first use.[104] This information would be required to be updated as of the end of each succeeding calendar quarter not later than one month after the completion of the quarter.[105]

The proposed Summary Prospectus rule also would require the top 10 portfolio holdings information to be provided as of the end of the most recent calendar quarter prior to the Summary Prospectus's first use or the immediately prior calendar quarter if the most recent calendar quarter ended less than one month prior to the Summary Prospectus's first use.[106] This is intended to ensure that there is a lag of at least one month between the end of a calendar quarter and disclosure of the top 10 holdings as of the end of that quarter. The portfolio holdings information would be required to be updated on the same schedule as the performance information, at the end of each succeeding calendar quarter not later than one month after the completion of the quarter. The one-month lag is intended to eliminate any potential harm to fund shareholders from predatory trading practices, such as trading ahead of funds or "front-running," that could

---

104 Proposed rule 498(b)(2)(ii).

105 Cf. rule 498(c)(2)(iii) (current voluntary profile rule requiring quarterly updating of return information as soon as practicable after the completion of each calendar quarter). The date of the performance information would be required to be included along with the performance information. The proposed rule would not require a fund to explain in the Summary Prospectus the reasons for any change in the securities market index used for comparison purposes in the performance presentation. Cf. Instruction 2(c) to proposed Item 4(b)(2) of Form N-1A (requiring this explanation in proposed summary section of prospectus). Proposed rule 498(b)(2)(ii).

106 Proposed rule 498(b)(2)(iii).

result from more immediate disclosure of fund portfolio holdings. In order to minimize the number of times that a fund would be required to update its Summary Prospectus, the proposed rule would also permit a one-month lag in the required quarterly update of performance information, so that both items could be updated on the same schedule.

The Commission is proposing to require quarterly updating of performance and portfolio holdings information in the Summary Prospectus because we believe that providing updated information in a concise, summary document may contribute significantly to the usefulness of the document to investors and their financial intermediaries. A fund could reflect the updated performance and portfolio holdings information in the Summary Prospectus by affixing a label or sticker, or by other reasonable means, and would not be required to reprint the Summary Prospectus each quarter.[107] This is intended to minimize the costs of quarterly updating while still resulting in an up-to-date and concise, unified presentation of key information. A fund would not be required to update the performance and portfolio holdings information in its statutory prospectus on a quarterly basis. The proposed rule would provide that the failure to include in a statutory prospectus or registration statement the quarterly updated performance and portfolio holdings information required to be included in a Summary Prospectus would not, solely by virtue of inclusion of the information in a Summary Prospectus, be considered an omission of material information required to be included in the statutory prospectus or registration statement.[108]

---

[107] Proposed Instruction to proposed rule 498(b)(2)(ii) and (iii).

[108] Proposed rule 498(e)(2). Cf. rule 408(b) under the Securities Act [17 CFR 230.408(b)].

Notwithstanding the quarterly updating requirements, the proposed rule would provide that, for purposes of satisfying a fund's prospectus delivery obligations, a Summary Prospectus that satisfies the requirements of the rule at the time it is sent or given shall be deemed to continue to satisfy those requirements until the earlier of the date on which (1) the information in the Summary Prospectus is required to be updated for any purpose other than the required quarterly updates to the portfolio holdings and performance information; or (2) the fund is required to file an annual updating amendment to its registration statement for the purpose of updating its statutory prospectus to satisfy the requirements of Section 10(a)(3) of the Securities Act.[109] Thus, if a fund's Summary Prospectus had previously been provided to an investor, persons could continue to rely on the rule with respect to their prospectus delivery obligations to that investor without providing a new Summary Prospectus that merely reflects the quarterly updates to top 10 holdings and performance information. The previously provided Summary Prospectus would continue to be deemed current for purposes of the proposed rule until the fund is required to update the Summary Prospectus for some other purpose or is required to file an annual updating amendment to its registration statement. This would be true in the case of existing investors as well as new investors. Today, some funds choose to send an updated statutory prospectus to all of their existing shareholders once each year in order to meet their prospectus delivery obligations with respect to those shareholders who purchase additional shares of the fund during the

---

109 Proposed rule 498(e)(1). Section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)] generally requires that when a prospectus is used more than nine months after the effective date of the registration statement, the information in the prospectus must be as of a date not more than sixteen months prior to such use. The effect of this provision is to require mutual funds to update their prospectuses annually to reflect current cost, performance, and other financial information.

coming year. Under the proposed rule, a fund could instead send an updated Summary Prospectus to its shareholders once each year, so long as the only changes to the Summary Prospectus during the year are the required quarterly updates to holdings and performance information and so long as the other conditions of the rule are satisfied.

We request comment generally on the proposed content and updating requirements of the Summary Prospectus and specifically on the following issues:

- Should the Summary Prospectus be required to include the same information as the summary section of the statutory prospectus in the same order as required in the statutory prospectus? Should any of the information that we propose to require in the Summary Prospectus not be required? Should any additional information, such as additional information from the statutory prospectus, SAI, or annual or semi-annual report, be required to be included in the Summary Prospectus?
- Should we, as proposed, prohibit the Summary Prospectus from including information that is not explicitly permitted? What effect would this prohibition have on the length, usability, and completeness of a Summary Prospectus? If we include this prohibition, should we make any exceptions to the prohibition?
- Should we restrict the number of funds or share classes that may be included in a Summary Prospectus? Would including multiple funds in a Summary Prospectus make it too long and confusing, and would it decrease the likelihood that investors would use the Summary Prospectus? Or would including multiple funds in a Summary Prospectus contribute to investors'

ability to compare those funds? Are there groups of funds that should be permitted to be included in a single Summary Prospectus even if we generally prohibit multiple fund Summary Prospectuses? Instead of, or in addition to, restricting the number of funds in a Summary Prospectus, should we impose page limits on Summary Prospectuses (e.g., three or four pages)? If so, what should the page limits be? How would we address situations in which a fund may conclude that it cannot provide the information required in the Summary Prospectus within a prescribed page limit?

- Is the information that we propose to require on the cover page or at the beginning of the Summary Prospectus appropriate? Should we include any additional information or eliminate any of the information that we have proposed to include?
- Is the proposed legend sufficient to notify investors of the availability and significance of the statutory prospectus and other information about the fund and how to obtain this information? Should the legend include greater detail about the information that is available? Will the legend adequately inform investors of the various means for obtaining additional information about a fund? Are the proposed requirements for the Web site address where additional information is available adequate to ensure that the Web site and the additional information will be easy to locate?
- Should we require or permit a fund to include its ticker symbol in the Summary Prospectus? If so, where should such information be included (e.g., at the beginning or on the cover page)?

- Will a one-month lag in reporting top 10 portfolio holdings sufficiently protect against potential dangers to shareholders, such as the dangers of front-running? Would a shorter or longer delay be more appropriate?
- Should we require the performance and portfolio holdings information in the Summary Prospectus to be updated quarterly? How would the inclusion of performance and portfolio holdings information that is not updated quarterly affect the usefulness of a Summary Prospectus to investors? How would the inclusion of performance and portfolio holdings information that is not updated quarterly affect investors' perceptions of the Summary Prospectus and investors' interest in reviewing the information in the Summary Prospectus?
- Would semi-annual updating of performance and portfolio holdings information in the Summary Prospectus be more appropriate or should we require annual updating only?
- Would any concerns relating to investor confusion, liability, or other matters arise from requiring quarterly updating of performance and portfolio holdings information in the Summary Prospectus but not in the statutory prospectus? Have any such concerns resulted in practice for funds that currently use the voluntary profile, where performance information is required to be updated on a quarterly basis, but such information is not required to be updated quarterly in the statutory prospectus?
- If we require quarterly or semi-annual updating of performance and portfolio holdings information in the Summary Prospectus, should we also require this

information to be updated quarterly or semi-annually in the statutory prospectus?

- What, if any, burdens would be associated with the requirement for quarterly updating of performance and portfolio holdings information? Would any burdens be reduced due to the availability of "on demand" printing technologies in which copies of documents are printed only as needed? How would any such burdens differ from those associated with quarterly updates to sales materials that include performance information, which funds routinely undertake today? If we require quarterly updating, how can we minimize any associated burdens?
- Should the rule require funds to provide quarterly updated performance and portfolio holdings information on an Internet Web site and/or on a toll-free telephone line instead of updating the Summary Prospectus quarterly? If so, should the Summary Prospectus be required to disclose the availability of the updated information? Would the addition of a legend to this effect, and the elimination of the updated information, affect the usefulness and perceived usefulness of the Summary Prospectus to investors, as well as their willingness to read and use the Summary Prospectus?
- Would it be appropriate for the proposed rule to deem a previously provided Summary Prospectus to be current notwithstanding subsequent quarterly updates to performance and portfolio holdings information? If we require quarterly updating, should we include any additional safe harbors or provide

for a cure provision in cases where a Summary Prospectus that lacks a required quarterly update has been inadvertently distributed?

3. Provision of Statutory Prospectus, SAI, and Shareholder Reports

In addition to sending or giving a Summary Prospectus, a person that decides to rely on the proposed rule to meet its statutory prospectus delivery obligations with respect to a mutual fund's securities would be required to provide the statutory prospectus itself on the Internet, together with other information, in the manner specified by the rule.[110] In order to maximize both the accessibility and usability of the information, the statutory prospectus would be required to be provided in two ways, by posting on an Internet website and by sending the information directly to any investor requesting a copy. Sending the information directly to any investor would not, however, be a condition of reliance on the rule.

Under the proposal, the statutory prospectus and other information would be required to be provided through the Internet as follows. The fund's current Summary Prospectus, statutory prospectus, SAI, and most recent annual and semi-annual reports to shareholders would be required to be accessible, free of charge, at the Web site address specified on the cover page or at the beginning of the Summary Prospectus.[111] These documents would be required to be accessible on or before the time that the Summary Prospectus is sent or given and current versions of the documents would be required to remain on the Web site through the date that is at least 90 days after (i) in the case of

---

110 Proposed rule 498(c)(3), (d)(3), and (f).

111 The cost to access the Internet itself (e.g., monthly subscription to an Internet service provider) and related costs, such as the cost of printer ink, would not be considered costs for purposes of determining whether information is accessible, free of charge.

reliance on the proposed rule to satisfy the obligation to have a statutory prospectus precede or accompany the carrying or delivery of a mutual fund security, the date that the mutual fund security is carried or delivered, and (ii) in the case of reliance on the proposed rule to deem a communication with respect to a mutual fund security not to be a prospectus under Section 2(a)(10) of the Securities Act, the date that the communication is sent or given.[112] This requirement is designed to ensure continuous access to the information from the time the Summary Prospectus is sent or given until at least 90 days after the date of delivery of a security or communication in reliance on the proposed rule.

We are proposing to require that the information on the Internet be presented in a format that:

- is convenient for both reading online and printing on paper;[113]
- permits persons accessing the statutory prospectus or SAI to move directly back and forth between the table of contents in that document and each section of that document referenced in the table of contents;[114] and
- permits persons accessing the Summary Prospectus to move directly back and forth between each section of the Summary Prospectus and (A) any section of the statutory prospectus and SAI that provides additional detail concerning that section of the Summary Prospectus; or (B) tables of contents in the statutory prospectus and SAI that prominently display the sections within

---

112 Proposed rule 498(f)(1).

113 Proposed rule 498(f)(2)(i). See also 17 CFR 240.14a-16(c) (requiring materials to be presented in a format convenient for both reading online and printing in paper when delivering proxy materials electronically).

114 Proposed rule 498(f)(2)(ii).

those documents that provide additional detail concerning information contained in the Summary Prospectus.[115]

The first requirement is designed to ensure that the information provided over the Internet will be user-friendly, both online and when printed. This imposes on the online information a standard of usability that is comparable to the readability of a paper document. The latter two requirements are intended to result in online information that is in a better and more usable format than the same information when provided in paper. The first of those two requirements would allow an investor or other user to move directly between the table of contents in the prospectus or SAI and the related sections of that document, by a single mouse click and without the need to flip through multiple pages of a paper document. The second requirement would allow an investor to move back and forth between related sections of the Summary Prospectus, statutory prospectus, and SAI, either directly through a single mouse click or indirectly by means of a table of contents in the prospectus or SAI, in which case two mouse clicks would be required.

In addition, persons accessing the Web site must be able to permanently retain, through downloading or otherwise, free of charge, an electronic version of the Summary Prospectus, statutory prospectus, SAI, and shareholder reports in a format that meets the first two requirements enumerated in the preceding paragraph.[116] That is, the format must be convenient for both reading online and printing on paper, and persons accessing the downloaded version of the statutory prospectus or SAI must be able to move directly back and forth between the table of contents in that document and each section of that

---

[115] Proposed rule 498(f)(2)(iii).

[116] Proposed rule 498(f)(3).

document referenced in the table of contents. An electronic version that is retained by an investor would not be required to incorporate links between the Summary Prospectus, statutory prospectus, and SAI because we anticipate that there may be technical difficulties associated with keeping these links current.

Compliance with all of the conditions in the proposed rule regarding Internet posting would be required in order to meet prospectus delivery obligations under Section 5(b)(2) of the Securities Act. Failure to comply with any of the conditions would be a violation of Section 5(b)(2) unless the fund's statutory prospectus is delivered by means other than reliance on the rule. The Commission recognizes, however, that there may be times when, due to system outages or other technological issues, a fund is temporarily not in compliance with the Internet posting requirements of the rule, despite the fund's best efforts. For that reason, the proposed rule includes a safe harbor provision stating that the conditions regarding Internet availability of a fund's Summary Prospectus, statutory prospectus, SAI, and shareholder reports would be deemed to be met, notwithstanding the fact that those materials are not available for a time in the manner required, provided that the fund has reasonable procedures in place to ensure that those materials are available in the required manner. In addition, a fund would be required to take prompt action to ensure that those materials become available in the manner required, as soon as practicable following the earlier of the time at which the fund knows or reasonably should have known that the documents are not available in the manner required.[117]

---

[117] Proposed rule 498(f)(4). This safe harbor would not be available to a fund that repeatedly fails to comply with the proposed rule's Internet posting requirements or that is not in compliance with the requirements over a prolonged period.

The Commission believes that every investor in a fund taking advantage of the proposed prospectus delivery regime should be permitted to choose whether to review a fund's information on the Internet or whether to receive that information directly, either in paper or through an e-mail. For that reason, the proposed rule would require that a fund (or financial intermediary through which shares of the fund may be purchased or sold) send, at no cost to the requestor and by U.S. first class mail or other reasonably prompt means, a paper copy of the fund's statutory prospectus, SAI, and most recent annual and semi-annual shareholder report to any person requesting such a copy within three business days after receiving a request for a paper copy. Similarly, a fund (or financial intermediary through which shares of the fund may be purchased or sold) would also be required to send, at no cost to the requestor and by e-mail, an electronic copy of the fund's statutory prospectus, SAI, and most recent annual and semi-annual shareholder report to any person requesting such a copy within three business days after receiving a request for an electronic copy.[118] This requirement, which is intended to ensure that an investor has prompt access to the required information in the form that he or she prefers, is based on a similar, existing requirement with respect to requests for the SAI and shareholder reports.[119]

The requirement that a fund send a paper or electronic copy of the statutory prospectus, SAI, and most recent annual and semi-annual shareholder reports, as applicable, to a person requesting such a copy would not be a condition to reliance on the rule to satisfy a fund's delivery obligations under Section 5(b)(2) of the Securities Act or

---

[118] Proposed rule 498(g).

[119] See Instruction 3 to Item 1 of Form N-1A (requiring the SAI and shareholder reports to be sent within three business days of receipt of a request).

the provision that a communication shall not be deemed a prospectus under Section 2(a)(10) of the Securities Act. A person that complied with all other aspects of the proposed rule would not violate Section 5(b)(2) of the Securities Act if the fund failed to send the required paper or electronic copy of the statutory prospectus, SAI, or most recent shareholder reports. This failure would, however, constitute a violation of the Commission's rules.

We request comment generally on the proposal to require that persons relying on the proposed rule provide the fund's statutory prospectus and other information on the Internet and upon request and specifically on the following issues:

- Should we permit the fund's current statutory prospectus and other information to be provided in the manner specified in the proposed rule? For what period of time should persons relying on the rule be required to retain this information on an Internet Web site?
- Should we require that the information on the Internet Web site be in a format that is convenient for both reading online and printing on paper?
- Are the proposed requirements regarding the ability to move back and forth within the statutory prospectus and the SAI from the table of contents to relevant sections, and between the Summary Prospectus, statutory prospectus, and SAI appropriate and useful? Would it be difficult or expensive for funds to comply with these requirements? Will these requirements help investors to navigate effectively within and between these documents and contribute to a more useful presentation of information than is possible through paper documents?

- Are there steps that the Commission should take to enhance the accessibility to the general public of fund Summary Prospectuses, statutory prospectuses, and other information that would be provided on an Internet Web site pursuant to the proposed rule? How can we enhance the availability of this information to investors, intermediaries, analysts, and others who are researching funds?
- What steps can the Commission take to enhance electronically provided documents? Should we require funds to tag any of the information in the Summary Prospectus or statutory prospectus using the eXtensible Business Reporting Language ("XBRL") taxonomy that was recently developed by the Investment Company Institute and is being used in the Commission's voluntary data tagging program?[120] Should the Commission make the submission of tagged risk/return summary information using the XBRL taxonomy mandatory in order for funds to rely upon the proposed rule amendments? If so, should funds be required to tag all of the risk/return summary information or should only certain information be required to be tagged, such as fees and expenses, past performance, and other numerical information? Are there any features, such as the ability to search documents for words and phrases, that we should require in documents that are provided electronically?
- Should we require that persons accessing the Web site at which the required documents are posted must be able to permanently retain, through

---

120 Recently, the Commission adopted rule amendments to enable mutual funds to submit information from the risk/return summary section of their prospectuses using interactive data under the Commission's voluntary interactive data program. See Securities Act Release No. 8823, supra note 24.

downloading or otherwise, free of charge, an electronic version of such documents? Should we require that documents downloaded from the Internet Web site must retain links that enable a user to move readily within a single document, as proposed? Would this proposed requirement present any technological difficulties? Should we also require that downloaded documents retain links that enable a user to move readily between related passages of multiple documents? Would it be technologically feasible to meet such a requirement? What would the costs be of complying with requirements that downloaded documents retain links, either within a single document or between related passages of multiple documents?

- Does the proposed rule appropriately address the possibility of inadvertent technological problems that may arise from time to time when information is provided electronically? Should funds having technological issues be required to disclose on the Web site that the information was not available for a time in the manner required and explain the reasons for the failure to comply? If so, how long should such information be required to be retained on the Web site? Should funds that are not able to comply for a prolonged period, perhaps a week or more, due to technological issues, or that are not able to comply repeatedly over a long period due to such reasons, be required to notify the Commission and/or investors?
- Are the requirements for sending the statutory prospectus, SAI, and annual and semi-annual shareholder reports in paper and electronically appropriate? Should funds be required to send a paper or electronic copy of the fund's

statutory prospectus, SAI, and most recent annual and semi-annual shareholder report to any person requesting such a copy within three business days after receiving a request for a copy? Would a longer or shorter period be appropriate? Will these requirements, together with the requirements for providing information on the Internet, as well as the proposed Summary Prospectus, enhance investors' ability to access, understand, and use the information that they receive?

- Should the requirements to send the statutory prospectus, SAI, and shareholder reports be a condition to reliance on the rule? Should failure to comply with these requirements result in a violation of Section 5(b)(2) of the Securities Act? Alternatively, should the failure to comply with these requirements be a violation of Commission rules that does not result in an inability to rely on the rule or a violation of Section 5(b)(2)?
- Should we require funds or other persons that use the proposed prospectus delivery regime to retain any additional records beyond those required by our current rules? Should we expressly require those persons to retain proof that the statutory prospectus, SAI, and annual and semi-annual reports were available on the Internet as required by the rule and records of the dates that documents were requested, along with the dates such documents were sent?

4. Incorporation by Reference

Permissible Incorporation by Reference

The proposed rule would permit a fund to incorporate by reference into the Summary Prospectus information contained in its statutory prospectus and SAI, as well

as any information from its most recent shareholder report, subject to the conditions described below.[121] A fund would not be permitted to incorporate by reference into the Summary Prospectus information from any other source. In addition, a fund could not incorporate by reference any of the information described above that is required to be included in the Summary Prospectus.[122] Information could be incorporated by reference into the Summary Prospectus only by reference to the specific document that contains the information, and not by reference to another document that incorporates the information by reference.[123] Thus, if a fund's statutory prospectus incorporates the fund's SAI by reference, the Summary Prospectus could not incorporate information in the SAI simply by referencing the statutory prospectus but would be required to reference the SAI directly.[124]

Incorporation by reference of information from a fund's statutory prospectus, SAI, and shareholder report would be permitted only if the fund satisfies the conditions described in Section II.B.3, above, which prescribe the means by which the incorporated

---

121 Proposed rule 498(b)(3)(i) and (ii).

122 Proposed rule 498(b)(3)(ii)(B).

123 Proposed rule 498(b)(3)(ii)(C).

124 Cf. Item 10(d) of Reg. S-K [17 CFR 229.10(d)] ("Except where a registrant or issuer is expressly required to incorporate a document or documents by reference . . . reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document."). General Instruction D.2 of Form N-1A makes Item 10(d) of Regulation S-K applicable to incorporation by reference into a fund's statutory prospectus.

information is provided to investors.[125] In addition, if a fund incorporates information by reference, the Summary Prospectus legend would be required to clearly identify the document from which the information is incorporated, including the date of the document, and explain that any information that is incorporated from the SAI or shareholder report may be obtained, free of charge, in the same manner as the statutory prospectus.[126] A fund that failed to comply with any of these conditions could not incorporate information by reference into its Summary Prospectus. A fund that provides the incorporated information to investors by complying with all of the conditions, including the conditions for providing the incorporated information through the Internet, would not also be required to send or give the incorporated information together with the Summary Prospectus.[127] While a fund would be required to send a paper or electronic copy of the incorporated information upon request, failure to do so would not preclude or nullify the incorporation by reference. It would, however, be a violation of Commission rules.

We are proposing to permit incorporation by reference in the Summary Prospectus in order to further our goal of creating a layered disclosure regime. The proposed rule requires provision to investors of all of the information in the Summary Prospectus, statutory prospectus, SAI, and shareholder reports. By using multiple means

---

125 Proposed rule 498(b)(3)(ii)(A) and (f). As discussed in Section II.B.3, this would not include the requirement to send or give a paper or electronic copy of the requested information upon request.

126 Proposed rule 498(b)(1)(iv)(B) and (b)(3)(ii)(A).

127 Proposed rule 498(b)(3)(i). Cf. Gen. Instr. D.1(b) of Form N-1A (permitting a fund to incorporate by reference any or all of the SAI into the statutory prospectus without delivering the SAI with the prospectus).

to provide this information and using technology to provide information in a layered format, the proposal is intended to facilitate investors' ability to effectively choose to review the particular information in which they are interested. Indeed, each investor in a fund taking advantage of the proposed prospectus delivery regime can also choose the particular means of receiving information because all of the information will be required to be promptly sent to any requesting investor in paper or electronically. We are proposing to permit incorporation by reference in the Summary Prospectus of the statutory prospectus, SAI, and information from the fund's most recent shareholder report because, under the proposal, these documents would be provided at the same time, though by different means.

Our determination to propose to permit incorporation of information into the Summary Prospectus is different from the determination we made with respect to the profile and is made in light of technological advances that have occurred during the intervening years. When the Commission adopted the profile almost 10 years ago, it did not permit incorporation by reference of the statutory prospectus into the profile and stated its belief that allowing this incorporation would be inconsistent with the purpose of the profile and not in the public interest. The Commission noted that the profile was designed to provide summary information about a fund in a self-contained format and that permitting incorporation by reference of the statutory prospectus would be inconsistent with the profile being a self-contained document.

By contrast, we do not intend the Summary Prospectus to be a self-contained document, but rather one element in a layered disclosure regime that results in the simultaneous provision of information to investors through multiple means. Indeed, we

intend the Summary Prospectus to provide investors with better, more usable access to the information in the statutory prospectus, SAI, and shareholder reports than they have today. The expansion in Internet access and the strides in the speed and quality of Internet connections since the profile rule was adopted in 1998 have made this possible.[128] At the moment that an investor receives a Summary Prospectus, he or she is also able to immediately review the full statutory prospectus, SAI, and shareholder reports online. Perhaps even more significantly, an investor could make use of required links between the Summary Prospectus and the other documents in order to move quickly and easily between the documents to review particular information of interest to the investor without having to read through lengthy, unrelated information. In addition, under our proposal, an investor who chooses to review the incorporated information in paper or electronically would be sent a copy of this information, promptly upon request. As a result of these considerations, we believe that it is consistent with the purpose of the Summary Prospectus and in the public interest to permit incorporation by reference of the statutory prospectus, SAI, and shareholder reports into the Summary Prospectus, subject to the conditions to incorporation contained in the proposed rule.

---

128 In 1998, one study indicated that over one-third of Americans over the age of 16 used the Internet. Associated Press Online, One-Third of Americans Use Internet (Aug. 25, 1998). As noted above, more recent surveys show that Internet use among American adults is at an all time high, with approximately three quarters identifying themselves as Internet users. See supra note 22. Moreover, very few American homes had broadband connections in 1998. See Robert J. Samuelson, Broadband's Faded Promise, The Washington Post, at A35 (Dec. 12, 2001) (noting that almost no American homes had broadband in 1998). In contrast, as of early 2007, nearly half of all adult Americans had a broadband connection at home. See supra note 23. See also Jesse Noyes, Broadband signals death of dial-up, The Boston Herald, at 028 (Aug. 7, 2005) (noting that dial-up speeds have remained constant at 56K since 1998 and cannot go higher, while broadband speeds have grown from 1 megabyte per second to 100 megabytes a second in the past six years).

Effect of Incorporation by Reference

Proposed rule 498 would provide that, for purposes of rule 159 under the Securities Act,[129] information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus in accordance with proposed rule 498. This proposal addresses the question of when information that is incorporated into the Summary Prospectus under proposed rule 498 is conveyed for purposes of Sections 12(a)(2) and 17(a)(2) of the Securities Act.

Under Section 12(a)(2) of the Securities Act, sellers have liability to purchasers for offers or sales by means of a prospectus or oral communication that includes an untrue statement of material fact or omits to state a material fact that makes the statements made, based on the circumstances under which they were made, not misleading. Securities Act Section 17(a)(2) is a general antifraud provision which makes it unlawful for any person in the offer and sale of a security to obtain money or property 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.

As we have previously stated, we interpret Section 12(a)(2) and Section 17(a)(2) as meaning that, for purposes of assessing whether at the time of sale (including a contract of sale) a prospectus or oral communication or statement includes or represents a material misstatement or omits to state a material fact necessary in order to make the prospectus, oral communication, or statement, in light of the circumstances under which

---

[129] 17 CFR 230.159.

it was made, not misleading, information conveyed to the investor only after the time of sale (including a contract of sale) should not be taken into account.[130] In furtherance of this interpretation, we adopted rule 159 under Sections 12(a)(2) and 17(a)(2). Consistent with our interpretation, rule 159 provides that, for purposes of Section 12(a)(2) and 17(a)(2) only, and without affecting any other rights under those sections, for purposes of determining at the time of sale (including the time of the contract of sale) whether a prospectus, oral statement, or a statement[131] includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading,[132] any information conveyed to the purchaser only after the time of sale will not be taken into account.

Proposed rule 498 provides that, for purposes of rule 159 (and therefore for purposes of Sections 12(a)(2) and 17(a)(2)), information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus in accordance with the proposed rule. For purposes of Sections 12(a)(2) and 17(a)(2), whether or not information has been conveyed to an investor at or prior to the time of the contract of sale is a facts and circumstances determination.[133] We have designed the requirements of proposed rule

---

130 See Securities Act Release No. 8591, 70 FR at 44766, supra note 91.

131 These include a prospectus or oral statement in the case of Section 12(a)(2), or a statement to which Section 17(a)(2) is applicable.

132 Or, in the case of Section 17(a)(2), 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.

133 See Securities Act Release No. 8591, 70 FR at 44766, supra note 91. Such information could include information in the issuer's registration statement and prospectuses for the offering in question, the issuer's Exchange Act reports incorporated by reference therein,

498 specifically so that the facts and circumstances surrounding receipt by a person of the Summary Prospectus will, in fact, result in the effective conveyance to that person of any information that is incorporated by reference into the Summary Prospectus in compliance with the conditions of the rule. For that reason, proposed rule 498 expressly states that, for purposes of rule 159, information incorporated into a Summary Prospectus is conveyed not later than the time that the Summary Prospectus is received.[134] The relevant facts and circumstances required by rule 498 include actual receipt of the Summary Prospectus; incorporation by reference of the information into the Summary Prospectus and clear disclosure of how the incorporated information may be obtained free of charge; and continuous Internet availability of the incorporated information in formats that permit permanent retention, are convenient for both reading online and in paper, and meet the document linking requirements of the rule.[135]

Proposed rule 498 addresses one particular set of facts and circumstances under rule 159 and does not address any other situations. For purposes of Sections 12(a)(2) and 17(a)(2), whether or not information has been conveyed to an investor at or prior to the time of the contract of sale remains a facts and circumstances determination. Proposed rule 498 does not address any facts and circumstances relating to operating companies or

---

or information otherwise disseminated by means reasonably designed to convey such information to investors. Such information also could include information directly communicated to investors.

134 Whether or not any or all of the incorporated information was conveyed to an investor prior to the time that the Summary Prospectus was received would be a facts and circumstances determination.

135 Cf. Investment Company Act Release No. 13436 (Aug. 12, 1983) [48 FR 37928, 37930 (Aug. 22, 1983)] (discussing incorporation by reference of the SAI into the statutory prospectus); see also White v. Melton, 757 F. Supp. 267, 272 (S.D.N.Y. 1991) (addressing effect of incorporation by reference of the SAI into the statutory prospectus).

any other issuers that are not mutual funds, nor does it address any information other than information incorporated by reference into a mutual fund Summary Prospectus in accordance with the proposed rule.

The Commission believes that a person that provides investors with a mutual fund Summary Prospectus in good faith compliance with the proposed rule would be able to rely on Section 19(a) of the Securities Act[136] against a claim that the Summary Prospectus did not include information that is disclosed in the fund's statutory prospectus, whether or not the fund incorporates the statutory prospectus by reference into the Summary Prospectus.[137] Section 19(a) protects a defendant from liability for actions taken in good faith in conformity with any rule of the Commission.[138]

We request comment generally on the proposal to permit incorporation by reference into the Summary Prospectus and specifically on the following issues:

- Does the proposed rule provide adequate means of providing investors with the information in the Summary Prospectus, statutory prospectus, SAI, and shareholder reports? Will these means result in more or less effective provision of information than our current rules require? Do these means of providing information adequately protect investors?
- Should we permit a fund to incorporate by reference into the proposed Summary Prospectus any or all of the information contained in its statutory

---

136 15 U.S.C. 77s(a).

137 Cf. Investment Company Act Release No. 23065, supra note 30, 63 FR at 13972 (similar Commission statement in context of profile).

138 See also Section 38(c) of the Investment Company Act [15 U.S.C. 80a-37(c)] (similar provision under Investment Company Act).

prospectus and SAI and any or all of the information from the fund's most recent shareholder report? Is there any other information that should be permitted to be incorporated by reference into the proposed Summary Prospectus?

- Should we permit a fund to incorporate by reference into the proposed Summary Prospectus any of the information that is required to be included in the Summary Prospectus?
- Should we require materials that are incorporated by reference into the Summary Prospectus to be available online in the manner described in Section II.B.3 above? Are there any additional conditions that we should impose on the ability to incorporate by reference into the Summary Prospectus? Should satisfaction of the requirement to send a paper or electronic copy of materials incorporated by reference be a condition to the ability to incorporate by reference or should we, as proposed, provide that failure to satisfy this requirement is a rule violation that does not affect the ability to incorporate by reference?
- Is the proposal relating to rule 159 appropriate? Should conveyance of information incorporated in the Summary Prospectus be tied to the time of receipt of the Summary Prospectus, the time that the Summary Prospectus is sent or given, or some other time? Does proposed rule 498 adequately ensure that information incorporated by reference into a Summary Prospectus will have been effectively conveyed to a person who receives the Summary Prospectus? Does the proposal relating to rule 159 provide sufficient clarity

regarding the effect of incorporation by reference into a Summary Prospectus and the impact on liability of using a Summary Prospectus?

5. Filing Requirements for the Summary Prospectus

The Commission is proposing to require each Summary Prospectus to be filed with the Commission on EDGAR no later than the fifth business day after the date that it is first used.[139] We are not proposing to require that a fund file the Summary Prospectus before it is first used because the content of the Summary Prospectus would be essentially identical to the content of the summary section of the statutory prospectus, which is filed prior to its first use. We are proposing that the Summary Prospectus be filed after it is first used in order to ensure that the Commission's EDGAR system contains a copy of every Summary Prospectus that is actually being used. A Summary Prospectus that is filed on EDGAR will be publicly available; however, a fund could not rely on this availability to satisfy the requirements to post the document online discussed in Section II.B.3. above.

Section 10(b) of the Securities Act provides that a prospectus permitted under that section shall, unless provided otherwise by Commission rule, be filed as part of the registration statement but shall not be deemed part of the registration statement for the purposes of Section 11 of the Securities Act.[140] In accordance with Section 10(b), a

---

139 Proposed rule 497(k). We are also proposing to delete the reference to the profile from rule 497(a) [17 CFR 230.497(a)].

140 15 U.S.C. 77j(b) and 77k. Congress provided a specific exception from liability under Section 11 of the Securities Act for summary prospectuses under Section 10(b) of the Securities Act in order to encourage the use of summary prospectuses. L. Loss & J. Seligman, Securities Regulation, § 2–b–5 (3d ed. 2006) (citing S. Rep. 1036, 83d Cong., 2d Sess. 17-18 (1954) and H.R. Rep. 1542, 83d Cong., 2d Sess. 26 (1954)). Information in the Summary Prospectus that is also contained in the statutory prospectus would be

Summary Prospectus would be filed as part of the registration statement, but would not be deemed a part of the registration statement for purposes of Section 11 of the Securities Act. A Summary Prospectus would be subject to the stop order and other administrative provisions of Section 8 of the Securities Act.[141] This is in addition to the Commission's power under Section 10(b) of the Securities Act to prevent or suspend the use of the Summary Prospectus, regardless of whether or not it has been filed.[142]

We request comment generally on the proposed filing requirements for the Summary Prospectus and specifically on the following issues:

- Should we require pre-use filing of the Summary Prospectus? Should we require post-use filing?
- Should the Summary Prospectus be filed as part of the registration statement and be subject to the stop order and other administrative provisions of Section 8 of the Securities Act? Should the Summary Prospectus be subject to Section 11 liability? Would investors be adequately protected under the proposed rule, or should we provide additional investor protections?

---

part of the registration statement for the purposes of Section 11 of the Securities Act as a result of its inclusion in the statutory prospectus.

141 15 U.S.C. 77h; H.R. Rep. 1542, 83d Cong., 2d Sess., 1954 U.S.C.C.A.N. 2973, 2982 (1954) (noting that the Commission's authority to suspend the use of a defective summary prospectus under Section 10(b) "is intended to supplement the stop-order powers of the Commission under [S]ection 8").

142 15 U.S.C. 77j(b).

C. Technical and Conforming Amendments

We are proposing the following conforming amendments to rule 482 under the Securities Act, the investment company advertising rule, to reflect the proposed Summary Prospectus and the proposed elimination of the voluntary profile.

- The scope section of rule 482 would be revised to clarify that the rule does not apply to a Summary Prospectus or to a communication that, pursuant to proposed rule 498, is not deemed a "prospectus" under section 2(a)(10) of the Securities Act.[143]

- For funds using the Summary Prospectus, the legend required in a rule 482 advertisement regarding the availability of the statutory prospectus would be required to include references to the Summary Prospectus.[144]

- The provision addressing the use of rule 482 advertisements together with a profile that includes an application to purchase shares is deleted as unnecessary.[145]

We are also proposing amendments to various cross-references to Form N-1A in our rules and forms to reflect changes that we are proposing to Form N-1A. These include cross-references in rule 485 under the Securities Act, rules 304 and 401 of Regulation S-T, Form N-4 under the Securities Act and the Investment Company Act, and Form

---

143 Proposed amendment to rule 482(a).

144 Proposed rule 482(b)(1).

145 Proposed rule 482(c).

N-14 under the Securities Act. We are also proposing to revise rule 159A under the Securities Act to refer to a Summary Prospectus rather than a profile.

We request comment generally on the proposed technical and conforming amendments.

D. Compliance Date

If the proposed amendments to Form N-1A are adopted, the Commission expects to provide for a transition period after the effective date in order to give funds sufficient time to prepare their registration statements under the amendments. If we adopt the proposed amendments to Form N-1A, we expect to require all initial registration statements on Form N-1A, and all post-effective amendments that are annual updates to effective registration statements on Form N-1A, filed six months or more after the effective date, to comply with the proposed amendments to Form N-1A. We expect that we would not permit a person to rely on rule 498 to satisfy its obligations to deliver a mutual fund's statutory prospectus unless the fund is also in compliance with the amendments to Form N-1A. The Commission requests comment on the proposed compliance date.

III. GENERAL REQUEST FOR COMMENTS

The Commission requests comment on the amendments proposed in this release, whether any further changes to our rules or forms are necessary or appropriate to implement the objectives of our proposed amendments, and on other matters that might affect the proposals contained in this release.

IV. SPECIAL REQUEST FOR COMMENTS FROM INVESTORS

We are proposing changes that are intended to provide you, the investor, with concise information about mutual funds that is easier to use than the mutual fund prospectuses available today.

Under our proposals, every mutual fund prospectus would include a summary section, consisting of the following key information about the fund: (1) investment objectives; (2) costs; (3) principal investment strategies, risks, and performance; (4) top 10 portfolio holdings; (5) identity of investment advisers and portfolio managers; (6) brief purchase, sale, and tax information; and (7) information about broker compensation and conflicts. Our intent is that this information would be presented in three or four pages at the front of the prospectus.

We are also proposing to permit mutual funds to send or give you the summary information while providing the prospectus online and, upon your request, sending you a paper copy of the prospectus. The proposal is intended to provide you with key information that is easier to use while using the power of the Internet to make the more detailed information in the prospectus available to you at all times. You would still be able to get the prospectus in paper by asking for it.

We want to know your views on our proposals and on the questions we have asked throughout this release. In addition, we want to know your views generally regarding the mutual fund prospectuses that you currently receive. What improvements would you suggest that would make it easier to read and understand mutual fund prospectuses? Would you find it useful to receive a short summary of the key information in a mutual fund prospectus, with the more detailed information readily available to you online and sent to you upon your request? Is the information that we

propose to include in the summary section of the prospectus the information that you need to make an informed investment decision? If not, what information would you like to see in the summary?

V. PAPERWORK REDUCTION ACT

Certain provisions of the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[146] We are submitting the proposed collections of information to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[147] The titles for the collections of information are: (1) "Form N-1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Open-End Management Investment Companies;" and (2) "Summary Prospectus for Open-End Management Investment Companies." Form N-1A (OMB Control No. 3235-0307) under the Securities Act and the Investment Company Act[148] is used by mutual funds to register under the Investment Company Act and to offer their securities under the Securities Act. The Commission is proposing a new collection of information under proposed rule 498 under the Securities Act to be used by mutual funds that choose to send or give a Summary Prospectus to investors.[149] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

---

146 44 U.S.C. 3501 et seq.

147 44 U.S.C. 3507(d); 5 CFR 1320.11.

148 17 CFR 239.15A; 17 CFR 274.11A.

149 If proposed rule 498 is adopted, a request would be submitted to OMB to remove the collection of information for current rule 498.

We are proposing an improved mutual fund disclosure framework that is intended to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that is available today. The foundation of the proposal is the provision to all investors of streamlined and user-friendly information that is key to an investment decision. More detailed information would be provided both on the Internet and, upon an investor's request, in paper or by e-mail.

The proposed amendments to Form N-1A, if adopted, would require every prospectus to include a summary section at the front of the prospectus, consisting of key information about the fund, including investment objectives and strategies, risks, costs, and performance. Proposed rule 498, if adopted, would provide a new option that would permit a person to satisfy its mutual fund prospectus delivery obligations under the Securities Act. Under the proposed option, key information would be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus would be provided on an Internet Web site. Upon an investor's request, funds would also be required to send the statutory prospectus to the investor.

We are also proposing technical and conforming amendments to rules 159A and 482 under the Securities Act that, if adopted, would reflect the proposed Summary Prospectus and the elimination of the voluntary profile, along with amendments that would update the cross references to Form N-1A contained in rule 485 under the Securities Act, rules 304 and 401 of Regulation S-T, Form N-4 under the Securities Act and the Investment Company Act, and Form N-14 under the Securities Act.[150] These

---

150 See supra notes 143 through 145 and accompanying text.

technical and conforming amendments do not constitute a collection of information because we are not altering the legal requirements of these rules and forms.

Finally, proposed amendments to rule 497, if adopted, would provide the requirements for filing Summary Prospectuses with the Commission. These amendments would not constitute a separate collection of information under rule 497 because the burden required by these amendments is part of the collection of information under proposed rule 498.

Form N-1A

Form N-1A, including the proposed amendments, contains collection of information requirements. The likely respondents to this information collection are open-end management investment companies registered or registering with the Commission. Compliance with the disclosure requirements of Form N-1A is mandatory. Responses to the disclosure requirements are not confidential.

Much of the information that would be required in the summary section of the prospectus is currently required in a fund's prospectus. However, our proposal would require new information regarding a fund's portfolio holdings and the compensation received by financial intermediaries which would entail costs, including the costs of compiling and reviewing the information. Thus, we estimate that the proposed amendments would increase the hour burden per portfolio per filing of an initial registration statement or the initial creation of a post-effective amendment to a registration statement by 16 hours. We further estimate that subsequent post-effective amendments to a registration statement would require, on average, approximately 4 burden hours per portfolio to update and review the information. Because the PRA

estimates represent the average burden over a three-year period, we estimate the average hour burden for one portfolio to comply with the proposed amendments to be approximately 8 hours.[151]

We received 2,397 initial registration statements and post-effective amendments on Form N-1A during our 2006 fiscal year covering approximately 8,726 portfolios. Thus, the incremental hour burden resulting from the proposed amendments relating to the proposed summary section disclosure would be 69,808 hours (8 hours x 8,726 portfolios). If the proposed amendments to Form N-1A are adopted, the total annual hour burden for all funds for preparation and filing of registration statements and post-effective amendments to Form N-1A would be 1,197,088 hours (69,808 hours + 1,127,280 hours).[152]

Rule 498

Proposed rule 498 would contain collection of information requirements. The likely respondents to this information collection are open-end management investment companies registered or registering with the Commission. Under proposed rule 498, use of the Summary Prospectus would be voluntary, but the rule's requirements regarding provision of the statutory prospectus would be mandatory for funds that elect to send or give a Summary Prospectus in reliance upon proposed rule 498. The information provided under proposed rule 498 would not be kept confidential.

---

151 (16 hours in the first year + 4 hours in the second year + 4 hours in the third year) ÷ 3 years = 8 hours.

152 Currently, the approved annual hour burden for preparing and filing registration statements on Form N-1A is 1,127,280 hours based on the previous estimate of 2,602 responses, referencing a total of 7,025 portfolios. We currently have outstanding a request for extension of the previously approved collection for Form N-1A. If our request is granted, the annual hour burden will be adjusted accordingly.

Our preliminary estimate is that proposed rule 498 would not impose any substantial new information collection requirements with respect to the initial preparation of a Summary Prospectus beyond those discussed above in connection with the collection of information for Form N-1A. It, however, would impose a ½ hour burden annually associated with the compilation of the additional information required on a cover page or at the beginning of the Summary Prospectus. Proposed rule 498 also would impose hour burdens associated with the quarterly updating of the Summary Prospectus, as well as hour burdens associated with the posting of a fund's Summary Prospectus, statutory prospectus, SAI, and most recent report to shareholders on an Internet Web site. The Commission estimates the average hour burden for one portfolio to comply with the proposed quarterly updating requirements to be approximately 3 hours per quarter, or 9 hours annually for each of the three subsequent quarters.[153] The Commission also estimates that the average hour burden for one portfolio to comply with the proposed Internet Web site posting requirements would be 1 hour per quarter, or 4 hours annually. The Summary Prospectus is voluntary, so the percentage of funds that will choose to provide it is uncertain. Given this uncertainty, we have assumed that 75% of all funds would choose to send or give a Summary Prospectus.[154] Assuming 75% of all funds file

---

153 In addition to the annual filing of a registration statement on Form N-1A, quantified above, a fund that chooses to provide Summary Prospectuses would have to update those Summary Prospectuses for each of the subsequent 3 quarters of the year.

154 We believe our estimate of 75% is reasonable given the potential benefits of our proposed amendments to funds. A recent study of industry participants found that 64% of respondents are very likely to consider using a short-form prospectus and that 31% are somewhat likely to consider using a short-form prospectus. See Forrester Consulting Study commissioned on behalf of NewRiver, Inc., The Short-Form Prospectus, at 5 (Oct. 2007), available at: http://www1.newriver.com/news_events/news/new_research_finds_mutual_fund_providers_overwhelmingly_support_the_securities_and_exchange_commissions_proposed_short

a Summary Prospectus, the total annual hour burden for filing and updating Summary Prospectuses and posting the required disclosure documents to an Internet Web site pursuant to proposed rule 498 would be 88,351 hours ((1/2 hour + 9 hours + 4 hours) x (.75 x 8,726 portfolios)).

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) evaluate the accuracy of our estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090, with reference to File No. S7-28-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-28-07, and be submitted to the Securities and Exchange

---

form_prospectus_rule.php. Study respondents included brokerage firms, banks, insurance companies, mutual fund families, and money management and financial advisory firms. Id. at 4.

Commission, Public Reference Room, 100 F Street, NE, Washington, DC 20549-0609. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. COST/BENEFIT ANALYSIS

The Commission is sensitive to the costs and benefits imposed by its rules. We are proposing an improved mutual fund disclosure framework that is intended to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that is available today. The foundation of the proposal is the provision to all investors of streamlined and user-friendly information that is key to an investment decision. More detailed information would be provided both on the Internet and, upon an investor's request, in paper or by e-mail.

To implement this improved disclosure framework, we are proposing amendments to Form N-1A that would require every prospectus to include a summary section at the front of the prospectus, consisting of key information about the fund, including investment objectives and strategies, risks, costs, and performance. As discussed in the release, this key information has been identified by the participants in the June 2006 roundtable, by investor research, and by a variety of commentators as the information that is important to most investors in selecting mutual funds.[155] The key information would be required to be presented in plain English in a standardized order.

---

[155] See supra notes 16 and 20.

Our intent is that this information would be presented succinctly, in three or four pages at the front of the prospectus.

We are also proposing a new option that would permit a person to satisfy its mutual fund prospectus delivery obligations under the Securities Act. Under the proposed option, key information would be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus would be provided on an Internet Web site. Upon an investor's request, funds would also be required to send the statutory prospectus to the investor. Our intent in proposing this option is that funds take full advantage of the Internet's search and retrieval capabilities in order to enhance the provision of information to mutual fund investors.

Today's proposal has the potential to revolutionize the provision of information to the millions of mutual fund investors who rely on mutual funds for their most basic financial needs. The proposal is intended to help investors who are overwhelmed by the choices among thousands of available funds described in lengthy and legalistic documents to readily access key information that is important to an informed investment decision. At the same time, by harnessing the power of technology to deliver information in better, more usable formats, the proposals can help those investors, their intermediaries, third party analysts, the financial press, and others to locate and compare facts and data from the wealth of more detailed disclosures that are available.

A. Benefits

Possible benefits of the proposed amendments include enhanced disclosure of information needed to make informed investment decisions about mutual funds, more

rapid dissemination of information over the Internet, and reduced printing and mailing costs.

Millions of individual Americans invest in shares of mutual funds, relying on mutual funds for their retirements, their children's educations, and their other basic financial needs.[156] These investors face a difficult task in choosing among the more than 8,000 available mutual funds.[157] Fund prospectuses, which have been criticized by investor advocates, representatives of the fund industry, and others as long and complicated, often prove difficult for investors to use efficiently in comparing their many choices. Current Commission rules require mutual fund prospectuses to contain key information about investment objectives, risks, and expenses that, while important to investors, can be difficult for investors to extract. Prospectuses are often long, both because they contain a wealth of detailed information and because prospectuses for multiple funds are often combined in a single document. Too frequently, the language of prospectuses is complex and legalistic, and the presentation formats make little use of graphic design techniques that would contribute to readability.

Our proposal would require investment information that is key to an investment decision to be provided in a streamlined document with other more detailed information provided elsewhere. The provision of this information to investors in concise, user-friendly formats, as proposed, would allow investors to compare information across funds and may assist them in making better informed portfolio allocation decisions in line with their investment goals.

---

156 See supra note 13.

157 See supra note 14.

Our proposal also would provide the additional benefits of increased Internet availability of fund information, by providing layered disclosure that allows investors to move back and forth between the information within the Summary Prospectus and more detailed information within other disclosure documents. These benefits include, among other things, facilitating comparisons among funds and replacing one-size-fits-all disclosure with disclosure that each investor can tailor to his or her own needs. In recent years, access to the Internet has greatly expanded,[158] and significant strides have been made in the speed and quality of Internet connections.[159] Advances in technology offer a promising means to address the length and complexity of mutual fund prospectuses by streamlining the key information that is provided to investors, ensuring that access to the full wealth of information about a fund is immediately and easily accessible, and providing the means to present all information about a fund online in a format that facilitates comparisons of key information, such as expenses, across different funds and different share classes of the same fund. Technology has the potential to replace the current one-size-fits-all mutual fund prospectus with an approach that allows investors, their financial intermediaries, third party analysts, and others to tailor the wealth of available information to their particular needs and circumstances.

Significant technological advances have increased both the market's demand for more timely disclosure and the ability of funds to capture, process, and disseminate information. The proposal would enable funds to take greater advantage of the Internet to more rapidly communicate and deliver information to investors. Accordingly, investor

---

158 See supra note 22.

159 See supra note 23.

demand for information could be satisfied through relatively inexpensive mass dissemination of the information through electronic means. We anticipate that demand for the information in the statutory prospectus and SAI will increase as access to that information becomes easier through the use of layered disclosure that allows investors, their financial intermediaries, third party analysts, and others to tailor the wealth of available information to their particular needs and circumstances.

The Summary Prospectus proposal also would provide cost savings to funds. We believe that funds will benefit from being able to send or give a Summary Prospectus and not having to print and send statutory prospectuses to all investors and prospective investors. We expect that funds would experience cost savings with respect to both annual mailings to their current shareholders and mailings made in connection with a purchase of fund shares. We estimate that funds distribute 290,000,000 statutory prospectuses annually to their current shareholders and another 64,500,000 in connection with fund purchases.[160] We estimate that the cost savings for annual mailings would be

---

160 Often, a fund will mail a statutory prospectus to each of its shareholders annually in addition to mailing a statutory prospectus in response to a purchase of fund shares. For purposes of this analysis, our best estimate of the number of statutory prospectuses mailed annually is based on the approximately 290,000,000 shareholder accounts in 2006. See Investment Company Institute, 2007 Investment Company Fact Book, at 101, supra note 13 (noting 289,997,000 shareholder accounts at the end of 2006). We recognize that: some shareholders may currently receive their fund documents electronically; some households where more than one fund investor resides will only receive one copy of the statutory prospectus per household; some accounts may hold more than one fund; and not all funds send out statutory prospectuses annually. Therefore, the actual number of prospectuses mailed annually may be higher or lower than our estimate.

Our estimate of the number of statutory prospectuses sent out to fulfill a fund's prospectus delivery obligation upon purchase is based on information provided by Broadridge Financial Solutions ("Broadridge"). We evaluated the information provided and believe the data likely represent relevant information and costs. We solicit comment on our estimates that incorporate information provided by Broadridge.

approximately $114,187,500[161] and that the cost savings for purchase mailings would be approximately $75,465,000.[162] These cost savings would be reduced by the costs of sending the statutory prospectus to those investors who request it. We estimate that approximately 10% of 64,500,000 investors making purchases will request that a statutory prospectus be sent to them.[163] We estimate that the cost of sending statutory prospectuses to requesting investors would be $7,546,500.[164] Therefore, we estimate the

---

161 Our annual estimates are derived from information we received from Broadridge. Broadridge estimates that the average cost of a statutory prospectus printed in a full production run is $0.27 and that the average cost to mail a statutory prospectus by bulk mail is $0.255. The cost savings with respect to annual mailings were calculated by multiplying the costs of printing and mailing a statutory prospectus by the 290,000,000 statutory prospectuses mailed annually reduced to reflect our estimate that 75% of funds will elect to send Summary Prospectuses (($0.27 for the printing of a statutory prospectus + $0.255 for the mailing of a statutory prospectus) x 290,000,000 statutory prospectuses x 75% of funds).

162 For purposes of our estimate, we used Broadridge's printing cost estimate of $0.35 that is blended to reflect full production printing runs and digital print on demand documents. This blended rate reflects the fact that a fund may run out of statutory prospectuses produced in a full production run and may have to print additional statutory prospectuses on demand. Broadridge also estimated that the average cost to mail a statutory prospectus by first class mail is $1.21. The cost savings with respect to purchase mailings were calculated by multiplying the costs of printing and mailing a statutory prospectus by 64,500,000 statutory prospectuses mailed in response to a fund purchase reduced to reflect our estimate that 75% of funds will elect to send Summary Prospectuses (($0.35 for the printing of a statutory prospectus + $1.21 for the mailing of a statutory prospectus) x 64,500,000 statutory prospectuses x 75% of funds).

163 We believe that the actual number of investors who would request that a statutory prospectus be sent to them may actually be lower given that investors may also request delivery by e-mail and our understanding that currently only a small percentage of investors request that a copy of a fund's SAI be sent to them.

164 For purposes of this estimate, we used the blended printing rate of $0.35 and the average first class mail rate of $1.21. The costs were calculated by multiplying the costs of printing and mailing a statutory prospectus by the 64,500,000 prospectuses sent out in response to fund purchases reduced to reflect our estimate that 75% of funds will elect to send Summary Prospectuses and 10% of investors will request a statutory prospectus be mailed to them (($0.35 for the printing of a statutory prospectus + $1.21 for the mailing of a statutory prospectus) x 64,500,000 statutory prospectuses x 75% of funds x 10% of requesting investors).

annual cost savings will be approximately $182,106,000,[165] or approximately $27,826 per portfolio.[166]

The full potential for savings may be reduced by several factors.[167] First, some mutual funds might not elect to send or give Summary Prospectuses pursuant to proposed rule 498. Second, to the extent that some shareholders do not have access to the Internet and request paper copies of prospectuses from the fund, the savings in printing and mailing costs would be reduced. Third, the requirement that funds supply requesting shareholders with paper copies within three business days may limit funds' ability to reduce printing costs by causing them to maintain inventories of paper copies. Technological advances, such as the ability to print documents on demand, however, may alleviate the need for such a paper inventory.

We expect that funds would face the highest level of uncertainty about the extent of investors' continued use of printed statutory prospectuses in the first year after adoption of the proposed amendments. We expect that, as funds gain familiarity with the continued use of printed prospectuses and as shareholders increasingly turn to the Internet for fund information, the number of requested paper copies will decline, as will funds' tendency to print more copies than ultimately are requested.

---

165 (($114,187,500 cost savings for annual mailings + $75,465,000 cost savings for purchase mailings) - $7,546,500 cost of sending requested statutory prospectuses).

A recent study of industry participants estimated cost savings of approximately $300,000,000 per year. See The Short-Form Prospectus, supra note 154, at 6.

166 $182,106,000 ÷ (8,726 portfolios x 75%).

167 Our estimates above take into account these possible reductions in cost savings.

We request comment on these benefits and any other potential benefits. Specifically, we request comment on our data and analysis, including any data on the printing and mailing cost savings that may be realized as a result of our proposed amendments, if adopted. Are there any other factors that would reduce the costs to funds? We also request comment on the current number of paper copies of the SAI requested by investors and the number of paper copies of the statutory prospectus funds estimate that investors would request if our proposed amendments are adopted.

B. Costs

While our proposal would result in significant cost savings for funds, we believe that there will be costs associated with the proposal. These include the costs for funds to compile and review the new information required by our proposal and to post the required disclosure documents on an Internet Web site. These costs may include both internal costs (for attorneys and other non-legal staff, such as computer programmers, to prepare and review the required disclosure) and external costs (for printing and mailing of the Summary Prospectus). We estimate that the external costs for printing and mailing of the Summary Prospectus would be $104,542,500[168] or approximately $15,974 per

---

168 Our estimate is derived from estimates provided to us by Broadridge. Broadridge estimates that the average cost to print a Summary Prospectus on demand is $0.11. We note that some funds may receive reduced bulk printing rates; however, Broadridge informed us that it believes that the majority of funds will print the Summary Prospectus on demand. With respect to mailing costs for a Summary Prospectus, Broadridge estimates that Summary Prospectuses sent out annually will be mailed at the bulk rate of $0.255 and that Summary Prospectuses sent out in connection with fund purchases will be mailed first class at a rate of $0.41. Our estimate, therefore, was derived as follows: (($0.11 for printing a Summary Prospectus on demand + $0.255 for bulk mail) x 290,000,000 Summary Prospectuses estimated to be sent out annually x 75% of funds) + (($0.11 for printing a Summary Prospectus on demand + $0.41 for first class mail) x 64,500,000 prospectuses estimated to be sent out in response to a fund purchase x 75% of funds).

portfolio.[169] There may also be external costs connected with the review of the required disclosure by outside counsel; however, we expect those costs to be minimal given that most of the information required is already required in a fund's prospectus.

For purposes of the PRA, we have estimated that the proposed new disclosure requirements, assuming 75% of funds choose to send or give a Summary Prospectus, would add: (1) 69,808 hours to the annual burden of preparing Form N-1A; and (2) 88,351 hours to the annual burden of preparing and using a Summary Prospectus under proposed rule 498. We estimate that this additional burden would equal total internal costs of $39,935,148 annually[170] or approximately $6,102 per portfolio.[171]

Our proposal also may result in potential costs for individual fund investors. These include any paper and printing costs for those investors who choose to print posted materials. We estimate that approximately 5% of investors making fund purchases will print statutory prospectuses at home at an estimated cost of $2.03 per statutory prospectus.[172] Based on these assumptions, the proposal is estimated to produce annual home printing costs of $4,910,063.[173]

---

169 $104,542,500 ÷ (8,726 funds x 75%).

170 This cost increase is estimated by multiplying the total annual hour burden (158,159 hours) by the estimated hourly wage rate of $252.50. The estimated wage figure is based on published rates for compliance attorneys and senior programmers, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, yielding effective hourly rates of $261 and $244, respectively. See Securities Industry Association, Report on Management & Professional Earnings in the Securities Industry 2006 (Sept. 2006). The estimated wage rate is further based on the estimate that attorneys and programmers would divide time equally, resulting in a weighted wage rate of $252.50 (($261 x .50) + ($244 x .50)).

171 $39,935,148 ÷ (8,726 funds x 75%).

172 Our estimate of potential home printing costs depends on data provided by Lexecon and ADP in response to Exchange Act Release No. 55146, supra note 91. See letter from ADP. The Lexecon data was included in the ADP comment letter. To calculate home

As these costs are difficult to quantify, we request comment on the magnitude of these potential costs and whether there are any other additional potential costs, including whether any such costs would affect different classes of investors differently. We also request comment on the nature and magnitude of our estimates of the costs of the additional disclosure that would be required if our proposal were adopted.

C. Request for Comments

We request comments on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed amendments. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION

Section 2(c) of the Investment Company Act[174] and Section 2(b) of the Securities Act[175] require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

---

printing costs, we estimate that 100% of prospectuses are printed in black and white at a cost of $0.035 per page for ink and that the average prospectus length is approximately 45 pages at a cost of $0.010 per page for the paper (($0.035 for ink + $0.010 for paper) x 45 pages).

173 (64,500,000 purchasers x 75% of funds x 5% of printing investors) x $2.03).

174 15 U.S.C. 80a-2(c).

175 15 U.S.C. 77b(b).

The proposed amendments are intended to provide enhanced disclosure regarding mutual funds. These changes may improve efficiency. The enhanced disclosure requirements may enable shareholders to make more informed investment decisions, which could promote efficiency. We anticipate that the proposed rules, if adopted, would increase efficiency at mutual funds by providing an alternative to the printing and mailing of paper copies of statutory prospectuses.

We anticipate that our proposal will improve investors' ability to make informed investment decisions and, therefore, lead to increased efficiency and competitiveness of the U.S. capital markets. Similarly, the ability of investors to directly locate the information they seek regarding a fund or funds through the use of the Internet may result in more fund investors or existing investors investing in more funds.

We anticipate that this increased market efficiency also may promote capital formation by improving the flow of information between funds and their investors. Specifically, we believe that the proposal will: (1) facilitate greater availability of information to investors and the market with regard to all funds; (2) reflect the increased importance of electronic dissemination of information, including the use of the Internet; and (3) promote the capital formation process.

We request comment on whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation. We also request comment on any anti-competitive effects of the proposed amendments. Commenters are requested to provide empirical data and other factual support for their views if possible.

VIII. INITIAL REGULATORY FLEXIBILITY ANALYSIS

This Initial Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[176] It relates to the Commission's proposed amendments to Form N-1A under the Securities Act and the Investment Company Act and to proposed new rule 498 under the Securities Act.

A. Reasons for, and Objectives of, Proposed Amendments

We are proposing an improved mutual fund disclosure framework that is intended to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that is available today. The foundation of the proposal is the provision to all investors of streamlined and user-friendly information that is key to an investment decision. More detailed information would be provided both on the Internet and, upon an investor's request, in paper or by e-mail.

B. Legal Basis

The Commission is proposing amendments to Form N-1A pursuant to authority set forth in Sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)] and Sections 8, 24(a), 24(g), 30, and 38 of the Investment Company Act [15 U.S.C. 80a-8, 80a-24(a), 80a-24(g), 80a-29, and 80a-37]. The Commission is proposing amendments to rule 498 under the Securities Act pursuant to authority set forth in Sections 5, 6, 7, 10, 19, and 28 of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, 77s, and 77z-3] and Sections 8, 24(a), 24(g), 30, and 38 of the Investment Company Act [15 U.S.C. 80a-8, 80a-24(a), 80a-24(g), 80a-29, and 80a-37].

---

176 5 U.S.C. 603 et seq.

C. Small Entities Subject to the Rule

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[177] Approximately 131 mutual funds registered on Form N-1A meet this definition.[178]

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments would require all funds, including funds that are small entities, to provide key information in a summary section of their statutory prospectuses. In addition, the proposed amendments provide a new option that would permit a person to satisfy its mutual fund prospectus delivery obligations under the Securities Act. Under the proposed option, key information would be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus would be provided on an Internet Web site. Upon an investor's request, funds would also be required to send the statutory prospectus to the investor. No funds would be required to send or give a Summary Prospectus. However, for purposes of the PRA, we estimate that 75% of all funds would choose to send or give a Summary Prospectus pursuant to proposed rule 498 both to enhance investor access to information about a fund and to take advantage of the cost savings that a fund may realize. If a fund elects the proposed new delivery regime for prospectuses, it would be required to prepare, file, and send or give a Summary Prospectus to investors. Moreover, a fund would be required to update its Summary

---

177 17 CFR 270.0-10.

178 This estimate is based on analysis by the Division of Investment Management staff of publicly available data.

Prospectus quarterly. The required disclosure in the Summary Prospectus is information that generally would be readily available to funds. A fund would be required to post the statutory prospectus along with other required documents to an Internet Web site and provide either a paper or an e-mail copy of its statutory prospectus to requesting shareholders.

For purposes of the Paperwork Reduction Act, we have estimated that the proposed new disclosure requirements would increase the hour burden of filings on Form N-1A by 69,808 hours annually and for proposed rule 498 by 88,351 hours annually. We estimate that this additional burden would increase total internal costs per fund, including funds that are small entities, by approximately $6,102 per portfolio annually.[179] Also for purposes of the Paperwork Reduction Act, we have estimated that the benefit of decreased printing and other costs would decrease total external costs per fund, including funds that are small entities, by approximately $27,826 per portfolio annually.[180]

The Commission solicits comment on these estimates and the anticipated effect the proposed amendments would have on small entities.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that duplicate, overlap, or conflict with the proposed amendments.

---

179 These figures are based on an estimated hourly wage rate of $252.50. See supra note 170. We note that this estimate includes a one-time burden of 16 hours to create the summary section of the statutory prospectus.

180 See supra note 166 and accompanying text.

F. Agency Action to Minimize the Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small issuers. In connection with the proposed amendments, the Commission considered the following alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed amendments for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. We believe that the proposed amendments to Form N-1A would provide investors with enhanced disclosure regarding funds. This enhanced disclosure would allow investors to better assess their investment decisions. Different disclosure requirements for funds that are small entities may create the risk that investors in these funds would be less able to evaluate funds and less able to compare different funds, thereby lessening the ability of investors to make informed choices among funds. We believe it is important for the disclosure that would be required by the proposed amendments to Form N-1A to be provided to investors in all funds, not just funds that are not considered small entities.

Proposed rule 498, if adopted, would provide a new option that would permit a person to satisfy its mutual fund prospectus delivery obligations under the Securities Act.

Under the proposed option, key information would be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus would be provided on an Internet Web site. Upon an investor's request, funds would also be required to send the statutory prospectus to the investor. Because the proposed rule is designed to provide investors with more accessible disclosure, an exemption from the proposed rule or separate requirements for small entities would not achieve the goal of more accessible disclosure for the investors in those funds.

We have endeavored through the proposed amendments to minimize the regulatory burden on all funds, including small entities, while meeting our regulatory objectives. Small entities should benefit from the Commission's reasoned approach to the proposed amendments to the same degree as other funds. We also have endeavored to clarify, consolidate, and simplify disclosure for all funds, including those that are small entities. Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the context of prospectus disclosure requirements.

G. Request for Comments

The Commission encourages the submission of written comments with respect to any aspect of this analysis. Comment is specifically requested on the number of small entities that would be affected by the proposed amendments and the likely impact of the proposal on small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed

amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

IX. CONSIDERATION OF IMPACT ON THE ECONOMY

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[181] a rule is "major" if it results or is likely to result in:

- an annual effect on the economy of $100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on:

- the potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment or innovation.

X. STATUTORY AUTHORITY

The Commission is proposing amendments to Form N-1A and Form N-4 pursuant to authority set forth in Sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)] and Sections 8, 24(a), 24(g), 30, and 38 of the Investment Company Act [15 U.S.C. 80a-8, 80a-24(a), 80a-24(g), 80a-29, and 80a-37]. The Commission is proposing amendments to Form N-14 pursuant to authority set forth in Sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)]. The Commission is proposing amendments to rules 159A, 482, 485, 497, and

---

[181] Pub. L. No. 104-21, Title II, 110 Stat. 857 (1996).

498 under the Securities Act and to rules 304 and 401 of Regulation S-T pursuant to authority set forth in Sections 5, 6, 7, 10, 19, and 28 of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, 77s, and 77z-3] and Sections 8, 24(a), 24(g), 30, and 38 of the Investment Company Act [15 U.S.C. 80a-8, 80a-24(a), 80a-24(g), 80a-29, and 80a-37].

List of Subjects

17 CFR Parts 230 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 232 and 239

Reporting and recordkeeping requirements, Securities.

TEXT OF PROPOSED RULE AND FORM AMENDMENTS

For the reasons set out in the preamble, the Commission proposes to amend Title 17, Chapter II, of the Code of Federal Regulations as follows.

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. Section 230.159A is amended by revising the word "profile" in paragraph (a)(2) to read "summary prospectus".

3. Section 230.482 is amended by:

a. Revising paragraph (a) before the note; and

b. Revising paragraphs (b)(1) and (c).

The revisions read as follows:

§ 230.482 Advertising by an investment company as satisfying requirements of section 10.

(a) Scope of rule. This section applies to an advertisement or other sales material (advertisement) with respect to securities of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) (1940 Act), or a business development company, that is selling or proposing to sell its securities pursuant to a registration statement that has been filed under the Act. This section does not apply to an advertisement that is excepted from the definition of prospectus by section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) or § 230.498(d) or to a summary prospectus under § 230.498. An advertisement that complies with this section, which may include information the substance of which is not included in the prospectus specified in section 10(a) of the Act (15 U.S.C 77j(a)), will be deemed to be a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

Note to paragraph (a): * * *

(b) * * *

(1) Availability of additional information. An advertisement must include a statement that advises an investor to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing; explains that the prospectus and, if available, the summary prospectus contain this and other information about the investment company; identifies a source from which an investor may obtain a prospectus and, if available, a summary prospectus; and states that the

prospectus and, if available, the summary prospectus should be read carefully before investing.

* * * * *

(c) Use of applications. An advertisement that complies with this section may not contain or be accompanied by any application by which a prospective investor may invest in the investment company, except that a prospectus meeting the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) by which a unit investment trust offers variable annuity or variable life insurance contracts may contain a contract application although the prospectus includes, or is accompanied by, information about an investment company in which the unit investment trust invests that, pursuant to this section, is deemed a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)).

4. Section 230.485 is amended by revising the reference "Items 5 or 6(a)(2) of Form N-1A" in paragraph (b)(1)(iv) to read "Item 6(b) or 11(a)(2) of Form N-1A".

5. Section 230.497 is amended by revising paragraphs (a) and (k).

The revisions read as follows:

§230.497 Filing of investment company prospectuses – number of copies.

(a) Five copies of every form of prospectus sent or given to any person prior to the effective date of the registration statement that varies from the form or forms of prospectus included in the registration statement filed pursuant to § 230.402(a) shall be filed as part of the registration statement not later than the date that form of prospectus is first sent or given to any person, except that an investment company advertisement under § 230.482 shall be filed under this paragraph (a) (but not as part of the registration statement) unless filed under paragraph (i) of this section.

* * * * *

(k) Summary Prospectus filing requirements. This paragraph (k), and not the other provisions of § 230.497, shall govern the filing of summary prospectuses under § 230.498. Each definitive form of a summary prospectus under § 230.498 shall be filed with the Commission no later than the fifth business day after the date that it is first used.

6. Section 230.498 is amended by revising it to read as follows:

§230.498 Summary Prospectuses for open-end management investment companies.

(a) Definitions. For purposes of this section:

(1) Class means a class of shares issued by a Fund that has more than one class that represent interests in the same portfolio of securities under § 270.18f-3 of this chapter or under an order exempting the Fund from sections 18(f), 18(g), and 18(i) of the Investment Company Act (15 U.S.C. 80a-18(f), 80a-18(g), and 80a-18(i)).

(2) Fund means an open-end management investment company, or any Series of such a company, that has, or is included in, an effective registration statement on Form N-1A (§§239.15A and 274.11A of this chapter) and that has a current prospectus that satisfies the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)).

(3) Series means shares offered by a Fund that represent undivided interests in a portfolio of investments and that are preferred over all other series of shares for assets specifically allocated to that series in accordance with § 270.18f-2(a) of this chapter.

(4) Statement of Additional Information means the statement of additional information required by Part B of Form N-1A.

(5) Statutory Prospectus means a prospectus that satisfies the requirements of section 10(a) of the Act.

(6) Summary Prospectus means the summary prospectus described in paragraph (b) of this section.

(b) General requirements for Summary Prospectus. This paragraph describes the requirements for a Fund's Summary Prospectus. A Summary Prospectus that complies with this paragraph (b) will be deemed to be a prospectus that is authorized under section 10(b) of the Act (15 U.S.C. 77j(b)) and section 24(g) of the Investment Company Act (15 U.S.C. 80a-24(g)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

(1) Cover page or beginning of Summary Prospectus. Include on the cover page of the Summary Prospectus or at the beginning of the Summary Prospectus:

(i) The Fund's name and the Class or Classes, if any, to which the Summary Prospectus relates.

(ii) A statement identifying the document as a "Summary Prospectus."

(iii) The approximate date of the Summary Prospectus's first use.

(iv) The following legend:

Before you invest, you may want to review the Fund's prospectus, which contains more information about the Fund and its risks. You can find the Fund's prospectus and other information about the Fund online at [_____]. You can also get this information at no cost by calling [_____] or by sending an e-mail request to [_____].

(A) The legend must provide an Internet address, other than the address of the Commission's electronic filing system; toll free (or collect) telephone number; and e-mail address that investors can use to obtain the Statutory Prospectus and other information.

The Internet Web site address must be specific enough to lead investors directly to the Statutory Prospectus and other materials that are required to be accessible under paragraph (f)(1) of this section, rather than to the home page or other section of the Web site on which the materials are posted. The Web site could be a central site with prominent links to each document. The legend may indicate, if applicable, that the Statutory Prospectus and other information are available from a financial intermediary (such as a broker-dealer or bank) through which shares of the Fund may be purchased or sold.

(B) If a Fund incorporates any information by reference into the Summary Prospectus, the legend must clearly identify the document from which the information is incorporated, including the date of the document; and, if information is incorporated from a source other than the Statutory Prospectus, the legend must explain that the incorporated information may be obtained, free of charge, in the same manner as the Statutory Prospectus. A Fund may modify the legend to include a statement to the effect that the Summary Prospectus is intended for use in connection with a defined contribution plan that meets the requirements for qualification under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), a tax-deferred arrangement under section 403(b) or 457 of the Internal Revenue Code (26 U.S.C. 403(b) and 457), or a variable contract as defined in section 817(d) of the Internal Revenue Code (26 U.S.C. 817(d)), as applicable, and is not intended for use by other investors.

(2) Contents of the Summary Prospectus.

(i) Except as otherwise provided in this paragraph (b), provide the information required or permitted by Items 2 through 9 of Form N-1A, and only that information, in the order required by the form.

(ii) Provide in the table required by Item 4(b) of Form N-1A the Fund's average annual total returns and, if applicable, yield as of the end of the most recent calendar quarter prior to the Summary Prospectus's first use. Update the return information as of the end of each succeeding calendar quarter not later than one month after the completion of the quarter. Include the date of the return information in the table. A Summary Prospectus may omit the explanation and information required by Instruction 2(c) to Item 4(b)(2) of Form N-1A.

(iii) Provide the portfolio holdings information required by Item 5 of Form N-1A as of the end of the most recent calendar quarter prior to the Summary Prospectus's first use or the immediately prior calendar quarter if the most recent calendar quarter ended less than one month prior to the Summary Prospectus's first use. Update the portfolio holdings information as of the end of each succeeding calendar quarter not later than one month after the completion of the quarter.

Instruction to paragraphs (b)(2)(ii) and (iii). A Fund may reflect the updated performance and portfolio holdings information in the Summary Prospectus by affixing a label or sticker, or by other reasonable means.

(3) Incorporation by reference.

(i) Except as provided by paragraph (b)(3)(ii) of this section, information may not be incorporated by reference into a Summary Prospectus. Information that is

incorporated by reference into a Summary Prospectus in accordance with paragraph (b)(3)(ii) of this section need not be sent or given with the Summary Prospectus.

(ii) A Fund may incorporate by reference into a Summary Prospectus any or all of the information contained in the Fund's Statutory Prospectus and Statement of Additional Information, and any information from the most recent report to the Fund's shareholders under § 270.30e-1, provided that:

(A) The conditions of paragraphs (b)(1)(iv)(B) and (f) of this section are met;

(B) A Fund may not incorporate by reference into a Summary Prospectus information that paragraphs (b)(1) and (2) of this section require to be included in the Summary Prospectus; and

(C) Information that is permitted to be incorporated by reference into the Summary Prospectus may be incorporated by reference into the Summary Prospectus only by reference to the specific document that contains the information, not by reference to another document that incorporates such information by reference.

(iii) For purposes of § 230.159, information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus in accordance with paragraph (b)(3)(ii) of this section.

(4) Multiple Funds and Classes. A Summary Prospectus may describe only one Fund, but may describe more than one Class of a Fund.

(c) Transfer of the security. Any obligation under section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)) to have a Statutory Prospectus precede or accompany the carrying or delivery of a Fund security in an offering registered on Form N-1A is satisfied if:

(1) A Summary Prospectus is sent or given no later than the time of the carrying or delivery of the Fund security; and, if any other materials accompany the Summary Prospectus, the Summary Prospectus is given greater prominence than those materials and is not bound together with any of those materials;

(2) The Summary Prospectus that is sent or given satisfies the requirements of paragraph (b) of this section at the time of the carrying or delivery of the Fund security; and

(3) The conditions set forth in paragraph (f) of this section are satisfied.

(d) Sending communications. A communication relating to an offering registered on Form N-1A sent or given after the effective date of a Fund's registration statement (other than a prospectus permitted or required under section 10 of the Act) shall not be deemed a prospectus under section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) if:

(1) It is proved that prior to or at the same time with such communication a Summary Prospectus was sent or given to the person to whom the communication was made; and, if any other materials accompany the Summary Prospectus, the Summary Prospectus is given greater prominence than those materials and is not bound together with any of those materials;

(2) The Summary Prospectus that was sent or given satisfies the requirements of paragraph (b) of this section at the time of such communication; and

(3) The conditions set forth in paragraph (f) of this section are satisfied.

(e) Updated Summary Prospectuses.

(1) For purposes of paragraphs (c) and (d) of this section, a Summary Prospectus that satisfies the requirements of paragraph (b) of this section at the time it is

sent or given shall be deemed to continue to satisfy those requirements until the earlier of the date on which:

(i) The information in the Summary Prospectus is required to be updated for any purpose other than compliance with paragraphs (b)(2)(ii) and (iii) of this section; or

(ii) The Fund is required to file an amendment to its registration statement for the purpose of updating its Statutory Prospectus to satisfy the requirements of section 10(a)(3) of the Act (15 U.S.C. 77j(a)(3)).

(2) Unless otherwise required to be included in the Statutory Prospectus or registration statement, the failure to include in a Statutory Prospectus or registration statement the updated return and portfolio holdings information required to be included in a Summary Prospectus by paragraphs (b)(2)(ii) and (b)(2)(iii) of this section will not, solely by virtue of inclusion of the information in a Summary Prospectus, be considered an omission of material information required to be included in the Statutory Prospectus or registration statement.

(f) Availability of Fund's Statutory Prospectus and certain other Fund documents.

(1) The Fund's current Summary Prospectus, Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders under § 270.30e-1 are publicly accessible, free of charge, at the Web site address specified on the cover page or at the beginning of the Summary Prospectus on or before the time that the Summary Prospectus is sent or given and current versions of those documents remain on the Web site through the date that is at least 90 days after:

(i) In the case of reliance on paragraph (c) of this section, the date that the Fund security is carried or delivered; or

(ii) In the case of reliance on paragraph (d) of this section, the date that the communication is sent or given.

(2) The materials that are accessible in accordance with paragraph (f)(1) of this section must be presented on the Web site in a format, or formats, that:

(i) Are convenient for both reading online and printing on paper;

(ii) Permit persons accessing the Statutory Prospectus or Statement of Additional Information to move directly back and forth between the table of contents in such document (including from the table of contents required by § 230.481(c)) and each section of the document referenced in the table of contents; and

(iii) Permit persons accessing the Summary Prospectus to move directly back and forth between each section of the Summary Prospectus and:

(A) Any section of the Statutory Prospectus and Statement of Additional Information that provides additional detail concerning that section of the Summary Prospectus, or

(B) Tables of contents in the Statutory Prospectus and Statement of Additional Information that prominently display the sections within the Statutory Prospectus and Statement of Additional Information that provide additional detail concerning that section of the Summary Prospectus.

(3) Persons accessing the materials specified in paragraph (f)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials

in a format, or formats, that meet each of the requirements of paragraphs (f)(2)(i) and (ii) of this section.

(4) The conditions set forth in paragraphs (f)(1), (f)(2), and (f)(3) of this section shall be deemed to be met, notwithstanding the fact that the materials specified in paragraph (f)(1) of this section are not available for a time in the manner required by such paragraphs, provided that:

(i) The Fund has reasonable procedures in place to ensure that the specified materials are available in the manner required by paragraphs (f)(1), (f)(2), and (f)(3) of this section; and

(ii) The Fund takes prompt action to ensure that the specified documents become available in the manner required by paragraphs (f)(1), (f)(2), and (f)(3) of this section, as soon as practicable following the earlier of the time at which it knows or reasonably should have known that the documents are not available in the manner required by paragraphs (f)(1), (f)(2), and (f)(3) of this section.

(g) If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund (or a financial intermediary through which shares of the Fund may be purchased or sold) must send, at no cost to the requestor and by U.S. first class mail or other reasonably prompt means, a paper copy of the Fund's Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders to any person requesting such a copy within three business days after receiving a request for a paper copy. If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund (or a financial intermediary through which shares of the Fund may be purchased or sold) must send, at no cost to the requestor and by e-mail, an electronic copy of the

Fund's Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders to any person requesting such a copy within three business days after receiving a request for an electronic copy. Compliance with this paragraph (g) is not a condition to the ability to rely on paragraph (c) or (d) of this section with respect to a Fund, and failure to comply with paragraph (g) does not negate the ability to rely on paragraph (c) or (d).

PART 232 – REGULATION S-T – GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

7. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

8. Section 232.304 is amended by revising the references "Item 22 of Form N-1A" in paragraphs (d) and (e) to read "Item 28 of Form N-1A".

9. Section 232.401 is amended by:

a. Revising the reference "Item 8(a) of Form N-1A" in paragraph (b)(1)(iii) to read "Item 14(a) of Form N-1A"; and

b. Revising the reference "Items 2 and 3 of Form N-1A" in paragraph (b)(1)(iv) to read "Items 2, 3, and 4 of Form N-1A".

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

10. The general authority citation for Part 239 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u–5, 78w(a), 78ll(d), 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

11. Form N-14 (referenced in § 239.23) is amended by:

a. Revising paragraph (a) in Item 5;

b. Revising the reference "Items 10 through 22 of Form N-1A" in Item 12(a) to read "Items 15 through 28 of Form N-1A"; and

c. Revising the reference "Items 10 through 13 and 15 through 22 of Form N-1A" in Item 13(a) to read "Items 15 through 18 and 20 through 28 of Form N-1A".

The revision to paragraph (a) of Item 5 reads as follows:

Note: The text of Form N-14 does not, and these amendments will not, appear in the Code of Federal Regulations.

FORM N-14

* * * * *

Item 5. Information About the Registrant

* * * * *

(a) if the registrant is an open-end management investment company, furnish the information required by Items 2 through 9, 10(a), 10(b), and 11 through 14 of Form N-1A under the 1940 Act;

* * * * *

PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

12. The authority citation for Part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

* * * * *

13. Form N-1A (referenced in §§ 239.15A and 274.11A) is amended by:

a. Revising the Table of Contents;

b. Revising the General Instructions as follows:

i. Revising the phrase "(except Items 1, 2, 3, and 8), B, and C (except Items 23(e) and (i) – (k))" in paragraph B.2.(b) to read "(except Items 1, 2 , 3, 4, and 14), B, and C (except Items 29(e) and (i) – (k))";

ii. Revising paragraphs B.4.(c), C.3.(a), C.3.(b), and C.3.(c);

iii. Revising the reference "Items 6(b)-(d) and 7(a)(2)-(5)" in paragraph C.3.(d)(i) to read "Items 12(b)-(d) and 13(a)(2)-(5)"; and

iv. Revising the reference "Items 2(c)(2)(iii)(B) and (C) and 2(c)(2)(iv)" in paragraph C.3.(d)(iii) to read "Items 4(b)(2)(iii)(B) and (C) and 4(b)(2)(iv)";

c. Revising Item 1 as follows:

i. Removing Instruction 6 to Item 1(b)(1);

ii. In Item 1(b)(3), revising the telephone number "1-202-942-8090" to read "1-202-551-8090"; and

iii. In Item 1(b)(3), revising the zip code "20549-0102" to read "20549-0213";

d. Redesignating Items 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 as Items 4, 10, 11, 12, 13, 14, 15,

16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, respectively;

e. Adding new Item 2;

f. Revising Item 3 as follows:

i. Adding a sentence after the sentence following the heading "Fees and expenses of the Fund";

ii. Revising the heading "Annual Fund Operating Expenses (expenses that are deducted from Fund assets)";

iii. Adding a new paragraph after the "Example" with the heading "Portfolio Turnover";

iv. Revising Instruction 1(b);

v. In Instruction 2(a)(i), revising the reference "Item 7(a)" to read "Item 13(a)";

vi. Revising Instruction 3(e);

vii. In Instruction 3(f)(iii), revising the references "Item 8(a)" to read "Item 14(a)";

viii. In Instruction 3(f)(vii), revising the reference "Item 8" to read "Item 14";

ix. Revising Instruction 4(a);

x. Redesignating Instruction 5 as Instruction 6 and adding new Instruction 5; and

xi. In newly redesignated Instruction 6, revising paragraph (b);

g. Revising newly redesignated Item 4 as follows:

i. Removing paragraph (a) and redesignating paragraphs (b) and (c) as paragraphs (a) and (b);

ii. In newly redesignated Item 4(a), revising the reference "Item 4(b)" to read "Item 10(b)";

iii. In newly redesignated Item 4(b)(1)(i), revising the reference "Item 4(c)" to read "Item 10(c)";

iv. In the Instruction to newly redesignated Item 4(b)(1)(iii), revising the reference "Items 2(c)(1)(ii) and (iii)" to read "Items 4(b)(1)(ii) and (iii)";

v. In newly redesignated Item 4(b)(2)(i), revising the reference "paragraphs (c)(2)(ii) and (iii)" to read "paragraphs (b)(2)(ii) and (iii)";

vi. In newly redesignated Item 4(b)(2)(iii), revising the reference "Item 22(b)(7)" to read "Item 28(b)(7)";

vii. In newly redesignated Item 4(b)(2)(iv), revising the reference "paragraph 2(c)(2)(iii)" to read "paragraph 4(b)(2)(iii)";

viii. In Instruction 1(a) to newly redesignated Item 4(b)(2), revising the reference "Item 8(a)" to read "Item 14(a)";

ix. In Instruction 1(b) to newly redesignated Item 4(b)(2), revising the reference "paragraph (c)(2)(i)" to read "paragraph (b)(2)(i)";

x. In Instruction 2(a) to newly redesignated Item 4(b)(2), revising the references "Item 21(a)", "Item 21(b)(1)", and "Items 21(b)(2) and (3)" to read "Item 27(a)", "Item 27(b)(1)", and "Items 27(b)(2) and (3)", respectively;

xi. In Instruction 2(b) to newly redesignated Item 4(b)(2), revising the reference "Item 22(b)(7)" to read "Item 28(b)(7)";

xii. In Instruction 2(d) to newly redesignated Item 4(b)(2), revising the references "Item 21(b)(2)" and "Item 21" to read "Item 27(b)(2)" and "Item 27", respectively;

xiii. In newly redesignated Item 4(b)(2), revising Instructions 2(e), 3(a), 3(b), and 3(c); and

xiv. In Instruction 4 to newly redesignated Item 4(b)(2), revising the reference "Item 22(b)(7)" to read "Item 28(b)(7)";

h. Adding new Items 5, 6, 7, 8, and 9;

i. In Instruction 5 to newly redesignated Item 10(b)(1), revising the reference "Item 11(c)(1)" to read "Item 17(c)(1)";

j. Revising newly redesignated Item 11 as follows:

i. Revising paragraph (a)(1)(i);

ii. Revising paragraph (a)(2); and

iii. Removing the Instructions to newly redesignated Item 11(a)(2);

k. In newly redesignated Item 12, removing paragraph (g);

l. Revising newly redesignated Item 13 as follows:

i. In Instruction 1 to newly redesignated Item 13(a)(2), revising the reference "Item 7" to read "Item 13";

ii. In Instruction 2 to newly redesignated Item 13(a)(2), revising the references "Item 7" and "Items 12(d) and 17(b)" to read "Item 13" and "Items 18(d) and 23(b)", respectively;

iii. In newly redesignated Item 13(a)(5), revising the reference "Item 17(a)" to read "Item 23(a)"; and

iv. In the Instruction to newly redesignated Item 13(a)(5), revising the references "Item 7" to read "Item 13";

m. Revising newly redesignated Item 17 as follows:

i. In newly redesignated Item 17(d), revising the reference "Item 4(b)" to read "Item 10(b)";

ii. In newly redesignated Item 17(e), revising the reference "Item 8" to read "Item 14"; and

iii. In Instruction 1 to newly redesignated Item 17(f)(2), revising the reference "Item 11(f)(2)" to read "Item 17(f)(2)";

n. In newly redesignated Item 18, revising the references "Item 12" to read "Item 18";

o. In newly redesignated Items 21(a), 21(b), and 21(c), revising the references "Item 5(a)(2)" to read "Item 6(b)";

p. Revising newly redesignated Item 24 as follows:

i. Removing the Instruction to newly redesignated Item 24(a);

ii. In Instruction 4 to newly redesignated Item 24(c), revising the reference "Item 22" to read "Item 28"; and

iii. In Instruction 1 to newly redesignated Item 24(e), revising the reference "Item 17(e)" to read "Item 23(e)";

q. In Instruction 1 to newly redesignated Item 26(c), revising the references "Item 7(b)(2)", "Item 14(d)", and "Item 30" to read "Item 13(b)(2)", "Item 20(d)", and "Item 36", respectively;

r. Revising newly redesignated Item 28 as follows:

i. In newly redesignated Item 28(a), revising the reference "Item 17(c)" to read "Item 23(c)";

ii. In newly redesignated Item 28(b)(2), revising the reference "Item 8(a)" to read "Item 14(a)";

iii. In newly redesignated Item 28(b)(5), revising the reference "Item 12(a)(1)" to read "Item 18(a)(1)";

iv. In newly redesignated Item 28(b)(7)(ii)(B), revising the reference "Item 21(b)(1)" to read "Item 27(b)(1)";

v. In Instruction 10 to newly redesignated Item 28(b)(7), revising the reference "Instruction 5 to Item 3" to read "Instruction 6 to Item 3";

vi. In the Instruction to newly redesignated Item 28(c)(1), revising the references "Item 22(b)(1)" and "Item 22(c)(1)" to read "Item 28(b)(1)" and "Item 28(c)(1)", respectively;

vii. In newly redesignated Item 28(c)(2), revising the reference "Item 8(a)" to read "Item 14(a)";

viii. In Instruction 1(c) to newly redesignated Item 28(d)(1), revising the reference "Item 8(a)" to read "Item 14(a)";

ix. In Instruction 2(a)(ii) to newly redesignated Item 28(d)(1), revising the reference "Item 22(d)(1)" to read "Item 28(d)(1)"; and

x. In the Instruction to newly redesignated Item 28(d)(4), revising the reference "Item 12(f)" to read "Item 18(f)";

s. In newly redesignated Item 29(k), revising the reference "Item 22" to read "Item 28";

t. Revising newly redesignated Item 33 as follows:

i. In newly redesignated Item 33(b), revising the reference "Item 20" to read "Item 26";

ii. In Instruction 2 to newly redesignated Item 33(c), revising the reference "Item 20(c)" to read "Item 26(c)"; and

u. In Instruction 1 to newly redesignated Item 35, revising the reference "Item 14" to read "Item 20".

The additions and revisions are to read as follows:

Note: The text of Form N-1A does not, and these amendments will not, appear in the Code of Federal Regulations.

FORM N-1A

* * * * *

CONTENTS OF FORM N-1A

GENERAL INSTRUCTIONS

A. Definitions

B. Filing and Use of Form N-1A

C. Preparation of the Registration Statement

D. Incorporation by Reference

PART A: INFORMATION REQUIRED IN A PROSPECTUS

Item 1.	**Front and Back Cover Pages**
Item 2.	**Risk/Return Summary: Investment Objectives/Goals**
Item 3.	**Risk/Return Summary: Fee Table**
Item 4.	**Risk/Return Summary: Investments, Risks, and Performance**
Item 5.	**Portfolio Holdings**
Item 6.	**Management**
Item 7.	**Purchase and Sale of Fund Shares**
Item 8.	**Tax Information**
Item 9.	**Financial Intermediary Compensation**
Item 10.	**Investment Objectives, Principal Investment Strategies, Related Risks, and Disclosure of Portfolio Holdings**
Item 11.	**Management, Organization, and Capital Structure**
Item 12.	**Shareholder Information**
Item 13.	**Distribution Arrangements**
Item 14.	**Financial Highlights Information**
PART B:	**INFORMATION REQUIRED IN A STATEMENT OF ADDITIONAL INFORMATION**
Item 15.	**Cover Page and Table of Contents**
Item 16.	**Fund History**
Item 17.	**Description of the Fund and Its Investments and Risks**
Item 18.	**Management of the Fund**
Item 19.	**Control Persons and Principal Holders of Securities**
Item 20.	**Investment Advisory and Other Services**

Item 21. **Portfolio Managers**

Item 22. **Brokerage Allocation and Other Practices**

Item 23. **Capital Stock and Other Securities**

Item 24. **Purchase, Redemption, and Pricing of Shares**

Item 25. **Taxation of the Fund**

Item 26. **Underwriters**

Item 27. **Calculation of Performance Data**

Item 28 **Financial Statements**

PART C: **OTHER INFORMATION**

Item 29. **Exhibits**

Item 30. **Persons Controlled by or Under Common Control with the Fund**

Item 31. **Indemnification**

Item 32. **Business and Other Connections of the Investment Adviser**

Item 33. **Principal Underwriters**

Item 34. **Location of Accounts and Records**

Item 35. **Management Services**

Item 36. **Undertakings**

SIGNATURES

GENERAL INSTRUCTIONS

* * * * *

B. Filing and Use of Form N-1A

* * * * *

4. * * *

(c) The plain English requirements of rule 421 under the Securities Act [17 CFR 230.421] apply to prospectus disclosure in Part A of Form N-1A. The information required by Items 2 through 9 must be provided in plain English under rule 421(d) under the Securities Act.

* * * * *

C. Preparation of the Registration Statement

* * * * *

3. * * *

(a) Organization of Information. Organize the information in the prospectus and SAI to make it easy for investors to understand. Notwithstanding rule 421(a) under the Securities Act regarding the order of information required in a prospectus, disclose the information required by Items 2 through 9 in numerical order at the front of the prospectus. Do not precede these Items with any other Item except the Cover Page (Item 1) or a table of contents meeting the requirements of rule 481(c) under the Securities Act. Information that is included in response to Items 2 through 9 need not be repeated elsewhere in the prospectus. Disclose the information required by Item 13 (Distribution Arrangements) in one place in the prospectus.

(b) Other Information. A Fund may include, except in response to Items 2 through 9, information in the prospectus or the SAI that is not otherwise required. For example, a Fund may include charts, graphs, or tables so long as the information is not incomplete, inaccurate, or misleading and does not, because of its nature, quantity, or manner of presentation, obscure or impede understanding of the information that is required to be included. Items 2 through 9 may not include disclosure other than that required or permitted by those Items.

(c) Use of Form N-1A by More Than One Registrant, Series or Class. Form N-1A may be used by one or more Registrants, Series, or Classes.

(i) When disclosure is provided for more than one Fund or Class, the disclosure should be presented in a format designed to communicate the information effectively. Except as required by paragraph (c)(ii) for Items 2 through 9, Funds may order or group the response to any Item in any manner that organizes the information into readable and comprehensible segments and is consistent with the intent of the prospectus to provide clear and concise information about the Funds or Classes. Funds are encouraged to use, as appropriate, tables, side-by-side comparisons, captions, bullet points, or other organizational techniques when presenting disclosure for multiple Funds or Classes.

(ii) Paragraph (a) requires Funds to disclose the information required by Items 2 through 9 in numerical order at the front of the prospectus and not to precede Items 2 through 9 with other information. A prospectus that contains information about more than one Fund must present all of the information required by Items 2 through 9 for each Fund sequentially and may not integrate the information for more than one Fund together.

That is, a prospectus must present all of the information for a particular Fund that is required by Items 2 through 9 together, followed by all of the information for each additional Fund, and may not, for example, present all of the Item 2 (Risk/Return Summary: Investment Objectives/Goals) information for several Funds followed by all of the Item 3 (Risk/Return Summary: Fee Table) information for several Funds. If a prospectus contains information about multiple Funds, clearly identify the name of the relevant Fund at the beginning of the information for the Fund that is required by Items 2 through 9. A Multiple Class Fund may present the information required by Items 2 through 9 separately for each Class or may integrate the information for multiple Classes, although the order of the information must be as prescribed in Items 2 through 9. For example, the prospectus may present all of the Item 2 (Risk/Return Summary: Investment Objectives/Goals) information for several Classes followed by all of the Item 3 (Risk/Return Summary: Fee Table) information for the Classes, or may present Items 2 and 3 for each of several Classes sequentially. Other presentations of multiple Class information also would be acceptable if they are consistent with the Form's intent to disclose the information required by Items 2 through 9 in a standard order at the beginning of the prospectus. For a Multiple Class Fund, clearly identify the relevant Classes at the beginning of the Items 2 through 9 information for those Classes.

* * * * *

PART A: INFORMATION REQUIRED IN A PROSPECTUS

* * * * *

Item 2. Risk/Return Summary: Investment Objectives/Goals

Disclose the Fund's investment objectives or goals. A Fund also may identify its type or category (e.g., that it is a Money Market Fund or a balanced fund).

Item 3. Risk/Return Summary: Fee Table

* * * * *

Fees and expenses of the Fund

* * * **You may qualify for sales charge discounts if you and your family invest, or agree to invest in the future, at least $[_____] in [name of fund family] funds.**

* * * * *

Annual Fund Operating Expenses (ongoing expenses that you pay each year as a percentage of the value of your investment)

* * * * *

Example

* * * * *

Portfolio Turnover

The Fund pays transaction costs, such as commissions, when it buys and sells securities (or "turns over" its portfolio). A higher portfolio turnover may indicate higher transaction costs. These costs, which are not reflected in annual fund operating expenses or in the example, affect the Fund's performance. During the most recent fiscal year, the Fund's portfolio turnover rate was __% of the average value of its whole portfolio.

Instructions.

1. General.

(a) * * *

(b) Include the narrative explanations in the order indicated. A Fund may modify the narrative explanations if the explanation contains comparable information to that shown. The narrative explanation regarding sales charge discounts is only required by a Fund that offers such discounts and should specify the minimum level of investment required to qualify for a discount.

* * * * *

3. Annual Fund Operating Expenses.

(a) * * *

(e) If there were expense reimbursement or fee waiver arrangements that reduced any Fund operating expenses and will continue to reduce them for no less than one year from the effective date of the Fund's registration statement, a Fund may add two captions to the table: one caption showing the amount of the expense reimbursement or fee waiver, and a second caption showing the Fund's net expenses after subtracting the fee reimbursement or expense waiver from the total fund operating expenses. The Fund should place these additional captions directly below the "Total Annual Fund Operating Expenses" caption of the table and should use appropriate descriptive captions, such as "Fee Waiver [and/or Expense Reimbursement]" and "Total Annual Fund Operating Expenses After Fee Waiver [and/or Expense Reimbursement]," respectively. If the Fund provides this disclosure, also disclose the period for which the expense reimbursement or fee waiver arrangement is expected to continue, and briefly describe who can terminate the arrangement and under what circumstances.

* * * * *

4. Example.

(a) Assume that the percentage amounts listed under "Total Annual Fund Operating Expenses" remain the same in each year of the 1-, 3-, 5-, and 10-year periods, except that an adjustment may be made to reflect any expense reimbursement or fee waiver arrangements that reduced any Fund operating expenses during the most recently completed calendar year and that will continue to reduce them for no less than one year from the effective date of the Fund's registration statement. An adjustment to reflect any expense reimbursement or fee waiver arrangement may be reflected only in the period(s) for which the expense reimbursement or fee waiver arrangement is expected to continue.

* * * * *

5. Portfolio Turnover. Disclose the portfolio turnover rate provided in response to Item 14(a) for the most recent fiscal year (or for such shorter period as the Fund has been in operation). Disclose the period for which the information is provided if less than a full fiscal year. A Fund that is a Money Market Fund may omit the portfolio turnover information required by this Item.

6. New Funds. * * *

(a) * * *

(b) If there are expense reimbursement or fee waiver arrangements that will reduce any Fund operating expenses for no less than one year from the effective date of the Fund's registration statement, a New Fund may add two captions to the table: one caption showing the amount of the expense reimbursement or fee waiver, and a second caption showing the New Fund's net expenses after subtracting the fee reimbursement or

expense waiver from the total fund operating expenses. The New Fund should place these additional captions directly below the "Total Annual Fund Operating Expenses" caption of the table and should use appropriate descriptive captions, such as "Fee Waiver [and/or Expense Reimbursement]" and "Total Annual Fund Operating Expenses After Fee Waiver [and/or Expense Reimbursement]," respectively. If the New Fund provides this disclosure, also disclose the period for which the expense reimbursement or fee waiver arrangement is expected to continue, and briefly describe who can terminate the arrangement and under what circumstances.

* * * * *

Item 4. Risk/Return Summary: Investments, Risks, and Performance

* * * * *

(2) Risk/Return Bar Chart and Table.

* * * * *

Instructions.

* * * * *

2. Table.

* * * * *

(e) Returns required by paragraphs 4(b)(2)(iii)(A), (B), and (C) for a Fund or Series must be adjacent to one another and appear in that order. The returns for a broad-based securities market index, as required by paragraph 4(b)(2)(iii), must precede or follow all of the returns for a Fund or Series rather than be interspersed with the returns of the Fund or Series.

3. Multiple Class Funds.

(a) When a Multiple Class Fund presents information for more than one Class together in response to Item 4(b)(2), provide annual total returns in the bar chart for only one of those Classes. The Fund can select which Class to include (e.g., the oldest Class, the Class with the greatest net assets) if the Fund:

(i) Selects the Class with 10 or more years of annual returns if other Classes have fewer than 10 years of annual returns;

(ii) Selects the Class with the longest period of annual returns when the Classes all have fewer than 10 years of returns; and

(iii) If the Fund provides annual total returns in the bar chart for a Class that is different from the Class selected for the most immediately preceding period, explain in a footnote to the bar chart the reasons for the selection of a different Class.

(b) When a Multiple Class Fund offers a new Class in a prospectus and separately presents information for the new Class in response to Item 4(b)(2), include the bar chart with annual total returns for any other existing Class for the first year that the Class is offered. Explain in a footnote that the returns are for a Class that is not presented that would have substantially similar annual returns because the shares are invested in the same portfolio of securities and the annual returns would differ only to the extent that the Classes do not have the same expenses. Include return information for the other Class reflected in the bar chart in the performance table.

(c) When a Multiple Class Fund presents information for more than one Class together in response to Item 4(b)(2):

(i) Provide the returns required by paragraph 4(b)(2)(iii)(A) of this Item for each of the Classes;

(ii) Provide the returns required by paragraphs 4(b)(2)(iii)(B) and (C) of this Item for only one of those Classes. The Fund may select the Class for which it provides the returns required by paragraphs 4(b)(2)(iii)(B) and (C) of this Item, provided that the Fund:

* * * * *

Item 5. Portfolio Holdings

Provide a list of the ten largest issues contained in the Fund's portfolio, in descending order, together with the percentage of net assets represented by each. Include the date as of which the holdings are provided adjacent to the holdings information.

Instructions.

1. Provide the required information as of the end of the most recent calendar quarter.

2. For purposes of the list, aggregate and treat as a single issue, respectively, (a) all fully collateralized repurchase agreements; and (b) all securities of any one issuer (other than fully collateralized repurchase agreements). The U.S. Treasury and each agency, instrumentality, or corporation, including each government-sponsored entity, that issues U.S. government securities is a separate issuer.

3. Any securities that would be required to be listed separately or included in a group of securities that is listed in the aggregate as a single issue may be listed in one amount as "Miscellaneous securities," provided the securities so listed are eligible to be categorized as "Miscellaneous securities" in accordance with Schedule I – Investments in

securities of unaffiliated issuers [17 CFR 210.12-12] as of the end of the most recent calendar quarter. However, if any security that is included in "Miscellaneous securities" would otherwise be required to be included in a group of securities that is listed in the aggregate as a single issue, the remaining securities of that group must nonetheless be listed as required, even if the remaining securities alone would not otherwise be required to be listed in this manner (e.g., because the combined value of the security listed in "Miscellaneous securities" and the remaining securities of the same issuer is sufficient to cause them to be among the 10 largest issues, but the value of the remaining securities alone is not sufficient to cause such remaining securities to be among the 10 largest issues). If any securities are listed as "Miscellaneous securities," briefly explain in a footnote what that term represents.

Item 6. Management

(a) Investment Adviser(s). Provide the name of each investment adviser of the Fund, including sub-advisers.

Instructions:

1. A Fund need not identify a sub-adviser whose sole responsibility for the Fund is limited to day-to-day management of the Fund's holdings of cash and cash equivalent instruments, unless the Fund is a Money Market Fund or other Fund with a principal investment strategy of regularly holding cash and cash equivalent instruments.

2. A Fund having three or more sub-advisers, each of which manages a portion of the Fund's portfolio, need not identify each such sub-adviser, except that the Fund must identify any sub-adviser that is (or is reasonably expected to be) responsible for the management of a significant portion of the Fund's net assets. For purposes of this

paragraph, a significant portion of a Fund's net assets generally will be deemed to be 30% or more of the fund's net assets.

(b) Portfolio Manager(s). State the name, title, and length of service of the person or persons employed by or associated with the Fund or an investment adviser of the Fund who are primarily responsible for the day-to-day management of the Fund's portfolio ("Portfolio Manager").

Instructions:

1. This requirement does not apply to a Money Market Fund.

2. If a committee, team, or other group of persons associated with the Fund or an investment adviser of the Fund is jointly and primarily responsible for the day-to-day management of the Fund's portfolio, information in response to this Item is required for each member of such committee, team, or other group. If more than five persons are jointly and primarily responsible for the day-to-day management of the Fund's portfolio, the Fund need only provide information for the five persons with the most significant responsibility for the day-to-day management of the Fund's portfolio.

Item 7. Purchase and Sale of Fund Shares

(a) Purchase of Fund Shares. Disclose the Fund's minimum initial or subsequent investment requirements.

(b) Sale of Fund Shares. Also disclose that the Fund's shares are redeemable and briefly identify the procedures for redeeming shares (e.g., on any business day by written request, telephone, or wire transfer).

Item 8. Tax Information

State, as applicable, that the Fund intends to make distributions that may be taxed as ordinary income or capital gains or that the Fund intends to distribute tax-exempt income. For a Fund that holds itself out as investing in securities generating tax-exempt income, provide, as applicable, a general statement to the effect that a portion of the Fund's distributions may be subject to federal income tax.

Item 9. Financial Intermediary Compensation

Include the following statement. A Fund may modify the statement if the modified statement contains comparable information.

Payments to Broker-Dealers and Other Financial Intermediaries.

If you purchase the Fund through a broker-dealer or other financial intermediary (such as a bank), the Fund and its related companies may pay the intermediary for the sale of Fund shares and related services. These payments may influence the broker-dealer or other intermediary and your salesperson to recommend the Fund over another investment. Ask your salesperson or visit your financial intermediary's Web site for more information.

* * * * *

Item 11. Management, Organization, and Capital Structure

(a) Management.

(1) Investment Adviser.

(i) Provide the name and address of each investment adviser of the Fund, including sub-advisers. Describe the investment adviser's experience as an investment adviser and the advisory services that it provides to the Fund.

* * * * *

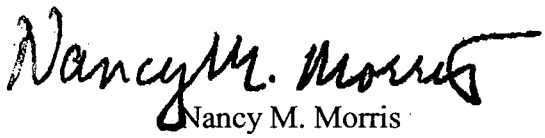
(2) Portfolio Manager. For each Portfolio Manager identified in response to Item 6(b), state the Portfolio Manager's business experience during the past 5 years. Include a statement, adjacent to the foregoing disclosure, that the SAI provides additional information about the Portfolio Manager's(s') compensation, other accounts managed by the Portfolio Manager(s), and the Portfolio Manager's(s') ownership of securities in the Fund. If a Portfolio Manager is a member of a committee, team, or other group of persons associated with the Fund or an investment adviser of the Fund that is jointly and primarily responsible for the day-to-day management of the Fund's portfolio, provide a brief description of the person's role on the committee, team, or other group (e.g., lead member), including a description of any limitations on the person's role and the relationship between the person's role and the roles of other persons who have responsibility for the day-to-day management of the Fund's portfolio.

* * * * *

14. Form N-4 (referenced in §§ 239.17b and 274.11c) is amended by revising the reference "Item 22(b)(ii) of Form N-1A" to read "Item 28(b)(ii) of Form N-1A" and by revising the reference "Item 22(b)(ii) equation" to read "Item 28(b)(ii) equation" in Instruction 3 to Item 21(b)(ii).

Note: The text of Form N-4 does not, and these amendments will not, appear in the Code of Federal Regulations.

By the Commission.



Nancy M. Morris
Secretary

November 21, 2007

Appendix

Note: This Appendix will not appear in the Code of Federal Regulations.

THE XYZ BALANCED FUND

SUMMARY PROSPECTUS

(Class A and Class B Shares)

November 1, 2007

Before you invest, you may want to review the Fund's prospectus, which contains more information about the Fund and its risks. You can find the Fund's prospectus and other information about the Fund, including the statement of additional information and most recent reports to shareholders, online at [Web address]. You can also get this information at no cost by calling 1-800-000-0000 or by sending an e-mail request to [e-mail address]. The Fund's prospectus and statement of additional information, both dated April 27, 2007, and most recent report to shareholders, dated June 30, 2007, are all incorporated by reference into this Summary Prospectus.

Investment Objective: Income and capital growth consistent with reasonable risks.

Fees and Expenses of the Fund: The tables below describe the fees and expenses that you may pay if you buy and hold shares of the Fund. You may qualify for sales charge discounts if you and your family invest, or agree to invest in the future, at least $25,000 in XYZ Funds.

Shareholder Fees (fees paid directly from your investment)

	Class A	Class B
Maximum Sales Charge (Load) Imposed on Purchases (as percentage of offering price)	5.75%	None
Maximum Deferred Sales Charge (Load) (as percentage of the lower of original purchase price or sale proceeds)	None	5.00%

Annual Fund Operating Expenses
(ongoing expenses that you pay each year as a percentage of the value of your investment)

	Class A	Class B
Management Fees	0.66%	0.66%
Distribution (12b-1) Fees	0.00%	0.75%
Service (12b-1) Fees	0.23%	0.23%
Other Expenses	0.28%	0.46%
Total Annual Fund Operating Expenses	1.17%	2.10%

Example

The Example below is intended to help you compare the cost of investing in the Fund with the cost of investing in other mutual funds. The Example assumes that you invest $10,000 in the Fund for the time periods indicated. The Example also assumes that your investment has a 5% return each year and that the Fund's operating expenses remain the same. Although your actual costs may be higher or lower, based on these assumptions your costs would be:

	1 year	3 years	5 years	10 years
Class A (whether or not shares are redeemed)	$687	$925	$1,182	$1,914
Class B (if shares are redeemed)	$713	$958	$1,329	$1,974
Class B (if shares are not redeemed)	$213	$658	$1,129	$1,974

Portfolio Turnover

The Fund pays transaction costs, such as commissions, when it buys and sells securities (or "turns over" its portfolio). A higher portfolio turnover may indicate higher transaction costs. These costs, which are not reflected in annual fund operating expenses or in the example, affect the Fund's performance. During the most recent fiscal year, the Fund's portfolio turnover rate was 63% of the average value of its whole portfolio.

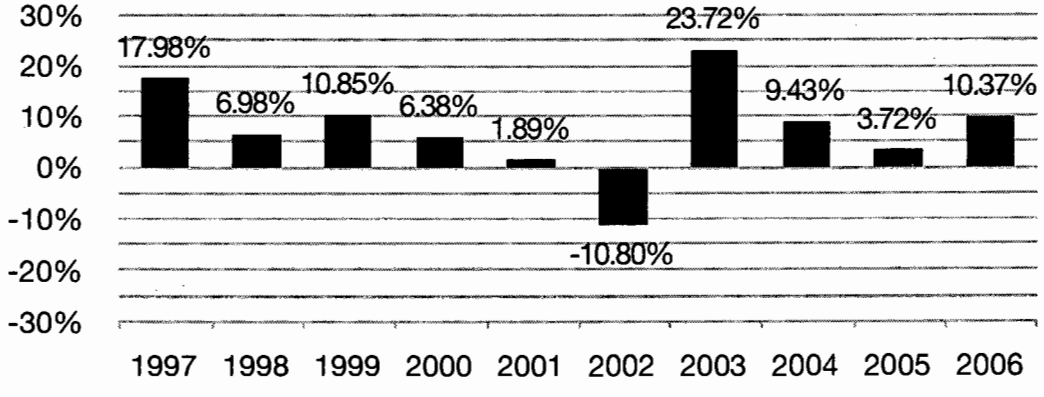
Principal Investment Strategies: The Fund invests mainly in common stocks, bonds, and notes of U.S. and foreign companies.....

Principal Risks:

- You could lose money by investing in the Fund.
- Risk Number Two – .....
- Risk Number Three – .....
- Risk Number Four – .....
- Risk Number Five – .....

Annual Total Return: The following bar chart and table provide some indication of the risks of investing in the Fund. The bar chart shows changes in the Fund's performance from year to year for Class A shares. The table shows how the Fund's average annual returns for 1, 5, and 10 years compared with those of a broad measure of market performance. The Fund's past performance (before and after taxes) is not necessarily an indication of how the Fund will perform in the future.

Sales charges are not reflected in the bar chart, and if those charges were included, returns would be less than those shown.



Best Quarter (ended 6/30/03): 12.08%. Worst Quarter (ended 9/30/01): -11.06%. The year-to-date return as of the most recent calendar quarter, which ended September 30, 2007, was 7.03%.

Average Annual Total Returns for Periods Ended December 31, 2006	1 Year	5 Years	10 Years
Class A (Return Before Taxes)	4.04%	5.72%	7.26%
Class A (Return After Taxes on Distributions)	2.48	4.52	5.05
Class A (Return After Taxes on Distributions and Sale of Fund Shares)	2.30	4.34	4.90
Class B (Return Before Taxes)	4.38	5.62	7.12
S&P 500 Index (reflects no deduction for fees, expenses or taxes)	15.79%	6.19%	8.42%

The after-tax returns are shown only for Class A shares and are calculated using the historical highest individual federal marginal income tax rates and do not reflect the impact of state and local taxes. Actual after-tax returns depend on an investor's tax situation and may differ from those shown. After-tax returns are not relevant to investors who hold their Fund shares through tax-deferred arrangements, such as 401(k) plans or individual retirement accounts.

Top Ten Portfolio Holdings (percent of total net assets) as of September 30, 2007			
Rank	**Security**	**Rank**	**Security**
1	XYZ, Inc. (3.0%)	6	The DEF Co. (1.3%)
2	The ABC Co. (2.3%)	7	The NOP Corp. (1.3%)
3	XYZ Growth, Inc. (1.7%)	8	HIJ Co. (1.1%)
4	The TUV Corp. (1.6%)	9	ABC Corp. (1.0%)
5	QRS Co. (1.4%)	10	OPQ, Inc. (0.9%)

Investment Adviser: XYZ Management Company, LLC

Portfolio Manager: John E. Smith, CFA, Vice President and Equity Portfolio Manager of XYZ Management Company, LLC. Mr. Smith has managed the Fund since 2005.

Purchase and Sale of Fund Shares: You may purchase or redeem shares of the Fund on any business day online or through our Web site at [Web address], by mail (XYZ Funds, Box 1000, Anytown, USA 10000), or by telephone at 800-000-0000. Shares may be purchased by electronic bank transfer, by check, or by wire. You may receive redemption proceeds by electronic bank transfer or by check. You generally buy and redeem shares at the Fund's next-determined net asset value (NAV) after XYZ receives your request in good order. NAVs are determined only on days when the NYSE is open for regular trading. The minimum initial purchase is $2,500. The minimum subsequent investment is $100 (or $50 under an automatic investment plan).

Dividends, Capital Gains, and Taxes: The Fund's distributions are taxable, and will be taxed as ordinary income or capital gains, unless you are investing through a tax-deferred arrangement, such as a 401(k) plan or an individual retirement account.

Payments to Broker-Dealers and Other Financial Intermediaries: If you purchase the Fund through a broker-dealer or other financial intermediary (such as a bank), the Fund and its related companies may pay the intermediary for the sale of Fund shares and related services. These payments may influence the broker-dealer or other intermediary and your salesperson to recommend the Fund over another investment. Ask your salesperson or visit your financial intermediary's Web site for more information.

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 8863 / November 27, 2007

Securities Exchange Act of 1934
Release No. 56848 / November 27, 2007

Administrative Proceeding
File Number 3-11893

In the Matter of	:	ORDER MAKING FINDINGS, IMPOSING REMEDIAL SANCTIONS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b)(6), 21C AND 11(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 11b-1 THEREUNDER AS TO FREDDY DEBOER
David A. Finnerty,	:	
Donald R. Foley II,	:	
Scott G. Hunt,	:	
Thomas J. Murphy, Jr.,	:	
Kevin M. Fee,	:	
Frank A. Delaney IV,	:	
Freddy DeBoer,	:	
Todd J. Christie,	:	
James V. Parolisi,	:	
Robert W. Luckow,	:	
Patrick E. Murphy,	:	
Robert A. Johnson, Jr.,	:	
Patrick J. McGagh, Jr.,	:	
Joseph Bongiorno,	:	
Michael J. Hayward,	:	
Richard P. Volpe,	:	
Michael F. Stern,	:	
Warren E. Turk,	:	
Gerard T. Hayes, and	:	
Robert A. Scavone, Jr.	:	
	:	
Respondents.	:	

Document 21 of 24

I.

On April 12, 2005, the Securities and Exchange Commission ("Commission") entered an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder ("OIP") against respondent Freddy DeBoer ("DeBoer").

II.

DeBoer has submitted an Offer of Settlement ("Offer") in these administrative proceedings, which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, DeBoer consents to the entry of this Order Making Findings, Imposing Remedial Sanctions, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder as to Freddy DeBoer ("Order"), as set forth below.

III.

On the basis of this Order and DeBoer's Offer, the Commission finds[1] that:

FACTS

1. DeBoer is one of several respondents in pending administrative and cease-and-desist proceedings, file number 3-11893, who have been charged with fraudulent and other improper trading during the period from at least 1999 through June 30, 2003, while they were acting as specialists on the New York Stock Exchange ("NYSE").

2. DeBoer, age 45, formerly of Southport, Connecticut, is believed to reside currently in the Netherlands. DeBoer acted as a specialist at LaBranche & Co. LLC ("LaBranche") from at least January 1, 1999 to approximately July 2004. (the "Relevant Period").

3. During the Relevant Period, DeBoer acted as a specialist in Nokia ("NOK") (from approximately March 2000 through June 2003), Lehman Brothers Holdings Inc. ("LEH") (from approximately September 2000 through approximately April 2001), and Celestica Inc. ("CLS") from approximately April 2001 through approximately October 2001).

---

[1] The findings herein are made pursuant to DeBoer's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

4. As a specialist, DeBoer had an obligation to serve public customer orders over the proprietary interests of the firm with whom he was formerly employed, LaBranche. In his role as a specialist, DeBoer had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from LaBranche's own account when those customer orders could be matched with other customer orders. DeBoer violated this obligation by filling orders through proprietary trades rather than through other customer orders, through two types of improper trading referred to herein as "interpositioning" and "trading ahead."

5. Interpositioning involves a two-step process that allows the specialist to generate a profit for the specialist firm from the spread between two opposite trades. Interpositioning can take various forms. In one form, the specialist purchases stock for the specialist firm's proprietary account from the customer sell order, and then fills the customer buy order by selling from the specialist firm's proprietary account at a higher price – thus locking in a riskless profit for the specialist firm's proprietary account. A second form of interpositioning involves the specialist selling stock into the customer buy order, and then filling the customer sell order by buying for the specialist firm's proprietary account at a lower price – again, locking in a riskless profit for the specialist firm's proprietary account. In both forms of interpositioning, the specialist participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction.

6. Trading ahead involves a practice whereby the specialist fills an agency order through a proprietary trade for the specialist firm's proprietary account – and thereby improperly 'steps in front' of, or 'trades ahead' of, another agency order – simply to allow the specialist firm to take advantage of market conditions promptly. Unlike interpositioning, the practice of "trading ahead" does not necessarily involve a second specialist trade for the specialist firm's proprietary account into the opposite, disadvantaged agency order. For example, in a declining market, a specialist may "trade ahead" by filling a market buy order by selling stock from the specialist firm's proprietary account in front of an agency market sell order. In so doing, the specialist would lock in a higher price for the proprietary trade, then fill the agency sell order *after* the proprietary trade, and thereby force the agency market sell order to accept a slightly lower price as the price of the stock fell.

7. During the Relevant Period, in NOK, LEH and CLS, DeBoer knowingly or recklessly engaged in over 7,710 instances of interpositioning, locking in a riskless profit of over $770,000 for his firm's proprietary account at the expense of customer orders, and over 11,620 instances of trading ahead, causing over $3,280,000 in customer harm.

APPLICABLE LAW

Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 Thereunder

9. The antifraud provisions of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder prohibit, among other things, any schemes to defraud or fraudulent or deceptive acts and practices in the offer or sale (Section 17(a)) or in connection with the purchase or sale (Section 10(b) and Rule 10b-5) of securities. Basic, Inc. v. Levinson, 485 US 224, 235 n.13 (1988) (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968) (en banc)). To prove a violation of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Commission must prove that the respondent acted with scienter. Aaron v. SEC, 446 U.S. 680, 691 (1980). Scienter may be established by proof of conscious behavior or recklessness on the part of the respondent. In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 74 (2d Cir. 2001); SEC v. U.S. Environmental, Inc., 155 F.3d 107, 111 (2d Cir. 1998), cert. denied, 526 U.S. 1111 (1999). Scienter need not be shown in order to establish violations of Sections 17(a)(2) and (3) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 696-97 (1980).

10. As a result of the described conduct above, DeBoer willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 11(b) of the Exchange Act and Rule 11b-1 Thereunder

11. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market."

12. Where specialists make trades for their firm's proprietary accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," and "were not effected in a manner consistent with the rules adopted by [the pertinent national securities exchange]," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. See In the Matter of Albert Fried & Co. and Albert Fried, Jr., 1978 WL 196046, S.E.C. Release No. 34-15293 (Nov. 3, 1978).

13. Several NYSE rules prohibit a specialist from trading ahead of a customer order, as well as from engaging in interpositioning, and require agency orders to be matched whenever possible, consistent with a specialist's duty to maintain a fair and orderly market.

14. NYSE Rule 104 (Dealings by Specialists), which sets forth specialists' obligations, prohibits specialists from trading for their own accounts unless it is reasonably necessary to maintain a fair and orderly market. This is known as the negative obligation. Rule 104 states in relevant part: "No specialist shall effect . . . purchases or sales of any security in which such specialist is registered . . ., unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."[2]

15. NYSE Rule 92 (Limitations on Members' Trading Because of Customers Orders) generally prohibits a member from entering a proprietary order to buy (or sell) a security while in possession of an executable buy (or sell) agency order that could be executed at the same price. During the Relevant Period, Rule 92 stated in relevant part:

> No member shall personally buy . . . any security . . . for his own account or for any account in which he is . . . interested . . . while such member personally holds or has knowledge that his member organization holds an unexecuted market order to buy such security . . . for a customer.[3]

16. Similarly, NYSE Rule 92 also applies to the specialist buying or selling a security while holding an unexecuted market buy or sell order, as well as to circumstances

---

[2] Rule 104.10(3), which describes specialists' affirmative obligations, also expands on the negative obligation:

> Transactions on the Exchange for his own account effected by a member acting as a specialist must constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated. Transactions not part of such a course of dealings ... are not to be effected.

[3] Rule 92 was amended on January 7, 2002 to read in relevant part:

> [n]o member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security for any account in which such member or member organization or any approved person thereof is directly or indirectly interested ("a proprietary order"), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price.

where the specialist holds unexecuted customer limit orders at a price that could be satisfied by the proprietary transaction effected by the specialist.

17. NYSE Rule 123B (Exchange Automated Order Routing Systems) requires specialists to cross orders received over the DOT system. Rule 123B(d) states in relevant part: "a specialist shall execute System orders in accordance with Exchange auction market rules and procedures, including requirements to expose orders to buying and selling interest in the trading crowd and *to cross orders before buying or selling from his own account.*" (Emphasis added).

18. NYSE Rule 401 requires NYSE members to "adhere to the principles of good business practice in the conduct of his or its business affairs." Similarly, NYSE Rule 476(a)(6) provides sanctions if NYSE members are adjudged guilty of "conduct or proceeding inconsistent with just and equitable principles of trade."

19. As a result of the conduct described above, DeBoer willfully violated NYSE Rules 104, 92, 123B, and 401, as well as Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in DeBoer's Offer.

Accordingly, it is hereby ORDERED that:

1. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, DeBoer shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Sections 10(b) and 11(b) of the Exchange Act and Rules 10b-5 and 11b-1 thereunder.

2. Pursuant to Section 15(b)(6) of the Exchange Act, DeBoer be, and hereby is, barred from association with any broker or dealer.

   Any reapplication for association by DeBoer will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against DeBoer, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

3. It is further ordered that Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $300,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies DeBoer as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Markowitz, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281.

By the Commission.

Nancy M. Morris
Secretary

FCH

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 8864 / November 27, 2007

Securities Exchange Act of 1934
Release No. 56849 / November 27, 2007

Administrative Proceeding
File Number 3-11893

In the Matter of	:	ORDER MAKING FINDINGS,
	:	IMPOSING REMEDIAL SANCTIONS,
	:	AND IMPOSING A CEASE-AND-DESIST
David A. Finnerty,	:	ORDER PURSUANT TO SECTION 8A
Donald R. Foley II,	:	OF THE SECURITIES ACT OF 1933 AND
Scott G. Hunt,	:	SECTIONS 15(b)(6), 21C AND 11(b) OF THE
Thomas J. Murphy, Jr.,	:	SECURITIES EXCHANGE ACT OF 1934 AND
Kevin M. Fee,	:	RULE 11b-1 THEREUNDER AS TO
Frank A. Delaney IV,	:	MICHAEL J. HAYWARD
Freddy DeBoer,	:	
Todd J. Christie,	:	
James V. Parolisi,	:	
Robert W. Luckow,	:	
Patrick E. Murphy,	:	
Robert A. Johnson, Jr.,	:	
Patrick J. McGagh, Jr.,	:	
Joseph Bongiorno,	:	
Michael J. Hayward,	:	
Richard P. Volpe,	:	
Michael F. Stern,	:	
Warren E. Turk,	:	
Gerard T. Hayes, and	:	
Robert A. Scavone, Jr.	:	
	:	
Respondents.	:	

Document 22 of 24

I.

On April 12, 2005, the Securities and Exchange Commission ("Commission") entered an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder ("OIP") against respondent Michael J. Hayward ("Hayward").

II.

Hayward has submitted an Offer of Settlement ("Offer") in these administrative proceedings, which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Hayward consents to the entry of this Order Making Findings, Imposing Remedial Sanctions, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder as to Michael F. Hayward ("Order"), as set forth below.

III.

On the basis of this Order and Haywards' Offer, the Commission finds[1] that:

FACTS

1. Hayward is one of several respondents in pending administrative and cease-and-desist proceedings, file number 3-11893, who have been charged with fraudulent and other improper trading during the period from at least 1999 through June 30, 2003, while they were acting as specialists on the New York Stock Exchange ("NYSE").

2. Hayward, age 53, acted as a specialist on the NYSE at Van der Moolen Specialists USA, LLC ("Van der Moolen") from at least January 1, 1999 to approximately March 2004 (the "Relevant Period").

3. From January 1999 to June 2003, Hayward was the specialist in SPX Corp. (from January 1999 to July 1999, from March 2001 to May 2001, and from November 2001 to February 2002), Time Warner Inc. (from approximately August 1999 to approximately January 2001), and Apache Corp. ("Apache") (from approximately March 2002 to approximately June 2003) (collectively, the "Relevant Securities").

---

[1] The findings herein are made pursuant to Hayward's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

4. As a NYSE specialist, Hayward had an obligation to serve public customer orders over the proprietary interests of the firm with whom he was formerly employed, Van der Moolen. In his role as a NYSE specialist, Hayward had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from Van der Moolen's own account when those customer orders could be matched with other customer orders. Hayward violated this obligation by filling orders through proprietary trades rather than through other customer orders, through two types of improper trading referred to herein as "interpositioning" and "trading ahead."

5. Interpositioning involves a two-step process that allows the specialist to generate a profit for the specialist firm from the spread between two opposite trades. Interpositioning can take various forms. In one form, the specialist purchases stock for the specialist firm's proprietary account from the customer sell order, and then fills the customer buy order by selling from the specialist firm's proprietary account at a higher price – thus locking in a riskless profit for the specialist firm's proprietary account. A second form of interpositioning involves the specialist selling stock into the customer buy order, and then filling the customer sell order by buying for the specialist firm's proprietary account at a lower price – again, locking in a riskless profit for the specialist firm's proprietary account. In both forms of interpositioning, the specialist participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction.

6. Trading ahead involves a practice whereby the specialist fills an agency order through a proprietary trade for the specialist firm's proprietary account – and thereby improperly 'steps in front' of, or 'trades ahead' of, another agency order – simply to allow the specialist firm to take advantage of market conditions promptly. Unlike interpositioning, the practice of "trading ahead" does not necessarily involve a second specialist trade for the specialist firm's proprietary account into the opposite, disadvantaged agency order. For example, in a declining market, a specialist may "trade ahead" by filling a market buy order by selling stock from the specialist firm's proprietary account in front of an agency market sell order. In so doing, the specialist would lock in a higher price for the proprietary trade, then fill the agency sell order *after* the proprietary trade, and thereby force the agency market sell order to accept a slightly lower price as the price of the stock fell.

7. During the Relevant Period, in the Relevant Securities, Hayward knowingly or recklessly engaged in approximately 2,774 instances of interpositioning, locking in a riskless profit of approximately $333,216 for his firm's proprietary account at the expense of customer orders, and approximately 3,524 instances of trading ahead, causing approximately $751,973.75 in customer harm.

8. On July 14, 2006, Hayward was found guilty on a jury verdict of one count of securities fraud in U.S. v. Joseph Bongiorno, et. al, 05 Crim. 390 (S.D.N.Y.) (the "Hayward Criminal Proceeding") with respect to his trading as a specialist in the securities of Apache stemming from the same conduct as that charged in the OIP. On January 25, 2007, Hayward was sentenced to 6 months imprisonment and 2 years of supervised release, and assessed a $250,000 fine. On January 29, 2007, Hayward filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit. Hayward paid the $250,000 fine into a court-administered account on February 21, 2007.

APPLICABLE LAW

Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 Thereunder

9. The antifraud provisions of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder prohibit, among other things, any schemes to defraud or fraudulent or deceptive acts and practices in the offer or sale (Section 17(a)) or in connection with the purchase or sale (Section 10(b) and Rule 10b-5) of securities. Basic, Inc. v. Levinson, 485 US 224, 235 n.13 (1988) (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968) (en banc)). To prove a violation of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Commission must prove that the respondent acted with scienter. Aaron v. SEC, 446 U.S. 680, 691 (1980). Scienter may be established by proof of conscious behavior or recklessness on the part of the respondent. In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 74 (2d Cir. 2001); SEC v. U.S. Environmental, Inc., 155 F.3d 107, 111 (2d Cir. 1998), cert. denied, 526 U.S. 1111 (1999). Scienter need not be shown in order to establish violations of Sections 17(a)(2) and (3) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 696-97 (1980). A specialist who engages in trading ahead and/or interpositioning may be found to have employed a scheme or device to defraud, as well as a course of business operating as a fraud, in violation of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. *See, e.g.*, U.S. v. Bongiorno, 05 Cr. 390, 2006 WL 1140864 (S.D.N.Y.); U.S. v. Finnerty, 05 Cr. 393, 05 Cr. 397, 2006 WL 2802042 (S.D.N.Y.).

10. As a result of the conduct described above, Hayward willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 11(b) of the Exchange Act and Rule 11b-1 Thereunder

11. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market."

12. Where specialists make trades for their firm's proprietary accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," and "were not effected in a manner consistent with the rules adopted by [the pertinent national securities exchange]," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. See In the Matter of Albert Fried & Co. and Albert Fried, Jr., 1978 WL 196046, S.E.C. Release No. 34-15293 (Nov. 3, 1978).

13. Several NYSE rules prohibit a specialist from trading ahead of a customer order, as well as from engaging in interpositioning, and require agency orders to be matched whenever possible, consistent with a specialist's duty to maintain a fair and orderly market.

14. NYSE Rule 104 (Dealings by Specialists), which sets forth specialists' obligations, prohibits specialists from trading for their own accounts unless it is reasonably necessary to maintain a fair and orderly market. This is known as the negative obligation. Rule 104 states in relevant part: "No specialist shall effect . . . purchases or sales of any security in which such specialist is registered . . ., unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."[2]

15. NYSE Rule 92 (Limitations on Members' Trading Because of Customers Orders) generally prohibits a member from entering a proprietary order to buy (or sell) a security while in possession of an executable buy (or sell) agency order that could be executed at the same price. During the Relevant Period, Rule 92 stated in relevant part:

---

[2] Rule 104.10(3), which describes specialists' affirmative obligations, also expands on the negative obligation:

> Transactions on the Exchange for his own account effected by a member acting as a specialist must constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated. Transactions not part of such a course of dealings ... are not to be effected.

> No member shall personally buy . . . any security . . . for his own account or for any account in which he is . . . interested . . . while such member personally holds or has knowledge that his member organization holds an unexecuted market order to buy such security . . . for a customer.[3]

16. Similarly, NYSE Rule 92 also applies to the specialist buying or selling a security while holding an unexecuted market buy or sell order, as well as to circumstances where the specialist holds unexecuted customer limit orders at a price that could be satisfied by the proprietary transaction effected by the specialist.

17. NYSE Rule 123B (Exchange Automated Order Routing Systems) requires specialists to cross orders received over the DOT system. Rule 123B(d) states in relevant part: "a specialist shall execute System orders in accordance with Exchange auction market rules and procedures, including requirements to expose orders to buying and selling interest in the trading crowd and *to cross orders before buying or selling from his own account.*" (Emphasis added).

18. NYSE Rule 401 requires NYSE members to "adhere to the principles of good business practice in the conduct of his or its business affairs." Similarly, NYSE Rule 476(a)(6) provides sanctions if NYSE members are adjudged guilty of "conduct or proceeding inconsistent with just and equitable principles of trade."

19. As a result of the conduct described above, Hayward willfully violated NYSE Rules 104, 92, 123B, and 401, as well as Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Hayward's Offer.

Accordingly, it is hereby ORDERED that:

---

[3] Rule 92 was amended on January 7, 2002 to read in relevant part:

> no member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security for any account in which such member or member organization or any approved person thereof is directly or indirectly interested (a 'proprietary order'), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price.

1. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Hayward shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Sections 10(b) and 11(b) of the Exchange Act and Rules 10b-5 and 11b-1 thereunder.

2. Pursuant to Section 15(b)(6) of the Exchange Act, Hayward be, and hereby is, barred from association with any broker or dealer.

Any reapplication for association by Hayward will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Hayward, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

3. Pursuant to Section 8A of the Securities Act and Sections 21B and C of the Exchange Act, Hayward shall pay disgorgement in the sum of $113,356.57, representing profits gained as a result of the conduct alleged in the OIP, together with prejudgment interest in the amount of $51,808.82, for a total of $165,165.39, which sum shall be reduced dollar for dollar by any sums Hayward pays in satisfaction in whole or in part of the fine imposed on him in the Hayward Criminal Proceeding (the "Disgorgement Payment"). Hayward shall pay any Disgorgement Payment then due and owing under this section at the earlier of: (i) December 31, 2011; or (ii) upon the conclusion of the Hayward Criminal Proceeding. For purposes of this section, "the conclusion of the Hayward Criminal Proceeding," shall mean the conclusion of any and all appeals in that matter, provided that, in the event any appellate court orders a retrial in that matter, "the conclusion of the Hayward Criminal Proceeding" shall mean the conclusion of any final re-trial or any and all appeals therefrom in the event any such appeals are made.

Effective upon the entry of this Order, Hayward is assigning to the Securities and Exchange Commission any and all right, title and interest he has or may have in the future in that portion of the monies currently deposited in the Crime Victims Fund administered by the United States Attorneys Office for the Southern District of New York in connection with the Hayward Criminal Proceeding (the "Criminal Proceeding Fund"), representing the Disgorgement Payment. Upon conclusion of the Hayward Criminal Proceeding, Hayward shall permit the Clerk of the Court of the United States District Court, Southern District of New York to pay, within ten days of the conclusion of the Hayward Criminal Proceeding, any Disgorgement

Payment to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Hayward as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Markowitz, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281. Payment by the Clerk of the Court of the United States District Court, Southern District of New York pursuant to the provisions of this paragraph shall be deemed satisfaction of the Disgorgement Payment. For purposes of this section, any payments Hayward makes to the Commission before the conclusion of the Hayward Criminal Proceeding shall reduce the Disgorgement Payment dollar for dollar.

In the event the conclusion of the Hayward Criminal Proceeding has not occurred by December 31, 2011, Hayward shall pay, by December 31, 2011, disgorgement in the sum of $113,356.57, representing profits gained as a result of the conduct alleged in the Order, together with prejudgment interest in the amount of $51,808.82, for a total of $165,165.39 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Hayward as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Markowitz, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281.

By the Commission.

Nancy M. Morris
Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 8862 / November 27, 2007

Securities Exchange Act of 1934
Release No. 56847 / November 27, 2007

Administrative Proceeding
File Number 3-11893

In the Matter of	:	ORDER MAKING FINDINGS,
	:	IMPOSING REMEDIAL SANCTIONS,
	:	AND IMPOSING A CEASE-AND-DESIST
David A. Finnerty,	:	ORDER PURSUANT TO SECTION 8A
Donald R. Foley II,	:	OF THE SECURITIES ACT OF 1933 AND
Scott G. Hunt,	:	SECTIONS 15(b)(6), 21C AND 11(b) OF THE
Thomas J. Murphy, Jr.,	:	SECURITIES EXCHANGE ACT OF 1934 AND
Kevin M. Fee,	:	RULE 11b-1 THEREUNDER AS TO
Frank A. Delaney IV,	:	MICHAEL F. STERN
Freddy DeBoer,	:	
Todd J. Christie,	:	
James V. Parolisi,	:	
Robert W. Luckow,	:	
Patrick E. Murphy,	:	
Robert A. Johnson, Jr.,	:	
Patrick J. McGagh, Jr.,	:	
Joseph Bongiorno,	:	
Michael J. Hayward,	:	
Richard P. Volpe,	:	
Michael F. Stern,	:	
Warren E. Turk,	:	
Gerard T. Hayes, and	:	
Robert A. Scavone, Jr.	:	
	:	
Respondents.	:	

Document 23 of 24

I.

On April 12, 2005, the Securities and Exchange Commission ("Commission") entered an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder ("OIP") against respondent Michael F. Stern ("Stern").

II.

Stern has submitted an Offer of Settlement ("Offer") in these administrative proceedings, which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Stern consents to the entry of this Order Making Findings, Imposing Remedial Sanctions, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder as to Michael F. Stern ("Order"), as set forth below.

III.

On the basis of this Order and Sterns' Offer, the Commission finds[1] that:

FACTS

1. Stern is one of several respondents in pending administrative and cease-and-desist proceedings, file number 3-11893, who have been charged with fraudulent and other improper trading during the period from at least 1999 through June 30, 2003, while they were acting as specialists on the New York Stock Exchange ("NYSE").

2. Stern, age 56, acted as a specialist on the NYSE at Van der Moolen Specialists USA, LLC ("Van der Moolen") from at least January 1, 1999 to approximately March 2004 (the "Relevant Period").

3. From January 1999 to June 2003, Stern was the specialist in Abercrombie & Fitch Co. (from approximately January 1999 to approximately September 1999), Pfizer, Inc. (from approximately November 1999 to approximately May 2000), SPX Corp. (from approximately November 2000 to approximately January 2001), Eli Lilly and Co. (from approximately October 2000 to approximately July 2001), Kohl's Corp. (from approximately September 2001 to approximately September

[1] The findings herein are made pursuant to Stern's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

2002), and Duke Energy Corp. (from approximately October 2002 to approximately April 2003) (collectively, the "Relevant Securities").

4. As a NYSE specialist, Stern had an obligation to serve public customer orders over the proprietary interests of the firm with whom he was formerly employed, Van der Moolen. In his role as a NYSE specialist, Stern had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from Van der Moolen's own account when those customer orders could be matched with other customer orders. Stern violated this obligation by filling orders through proprietary trades rather than through other customer orders, through two types of improper trading referred to herein as "interpositioning" and "trading ahead."

5. Interpositioning involves a two-step process that allows the specialist to generate a profit for the specialist firm from the spread between two opposite trades. Interpositioning can take various forms. In one form, the specialist purchases stock for the specialist firm's proprietary account from the customer sell order, and then fills the customer buy order by selling from the specialist firm's proprietary account at a higher price – thus locking in a riskless profit for the specialist firm's proprietary account. A second form of interpositioning involves the specialist selling stock into the customer buy order, and then filling the customer sell order by buying for the specialist firm's proprietary account at a lower price – again, locking in a riskless profit for the specialist firm's proprietary account. In both forms of interpositioning, the specialist participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction.

6. Trading ahead involves a practice whereby the specialist fills an agency order through a proprietary trade for the specialist firm's proprietary account – and thereby improperly 'steps in front' of, or 'trades ahead' of, another agency order – simply to allow the specialist firm to take advantage of market conditions promptly. Unlike interpositioning, the practice of "trading ahead" does not necessarily involve a second specialist trade for the specialist firm's proprietary account into the opposite, disadvantaged agency order. For example, in a declining market, a specialist may "trade ahead" by filling a market buy order by selling stock from the specialist firm's proprietary account in front of an agency market sell order. In so doing, the specialist would lock in a higher price for the proprietary trade, then fill the agency sell order *after* the proprietary trade, and thereby force the agency market sell order to accept a slightly lower price as the price of the stock fell.

7. During the Relevant Period, in the Relevant Securities, Stern knowingly or recklessly engaged in approximately 3,935 instances of interpositioning, locking in a riskless profit of approximately $407,508 for his firm's proprietary account at

the expense of customer orders, and approximately 5,151 instances of trading ahead, causing approximately $619,190 in customer harm.

8. On July 14, 2006, Stern was found guilty on a jury verdict of one count of securities fraud in U.S. v. Joseph Bongiorno, et. al, 05 Crim. 390 (S.D.N.Y.) (the "Stern Criminal Proceeding") with respect to his trading as a specialist in the securities of Duke Energy Corp. stemming from the same conduct as that charged in the OIP. On January 25, 2007, Stern was sentenced to 6 months imprisonment and 2 years of supervised release, and assessed a $250,000 fine. On January 26, 2007, Stern filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit. Stern paid the $250,000 fine into a court-administered account on February 21, 2007.

APPLICABLE LAW

Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 Thereunder

9. The antifraud provisions of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder prohibit, among other things, any schemes to defraud or fraudulent or deceptive acts and practices in the offer or sale (Section 17(a)) or in connection with the purchase or sale (Section 10(b) and Rule 10b-5) of securities. Basic, Inc. v. Levinson, 485 US 224, 235 n.13 (1988) (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968) (en banc)). To prove a violation of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Commission must prove that the respondent acted with scienter. Aaron v. SEC, 446 U.S. 680, 691 (1980). Scienter may be established by proof of conscious behavior or recklessness on the part of the respondent. In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 74 (2d Cir. 2001); SEC v. U.S. Environmental, Inc., 155 F.3d 107, 111 (2d Cir. 1998), cert. denied, 526 U.S. 1111 (1999). Scienter need not be shown in order to establish violations of Sections 17(a)(2) and (3) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 696-97 (1980). A specialist who engages in trading ahead and/or interpositioning may be found to have employed a scheme or device to defraud, as well as a course of business operating as a fraud, in violation of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. *See, e.g.*, U.S. v. Bongiorno, 05 Cr. 390, 2006 WL 1140864 (S.D.N.Y.); U.S. v. Finnerty, 05 Cr. 393, 05 Cr. 397, 2006 WL 2802042 (S.D.N.Y.).

10. As a result of the conduct described above, Stern willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 11(b) of the Exchange Act and Rule 11b-1 Thereunder

11. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market."

12. Where specialists make trades for their firm's proprietary accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," and "were not effected in a manner consistent with the rules adopted by [the pertinent national securities exchange]," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. See In the Matter of Albert Fried & Co. and Albert Fried, Jr., 1978 WL 196046, S.E.C. Release No. 34-15293 (Nov. 3, 1978).

13. Several NYSE rules prohibit a specialist from trading ahead of a customer order, as well as from engaging in interpositioning, and require agency orders to be matched whenever possible, consistent with a specialist's duty to maintain a fair and orderly market.

14. NYSE Rule 104 (Dealings by Specialists), which sets forth specialists' obligations, prohibits specialists from trading for their own accounts unless it is reasonably necessary to maintain a fair and orderly market. This is known as the negative obligation. Rule 104 states in relevant part: "No specialist shall effect . . . purchases or sales of any security in which such specialist is registered . . ., unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."[2]

15. NYSE Rule 92 (Limitations on Members' Trading Because of Customers Orders) generally prohibits a member from entering a proprietary order to buy (or sell) a security while in possession of an executable buy (or sell) agency order that could be executed at the same price. During the Relevant Period, Rule 92 stated in relevant part:

---

[2] Rule 104.10(3), which describes specialists' affirmative obligations, also expands on the negative obligation:

> Transactions on the Exchange for his own account effected by a member acting as a specialist must constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated. Transactions not part of such a course of dealings ... are not to be effected.

> No member shall personally buy . . . any security . . . for his own account or for any account in which he is . . . interested . . . while such member personally holds or has knowledge that his member organization holds an unexecuted market order to buy such security . . . for a customer.[3]

16. Similarly, NYSE Rule 92 also applies to the specialist buying or selling a security while holding an unexecuted market buy or sell order, as well as to circumstances where the specialist holds unexecuted customer limit orders at a price that could be satisfied by the proprietary transaction effected by the specialist.

17. NYSE Rule 123B (Exchange Automated Order Routing Systems) requires specialists to cross orders received over the DOT system. Rule 123B(d) states in relevant part: "a specialist shall execute System orders in accordance with Exchange auction market rules and procedures, including requirements to expose orders to buying and selling interest in the trading crowd and *to cross orders before buying or selling from his own account.*" (Emphasis added).

18. NYSE Rule 401 requires NYSE members to "adhere to the principles of good business practice in the conduct of his or its business affairs." Similarly, NYSE Rule 476(a)(6) provides sanctions if NYSE members are adjudged guilty of "conduct or proceeding inconsistent with just and equitable principles of trade."

19. As a result of the conduct described above, Stern willfully violated NYSE Rules 104, 92, 123B, and 401, as well as Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Stern's Offer.

Accordingly, it is hereby ORDERED that:

---

[3] Rule 92 was amended on January 7, 2002 to read in relevant part:

> no member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security for any account in which such member or member organization or any approved person thereof is directly or indirectly interested (a 'proprietary order'), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price.

1. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Stern shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Sections 10(b) and 11(b) of the Exchange Act and Rules 10b-5 and 11b-1 thereunder.

2. Pursuant to Section 15(b)(6) of the Exchange Act, Stern be, and hereby is, barred from association with any broker or dealer.

   Any reapplication for association by Stern will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Stern, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

3. Pursuant to Section 8A of the Securities Act and Sections 21B and C of the Exchange Act, Stern shall pay disgorgement in the sum of $84,611.04, representing profits gained as a result of the conduct alleged in the OIP, together with prejudgment interest in the amount of $35,768, for a total of $120,379.04, which sum shall be reduced dollar for dollar by any sums Stern pays in satisfaction in whole or in part of the fine imposed on him in the Stern Criminal Proceeding (the "Disgorgement Payment"). Stern shall pay any Disgorgement Payment then due and owing under this section at the earlier of: (i) December 31, 2011; or (ii) upon the conclusion of the Stern Criminal Proceeding. For purposes of this section, "the conclusion of the Stern Criminal Proceeding," shall mean the conclusion of any and all appeals in that matter, provided that, in the event any appellate court orders a retrial in that matter, "the conclusion of the Stern Criminal Proceeding" shall mean the conclusion of any final re-trial or any and all appeals therefrom in the event any such appeals are made.

   Effective upon the entry of this Order, Stern is assigning to the Securities and Exchange Commission any and all right, title and interest he has or may have in the future in that portion of the monies currently deposited in the Crime Victims Fund administered by the United States Attorneys Office for the Southern District of New York in connection with the Stern Criminal Proceeding (the "Criminal Proceeding Fund"), representing the Disgorgement Payment. Upon conclusion of the Stern Criminal Proceeding, Stern shall permit the Clerk of the Court of the United States District Court, Southern District of New York to pay, within ten days of the conclusion of the Stern Criminal Proceeding, any Disgorgement Payment to the United States Treasury. Such payment shall be (A) made by

United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Stern as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Markowitz, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281. Payment by the Clerk of the Court of the United States District Court, Southern District of New York pursuant to the provisions of this paragraph shall be deemed satisfaction of the Disgorgement Payment. For purposes of this section, any payments Stern makes to the Commission before the conclusion of the Stern Criminal Proceeding shall reduce the Disgorgement Payment dollar for dollar.

In the event the conclusion of the Stern Criminal Proceeding has not occurred by December 31, 2011, Stern shall pay, by December 31, 2011, disgorgement in the sum of $84,611.04, representing profits gained as a result of the conduct alleged in the Order, together with prejudgment interest in the amount of $35,768, for a total of $120,379.04 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Stern as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Markowitz, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281.

By the Commission.

Nancy M. Morris
Secretary

Chairman Cox - Not Participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 8865 / November 30, 2007

SECURITIES EXCHANGE ACT OF 1934
Rel. No.56874 / November 30, 2007

INVESTMENT ADVISERS ACT OF 1940
Rel. No.2679 / November 30, 2007

INVESTMENT COMPANY ACT OF 1940
Rel. No.28070 / November 30, 3007

Admin. Proc. File No. 3-12554

In the Matter of MICHAEL SASSANO, DOGAN BARUH, ROBERT OKIN, and R. SCOTT ABRY	ORDER DENYING INTERLOCUTORY REVIEW

I.

The Division of Enforcement ("the Division") seeks interlocutory review of an administrative law judge's order requiring that it provide Respondents Michael Sassano, Dogan Baruh, Robert Okin, and R. Scott Abry access to all relevant, non-privileged evidence the Division gathered pursuant to an omnibus formal order of investigation issued on September 10, 2003 (the "NY-7220 Order"). 1/ The NY-7220 Order authorized an investigation into certain practices in connection with the trading of mutual fund shares, and the Division subsequently opened numerous investigations under separate file numbers pursuant to the authority of the NY-7220 Order. The Division never sought separate formal orders of investigation for these subsequent investigations.

1/ On June 15, 2007, we stayed this proceeding pending our consideration of the Division's interlocutory appeal.

Document 24 of 24

On January 29, 2004, the Division opened one of these investigations into mutual fund trading practices at Canadian Imperial Bank of Commerce, Inc. ("CIBC"). Although the Division opened a new file number for the CIBC investigation, NY-7273, it did not seek a new formal order of investigation and took testimony and subpoenaed documents pursuant to the authority of the NY-7220 Order.

II.

On January 31, 2007, the Commission instituted proceedings against Respondents. The Order Instituting Proceedings ("OIP") against Respondents alleges that each Respondent was associated with a broker-dealer subsidiary of CIBC.

Commission Rule of Practice 230 requires that, unless otherwise provided by order of the Commission or a hearing officer, the Division "shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings." 2/ The Division provided Respondents with access to the documents in its investigative file for the NY-7273 investigation.

However, Respondent Sassano requested that the Division provide access to all documents obtained pursuant to the NY-7220 Order. 3/ Sassano argued that "NY-7220 is the investigation that led to institution of this proceeding" because the "record establishe[d] beyond dispute that the Division gathered *all* of the evidence in this proceeding under the authority granted it by the Commission in formal order of investigation NY-7220." The Division responded that "only documents gathered in the file leading to the [Division's] specific recommendation [to institute proceedings] need be made available" and that the Division's "recommendation was made under NY-7273, not NY-7220."

On June 8, 2007, the administrative law judge granted Sassano's motion in part. The law judge noted that Comment (a) to Rule 230 provides that the "'investigation leading to the Division's recommendation to institute proceedings' ordinarily is delineated by the investigation number or numbers under which requests for documents, testimony, or other information were

---

2/ 17 C.F.R. § 201.230.

3/ Sassano made this request on May 29, 2007. On June 8, 2007, Respondent Abry filed a motion joining Sassano's request. These requests occurred more than three months after the Division provided access to the NY-7273 investigative file in February 2007. Although it does not affect our consideration of the Division's motion for interlocutory review, we are troubled by Respondents' delay in making these requests. We believe that respondents have an obligation to make discovery requests as quickly as possible so as not to delay the proceeding.

made." The law judge "reject[ed] the Division's argument that NY-7273 is the only relevant investigation here," noting that the Division conceded that it took testimony and subpoenaed documents pursuant to the NY-7220 Order. Although the law judge refused to require that the Division provide access to all documents obtained pursuant to the NY-7220 Order, he ordered that the Division provide access to all such non-privileged evidence "relating to any of the mutual funds, annuity funds, hedge funds, trading platforms, and individuals referenced in the OIP." 4/ The law judge also ordered that the Division supplement its privilege log.

The law judge ordered that "[i]f the Division is unable or unwilling to provide Respondents with access to the relevant, non-privileged portions of its investigative file in NY-7220 . . . then it may not introduce . . . evidence that it gathered pursuant to subpoenas authorized by NY-7220." The law judge noted that, "[i]f the Division so chooses, it may circumscribe its duty to produce materials from NY-7220 by scaling back on the thousands of exhibits it intends to offer and/or the 45 witnesses it intends to call at the hearing." The law judge denied the Division's ensuing motion to certify his order for interlocutory review, pursuant to Commission Rule of Practice 400. 5/

III.

The Division argues that, "[i]n view of the importance of the issues in this appeal, the Commission should review the Order notwithstanding the law judge's denial of the Division's motion for certification." The Division contends that the burden of complying with the order, which, it believes, requires it to "review tens of millions of documents, select the documents that fall into the relevant categories, and prepare a document-by-document privilege log of withheld materials," is "substantial enough to warrant reversal."

Respondents oppose interlocutory review on the grounds that "an allegation that the court interpreted a relevant discovery rule incorrectly does not . . . warrant[] interlocutory appeal" and "the fact that a discovery order may place substantial burdens on a party is irrelevant for purposes of determining the propriety of interlocutory review."

Rule of Practice 400(a) provides that petitions for interlocutory review "are disfavored," that they will be granted "only in extraordinary circumstances," and that the Commission may

---

4/ The law judge also ordered that the Division provide access to documents obtained "in any other investigations that were not part of the omnibus NY-7220 investigation, but yielded documents that may become Division exhibits in this proceeding, including C-3781, In re Ritchie Capital Mgmt., and B-1229, In re Prudential Sec."

5/ 17 C.F.R. § 201.400 (stating that "a ruling submitted to the Commission for interlocutory review must be certified . . . by the hearing officer" but also providing that the Commission "may, at any time, on its own motion, direct that any matter be submitted to it for review").

decline to consider a petition "if it determines that interlocutory review is not warranted or appropriate." 6/ The Commission adopted this language "to make clear that petitions for interlocutory review . . . rarely will be granted." 7/

We find that the extraordinary circumstances justifying interlocutory review are not present here. "It is well-established that pre-trial discovery orders are almost never immediately appealable." 8/ We have previously found no extraordinary circumstances and denied interlocutory review on the ground that parties' "complaints about production of documents do not warrant our interference with the orderly hearing process." 9/ Although the Division argues that the burden of complying with the law judge's order renders the circumstances of this discovery obligation extraordinary, at least one court has held, in denying interlocutory review of an administrative agency's ruling on a discovery request, that the "mere expense and inconvenience in complying with a discovery order . . . do not ordinarily present grounds for interlocutory review of evidentiary rulings." 10/ Accordingly, we find no extraordinary circumstances justifying our intervention at this time.

6/ 17 C.F.R. § 201.400(a).

7/ Adoption of Amendments to the Rules of Practice, Securities Exchange Act Rel. No. 49412 (Mar. 12, 2004), 82 SEC Docket 1744, 1749.

8/ Borntrager v. Cent. States, Se. and Sw. Areas Pension Fund, 425 F.3d 1087, 1093 (8th Cir. 2005); cf. Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 382 (2004) (finding fact that "Vice President and his comembers on the [National Energy Policy Development Group] [were] the subjects of the discovery orders" "remove[d] this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise").

9/ Kevin Hall, CPA, Exchange Act Rel. No. 55987 (June 29, 2007), 90 SEC Docket 3068, 3069. Compare Gregory M. Dearlove, CPA, Admin. Proc. File No. 3-12064 (Jan. 6, 2006) (denying interlocutory review of law judge's order denying postponement of hearing due to complexity of case because respondent's argument about the complexity of his case could be made by many respondents in Commission cases and did not constitute extraordinary circumstances) with Philip L. Pascale, CPA, Admin. Proc. File No. 3-11194 (Nov. 24, 2004) (finding extraordinary circumstances justifying review of law judge's order denying postponement of hearing because counsel's medical condition rendered him effectively incapacitated and unable to participate effectively in the proceeding).

10/ Consol. Gas Supply Corp. v. FERC, 611 F.2d 951, 960 (4th Cir. 1979); see also Borntrager, 425 F.3d at 1093 ("The fact that an interlocutory discovery order may be onerous or inconvenient does not make the order immediately appealable . . . .").

IV.

Although we are denying the Division's motion for interlocutory review, we nevertheless believe it is appropriate for us to address certain timing issues that have arisen in connection with this motion. 11/ In particular, the parties have expressed concern regarding their ability either to produce the documents as specified in the law judge's order in the time granted by the law judge, or to review those documents before the law judge begins the hearing in this case. Accordingly, under the circumstances, it seems appropriate to permit the Division up to sixty days from the date of this order to comply with the law judge's ruling and, thereafter, to permit the Respondents sixty days to review the documents once they have been made available by the Division.

In addition, the Division "requests that the Commission toll the 300-day period under Rule 360(a)(2) during the pendancy of this interlocutory review." Rule 360(a)(2) provides that, in the OIP, the Commission "will specify a time period in which the hearing officer's initial decision must be filed." 12/ The OIP in this case specified a period of 300 days from service of the OIP. Respondents do not oppose the Division's request and, in light of the extended period these proceedings have been stayed, we consider it appropriate to grant that request. We also consider it appropriate to toll the 300-day period for the additional 120-day period we are providing the parties to respond to the law judge's order.

In his denial of certification for interlocutory review, the law judge stated that the Division's motion was "silent as to whether the Division is going to begin to gather in one location all the materials from NY-7220 that [he] ordered it to make available to Respondents." Rule of Practice 230(e), however, states that documents "shall be made available . . . at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree." Thus, we wish to alert the law judge to our view that the Rule does not contain a requirement that the Division gather all the documents in one location, and we encourage the parties to reach agreement on the procedures and conditions governing Respondents' review of the documents.

Accordingly, it is ORDERED that the Division's motion for interlocutory review and reversal of the law judge's June 8, 2007 order be, and it hereby is, denied; and it is further

ORDERED that the Division comply with the law judge's June 8, 2007 order within sixty days from the date of this order and that Respondents be given sixty days to review documents made available by the Division after it complies with the law judge's order; and it is further

---

11/ The Rules of Practice grant us broad discretion, upon our determination "that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding," to "direct, in a particular proceeding, that an alternative procedure shall apply." Rule of Practice 100(c), 17 C.F.R. § 201.100(c).

12/ 17 C.F.R. § 201.360(a)(2).

ORDERED that the 300-day period for rendering an initial decision in this proceeding be, and it hereby is, tolled for the period of the Commission's consideration of the Division's motion and for an additional 120 days beyond that period.

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E Harmon
Deputy Secretary