

SECURITIES AND EXCHANGE COMMISSION

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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

30 Documents

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 24, 2008

**IN THE MATTER OF CERTAIN
COMPANIES QUOTED ON THE
PINK SHEETS:**

**ORDER OF SUSPENSION
OF TRADING**

**Asia Pacific Energy Inc.
Bolivar Mining Corp.**

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 the issuers listed below. As set forth below for each issuer, questions have arisen regarding the adequacy and accuracy of publicly disseminated information concerning, among other things: (1) the companies' current financial condition, (2) the companies' management, (3) the companies' business operations, and/or (4) stock promoting activity.

1. **Asia Pacific Energy Inc.** is a Nevada company with offices in Richmond Hill, Ontario, Canada. Questions have arisen regarding the adequacy and accuracy of statements on the company's website concerning the company's management, operations, current financial condition, transactions involving the issuance of the company's shares, and concerning stock promoting activity.
2. **Bolivar Mining Corp.** is a Nevada company with offices in Vancouver, British Columbia, Canada. Questions have arisen regarding the adequacy and accuracy of press releases concerning the company's current financial condition, operations, management, and concerning stock promoting activity.

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 companies listed above.

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Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the companies listed above is suspended for the period from 9:30 a.m. EST on January 24, 2008, through 11:59 p.m. EST, on February 6, 2008.

By the Commission.


Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28140; 812-13386]

PowerShares Capital Management LLC, et al.; Notice of Application

February 1, 2008

Agency: Securities and Exchange Commission (“Commission”).

Action: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (“Act”) for an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c-1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act.

Applicants: PowerShares Capital Management LLC (the “Advisor”), AER Advisors, Inc. (“AER”), AIM Distributors, Inc. (the “Distributor”), and PowerShares Actively Managed Exchange-Traded Fund Trust (the “Trust”).

Summary of Application: Applicants request an order that permits: (a) series of certain open-end management investment companies to issue shares (“Shares”) redeemable in large aggregations only (“Creation Units”); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (d) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

Filing Dates: The application was filed on May 18, 2007, and amended on November 9, 2007, November 16, 2007, November 30, 2007, December 20, 2007 and January 7, 2008.

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Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 26, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. Applicants: Advisor and Trust, 301 West Roosevelt Road, Wheaton, IL 60187; Distributor, 11 Greenway Plaza, Houston, TX 77046-1173; AER, 30 Laurence Lane, Rye Beach, NH 03871.

For Further Information Contact: Marilyn Mann, Branch Chief, or Michael W. Mundt, Assistant Director, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Desk, 100 F Street, NE, Washington, DC 20549-0102 (tel. 202-551-5850).

Applicants' Representations:

1. The Trust is an open-end management investment company registered under the Act and organized as a Delaware business trust. The Trust will offer two initial series subadvised by AER: the PowerShares Active AlphaQ Portfolio and the PowerShares Active Alpha Multi-Cap Portfolio (the "Initial AER Funds"). The Trust will also offer two initial series

subadvised by Invesco Institutional (N.A.), Inc. (“Invesco”): the PowerShares Active Mega-Cap Portfolio (“Mega-Cap Fund”) and PowerShares Active Low Duration Portfolio (“Low Duration Fund,” and together with the Mega-Cap Fund, the “Initial Invesco Funds”). The Initial AER Funds and Initial Invesco Funds are collectively referred to as the “Initial Funds.” Each Initial AER Fund’s investment objective will be to provide long-term capital appreciation by investing in stocks selected according to a quantitative screening methodology developed by AER. The Mega-Cap Fund’s investment objective will be to provide long-term growth of capital by investing primarily in the equity securities of mega-capitalization companies according to a quantitative approach developed by Invesco. The Low Duration Fund’s investment objective is to provide total return by investing primarily in U.S. government and corporate debt securities.

2. The Advisor plans to introduce future series of the Trust or of other open-end management investment companies that will invest in equity or fixed income securities traded in the U.S. markets (“Future Funds”). Applicants request that the order apply to any such Future Funds. Any Future Fund will be (a) advised by the Advisor or an entity controlling, controlled by, or under common control with the Advisor, and (b) comply with the terms and conditions of the order. The Initial Funds and Future Funds together are the “Funds.” Funds that invest in equity securities are “Equity Funds” and Funds that invest in fixed income securities are “Fixed Income Funds.” Each Fund will operate as an actively-managed exchange-traded fund (“ETF”).

3. The Advisor, a Delaware limited liability company, is registered as an investment adviser under the Investment Advisers Act of 1940 (“Advisers Act”) and serves as investment adviser to each Fund. The Advisor has retained AER as subadvisor to the Initial AER Funds and Invesco as subadvisor to the Initial Invesco Funds, and may in the future retain other subadvisers (together with AER and Invesco, the “Fund Subadvisors”) to manage the portfolios of other

Funds. AER, a New Hampshire corporation, and Invesco, a Delaware corporation, are registered under the Advisers Act, and any other Fund Subadvisor will be registered under the Advisers Act. The Distributor, a Delaware corporation, is registered as a broker-dealer under the Securities Exchange Act of 1934 (“Exchange Act”) and serves as the principal underwriter and distributor for the Funds. Each of the Advisor, Invesco and the Distributor is an indirect wholly-owned subsidiary of Invesco PLC, a public limited company organized in the United Kingdom.¹

4. Shares of the Funds will be sold at a price of between \$50 and \$60 per Share in Creation Units of between 50,000 and 100,000 Shares. All orders to purchase Creation Units must be placed with the Distributor by or through a party that has entered into an agreement with the Trust and the Distributor (“Authorized Participant”). An Authorized Participant must be either: (a) a broker-dealer or other participant in the continuous net settlement system of the National Securities Clearing Corporation (“NSCC”), a clearing agency registered with the Commission, or (b) a participant in the Depository Trust Company (“DTC,” and such participant, “DTC Participant”). Shares of each Fund generally will be sold in Creation Units in exchange for an in-kind deposit by the purchaser of a portfolio of securities designated by the Advisor (the “Deposit Securities”), together with the deposit of a relatively small specified cash payment (“Cash Component”). The Cash Component is an amount equal to the difference between (a) the net asset value (“NAV”) per Creation Unit of the Fund and (b) the total aggregate market value per Creation Unit of the Deposit Securities.² Applicants state that in some circumstances it may

¹ All entities that currently intend to rely on the order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application. An Investing Fund (as defined below) may rely on the order only to invest in Funds and not in any other registered investment company.

² In addition to the list of names and amount of each security constituting the current Deposit Securities, it is intended that, on each day that a Fund is open, including as required by section 22(e) of the Act (“Business Day”), the Cash Component effective as of the previous Business

not be practicable or convenient for a Fund to operate exclusively on an “in-kind” basis. The Trust reserves the right to permit, under certain circumstances, a purchaser of Creation Units to substitute cash in lieu of depositing some or all of the requisite Deposit Securities.

5. An investor purchasing a Creation Unit from a Fund will be charged a fee (“Transaction Fee”) to prevent the dilution of the interests of the remaining shareholders resulting from costs in connection with the purchase of Creation Units.³ The maximum Transaction Fees relevant to each Fund will be fully disclosed in the prospectus (“Prospectus”) or statement of additional information (“SAI”) of such Fund. All orders to purchase Creation Units will be placed with the Distributor by or through an Authorized Participant and it will be the Distributor’s responsibility to transmit such orders to the Trust. The Distributor also will be responsible for delivering the Prospectus to those persons purchasing Creation Units, and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the Trust to implement the delivery of Shares.

6. Purchasers of Shares in Creation Units may hold such Shares or may sell such Shares into the secondary market. Shares will be listed and traded on a national securities exchange as defined in section 2(a)(26) of the Act (“Stock Exchange”). It is expected that one or more member firms of a listing Stock Exchange will be designated to act as a specialist and

Day, per outstanding Share of each Fund, will be made available. The Stock Exchange intends to disseminate, every 15 seconds, during regular trading hours, through the facilities of the Consolidated Tape Association, an approximate amount per Share representing the sum of the estimated Cash Component effective through and including the previous Business Day, plus the current value of the Deposit Securities, on a per Share basis.

³ Where a Fund permits a purchaser to substitute cash in lieu of depositing a portion of the requisite Deposit Securities, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Securities, including brokerage costs, and part or all of the spread between the expected bid and the offer side of the market relating to such Deposit Securities.

maintain a market for Shares on the Stock Exchange (the "Specialist"), or if Nasdaq is the listing Stock Exchange, one or more member firms of Nasdaq will act as a market maker ("Market Maker") and maintain a market for Shares.⁴ Prices of Shares trading on a Stock Exchange will be based on the current bid/offer market. Shares sold in the secondary market will be subject to customary brokerage commissions and charges.

7. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). The Specialist, or Market Maker, in providing a fair and orderly secondary market for the Shares, also may purchase Creation Units for use in its market-making activities. Applicants expect that secondary market purchasers of Shares will include both institutional investors and retail investors.⁵ Applicants expect that the price at which the Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV, which should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

8. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from a Fund, or tender such Shares for redemption to the Fund, in Creation Units only. To redeem, an investor will have to accumulate enough Shares to constitute a Creation Unit. Redemption orders must be placed by or through an Authorized Participant. An investor

⁴ If Shares are listed on the Nasdaq, no particular Market Maker will be contractually obligated to make a market in Shares, although Nasdaq's listing requirements stipulate that at least two Market Makers must be registered as Market Makers in Shares to maintain the listing. Registered Market Makers are required to make a continuous, two-sided market at all times or be subject to regulatory sanctions.

⁵ Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. DTC or DTC Participants will maintain records reflecting beneficial owners of Shares.

redeeming a Creation Unit generally will receive (a) a portfolio of securities designated to be delivered for Creation Unit redemptions on the date that the request for redemption is submitted ("Fund Securities"), which may not be identical to the Deposit Securities required to purchase Creation Units on that date, and (b) a "Cash Redemption Payment," consisting of an amount calculated in the same manner as the Cash Component, although the actual amount of the Cash Redemption Payment may differ from the Cash Component if the Fund Securities are not identical to the Deposit Securities on that day. An investor may receive the cash equivalent of a Fund Security in certain circumstances, such as if the investor is constrained from effecting transactions in the security by regulation or policy. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Units.

9. Neither the Trust nor any individual Fund will be marketed or otherwise held out as an "open-end investment company" or a "mutual fund." Instead, each Fund will be marketed as an "actively-managed exchange-traded fund." All marketing materials that describe the method of obtaining, buying or selling Shares, or refer to redeemability, will prominently disclose that Shares are not individually redeemable and that the owners of Shares may purchase or redeem Shares from a Fund in Creation Units only. The same approach will be followed in the SAI, shareholder reports and investor educational materials issued or circulated in connection with the Shares. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

10. The Funds' website, which will be publicly available prior to the public offering of Shares, will include the Prospectus and other information about the Funds that is updated on a daily basis, including the mid-point of the bid-ask spread at the time of the calculation of NAV

("Bid/Ask Price"). On each Business Day, before the commencement of trading in Shares on the Stock Exchange, each Fund will disclose the identities and quantities of the securities ("Portfolio Securities") and other assets held in the Fund portfolio that will form the basis for the Fund's calculation of NAV at the end of the Business Day.⁶

Applicants' Legal Analysis:

1. Applicants request an order under section 6(c) of the Act granting an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c-1 under the Act; and under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of

⁶ Applicants note that under accounting procedures followed by the Funds, trades made on the prior Business Day ("T") will be booked and reflected in NAV on the current Business Day ("T + 1"). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an “open-end company” as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer’s current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit each Fund, as a series of an open-end management investment company, to issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units from each Fund and redeem Creation Units from each Fund. Applicants further state that because the market price of Shares will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary substantially from their NAV.

Section 22(d) of the Act and Rule 22c-1 under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the

secondary market will not comply with section 22(d) of the Act and rule 22c-1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (c) assure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of Shares and their NAV remains narrow.

Section 12(d)(1)

7. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, or any other broker or dealer from selling its shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

8. Applicants request that the order permit certain investment companies registered under the Act to acquire Shares beyond the limitations in section 12(d)(1)(A) and permit the Funds, any principal underwriter for the Funds, and any broker or dealer registered under the Exchange Act ("Brokers"), to sell Shares beyond the limitations in section 12(d)(1)(B).

Applicants request that these exemptions apply to: (1) any Fund that is currently or subsequently part of the same "group of investment companies" as the Initial Funds within the meaning of section 12(d)(1)(G)(ii) of the Act as well as any principal underwriter for the Funds and any Brokers selling Shares of a Fund to an Investing Fund (as defined below); and (2) each management investment company or unit investment trust registered under the Act that is not part of the same "group of investment companies" as the Funds within the meaning of section 12(d)(1)(G)(ii) of the Act and that enters into a FOF Participation Agreement (as defined below) with a Fund (such management investment companies are referred to herein as "Investing Management Companies," such unit investment trusts are referred to herein as "Investing

Trusts,” and Investing Management Companies and Investing Trusts are “Investing Funds”). Investing Funds do not include the Funds. Each Investing Trust will have a sponsor (“Sponsor”) and each Investing Management Company will have an investment adviser within the meaning of Section 2(a)(20)(A) of the Act (“Investing Fund Advisor”) that does not control, is not controlled by or under common control with the Advisor. Each Investing Management Company may also have one or more investment advisers within the meaning of Section 2(a)(20)(B) of the Act (each, a “Subadvisor”).

9. Applicants assert that the proposed transactions will not lead to any of the abuses that section 12(d)(1) was designed to prevent. Applicants submit that the proposed conditions to the requested relief address the concerns underlying the limits in section 12(d)(1), which include concerns about undue influence, excessive layering of fees and overly complex structures.

10. Applicants believe that neither the Investing Funds nor an Investing Fund Affiliate would be able to exert undue influence over the Funds.⁷ To limit the control that an Investing Fund may have over a Fund, applicants propose a condition prohibiting the Investing Fund Advisor or Sponsor; any person controlling, controlled by, or under common with the Investing Fund Advisor or Sponsor; and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Investing Fund Advisor or advised or sponsored by the Sponsor, or any person controlling, controlled by, or under common control with the Investing Fund Advisor or Sponsor (“Investing Fund’s Advisory Group”) from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Subadvisor; any

⁷ An “Investing Fund Affiliate” is an Investing Fund Advisor, Subadvisor, Sponsor, promoter, and principal underwriter of an Investing Fund, and any person controlling, controlled by, or under common control with any of those entities.

person controlling, controlled by, or under common control with the Subadvisor; and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Subadvisor or any person controlling, controlled by, or under common control with the Subadvisor (“Investing Fund’s Subadvisory Group”).

11. Applicants propose other conditions to limit the potential for undue influence over the Funds, including that no Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (“Affiliated Underwriting”). An “Underwriting Affiliate” is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Investing Fund Advisor, Subadvisor, employee or Sponsor of an Investing Fund, or a person of which any such officer, director, member of an advisory board, Investing Fund Advisor, Subadvisor, employee, or Sponsor is an affiliated person (except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

12. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of each Investing Management Company, including a majority of the disinterested directors or trustees, before approving any advisory contract under section 15 of the Act, will be required to determine that the advisory fees charged to the Investing Management Company are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. In addition, the Investing Fund Advisor,

trustee of an Investing Trust (“Trustee”) or Sponsor, as applicable, will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation received from a Fund by the Investing Fund Advisor, Trustee or Sponsor, or an affiliated person of the Investing Fund Advisor, Trustee or Sponsor (other than any advisory fees), in connection with the investment by the Investing Fund in the Funds. Applicants also state that any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds set forth in Conduct Rule 2830 of the NASD (“Rule 2830”).

13. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that a Fund will be prohibited from acquiring securities of any investment company, or of any company relying on section 3(c)(1) or 3(c)(7) of the Act, in excess of the limits contained in section 12(d)(1)(A) of the Act.

14. To ensure that Investing Funds are aware of the terms and conditions of the requested order, the Investing Funds must enter into an agreement with the respective Funds (“FOF Participation Agreement”). The FOF Participation Agreement will include an acknowledgement from the Investing Fund that it may rely on the order only to invest in the Funds and not in any other investment company. The FOF Participation Agreement will further require any Investing Fund that exceeds the 5% or 10% limitations in section 12(d)(1)(A)(ii) and (iii) to disclose in its Prospectus that it may invest in ETFs and disclose, in “plain English,” in its Prospectus the unique characteristics of the Investing Funds investing in investment companies, including but not limited to the expense structure and any additional expenses of investing in investment companies.

Sections 17(a)(1) and (2) of the Act

15. Section 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a

registered investment company, or an affiliated person of such a person (“second tier affiliate”), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines “affiliated person” to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person’s voting securities. The Funds may be deemed to be controlled by the Advisor or an entity controlling, controlled by or under common control with the Advisor and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by the Advisor or an entity controlling, controlled by or under common control with the Advisor (an “Affiliated Fund”). Applicants state that because the definition of “affiliated person” includes any person owning 5% or more of an issuer’s outstanding voting securities, every purchaser of a Creation Unit will be affiliated with the Fund so long as fewer than twenty Creation Units are in existence, and any purchaser that owns more than 25% of a Fund’s outstanding Shares will be affiliated with a Fund.

16. Applicants request an exemption from section 17(a) under sections 6(c) and 17(b), to permit in-kind purchases and redemptions by persons that are affiliated persons or second tier affiliates of the Funds solely by virtue of one or more of the following: (1) holding 5% or more, or more than 25%, of the outstanding Shares of the Trust or one or more Funds; (2) an affiliation with a person with an ownership interest described in (1); or (3) holding 5% or more, or more than 25%, of the shares of one or more Affiliated Funds. Applicants also request an exemption in order to permit each Fund to sell Shares to and redeem Shares from, and engage in the in-kind

transactions that would accompany such sales and redemptions with, any Investing Fund of which it is an affiliated person or second tier affiliate because of one or more of the following: (1) the Investing Fund holds 5% or more of the Shares of the Trust or one or more Funds; (2) an Investing Fund described in (1) is an affiliated person of the Investing Fund; or (3) the Investing Fund holds 5% or more of the shares of one or more Affiliated Funds.⁸

17. Applicants contend that no useful purpose would be served by prohibiting affiliated persons or second tier affiliates of a Fund from purchasing or redeeming Creation Units through “in-kind” transactions. The deposit procedure for in-kind purchases and the redemption procedure for in-kind redemptions will be the same for all purchases and redemptions. Deposit Securities and Fund Securities will be valued under the same objective standards applied to valuing Portfolio Securities. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for the affiliated persons and second tier affiliates described above to effect a transaction detrimental to the other holders of Shares. Applicants also believe that in-kind purchases and redemptions will not result in abusive self-dealing or overreaching by these persons of the Fund.

18. Applicants also submit that the sale of Shares to and redemption of Shares from an Investing Fund satisfies the standards for relief under sections 17(b) and 6(c) of the Act. Applicants note that the consideration paid for the purchase or received for the redemption of Shares directly from a Fund by an Investing Fund (or any other investor) will be based on the NAV of the Shares. In addition, the securities received or transferred by the Fund in connection

⁸ Although applicants believe that most Investing Funds will purchase and sell Shares in the secondary market, an Investing Fund might seek to transact in Shares directly with a Fund. With respect to these in-kind transactions, applicants are requesting relief for Funds that are affiliated persons or second tier affiliates of an Investing Fund solely by virtue of one or more of the reasons described above.

with the purchase or redemption of Shares will be valued in the same manner as the Fund's Portfolio Securities and thus the transactions will not be detrimental to the Investing Fund. Applicants also state that the proposed transactions will be consistent with the policies of each Investing Fund and Fund and with the general purposes of the Act. Applicants state that the FOF Participation Agreement will require an Investing Fund to represent that its ownership of Shares issued by a Fund is consistent with the investment policies set forth in the Investing Fund's registration statement.

Applicants' Conditions:

The applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

A. Actively-Managed Exchange-Traded Fund Relief

1. Each Prospectus will clearly disclose that, for purposes of the Act, Shares are issued by a registered investment company and that the acquisition of Shares by investment companies and companies relying on sections 3(c)(1) or 3(c)(7) of the Act is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits in section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into a FOF Participation Agreement with the Fund regarding the terms of the investment.

2. As long as the Funds operate in reliance on the requested order, the Shares of the Funds will be listed on a Stock Exchange.

3. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each Fund's Prospectus will prominently disclose that the Fund is an actively managed exchange-traded fund. Each Prospectus will prominently

disclose that the Shares are not individually redeemable shares and will disclose that the owners of the Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that the Shares are not individually redeemable and that owners of the Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

4. The website for the Funds, which is and will be publicly accessible at no charge, will contain the following information, on a per Share basis, for each Fund: (a) the prior Business Day's NAV and the Bid/Ask Price, and a calculation of the premium or discount of the Bid/Ask Price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters (or for the life of the Fund, if shorter).

5. The Prospectus and annual report for each Fund will also include: (a) the information listed in condition A.4(b), (i) in the case of the Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years (or for the life of the Fund, if shorter), and (b) calculated on a per Share basis for one-, five- and ten-year periods (or for the life of the Fund, if shorter), the cumulative total return and the average annual total return based on NAV and Bid/Ask Price.

6. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund will disclose on its website the identities and quantities of the Portfolio

Securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.

7. The Advisor or Fund Subadvisor, directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Security for the Fund through a transaction in which the Fund could not engage directly.

8. The requested order will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively managed exchange-traded funds.

B. Section 12(d)(1) Relief

1. The members of the Investing Fund's Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the 1940 Act. The members of the Investing Fund's Subadvisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the 1940 Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Investing Fund's Advisory Group or the Investing Fund's Subadvisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares of the Fund in the same proportion as the vote of all other holders of the Fund's Shares. This condition does not apply to the Investing Fund's Subadvisory Group with respect to a Fund for which the Subadvisor or a person controlling, controlled by or under common control with the Subadvisor acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Investing Fund or Investing Fund Affiliate will cause any existing or potential investment by the Investing Fund in a Fund to influence the terms of any services or transactions between the Investing Fund or an Investing Fund Affiliate and the Fund or a Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to assure that the Investing Fund Advisor and any Subadvisor are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or an Investing Fund Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

4. Once an investment by an Investing Fund in the securities of a Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of trustees ("Board") of a Fund, including a majority of the disinterested Board members, will determine that any consideration paid by the Fund to the Investing Fund or an Investing Fund Affiliate in connection with any services or transactions: (i) is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Investing Fund Advisor, or Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b-1 under the Act)

received from a Fund by the Investing Fund Advisor, or Trustee or Sponsor, or an affiliated person of the Investing Fund Advisor, or Trustee or Sponsor, other than any advisory fees paid to the Investing Fund Advisor, or Trustee or Sponsor, or its affiliated person by the Fund, in connection with the investment by the Investing Fund in the Fund. Any Subadvisor will waive fees otherwise payable to the Subadvisor, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund by the Subadvisor, or an affiliated person of the Subadvisor, other than any advisory fees paid to the Subadvisor or its affiliated person by the Fund, in connection with the investment by the Investing Management Company in the Fund made at the direction of the Subadvisor. In the event that the Subadvisor waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an Affiliated Underwriting.

7. The Board of the Fund, including a majority of the disinterested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund in an Affiliated Underwriting, once an investment by an Investing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Investing Fund in the Fund. The Board will consider, among other things: (i) whether the purchases were consistent with the investment objectives and policies of the Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares

to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders.

8. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by an Investing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the 1940 Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Fund in excess of the limit in section 12(d)(1)(A), an Investing Fund will execute a FOF Participation Agreement with the Fund stating that their respective boards of directors or trustees and their investment advisors, or Trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), an Investing Fund will notify the Fund of the investment. At such time, the Investing Fund will also transmit to the Fund a list of the names of each Investing Fund

Affiliate and Underwriting Affiliate. The Investing Fund will notify the Fund of any changes to the list as soon as reasonably practicable after a change occurs. The Fund and the Investing Fund will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

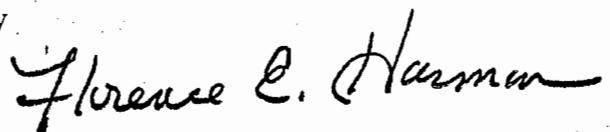
10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in Rule 2830.

12. No Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act.

By the Commission.

Nancy M. Morris
Secretary



By: Florence E Harmon
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 210, 228, 229 and 249

[RELEASE NOS. 33-8889; 34-57258; File No. S7-06-03]

RIN 3235-AJ64

**INTERNAL CONTROL OVER FINANCIAL REPORTING IN EXCHANGE ACT
PERIODIC REPORTS OF NON-ACCELERATED FILERS**

AGENCY: Securities and Exchange Commission.

ACTION: Proposed amendments of temporary rules.

SUMMARY: We are proposing to amend temporary rules that were published on December 21, 2006, in Release No. 33-8760 [71 FR 76580]. These temporary rules require companies that are non-accelerated filers to include in their annual reports, pursuant to rules implementing Section 404(b) of the Sarbanes-Oxley Act of 2002, an attestation report of their independent auditor on internal control over financial reporting for fiscal years ending on or after December 15, 2008. Under the proposed amendments, a non-accelerated filer would be required to provide the auditor's attestation report on internal control over financial reporting in an annual report filed for fiscal years ending on or after December 15, 2009.

DATES: Comments should be received on or before [insert date 30 days after date of 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/other.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-06-03 on the subject line; or

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- Use the Federal Rulemaking 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 S7-06-03. 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/other.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: Sean Harrison, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are proposing to amend the following forms and temporary rules: Rule 2-02T of Regulation S-X,¹ Item 308T of Regulation S-K,² and S-B,³ Item 4T of Form 10-Q,⁴ Item 3A(T) of Form 10-QSB,⁵ Item 9A(T) of Form 10-K,⁶ Item 8A(T) of

¹ 17 CFR 210-2.02T.

² 17 CFR 229.308T.

³ 17 CFR 228.310T.

⁴ 17 CFR 249.308a.

Form 10-KSB,⁷ Item 15T of Form 20-F,⁸ and Instruction 3T of General Instruction B.(6) of Form 40-F.⁹

I. BACKGROUND

On December 15, 2006,¹⁰ we extended the dates by which non-accelerated filers¹¹ must begin to comply with the internal control over financial reporting (“ICFR”) requirements mandated by Section 404 of the Sarbanes-Oxley Act of 2002.¹² Specifically, we postponed for five months, from fiscal years ending on or after July 15, 2007 to fiscal years ending on or after December 15, 2007, the date by which non-accelerated filers must begin to comply with the management report requirement in Item 308(a) of Regulation S-K.¹³ We also postponed to fiscal years ending on or after December 15, 2008 the date by which non-accelerated filers must begin to comply with the auditor attestation report requirement in Item 308(b) of Regulation S-K.¹⁴ We indicated that we would consider further postponing the auditor attestation report compliance

⁵ 17 CFR 249.308b.

⁶ 17 CFR 249.310.

⁷ 17 CFR 249.310(b).

⁸ 17 CFR 249.220f.

⁹ 17 CFR.249.240f.

¹⁰ See Release No. 33-8760 (December 15, 2006) [71 FR 76580] (the “2006 Release”).

¹¹ Although the term “non-accelerated filer” is not defined in our rules, we use it throughout this release to refer to an Exchange Act reporting company that does not meet the Rule 12b-2 definition of either an “accelerated filer” or a “large accelerated filer.”

¹² 15 U.S.C. 7262.

¹³ 17 CFR 229.308(a). We effected the postponement, in part, by adding temporary Item 308T to Regulation S-K. We similarly added temporary Item 308T to Regulation S-B, but the Commission recently adopted amendments that will eliminate Regulation S-B effective March 15, 2009. See Release No. 33-8876 (December 19, 2007) [73 FR 934].

¹⁴ 17 CFR 229.308(b).

date after considering the anticipated revisions to the Public Company Accounting Oversight Board's ("PCAOB") Auditing Standard No. 2 ("AS No. 2").

In the 2006 Release, we cited two primary reasons for deferring implementation of the auditor attestation report requirement for an additional year after implementation of the management report requirement. First, we stated that the deferred implementation would afford non-accelerated filers and their auditors the benefit of anticipated changes by the PCAOB to AS No. 2, subject to Commission approval, as well as any implementation guidance that the PCAOB issued for auditors of smaller public companies.

Second, we expected a deferred implementation of the auditor attestation requirement to save non-accelerated filers the full potential costs associated with the auditor's initial attestation to, and report on, management's assessment of ICFR during the period that changes to AS No. 2 were being considered and implemented, and the PCAOB was formulating guidance specifically for auditors of smaller public companies. Public commenters previously have asserted that the ICFR compliance costs are likely to be disproportionately higher for smaller public companies than larger ones, and that the auditor's fee represents a large percentage of those costs.¹⁵

Furthermore, we have learned from commenters, including those participating in our roundtables on implementation of the ICFR requirements, that while companies incur increased internal costs in the first year of compliance, some of which are due to "deferred maintenance" items (for example, documentation, remediation, etc.), these costs may decrease in the second year.¹⁶ Therefore, we anticipated that postponing the costs resulting from the auditor's

¹⁵ See, for example, letters of American Electronics Association, International Association of Small Broker-Dealers and Advisers, Small Business Entrepreneurship Council, and the Silicon Valley Leadership Group, Committee on Capital Markets Regulation on Release No. 33-8762 (December 20, 2006) [71 FR 77635], File No. S7-24-06.

¹⁶ Materials related to the Commission's 2005 Roundtable Discussion on Implementation of Internal Control Reporting Provisions and 2006 Roundtable on Second-Year Experiences with Internal Control Reporting and

attestation report until the second year would help non-accelerated filers to smooth the cost spike that many accelerated filers experienced in their first year of compliance with the Section 404 requirements.

The compliance date extensions that we granted in 2006 were part of a series of actions that the Commission and PCAOB each announced that they intended to take to improve implementation of the internal control over financial reporting requirements.¹⁷ These actions included:

- Issuance by the Commission of interpretive guidance for management to assist management in complying with the ICFR evaluation and disclosure requirements;
- Consideration of efforts by COSO to provide more guidance on how the COSO framework on internal control can be applied to smaller public companies;
- The PCAOB's issuance, with Commission approval, of Auditing Standard No. 5 ("AS No. 5"), which replaced AS No. 2;
- Reinforcement of auditor efficiency through PCAOB inspections and Commission oversight of the PCAOB's audit firm inspection program;
- Development, or facilitation of development, of implementation guidance for auditors of smaller public companies; and
- Continuation of PCAOB forums on auditing in the small business environment.

Auditing Provisions, including the archived roundtable broadcasts, are available at <http://www.sec.gov/spotlight/soxcomp.htm>.

¹⁷ See SEC Press Release 2006-75 (May 17, 2006), "SEC Announces Next Steps for Sarbanes-Oxley Implementation" and PCAOB Press Release (May 17, 2006), "Board Announces Four-Point Plan to Improve Implementation of Internal Control Reporting Requirements."

On June 20, 2007, we approved the issuance of interpretive guidance¹⁸ and adopted rule amendments¹⁹ to help public companies strengthen their ICFR evaluations while reducing unnecessary costs. The interpretive release provided guidance for management on how to conduct an evaluation of the effectiveness of a company's ICFR. The guidance sets forth an approach by which management can conduct a top-down, risk-based evaluation of ICFR.

As discussed above, on July 25, 2007, we approved the PCAOB's AS No. 5, which replaced AS No. 2. The new standard sets forth the professional standards and related performance guidance for independent auditors to attest to, and report on, management's assessment of the effectiveness of ICFR. Our management guidance, in combination with AS No. 5, was intended to make ICFR audits and management evaluations of ICFR more cost-effective by being risk-based and scalable to a company's size and complexity. Although the PCAOB issued AS No. 5, and we approved it, according to our planned timetables, there still are some additional actions that the Commission and PCAOB intend to take that give us reason to propose a further extension of the auditor attestation report compliance date for non-accelerated filers.

One of these actions is the PCAOB's issuance of final staff guidance on auditing ICFR of smaller public companies. On October 17, 2007, the PCAOB published preliminary staff guidance that demonstrates how auditors can apply the principles described in AS No. 5 and provides examples of approaches to particular issues that might arise in the audits of smaller, less

¹⁸ Release No. 33-8810 (Jun. 20, 2007) [72 FR 35324].

¹⁹ Release No. 33-8809 (Jun. 20, 2007) [72 FR 35310]. The rule amendments, among other things, provided that an evaluation that complies with our interpretive guidance is one way to satisfy the annual ICFR evaluation requirement in Exchange Act Rules 13a-15(c) and 15d-15(c) [17 CFR 240.13a-15(c) and 240.15d-15(c)].

complex public companies.²⁰ Topics discussed in the PCAOB's guidance include: entity-level controls, risk of management override, segregation of duties and alternative controls, information technology controls, financial reporting competencies, and testing controls with less formal documentation. The PCAOB sought public comment on this guidance, and the comment period ended on December 17, 2007.²¹

Another action involves a study that we are undertaking to determine whether the Section 404(b) auditor attestation requirement of the Sarbanes-Oxley Act is being implemented in a manner that will be cost-effective for smaller reporting companies. The study will pay special attention to those small companies that are complying with the ICFR requirements for the first time.

This study of costs and benefits will include a web-based survey of companies that are subject to the ICFR requirements as well as in-depth interviews with a subset of these companies. Our plan is to gather data from a large cross-section of companies about the costs and benefits of compliance with the ICFR requirements and to evaluate whether the new management guidance and AS No. 5 are having the intended effect of facilitating more cost-effective ICFR evaluations and audits. Because we intend to collect data based on companies' experiences, this study will be taking place in the coming months as companies for the first time prepare their financial statements and undergo external audits under the new AS No. 5 and/or conduct their internal ICFR evaluations with the aid of the new management guidance. We anticipate that the study and analysis of the results will be completed no earlier than the summer of 2008.

²⁰ See "An Audit of Internal Control that is Integrated with an Audit of the Financial Statements: Guidance for Auditors of Smaller Companies," (October 17, 2007), available at www.pcaobus.org.

²¹ The PCAOB has not announced when it plans to finalize this guidance.

We also note that others have expressed concerns about the orderly and efficient implementation of the ICFR requirements.²²

If we do not adopt the proposed amendments, non-accelerated filers will have to begin complying with the auditor attestation requirement for fiscal years ending on or after December 15, 2008. To accomplish this, in 2008, many non-accelerated filers would need to engage their independent auditors to perform integrated audits of their financial statements and ICFR. Without an extension, these companies may begin to incur costs before we have an opportunity to observe whether further action to improve the effectiveness and efficiency of Section 404 implementation is warranted. Therefore, we believe that an additional one-year deferral of the auditor attestation requirement would be appropriate so that these companies do not incur unnecessary compliance costs before we have the benefit of the study. An additional one-year deferral will allow the PCAOB additional time during 2008 to promulgate its guidance for ICFR audits of smaller public companies, as well as additional time for the auditors of non-accelerated filers to incorporate such guidance in their planning and conduct of their ICFR audits during 2009.

II. PROPOSED EXTENSION OF AUDITOR ATTESTATION COMPLIANCE DATE FOR NON-ACCELERATED FILERS

We propose to amend Item 308T of Regulation S-K, Rule 2-02T of Regulation S-X, and Forms 10-Q, 10-K, 20-F and 40-F to require non-accelerated filers to provide their auditor's attestation in their annual reports filed for fiscal years ending on or after December 15, 2009. If

²² See, for example, the May 8, 2007, letter to Chairman Christopher Cox and Chairman Mark Olson from Senator John Kerry, Chairman, Senate Committee on Small Business and Entrepreneurship, and Senator Olympia Snowe, Ranking Member, Senate Committee on Small Business and Entrepreneurship, available at <http://sbc.senate.gov/lettersout/070508-SEC-PCAOB-HearingFollowUp.pdf>; hearing on "Sarbanes-Oxley Section 404: New Evidence on the Costs for Small Businesses," House Committee on Small Business (December 12, 2007); and the July 12, 2007, letter from Sharon Haeger, America's Community Bankers, on Release No. 34-55876 [72 FR 32340], File No. PCAOB 2007-02, available at <http://www.sec.gov/comments/pcaob-2007-02/pcaob200702.shtml>.

we adopt the proposed amendments, a non-accelerated filer would continue to be required to state in its management report on ICFR that the company's annual report does not include an auditor attestation report.²³

In the 2006 Release, we also adopted a temporary amendment that provided that the management report included in a non-accelerated filer's annual report that did not contain the auditor's attestation report would be deemed "furnished" rather than "filed" and not be subject to liability under Section 18 of the Exchange Act.²⁴ We acknowledged in that release non-accelerated filers filing only a management report during their first year of compliance with the Section 404(a) requirements may become subject to more second-guessing as a result of separating the management report from the auditor's attestation. As proposed, the amendments would maintain this distinction.

Request for Comment

We request and encourage any interested person to submit comments regarding the proposed amendments to extend the auditor attestation report compliance date described above. In particular, we solicit comment on the following questions:

- Is it appropriate to provide a further extension of the auditor attestation requirement for non-accelerated filers as proposed? If so, should we postpone this requirement for an additional year as proposed, or would a longer or shorter timeframe be more appropriate?

²³ See Item 308T(a)(4) of Regulation S-K, Item 15T(b)(4) of Form 20-F and General Instruction B.(6)(3T) of Form 40-F.

²⁴ Section 18 of the Exchange Act [15 U.S.C. 78r] imposes liability on any person who makes or causes to be made in any application or report or document filed under the Act, or any rule thereunder, any statement that "was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact." As a result of the temporary Item 308T of Regulation S-K and S-B and the temporary amendments to Forms 20-F and 40-F, however, during the applicable periods, management's report would be subject to liability under this section only in the event that a non-accelerated filer specifically states that the report is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act.

- How would the proposed extension affect investors in non-accelerated filers?
- Would the proposed additional deferral of the auditor's attestation report requirement make the application of the Section 404 requirements more or less efficient and effective for non-accelerated filers?
- Should management's report on ICFR be "filed" rather than "furnished" during the second year of the non-accelerated filer's compliance with the ICFR requirements under Section 404(a) if we adopt the proposed extension?

III. PAPERWORK REDUCTION ACT

In connection with our original proposal and adoption of the rules and amendments implementing the Section 404 requirements, we submitted cost and burden estimates of the collection of information requirements of the amendments to the Office of Management and Budget ("OMB"). We published a notice requesting comment on the collection of information requirements in the proposing release for the rule amendments. We submitted these requirements to the OMB for review in accordance with the Paperwork Reduction Act of 1995 ("PRA")²⁵ and received approval of these estimates. We do not believe that the proposed extension will result in any change in the collection of information requirements of the amendments implementing Section 404. Therefore, we are not revising our PRA burden and cost estimates submitted to the OMB.

IV. COST-BENEFIT ANALYSIS

A. Benefits

The proposed amendments would postpone for one year the date by which a non-accelerated filer would be required to include in its annual report an auditor attestation report on

²⁵ 44 U.S.C. 3501 et seq. and 5 CFR 1320.11.

management's assessment of internal control over financial reporting. As a result, all non-accelerated filers would be required to complete only management's assessment in their first and second year of their compliance with the Section 404 requirements.

We plan to conduct a study to assess whether the Section 404(b) auditor attestation requirement of the Sarbanes-Oxley Act is being implemented in a manner that will be cost-effective for smaller reporting companies. Our management guidance and the new auditing standard were designed to make management evaluations and ICFR audits more cost-effective. We believe that an additional one-year deferral of the auditor attestation report requirement would benefit non-accelerated filers by helping smaller companies avoid incurring unnecessary compliance costs as we determine whether further action to improve the effectiveness and efficiency of Section 404 implementation is warranted. In addition, we believe that non-accelerated filers may experience the following additional benefits from the proposed extension:

- Auditors of non-accelerated filers would have significantly more time to conform their ICFR audit approach to meet the requirements of AS No. 5, and to consider the PCAOB's guidance for auditors of smaller public companies; and
- Non-accelerated filers would have additional time to focus on their approach for evaluating and reporting on the effectiveness of ICFR. This may facilitate their efforts to develop best practices and efficiencies in preparing the management report prior to becoming subject to the auditor attestation report requirement.

B. Costs

If we adopt the proposed amendments, investors in non-accelerated filers will have to wait longer than they would in the absence of the proposed extension for the assurances provided by the attestation report by the companies' auditor on management's report on ICFR and the

added investor confidence that could result. The proposed amendments may increase the risk that, without the auditor's attestation, some non-accelerated filers may erroneously conclude that the company's ICFR is effective, when an ICFR audit might reveal that it is not. In addition, some companies may conduct an assessment that is not as thorough, careful and as appropriate to the company's circumstances as they would perform if the auditor were also conducting an audit of ICFR. The proposed amendments may also increase the risk that weaknesses in a company's ICFR will go undetected for a longer period of time.

We request data to quantify the potential costs and benefits described above. We seek estimates of these costs and benefits, as well as any costs and benefits that we have not identified that may result from the adoption of these proposed amendments. We also request qualitative feedback on the nature of the potential benefits and costs described above and any benefits and costs we may have overlooked.

V. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"²⁶ we solicit data to determine whether the proposals constitute a "major" rule.

Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

²⁶ 5 U.S.C. 603.

We request comment on the potential impact of the proposals on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views if possible.

Section 23(a)(2) of the Exchange Act²⁷ also requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b)²⁸ of the Securities Act and Section 3(f)²⁹ of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

We believe that taking additional time to evaluate how efficiently the Section 404(b) process is being implemented reduces the possibilities of needless inefficiencies and transition costs for non-accelerated filers. Further, if the costs incurred by companies are unnecessarily high, companies may find it difficult to grow and may experience barriers to capital formation. We expect that this additional one-year delay of the auditor attestation report requirement will make the implementation process more efficient and less costly for non-accelerated filers, which should promote efficiency and capital formation.

It is possible that a competitive impact could result from the differing treatment of non-accelerated filers and larger companies that already have been complying with the Section 404

²⁷ 15 U.S.C. 78w(a).

²⁸ 15 U.S.C. 77b(b).

²⁹ 15 U.S.C. 78c(f).

requirements, but we do not expect that the extension will have any measurable effect on competition. We solicit public comment that will assist us in assessing the impact that the proposed amendments could have on competition, efficiency and capital formation.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

This Initial Regulatory Flexibility Analysis (“IRFA”) has been prepared in accordance with the Regulatory Flexibility Act.³⁰ This IRFA involves proposed amendments to temporary rules Item 308T of Regulation S-K and S-B, Rule 2-02T of Regulation S-X, Item 4T of Form 10-Q, Item 3A(T) of Form 10-QSB, Item 9A(T) of Form 10-K, Item 8A(T) of Form 10-KSB, Item 15T of Form 20-F, and Instruction 3T of General Instruction B.(6) of Form 40-F. A non-accelerated filer is currently required to start providing its auditor’s attestation report on ICFR in its annual report for fiscal years ending on or after December 15, 2008. We propose to amend these forms and temporary rules to require a non-accelerated filer to start providing its auditor’s attestation report on ICFR in annual reports for fiscal years ending on or after December 15, 2009.

A. Reasons for the Proposed Amendments

The Commission plans to complete a study of the costs and benefits of companies’ Section 404 implementation. We are proposing to defer the implementation of the auditor attestation report requirement for non-accelerated filers for an additional year for the following reasons, among others discussed above:

- To enable non-accelerated filers more time to prepare and gain efficiencies in the review and evaluation of the effectiveness of internal control over financial reporting;

³⁰ 5 U.S.C. 601.

- To provide the Commission with time to review the findings of its study and to consider whether further action to improve the effectiveness and efficiency of Section 404 implementation is warranted;
- To provide the PCAOB additional time to promulgate its guidance for ICFR audits of smaller public companies; and
- To provide the auditors of non-accelerated filers additional time to consider such guidance.

B. Objectives

The proposed amendments aim to further the goals of the Sarbanes-Oxley Act to enhance the quality of public company disclosure concerning the company's internal control over financial reporting and increase investor confidence in the financial markets.

C. Legal Basis

We are issuing the proposals under the authority set forth in Section 19 of the Securities Act, Sections 3, 12, 13, 15, 23 and 36 of the Exchange Act, and Sections 3(a) and 404 of the Sarbanes-Oxley Act.

D. Small Entities Subject to the Proposed Amendments

The proposed changes would affect some issuers that are small entities. Exchange Act Rule 0-10(a)³¹ defines an issuer, other than an investment company, to be a "small business" or "small organization" if it had total assets of \$5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 issuers, other than registered investment companies, that may be considered small entities. The proposed amendments would

³¹ 17 CFR 240.0-10(a).

apply to any small entity that is subject to reporting under either Section 13(a) or 15(d) of the Exchange Act.

E. Reporting, Recordkeeping, and other Compliance Requirements

The proposed amendments would alleviate reporting and compliance burdens by postponing by an additional year the date by which non-accelerated filers must begin to comply with the auditor attestation report on ICFR in their annual reports.

F. Duplicative, Overlapping, or Conflicting Federal Rules

The ICFR requirements do not duplicate, overlap, or conflict with other federal rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The proposed amendments would establish a different compliance and reporting timetable for small entities. We believe that the proposed amendments would promote the primary goal of enhancing the quality of reporting and increasing investor confidence in the fairness and integrity of the securities markets. Therefore we do not believe exempting small entities from the proposed amendments would be appropriate.

H. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- The number of small entity issuers that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entity issuers discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if we adopt the proposed amendments, and will be placed in the same public file as comments on the proposed amendments themselves.

VII. STATUTORY AUTHORITY AND TEXT OF THE PROPOSED AMENDMENTS

The amendments described in this release are being proposed under the authority set forth in Section 19 of the Securities Act, Sections 3, 12, 13, 15, 23 and 36 of the Exchange Act, and Sections 3(a) and 404 of the Sarbanes-Oxley Act.

List of Subjects

17 CFR Part 210

Accountants, Accounting, Reporting and recordkeeping requirements, Securities.

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Parts 229 and 249

Reporting and recordkeeping requirements, Securities.

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, and 7201 et seq., and 18 U.S.C. 1350.

* * * * *

3. Section 228.308T is amended by revising the date “December 15, 2008” in the “Note to Item 308T” to read “March 15, 2009”.

PART 229 – STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K

4. The authority citation for Part 229 continues to read, in part, as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

5. Section 229.308T is amended by:

a. Revising the date “December 15, 2008” in the “Note to Item 308T” to read “December 15, 2009”; and

b. Revising the date “June 30, 2009” in paragraph (c) to read “June 30, 2010”.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

6. The general authority citation for Part 249 is revised to read as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

7. Form 20-F (referenced in §249.220f), Part II, Item 15T is amended by:
- a. Revising the date “December 15, 2008” in paragraph (2) to the “Note to Item 15T” to read “December 15, 2009”; and
 - b. Revising the date “June 30, 2009” in paragraph (d) to read “June 30, 2010”.

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

8. Form 40-F (referenced in §249.240f) is amended by:
- a. Revising the date “December 15, 2008” in “Instruction 3T(2)” to the “Instructions to paragraphs (b), (c), (d) and (e) of General Instruction B.(6)” to read “December 15, 2009”; and
 - b. Revising the date “June 30, 2009” in the paragraph following “Instruction 3T” to the “Instructions to paragraphs (b), (c), (d) and (e) of General Instruction B.(6)” to read “June 30, 2010”.

Note: The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

9. Form 10-Q (referenced in §249.308a) is amended by revising Item 4T to Part I to read as follows:

Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-Q

* * * * *

PART I – FINANCIAL INFORMATION

* * * * *

Item 4T. Controls and Procedures.

(a) If the registrant is neither a large accelerated filer nor an accelerated filer as those terms are defined in §240.12b-2 of this chapter, furnish the information required by Items 307 and 308T(b) of Regulation S-K (17 CFR 229.307 and 229.308T(b)) with respect to a quarterly report that the registrant is required to file for a fiscal year ending on or after December 15, 2007 but before December 15, 2009.

(b) This temporary Item 4T will expire on June 30, 2010.

* * * * *

10. Form 10-QSB (referenced in §249.308b) is amended by revising Item 3A(T) to Part I to read as follows:

Note: The text of Form 10-QSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-QSB

* * * * *

PART I – FINANACIAL INFORMATION

* * * * *

Item 3A(T). Controls and Procedures.

(a) Furnish the information required by Items 307 and 308T(b) of Regulation S-B (17 CFR 228.307 and 228.308T(b)) with respect to a quarterly report that the small business issuer is required to file for a fiscal year ending on or after December 15, 2007 but before October 31, 2008.

* * * * *

11. Form 10-K (referenced in §249.310) is amended by:

a. Revising the date “December 15, 2008” in paragraph (a) to Item 9A(T) to Part II to read “December 15, 2009”; and

b. Revising the date "June 30, 2009" in paragraph (b) to Item 9A(T) to Part II to read "June 30, 2010".

Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

12. Form 10-KSB (referenced in §249.310b) is amended by revising the date "December 15, 2008" in paragraph (a) to Item 8A(T) to Part II to read "March 15, 2009".

Note: The text of Form 10-KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

By the Commission.



Nancy M. Morris
Secretary

February 1, 2008

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 200

[Release No. 34-57262]

Delegation of Authority to the Director of the Division of Corporation Finance

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is amending its Rules of Organization and Program Management to delegate its authority to the Director of the Division of Corporation Finance to grant or deny exemptions pursuant to Section 36 of the Securities Exchange Act of 1934 from the requirement for registrants in connection with an annual meeting of security holders to furnish an annual report to security holders that contains audited financial statements as required by rules under the Exchange Act under certain limited circumstances. The delegation of authority is intended to conserve Commission resources by permitting the staff to review and act on exemptive applications under Section 36 when appropriate.

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Celeste M. Murphy, Special Counsel, at (202) 551-3440, Office of Mergers and Acquisitions, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

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SUPPLEMENTARY INFORMATION:

The Commission today announces an amendment to its Organization and Program Management Rules governing Delegations of Authority to the Director of the Division of Corporation Finance.¹ The amendment adds to Rule 30-1 a new paragraph (e)(18) authorizing the Director to grant or deny exemptions from the requirements of Rule 14a-3(b) and Rule 14c-3(a) under the Exchange Act, pursuant to Section 36 of the Exchange Act, for audited financial statements to be included in the annual report to be furnished to security holders in connection with an annual meeting of security holders.

A number of companies have faced the dilemma of being required to hold a meeting of security holders when they are unable to deliver current audited financial statements. These companies may be compelled to hold meetings of their security holders pursuant to the provisions of certain state corporation laws, despite the inability to comply with the requirements of Rule 14a-3(b) and Rule 14c-3(a) under the Exchange Act. Although these situations are infrequent, we recognize the need to flexibly address this conflict in limited circumstances.

Section 36(a) provides that “the Commission, by rule, regulation, or order, may 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 this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”²

¹ 17 CFR 200.30-1.

² 15 U.S.C. 78mm(a).

Section 4A(a) of the Exchange Act grants the Commission “the authority to delegate, by published order or rule, any of its functions to a division of the Commission.”³

The delegation of authority to the Director is intended to conserve Commission resources by permitting the staff, pursuant to Section 36(a), to review and act on applications for exemption from Rule 14a-3(b) and Rule 14c-3(a) in cases where upon examination, the matter does not appear to present significant issues that have not been addressed previously or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants that the Commission consider the matter. Nevertheless, the staff may submit matters to the Commission for consideration as it deems appropriate. In addition, under Section 4A(b) of the Exchange Act, the Commission retains discretionary authority to review upon its own initiative or, pursuant to Commission Rule 430, upon application by a party adversely affected, any exemption granted or denied by the Director pursuant to delegated authority.⁴

The Commission finds, in accordance with Section 553(b)(3)(A) of the Administrative Procedure Act,⁵ that this amendment relates solely to agency organization, procedure, or practice, and does not relate to a substantive rule. Accordingly, notice, opportunity for public comment, and publication of the amendment prior to its effective date are unnecessary.

³ 15 U.S.C. 78d-1(a).

⁴ For information concerning the filing of exemptive relief applications, see Exchange Act Release No. 39624 (February 5, 1998), 63 FR 8101 (February 18, 1998); 17 CFR 240.0-12.

⁵ 5 U.S.C. 553(b)(3)(A).

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

TEXT OF AMENDMENT

In accordance with the preamble, the Commission hereby amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 200 - - ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The authority citation for Part 200, Subpart A, continues to read in part as follows:

Authority: 15 U.S.C. 77o, 77s, 77sss, 78d, 78d-1, 78d-2, 78w, 78ll (d), 78mm, 80a-37, 80b-11, and 7202, unless otherwise noted.

* * * * *

2. Section 200.30-1 is amended by adding paragraph (e)(18) to read as follows:

§ 200.30-1 Delegation of authority to Director of Division of Corporation Finance.

* * * * *

(e) * * *

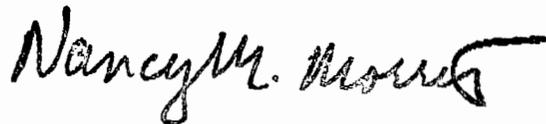
(18) To review and, either unconditionally or upon specified terms and conditions, grant or deny exemptions from the requirements of Rules 14a-3(b) and 14c-3(a) (§§ 240.14a-3(b) and 240.14c-3(a) of this chapter) under the Act pursuant to Section 36 of the Act, in cases where upon examination, the matter does not appear to the Director to present significant issues that have not been addressed previously or to raise questions of fact or policy indicating that the public interest or the interest of investors

warrants that the Commission consider the matter, where an applicant demonstrates that it:

- (i) Is required to hold a meeting of security holders as a result of an action taken by one or more of the applicant's security holders pursuant to state law;
 - (ii) Is unable to comply with the requirements of Rule 14a-3(b) or Rule 14c-3(a) under the Act for audited financial statements to be included in the annual report to security holders to be furnished to security holders in connection with the security holder meeting required to be held as a result of the security holder demand under state law;
 - (iii) Has made a good faith effort to furnish the audited financial statements before holding the security holder meeting;
 - (iv) Has made a determination that it has disclosed to security holders all available material information necessary for the security holders to make an informed voting decision in accordance with Regulation 14A or Regulation 14C (§§240.14a-1 – 240.14b-2 or §§240.14c-1 – 240.14c-101 of this chapter); and
- Absent a grant of exemptive relief, it would be forced to violate either state law or the rules and regulations administered by the Commission.

* * * * *

By the Commission.



Nancy M. Morris
Secretary

Dated: February 4, 2008

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 4, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12946

In the Matter of

A Novo Broadband, Inc.,
Acadia Group, Inc.,
Adva International, Inc.,
AHT Corp.,
Airtech International Group, Inc.,
Alliance Environmental
Technologies, Inc.
(f/k/a Spacial Corp.), and
Allou Healthcare, Inc.
(f/k/a Allou Health & Beauty
Care, 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").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. A Novo Broadband, Inc. ("A Novo") (CIK No. 893139) is a dissolved Delaware corporation located in New Castle, Delaware with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). A Novo 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, 2002, which reported a net loss of \$5.8 million for the prior nine months.

2. Acadia Group, Inc. ("Acadia") (CIK No. 1026491) is a dissolved Colorado corporation located in Auburn, Maine with a class of equity securities registered with the

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Commission pursuant to Exchange Act Section 12(g). Acadia 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, 2000, which reported a net loss of \$2.9 million for the prior nine months.

3. Adva International, Inc. (“Adva”) (CIK No. 807732) is a void Delaware corporation located in Charlotte, North Carolina with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Adva 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, 2002, which reported a net loss of \$590,113 for the prior six months.

4. AHT Corp. (“AHT”) (CIK No. 1002628) is a void Delaware corporation located in Tarrytown, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). AHT 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, 2000, which reported an operating loss of \$6.8 million for the prior six months.

5. Airtech International Group, Inc. (“Airtech”) (CIK No. 883041) is an inactive Wyoming corporation located in Washington, Virginia with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Airtech 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 February 28, 2002, which reported a net loss of \$4.1 million for the prior nine months. Airtech filed an invalid Form 15 on November 27, 2006, because it last reported approximately 2,000 shareholders of record.¹ As of October 18, 2007, the company’s common stock (symbol “AIRG”) was traded on the over-the-counter markets.

6. Alliance Environmental Technologies, Inc. (“Alliance”) (f/k/a Spacial Corp.) (CIK No. 1083371) is an inactive Delaware corporation located in Bronx, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Alliance 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, 2001.

7. Allou Healthcare, Inc. (f/k/a Allou Health & Beauty Care, Inc.) (“Allou”) (CIK No. 846538) is a void Delaware corporation located in Brentwood, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Allou 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 December 31, 2002. On April 18, 2003, Allou filed a Chapter 7 petition with the U.S. Bankruptcy Court for the Eastern District of New York, and the case is still pending. As of October

¹Exchange Act Rule 12g-4 requires that a domestic issuer certify on its Form 15 that the securities are held of record by less than 300 persons, or by less than 500 persons where the total assets of the issuer have not exceeded \$10 million on the last day of each of the issuer’s three most recent fiscal years.

18, 2007, the company's stock (symbol "ALUHQ") was quoted on the Pink Sheets and had two market makers.

B. DELINQUENT PERIODIC FILINGS

8. 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.

9. 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).

10. 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: **Jill M. Peterson**
Assistant Secretary

**Chart of Delinquent Filings
A Novo Broadband, Inc., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
A Novo Broadband, Inc.					
	10-KSB	09/30/02	12/30/02	Not filed	61
	10-QSB	12/31/02	02/14/03	Not filed	59
	10-QSB	03/31/03	05/15/03	Not filed	56
	10-QSB	06/30/03	08/14/03	Not filed	53
	10-KSB	09/30/03	12/29/03	Not filed	49
	10-QSB	12/31/03	02/16/04	Not filed	47
	10-QSB	03/31/04	05/17/04	Not filed	44
	10-QSB	06/30/04	08/16/04	Not filed	41
	10-KSB	09/30/04	12/29/04	Not filed	37
	10-QSB	12/31/04	02/14/05	Not filed	35
	10-QSB	03/31/05	05/16/05	Not filed	32
	10-QSB	06/30/05	08/15/05	Not filed	29
	10-KSB	09/30/05	12/29/05	Not filed	25
	10-QSB	12/31/05	02/14/06	Not filed	23
	10-QSB	03/31/06	05/15/06	Not filed	20
	10-QSB	06/30/06	08/14/06	Not filed	17
	10-KSB	09/30/06	12/29/06	Not filed	13
	10-QSB	12/31/06	02/14/07	Not filed	11
	10-QSB	03/31/07	05/15/07	Not filed	8
	10-QSB	06/30/07	08/14/07	Not filed	5
	10-KSB	09/30/07	12/31/07	Not filed	1
Total Filings Delinquent		21			
Acadia Group, Inc.					
	10-QSB	12/31/00	02/14/01	Not filed	83
	10-QSB	03/31/01	05/15/01	Not filed	80
	10-QSB	06/30/01	08/14/01	Not filed	77
	10-KSB	09/30/01	12/31/01	Not filed	73
	10-QSB	12/31/01	02/14/02	Not filed	71
	10-QSB	03/31/02	05/15/02	Not filed	68
	10-QSB	06/30/02	08/14/02	Not filed	65

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Acadia Group, Inc.					
	10-KSB	09/30/02	12/30/02	Not filed	61
	10-QSB	12/31/02	02/14/03	Not filed	59
	10-QSB	03/31/03	05/15/03	Not filed	56
	10-QSB	06/30/03	08/14/03	Not filed	53
	10-KSB	09/30/03	12/29/03	Not filed	49
	10-QSB	12/31/03	02/17/04	Not filed	47
	10-QSB	03/31/04	05/17/04	Not filed	44
	10-QSB	06/30/04	08/16/04	Not filed	41
	10-KSB	09/30/04	12/29/04	Not filed	37
	10-QSB	12/31/04	02/14/05	Not filed	35
	10-QSB	03/31/05	05/16/05	Not filed	32
	10-QSB	06/30/05	08/15/05	Not filed	29
	10-KSB	09/30/05	12/29/05	Not filed	25
	10-QSB	12/31/05	02/14/06	Not filed	23
	10-QSB	03/31/06	05/15/06	Not filed	20
	10-QSB	06/30/06	08/14/06	Not filed	17
	10-KSB	09/30/06	12/29/06	Not filed	13
	10-QSB	12/31/06	02/14/07	Not filed	11
	10-QSB	03/31/07	05/15/07	Not filed	8
	10-QSB	06/30/07	08/14/07	Not filed	5
	10-KSB	09/30/07	12/31/07	Not filed	1

Total Filings Delinquent 28

Adva International, Inc.

10-QSB	12/31/02	02/14/03	Not filed	59
10-KSB	03/31/03	06/30/03	Not filed	55
10-QSB	06/30/03	08/14/03	Not filed	53
10-QSB	09/30/03	11/14/03	Not filed	50
10-QSB	12/31/03	02/17/04	Not filed	47
10-KSB	03/31/04	06/29/04	Not filed	43
10-QSB	06/30/04	08/16/04	Not filed	41
10-QSB	09/30/04	11/15/04	Not filed	38
10-QSB	12/31/04	02/14/05	Not filed	35
10-KSB	03/31/05	06/29/05	Not filed	31
10-QSB	06/30/05	08/15/05	Not filed	29
10-QSB	09/30/05	11/14/05	Not filed	26

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Adva International, Inc.					
	10-QSB	12/31/05	02/14/06	Not filed	23
	10-KSB	03/31/06	06/29/06	Not filed	19
	10-QSB	06/30/06	08/14/06	Not filed	17
	10-QSB	09/30/06	11/14/06	Not filed	14
	10-QSB	12/31/06	02/14/07	Not filed	11
	10-KSB	03/31/07	06/29/07	Not filed	7
	10-QSB	06/30/07	08/14/07	Not filed	5
	10-QSB	09/30/07	11/14/07	Not filed	2
Total Filings Delinquent		20			

AHT Corp.

10-K	09/30/00	12/29/00	Not filed	85
10-Q	12/31/00	02/14/01	Not filed	83
10-Q	03/31/01	05/15/01	Not filed	80
10-Q	06/30/01	08/14/01	Not filed	77
10-K	09/30/01	12/31/01	Not filed	73
10-Q	12/31/01	02/14/02	Not filed	71
10-Q	03/31/02	05/15/02	Not filed	68
10-Q	06/30/02	08/14/02	Not filed	65
10-K	09/30/02	12/30/02	Not filed	61
10-Q	12/31/02	02/14/03	Not filed	59
10-Q	03/31/03	05/15/03	Not filed	56
10-Q	06/30/03	08/14/03	Not filed	53
10-K	09/30/03	12/29/03	Not filed	49
10-Q	12/31/03	02/17/04	Not filed	47
10-Q	03/31/04	05/17/04	Not filed	44
10-Q	06/30/04	08/16/04	Not filed	41
10-K	09/30/04	12/29/04	Not filed	37
10-Q	12/31/04	02/14/05	Not filed	35
10-Q	03/31/05	05/16/05	Not filed	32
10-Q	06/30/05	08/15/05	Not filed	29
10-K	09/30/05	12/29/05	Not filed	25
10-Q	12/31/05	02/14/06	Not filed	23
10-Q	03/31/06	05/15/06	Not filed	20
10-Q	06/30/06	08/14/06	Not filed	17
10-K	09/30/06	12/29/06	Not filed	13

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
AHT Corp.					
	10-Q	12/31/06	02/14/07	Not filed	11
	10-Q	03/31/07	05/15/07	Not filed	8
	10-Q	06/30/07	08/14/07	Not filed	5
	10-K	09/30/07	12/31/07	Not filed	1
Total Filings Delinquent	29				
Airtech International Group, Inc.					
	10-K	05/31/02	08/29/02	Not filed	65
	10-Q	08/31/02	10/15/02	Not filed	63
	10-Q	11/30/02	01/14/03	Not filed	60
	10-Q	02/28/03	04/14/03	Not filed	57
	10-K	05/31/03	08/29/03	Not filed	53
	10-Q	08/31/03	10/15/03	Not filed	51
	10-Q	11/30/03	01/14/04	Not filed	48
	10-Q	02/28/04	04/14/04	Not filed	45
	10-K	05/31/04	08/30/04	Not filed	41
	10-Q	08/31/04	10/15/04	Not filed	39
	10-Q	11/30/04	01/14/05	Not filed	36
	10-Q	02/28/05	04/14/05	Not filed	33
	10-K	05/31/05	08/29/05	Not filed	29
	10-Q	08/31/05	10/15/05	Not filed	27
	10-Q	11/30/05	01/14/06	Not filed	24
	10-Q	02/28/06	04/14/06	Not filed	21
	10-K	05/31/06	08/29/06	Not filed	17
	10-Q	08/31/06	10/15/06	Not filed	15
	10-Q	11/30/06	01/14/07	Not filed	12
	10-Q	02/28/07	04/14/07	Not filed	9
	10-K	05/31/07	08/29/07	Not filed	5
	10-Q	08/31/07	10/15/07	Not filed	3
Total Filings Delinquent	22				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Alliance Environmental Technologies, Inc. (f/k/a Spacial Corp.)					

10-KSB	09/30/01	12/31/01	Not filed	73
10-QSB	12/31/01	02/14/02	Not filed	71
10-QSB	03/31/02	05/15/02	Not filed	68
10-QSB	06/30/02	08/14/02	Not filed	65
10-KSB	09/30/02	12/30/02	Not filed	61
10-QSB	12/31/02	02/14/03	Not filed	59
10-QSB	03/31/03	05/15/03	Not filed	56
10-QSB	06/30/03	08/14/03	Not filed	53
10-KSB	09/30/03	12/29/03	Not filed	49
10-QSB	12/31/03	02/17/04	Not filed	47
10-QSB	03/31/04	05/17/04	Not filed	44
10-QSB	06/30/04	08/16/04	Not filed	41
10-KSB	09/30/04	12/29/04	Not filed	37
10-QSB	12/31/04	02/14/05	Not filed	35
10-QSB	03/31/05	05/16/05	Not filed	32
10-QSB	06/30/05	08/15/05	Not filed	29
10-KSB	09/30/05	12/29/05	Not filed	25
10-QSB	12/31/05	02/14/06	Not filed	23
10-QSB	03/31/06	05/15/06	Not filed	20
10-QSB	06/30/06	08/14/06	Not filed	17
10-KSB	09/30/06	12/29/06	Not filed	13
10-QSB	12/31/06	02/14/07	Not filed	11
10-QSB	03/31/07	05/15/07	Not filed	8
10-QSB	06/30/07	08/14/07	Not filed	5
10-KSB	09/30/07	12/31/07	Not filed	1

Total Filings Delinquent

25

**Allou Healthcare, Inc.
(f/k/a Allou Health & Beauty Care, Inc.)**

10-KSB	03/31/03	06/30/03	Not filed	55
10-QSB	06/30/03	08/14/03	Not filed	53
10-QSB	09/30/03	11/14/03	Not filed	50
10-QSB	12/31/03	02/17/04	Not filed	47
10-KSB	03/31/04	06/29/04	Not filed	43

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Allou Healthcare, Inc. <i>(f/k/a Allou Health & Beauty Care, Inc.)</i>	<i>10-QSB</i>	06/30/04	08/16/04	Not filed	41
	<i>10-QSB</i>	09/30/04	11/15/04	Not filed	38
	<i>10-QSB</i>	12/31/04	02/14/05	Not filed	35
	<i>10-KSB</i>	03/31/05	06/29/05	Not filed	31
	<i>10-QSB</i>	06/30/05	08/15/05	Not filed	29
	<i>10-QSB</i>	09/30/05	11/14/05	Not filed	26
	<i>10-QSB</i>	12/31/05	02/14/06	Not filed	23
	<i>10-KSB</i>	03/31/06	06/29/06	Not filed	19
	<i>10-QSB</i>	06/30/06	08/14/06	Not filed	17
	<i>10-QSB</i>	09/30/06	11/14/06	Not filed	14
	<i>10-QSB</i>	12/31/06	02/14/07	Not filed	11
	<i>10-KSB</i>	03/31/07	06/29/07	Not filed	7
	<i>10-QSB</i>	06/30/07	08/14/07	Not filed	5
	<i>10-QSB</i>	09/30/07	11/14/07	Not filed	2
	Total Filings Delinquent		19		

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57266 / February 4, 2008

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2700 / February 4, 2008

Admin. Proc. File No. 3-12323

In the Matter of

JEFFREY L. GIBSON
c/o Timothy R. Simonds
Presley & Simonds
1612 Gunbarrel Road
Suite 102
Chattanooga, Tennessee 37421

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING
INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violations of the federal securities laws.
Held, it is in the public interest to bar respondent from association with a broker or dealer
or investment adviser.

APPEARANCES:

Timothy R. Simonds and Buddy B. Presley, Jr., of Presley & Simonds, for Jeffrey L.
Gibson.

Alana R. Black, for the Division of Enforcement.

Appeal filed: October 13, 2006
Last brief received: January 18, 2007
Oral Argument: January 30, 2008

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I.

Jeffrey L. Gibson, a part owner and associated person of Gibson Gaither Wealth Management Advisors, an investment adviser, and, during the period at issue, an associated person with H. Beck, Inc., 1/ a broker-dealer, appeals from an initial decision of an administrative law judge. 2/ The law judge found that Gibson had been enjoined from violating antifraud provisions of the securities laws. Based on that injunction, the law judge barred Gibson from associating with any broker or dealer or investment adviser. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

In August 2005, the Commission filed an injunctive complaint (the "Complaint") against Gibson and a company he wholly owned and controlled, Investment Property Management, LLC ("IPM"), in the United States District Court for the Northern District of Georgia. The Complaint alleged that Gibson and IPM violated Section 17(a) of the Securities Act of 1933, 3/ Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5, 4/ and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940, 5/ between 2002 and 2005, in connection with the offer and sale of limited partnership interests in American Car Wash Fund, LP ("ACW"). The Complaint alleged that Gibson formed ACW in November 2002 to buy and manage coin-operated car-wash businesses in northern Georgia and that, through IPM, Gibson sold forty-three limited-partnership interests raising approximately \$875,000. In addition, the Complaint alleged that "[a]pproximately 38 of the limited partners were also clients of Gibson's advisory business."

The Complaint further alleged that "[a]most as soon as he began selling interests in ACW, Gibson began misappropriating investor funds for his use." According to the Complaint, Gibson wrote checks payable to cash on ACW bank accounts, ultimately misappropriating "a total of approximately \$450,000." Although not detailed in the Complaint, Gibson has asserted, and the Division of Enforcement ("the Division") does not dispute, that these funds were used to

1/ Records of the Central Registration Depository reflect that Gibson was a registered representative with H. Beck, Inc. until July 2, 2006.

2/ Jeffrey L. Gibson, Initial Decision Rel. No. 319 (Sept. 22, 2006), 88 SEC Docket 3410.

3/ 15 U.S.C. § 77q(a).

4/ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

5/ 15 U.S.C. §§ 80b-6(1), (2).

purchase certain otherwise unidentified commercial real property. ^{6/} According to the Complaint, the private placement memorandum ("PPM") that Gibson provided to prospective investors "stated that after organizational expenses, investors' funds would be invested in money market funds or government securities until the funds could be invested in projects." Gibson's actions in misappropriating these funds, the Complaint stated, were "contrary to representations made to investors by Gibson concerning the intended use of investors' funds" and "exceeded any payments to which [Gibson and IPM] may have been entitled under the" PPM. The PPM was never amended to reflect the actual use of the funds.

The Complaint alleged that the misappropriations continued up to the time the Complaint was filed. The Complaint also alleged that "[s]ubsequent to the sales of securities," Gibson and IPM sought to "lull investors into believing that their investments [were] profitable and to conceal the misappropriation of funds" by sending letters to the investors describing "annualized rates of return, dividends and purchases of various properties" without disclosing "the ongoing misuse of proceeds by" Gibson and IPM. In response to questioning at oral argument, counsel for Gibson acknowledged that Gibson made misrepresentations to investors with respect to the disposition of the offering's proceeds.

In lieu of trial, Gibson and IPM consented, without admitting or denying the allegations of the Complaint, to entry of the injunction against them, agreeing as part of the settlement that "in any disciplinary proceeding before the Commission based on the entry of the injunction . . . [they] underst[ood] that they [would] not be permitted to contest the factual allegations of the [Complaint]." Gibson and IPM further agreed "not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the [Complaint] or creating the impression that the [Complaint] is without factual basis; and . . . [to] withdraw any papers filed in this [injunctive] action to the extent that they deny any allegation in the [Complaint]." ^{7/} After Gibson executed the consent agreement for himself and IPM, the district court permanently enjoined Gibson from violating the antifraud provisions of the securities laws, ordered him to pay a civil penalty of \$25,000 and to disgorge \$427,701.73 in ill-gotten gains, and enjoined Gibson and IPM from serving as a general partner or otherwise controlling ACW either "directly or through any entity under their control." ^{8/} Gibson subsequently liquidated assets

^{6/} At oral argument, counsel for Gibson stated that the properties were held in the name of "Gibson Properties, LLC." Neither the record nor the parties at oral argument address the ownership or structure of Gibson Properties.

^{7/} The consent agreement also provided that it did not affect Gibson's and IPM's "(i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party."

^{8/} SEC v. Gibson, 4:05-CV-163-RLV (N.D. Ga. May 9, 2006). The Complaint alleged that the misappropriations totaled approximately \$450,000 and requested that Gibson be

(continued...)

purchased with the misappropriated investors' funds and used the proceeds to pay the court-ordered civil penalty and disgorgement.

On June 6, 2006, we initiated this administrative proceeding on the basis of the injunction pursuant to Exchange Act Section 15(b) and Advisers Act Section 203(f). ^{9/} Gibson admitted in his answer to the Order Instituting Proceedings that he was associated with a broker-dealer and an investment adviser and that an injunction had been entered against him in connection with the purchase or sale of securities.

After two pre-hearing conferences, the Division moved for summary disposition pursuant to Commission Rule of Practice 250, relying on the allegations of the Complaint and the injunction. ^{10/} Gibson attached his own declaration and declarations from thirty-one ACW investors (the "Investor Declarations") to his brief in opposition to the Division's motion. Gibson's declaration stated that he had a clean disciplinary record, that he cooperated with the Commission's investigation, and that he paid the fine and disgorgement ordered by the district court. The Investor Declarations, each in the form of an ACW partnership resolution, were substantively identical to each other, and noted, among other things, that the declarant had reviewed Gibson's answer to the Complaint. Each declarant also marked boxes to indicate his or her agreement with two preprinted statements, one "ratify[ing]" all of Gibson's actions with respect to ACW, and the other stating that the declarant "accept[ed] the Services of [Gibson] . . . and request[ed] that [Gibson] continue to act on [his or her] behalf as Investment Adviser." The law judge granted the Division's motion for summary disposition, finding that Gibson had failed to create a genuine dispute of material fact. Concluding that "Gibson's misappropriation of investor funds shows a lack of honesty and judgment and indicates that he is unsuited to function in the securities industry," the law judge determined that the public interest required that Gibson be barred.

III.

A. Exchange Act Sections 15(b)(6) and 15(b)(4)(C) and Advisers Act Sections 203(f) and 203(e)(4) authorize us to sanction any person associated with a broker or dealer or investment adviser who has been enjoined from "engaging in or continuing any conduct or

^{8/} (...continued)
directed to provide an accounting of the entire \$875,000 raised. As part of the settlement, Gibson agreed to pay \$427,701.73 in disgorgement. On July 11, 2006, the district court issued an order that increased the disgorgement amount ordered to \$427,760.23, to reflect the total amount paid by Gibson.

^{9/} 15 U.S.C. §§ 78o(b), 80b-3(f).

^{10/} 17 C.F.R. § 201.250.

practice in connection with the purchase or sale of any security." ^{11/} The record establishes, and Gibson does not dispute, that, at the time at issue, he was associated with a broker-dealer and an investment adviser and that an injunction has been entered against his engaging in conduct in connection with the purchase or sale of securities. We find, therefore, that the statutory requirements for the imposition of sanctions have been satisfied.

In assessing the need for sanctions in the public interest, we consider the following factors: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. ^{12/}

As part of his settlement, Gibson agreed not to contest the factual matters raised in the underlying injunctive proceeding in any subsequent Commission proceeding based on the injunction. Although Gibson does not challenge the allegations of misconduct, he asserts that a bar in this case is "an overly excessive disciplinary sanction." He argues that "a fine and/or short-term suspension would be the most severe punishment warranted under the Steadman factors in this case."

We disagree with Gibson and find that a consideration of the Steadman factors supports the law judge's determination to impose a bar. Gibson's conduct was egregious. He was enjoined based on allegations that he misappropriated approximately \$450,000 from a group of investors, many of whom were his investment advisory clients to whom he owed a fiduciary duty. ^{13/} Gibson misappropriated funds by writing checks on ACW's account made payable to "cash," which made it more difficult to detect his misconduct. He continued to solicit funds using a PPM that he knew misstated the use of the proceeds. Also during this period, he sent the investors lulling communications, and, as his counsel acknowledged, he misrepresented how the proceeds were being used.

We believe that a consideration of the second Steadman factor, the isolated or recurrent nature of the misconduct, supports the imposition of a bar. Gibson's misappropriations occurred

^{11/} 15 U.S.C. §§ 78o(b)(6), 78o(b)(4)(C), 80b-3(f), and § 80b-3(e)(4).

^{12/} Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979).

^{13/} An investment adviser has a fiduciary role that imposes "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation to employ reasonable care to avoid misleading clients." Michael Batterman, Investment Advisers Act Rel. No. 2334 (Dec. 3, 2004), 84 SEC Docket 1349, 1359 (footnotes omitted) (quoting Capital Gains Research Bureau v. SEC, 375 U.S. 180, 194 (1963)), aff'd, No. 05-0404 (2d Cir. 2003).

over three years and, as discussed above, involved several, different types of misconduct. They also involved a large number of his clients.

As to the third Steadman factor, we believe his actions evince a high degree of scienter. He used the PPM to solicit investments for three years although he knew the PPM's representations with respect to the use of proceeds were misleading and that his actions were clearly contrary to those representations. He also took actions to disguise his conduct, both by writing checks to cash and lulling his investors. Moreover, Gibson's conduct did not stop until we filed the Complaint.

Gibson states that two of the Steadman factors weigh in his favor because he understands the wrongfulness of his past conduct and is sincere in his assurances against future violations. Gibson further points to various circumstances which he claims are mitigating, including his settlement of the injunctive action, his cooperation with our staff investigation of this matter once his conduct was discovered, and his prompt payment of the fine and disgorgement amounts ordered by the district court. "All these facts," according to Gibson, "show [his] good faith and sincere efforts . . . to rectify and correct his actions . . . [and his recognition] of the wrongful nature of his past conduct." Gibson further asserts that "no loss was suffered by Gibson's investors/customers" and that those investors have "shown their support for him" by executing the Investor Declarations and agreeing to testify on his behalf. Finally, he notes that he has no prior disciplinary history during more than twenty-five years in the securities industry, which, he claims, supports a finding that he is unlikely to commit future violations.

While we do not dispute Gibson's assertions regarding his acknowledgment of wrongdoing and his assurances against future misconduct, those assertions do not overcome the other factors that indicate the gravity of the threat to investors that Gibson would present if he were permitted to remain in the securities industry. Although Gibson eventually cooperated in the investigation of this matter, he had earlier taken steps to prevent detection of the fraud. Moreover, although Gibson was ultimately able to liquidate the property that had been improperly acquired with the misappropriated funds, and thereby pay the amounts ordered by the district court, we do not believe that Gibson deserves much credit for this result. ^{14/} Funds that the investors believed would be held in low-risk money-market instruments pending investment in the car-wash ventures specified in the PPM were, instead, used without notice or disclosure to purchase unrelated commercial real property held by Gibson Properties. Gibson's actions exposed his investors to risks of which they were never aware and to which they had not agreed beforehand.

While many of ACW's investors executed declarations in support of Gibson, several of those investors apparently did not do so, and their opinions are unknown. In any event, we do not believe that the views of the investors who executed the Investor Declarations should be

^{14/} The record contains no information regarding the ultimate return, if any, realized through an investment in ACW.

determinative. As we have held, we look beyond the interests of particular investors, in assessing the need for sanctions, to the protection of investors generally. ^{15/} Moreover, like the Division, we believe that Gibson's ability to retain the support of his investors under the circumstances of this case is a testament to his persuasiveness and increases our concern about his potential to engage in similar misconduct in the future. ^{16/}

Nor do we consider his prior disciplinary record determinative. ^{17/} Although the record contains no evidence of past misconduct by Gibson, his actions here cannot be characterized as isolated. As mentioned, the misappropriations occurred over a three-year period, beginning while Gibson was still selling the partnership interests at issue, using a PPM that did not disclose his actual use of the funds, and not ending until after the Division filed the injunctive action. Gibson thus engaged in repeated fraudulent conduct over an extended period, suggesting the likelihood of future misconduct.

The final Steadman factor also supports a decision to bar Gibson. We believe that Gibson's twenty-five-year career in the securities industry and professional credentials suggest that Gibson would, if permitted, continue to work in the securities industry and that, in doing so,

^{15/} Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2003) (stating that public interest analysis extends beyond interests of particular group of investors), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975) (stating that "we must weigh the effect of our action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally"). In any event, ratifications of fraudulent conduct do not limit our ability to sanction that conduct. Wilshire Discount Secs., 51 S.E.C. 547, 551 n.15 (1993) ("[E]ven assuming that certain investors ratified or endorsed [respondent]'s action, that would not alter the objective fact that [respondent] fraudulently departed from the . . . stated use of proceeds.").

^{16/} Gibson objects that the law judge improperly discounted the value of the Investor Declarations based on what Gibson claimed was the law judge's "mere speculation unsupported by the record" that Gibson, contrary to a provision in the injunctive settlement, "provided a copy of his Answer in [the injunctive action] to investors after he agreed to withdraw it." Whether or not Gibson used his answer in violation of his settlement of the injunctive proceeding, the Investor Declarations that he procured expressly reference the answer, calling into question his claim that he recognizes the wrongfulness of his conduct.

^{17/} Marshall E. Melton, 56 S.E.C. 695, 708 (2003) (imposing bar based on antifraud injunction despite clean disciplinary record); Martin R. Kaiden, 54 S.E.C. 194, 209 (1998) (same); see also Robert Bruce Lohman, 56 S.E.C. 573, 582 (2003) (imposing bar in insider-trading proceeding despite clean disciplinary record).

would be presented with further opportunities to engage in misconduct. 18/ In assessing the potential effects on the public interest, we consider it significant that, as part of his fraudulent scheme, Gibson targeted clients from his investment advisory business. Gibson's willingness to exploit his position as an investment adviser -- which placed him in a fiduciary relationship with his advisory clients 19/ -- underscores his lack of integrity and unfitness to remain in the securities industry.

B. We now turn to Gibson's objection to the law judge's grant of the Division's motion for summary disposition. Gibson contends that, by granting the motion for summary disposition, the law judge prevented him from presenting "a considerable amount" of evidence -- as yet unidentified, but presumably including his own testimony and the testimony of ACW investors -- with relevance to the sanctioning determination. According to Gibson, "the application of the Steadman factors (such as sincerity of assurances against future wrongdoing, recognition of wrongdoing, etc), is 'in large part, based on a credibility determination by the Administrative Law Judge' made during an evidentiary hearing on the merits."

We find nothing inappropriate about the grant of summary disposition here. Our Rules of Practice provide that a law judge may grant summary disposition where "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 20/ Use of the summary disposition procedure has been repeatedly upheld in cases such as this one where the respondent has been enjoined or convicted, and the sole determination concerns the appropriate sanction. 21/ As we observed in Conrad P.

18/ See Charles Phillip Elliott, 50 S.E.C. 1273, 1276 (1992) (stating that the securities industry is "a business that presents many opportunities for abuse and overreaching"), aff'd, 36 F.3d 86 (11th Cir. 1994) (per curiam).

19/ See, e.g., SEC v. Washington Inv. Network, 475 F.3d 392, 404 (D.C. Cir. 2007) (stating that investment advisers act "as fiduciaries" to their clients); see also SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963) (stating that an investment adviser has "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients").

20/ Rule of Practice 250(b), 17 C.F.R. § 201.250(b).

21/ See, e.g., Jose Zollino, Securities Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598; Batterman, 84 SEC Docket 1356; Charles Trento, Securities Act Rel. No. 8391 (Feb. 23, 2004), 82 SEC Docket 785; Joseph P. Galluzzi, 55 S.E.C. 1110 (2002); John S. Brownson, 55 S.E.C. 1023 (2002), petition denied, 66 Fed. Appx. 687 (9th Cir. 2003). In Brownson, we observed, as Gibson notes, that summary disposition is not appropriate where the respondent "may present genuine issues with respect to facts that

(continued...)

Seghers, 22/ "courts have upheld summary disposition where no genuine issue of material fact is in dispute. 23/ In addition, courts have sustained Commission findings that sanctions were in the public interest following administrative hearings based on summary disposition. 24/"

Rule of Practice 250(a) gives an advantage to the party opposing summary disposition: "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true" 25/ Once the Division's motion showed that it had satisfied the criteria for summary disposition, Gibson was required to produce documents, affidavits or some other evidence to demonstrate that there was a genuine and material factual dispute that the law judge could not resolve without a hearing. 26/ Gibson failed to produce such evidence.

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- 21/ (...continued)
could mitigate his or her misconduct" Brownson, 55 S.E.C. at 1028 n.12. However, we also observed in Brownson, which found no error in the law judge's grant of summary disposition, that "those cases [in which summary disposition in a follow-on proceeding involving fraud is inappropriate] will be rare." Id.
- 22/ Advisers Act Rel. No. 2656 (Sept. 26, 2007), __ SEC Docket __ (footnotes in original), appeal filed, No. 07-1478 (D.C. Cir. Nov. 27, 2007).
- 23/ See, e.g., Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743, 750 (6th Cir. 2004) ("[I]t would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact."); Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 606-11 (1st Cir. 1994) (affirming generally the validity of summary disposition procedures in the administrative context and stating that a grant of summary disposition is proper when there fails to be a genuine issue of material fact); cf. Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607-08 (D.C. Cir. 1987) (affirming the Agriculture Department's denial of an evidentiary hearing under its procedural rules, which allowed the Department to "dispense with a hearing when no answer is filed," because there was no material issue of fact).
- 24/ See, e.g., Brownson v. SEC, 66 Fed. Appx. 687, 688 (9th Cir. 2003) (unpublished decision denying petition for review) (upholding the use of summary disposition under Rule of Practice 250 during sanctioning proceedings); Michael Batterman, Advisers Act Rel. No. 2334 (Dec. 3, 2004), 84 SEC Docket 1349, 1355-56, aff'd, No. 05-0404 (2d Cir. 2005) (unpublished).
- 25/ Rule of Practice 250(a), 17 C.F.R. § 201.250(a).
- 26/ Rule 56 of the Federal Rules of Civil Procedure does not govern Commission administrative proceedings, but cases construing it clarify the obligations a motion for summary disposition places on the party opposing it. Under Rule 56, once the moving
(continued...)

Gibson was not denied an opportunity to present evidence but, in fact, as part of the summary disposition procedure, was called upon to present evidence so that the law judge could determine whether he could "present genuine issues with respect to facts" that could mitigate his misconduct. ^{27/} The evidence that Gibson produced did not create a genuine factual issue with respect to sanctions or any other material issue in the case.

Gibson contends that his acknowledgment of his misconduct and assurances of no further misconduct required a hearing to assess his credibility. However, as discussed, we have accepted Gibson's assertions, but nevertheless have determined that they do not outweigh the other Steadman factors that weigh in favor of barring Gibson from continuing in the industry.

When, at oral argument, Gibson's counsel was asked to identify disputed factual matters, he only referred to what he claimed was the law judge's improper finding that Gibson had contravened the terms of the settlement agreement by providing his answer to the Complaint to investors who signed declarations. Gibson's brief asserts that the record contains no evidence regarding the "circumstances surrounding the investors' receipt and review of the pleadings and their execution of the written declarations." He argues that, in the absence of such evidence, the law judge's conclusion that Gibson acted improperly in using the answer in obtaining the Investor Declarations is "unsupported by the record." ^{28/} We do not need to decide this issue, however, because we do not base our determination to bar Gibson on his possible misuse of the answer.

Gibson's declaration addresses his clean disciplinary record, cooperation, and his prompt payment of the civil penalty and disgorgement, but those facts were not disputed. The Investor Declarations, which purport to ratify Gibson's actions and express the declarants' preference that Gibson remain their investment adviser, were taken to be true for the purposes of the motion. Hence, it is difficult to see how live testimony regarding the investors' attitude toward Gibson would affect the sanctioning determination. While Gibson asserts that he has additional evidence to present at an evidentiary hearing, he failed before the law judge and fails now to identify that

^{26/} (...continued)
party has carried its burden of establishing its entitlement to judgment on the factual record, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon mere allegations or denials in its submissions to the judge to create a genuine issue.

^{27/} See Brownson, 55 S.E.C. at 1028 n.12 (approving summary disposition when respondent failed to identify "genuine issues with respect to facts that could mitigate his . . . misconduct").

^{28/} See supra note 16.

evidence or show how it would create a genuine issue regarding mitigation. Therefore, we find no error in the law judge's grant of summary disposition.

* * * *

Gibson's injunction, based on allegations that he had defrauded forty-three investors of approximately \$450,000 over a three-year period in a manner designed to avoid detection, raises significant doubts about his fitness to remain in the securities industry. Antifraud injunctions have especially serious implications for the public interest. 29/ As we have held, "an antifraud injunction can . . . indicate the appropriateness in the public interest" of a bar from participation in the securities industry. 30/ As we have also held, "[f]idelity to the public interest" requires a severe sanction when a respondent's misconduct involves fraud because the "securities business is one in which opportunities for dishonesty recur constantly." 31/ Under the circumstances, therefore, we have determined that barring Gibson serves the public interest. 32/

An appropriate order will issue. 33/

By the Commission (Chairman COX and Commissioners ATKINS, NAZARETH, and CASEY).


Nancy M. Morris
Secretary

29/ See Michael T. Studer, Exchange Act Rel. No. 50411 (Sept. 20, 2004), 83 SEC Docket 2853, 2861 (stating that "the fact that a person has been enjoined from violating antifraud provisions 'has especially serious implications for the public interest'"); Melton, 56 S.E.C. at 713 ("Based on our experience enforcing the federal securities laws, we believe that ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to . . . suspend or bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions.")

30/ Batterman, 84 SEC Docket at 1358-59.

31/ Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

32/ See Batterman, 84 SEC Docket at 1349 (respondents in follow-on case barred based on antifraud injunction); Studer, 83 SEC Docket at 2853 (same); Nolan Wayne Wade, 56 S.E.C. 748 (2003) (same); Lowry, 55 S.E.C. at 1133 (same).

33/ 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. 57266 / February 4, 2008

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2700 / February 4, 2008

Admin. Proc. File No. 3-12323

In the Matter of

JEFFREY L. GIBSON
c/o Timothy R. Simonds
Presley & Simonds
1612 Gunbarrel Road
Suite 102
Chattanooga, Tennessee 37421

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Jeffrey L. Gibson be barred from association with any broker or dealer;
and it is further

ORDERED that Jeffrey L. Gibson be barred from association with any investment
adviser.

By the Commission.


Nancy M. Morris
Secretary

*Chairman Cox and
Commissioner Nezhareth
Not Participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8890 / February 5, 2008

SECURITIES EXCHANGE ACT OF 1934
Release No. 57271 / February 5, 2008

INVESTMENT ADVISERS ACT OF 1940
Release No. 2701 / February 5, 2008

INVESTMENT COMPANY ACT OF 1940
Release No. 28142 / February 5, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12947

In the Matter of

**RITCHIE CAPITAL
MANAGEMENT L.L.C., RITCHIE
MULTI-STRATEGY GLOBAL
TRADING, LTD., A.R. THANE
RITCHIE, AND WARREN LOUIS
DEMAIO**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST
ORDER PURSUANT TO SECTION 8A OF
THE SECURITIES ACT OF 1933,
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, SECTIONS
203(e) AND 203(f) OF THE INVESTMENT
ADVISERS ACT OF 1940, AND SECTIONS
9(b) AND 9(f) OF THE INVESTMENT
COMPANY ACT OF 1940**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Ritchie Capital Management L.L.C., Ritchie Multi-Strategy Global Trading, Ltd., A.R. Thane Ritchie, and Warren Louis DeMaio, pursuant to Section 203(e) of the Investment Advisers Act of 1940 ("Investment Advisers Act") against Ritchie Capital Management LLC and Ritchie Multi-Strategy Global Trading Ltd., and

pursuant to Section 203(f) of the Investment Advisers Act against A.R. Thane Ritchie and Warren Louis DeMaio.

II.

In anticipation of the institution of these proceedings, Ritchie Capital Management L.L.C., Ritchie Multi-Strategy Global Trading, Ltd., A.R. Thane Ritchie, and Warren Louis DeMaio (“Respondents”) have submitted Offers of Settlement (the “Offers”) 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(e) and 203(f) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offers, the Commission finds¹ that:

Respondents

1. **Ritchie Capital Management, L.L.C.** (“Ritchie Capital”), located in Geneva, Illinois, is an investment adviser for several hedge funds. During the relevant timeframe, Ritchie Capital managed a master feeder structure in which the master fund, the Ritchie Multi-Strategy Global Trading, Ltd, pooled assets from on-shore and off-shore funds. At its peak in 2003, Ritchie Capital had approximately \$1.23 billion under management. Securities traded in the fund included stocks, futures, derivatives, and mutual funds. Ritchie Capital’s mutual fund transactions were conducted using introducing brokers and dealers in fund securities or persons designated in a fund prospectus as authorized to consummate transactions in such fund’s securities, such as Bear Stearns Securities Corp. (“Bear Stearns”), Trautman Wasserman & Co. (“Trautman”), Banc of America Securities, and CIBC World Markets Corp. (“CIBC”).

2. **Ritchie Multi-Strategy Global Trading, Ltd.** (“RMS Fund”), is a Cayman Islands company incorporated on June 9, 1999. The RMS Fund is a part of a master feeder structure, which is an arrangement where investors’ money initially was placed into smaller sub-funds, called “feeder funds”, and then is pooled into a master fund, the RMS Fund. The sole shareholders of the RMS Fund are Ritchie Multi-Strategy Global, Ltd. (an off-shore feeder fund) and Ritchie Multi-Strategy Global LLC (an on-shore feeder fund).

¹ The findings herein are made pursuant to Respondents’ Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

3. **A.R. Thane Ritchie** (“**Thane Ritchie**”), age 41, is the Chief Executive Officer of Ritchie Capital, a firm that he founded in approximately 1998. During the relevant time-period, Thane Ritchie maintained a majority ownership interest in Ritchie Capital.

4. **Warren Louis DeMaio** (“**DeMaio**”), age 47, had responsibility for the oversight and supervision of mutual fund trading at Ritchie Capital from February 2001 through September 2003. During the relevant time-period, DeMaio was a member at Ritchie Capital and maintained a minority ownership interest in the firm.

Overview

5. From at least January 2001 through September 2003, Ritchie Capital engaged in an illegal late trading scheme. Specifically, Ritchie Capital placed thousands of late trades in mutual fund shares and used post-4:00 p.m.² news and market information to make its mutual fund trading decisions while receiving the same day’s net asset value (“NAV”) for the mutual funds traded. Thane Ritchie approved the use of late trading by Ritchie Capital’s mutual fund group, reviewed the performance of the group, and occasionally suggested mutual fund late trades. DeMaio supervised mutual fund trading at Ritchie Capital and was involved in the development of various mutual fund trading strategies, including late trading.

Late Trading

6. “Late trading” refers to the practice of placing orders to buy or sell mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m.), but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market events that occur after 4:00 p.m. but that are not reflected in that day’s price. In particular, the late trader obtains an advantage – at the expense of the other shareholders of the mutual fund – when he learns of market moving information and is able to purchase (or sell) mutual fund shares at prices set before the market moving information is released. Late trading violates Rule 22c-1(a) under the Investment Company Act and harms other shareholders when late trading dilutes the value of their shares.

Ritchie Capital Engaged in Late Trading with Trautman

7. From at least January 2001 through September 2003, Ritchie Capital used Trautman to execute thousands of mutual fund trades after 4:00 p.m. Ritchie Capital’s late trading scheme at Trautman was designed to allow Ritchie Capital to use post-4:00 p.m. information in making its trading decisions.

8. Prior to January 2002, Ritchie Capital occasionally engaged in late trading activity at Trautman. In late 2001, Ritchie Capital was offered the opportunity to significantly increase its late trading activity in a meeting attended by DeMaio with representatives from Trautman. As

² This Order uses Eastern Time unless otherwise noted.

a result of this opportunity, Ritchie Capital devised a strategy for late trading domestic mutual funds. Specifically, Ritchie Capital's strategy primarily focused on market movement in the S&P 500 Index Futures after 4:00 p.m. Ritchie Capital believed there was a correlation between movement in the S&P 500 Index Futures and the domestic mutual funds that tracked the U.S. stock market. Thus, Ritchie Capital's strategy centered on the fact that post-4pm movement in the S&P 500 Index Futures market would not be reflected in domestic mutual funds' NAV that day, and thus would be incorporated into the next day's NAV.

9. Ritchie Capital also followed post-4:00 p.m. news, such as earnings and merger announcements, and political events, and used that information in making its trading decisions. Finally, on occasion, Ritchie Capital obtained the NAV for its most frequently traded domestic mutual funds, which was generally disclosed by the funds shortly after 4:00 p.m., and used that information before making its trading decisions.

10. By trading domestic mutual funds after 4:00 p.m., but at that day's NAV, Ritchie Capital was able to reap an advantage by having more information than the ordinary investor about whether to buy or sell mutual funds on any given day.

11. Ritchie Capital and Trautman devised certain procedures to carry out the trading scheme. On an almost daily basis, by approximately 3:45 p.m., Ritchie Capital traders sent to Trautman employees, via facsimile or electronic mail, spreadsheets that listed hundreds of potential mutual fund trades ("trade sheets"). These trade sheets, which were treated as order tickets, contained virtually every possible mutual fund trade that Ritchie Capital could place that day, including both purchases and sales of mutual fund shares.

12. Ritchie Capital sent these trade sheets to Trautman before 4:00 p.m., at Trautman's request, in order to obtain a pre-4 p.m. time-stamp. Trautman employees collected these trade sheets and stamped them at approximately 3:45 p.m. Although the trade sheets had pre-4:00 p.m. time-stamps, Trautman did not enter these trades for execution into its mutual fund routing system when it received the trade sheets and time-stamped them.

13. Ritchie Capital traders called Trautman regularly after 4:00 p.m. to confirm, modify and/or cancel trades that were listed on the trade sheets. Because Ritchie Capital submitted pre-4 p.m. nearly all possible mutual funds trades that it could make every day, its post-4 p.m. trading primarily consisted of picking which trades it wished to make off the trade sheets and asking Trautman to "cancel" or disregard others.

14. Trautman did not enter trades until it received a phone call from Ritchie Capital after 4:00 p.m. that confirmed or canceled the trades that were on the pre-4:00 p.m. trade sheets. Indeed, Ritchie Capital's trade sheets stated that the orders listed were subject to "verbal confirmation." Banc of America Securities was the clearing firm for mutual fund trades placed through Trautman.

15. On occasion, Ritchie Capital submitted wholly new orders after 4:00 p.m. that were not part of the trade sheets stamped before 4 p.m. Ritchie Capital also sometimes changed

the number of mutual fund shares that should be traded post-4:00 p.m. from those listed on the trade sheets. Trautman entered these orders without creating new or modified trade sheets or restamping these trade sheets.

16. Recorded telephone conversations establish that Ritchie Capital engaged in late trading and that the purpose of the late trading scheme was to use post-4 p.m. market information. For example, on January 18, 2002 at 3:47 p.m., a Ritchie Capital trader, called a Trautman employee and informed him that “the domestic, we really can’t make. . . can’t even make a call . . . until after the stock market closes . . . so unless the market rallies between . . . 4:00 and 4:15, we’re not doing anything.” On March 14, 2002 at 5:38 p.m., a Ritchie Capital trader told a Trautman employee that in order for Ritchie Capital to trade mutual funds that night, “the market has got to move a decent amount in these after hours here.” On October 23, 2002 at 5:54 p.m., a Ritchie Capital trader instructed a Trautman employee on which mutual fund trades to execute and which to “throw out,” and, referring to the trade sheets, also directed him to substitute one fund for another.

17. This scheme gave Ritchie Capital as much as 2 ½ hours after the close of the U.S. stock market to make mutual fund trading decisions. The late trading was concealed because the order tickets had pre-4:00 p.m. time-stamps.

Ritchie Capital Used the Bear Stearns Electronic Platform To Engage in Late Trading

18. Ritchie Capital also used an existing Bear Stearns electronic trading platform to engage in late trading. In November 2000, Ritchie Capital had received access to Bear Stearns’ Mutual Fund Routing System (“MFRS”), an electronic mutual fund entry platform that processed orders until 5:45 p.m. or later. Ritchie Capital occasionally placed late trades in mutual funds in 2001.

19. When it devised its domestic mutual fund late trading strategy with Trautman in late 2001, Ritchie Capital traders realized that they could also use MFRS to conduct its late trading strategy and significantly increased its late trading activity.

20. From January 2002 through September 2003, Ritchie Capital placed late trades in domestic mutual funds through MFRS between 4:00 p.m. and 5:30 p.m. Bear Stearns’ trading records clearly identify the input times of these trades through MFRS, which were after 4:00 p.m. Recorded telephone conversations also establish that Ritchie Capital placed late trades using MFRS.

Ritchie Capital Placed Late Trades through CIBC

21. Ritchie Capital also placed mutual fund late trades through CIBC. Although late trading through CIBC did not occur on a daily basis, between 2001 and 2003, Ritchie Capital had the ability to and periodically did trade through CIBC as late as 4:30 p.m. Ritchie Capital’s late trading was limited to trading in international mutual funds during this time-period.

22. Ritchie Capital's relationship with CIBC began when Thane Ritchie discovered that CIBC could process late trades. In an email dated July 11, 2001 to Warren DeMaio, Thane Ritchie explained:

CIBC mentioned they could go in to funds up intill [sic] 4:30 (not sure if it was our time on an occasional basis... Again [a Ritchie Capital trader] is probably not aware of this ... on a day like to day [sic] using this we probaly [sic] could have made an extra \$250k...

23. On an almost daily basis, Ritchie Capital traders sent via facsimile or electronic mail trade sheets to CIBC employees around 3:30 p.m. While these traders would usually call to confirm or cancel the trades shortly before or at 4:00 p.m., they would sometimes ask CIBC to hold the trade sheets past 4:00 p.m. In these circumstances, Ritchie Capital would then call back to make its final decision between 4:00 and 4:30 p.m. on which mutual funds to trade that day.

24. Recorded telephone conversations demonstrate that Ritchie Capital engaged in late trading with CIBC and used post-4:00 p.m. information to make its trading decisions. For example, at 4:26 p.m. on August 21, 2001, a Ritchie Capital trader called a CIBC employee to ask if he could execute mutual fund trades. Referring to the trade sheets, the CIBC employee responded, "I'm going to have to take it out of the garbage, but yeah." As another example, on May 7, 2002, a CIBC employee called a Ritchie Capital trader at 4:15 p.m. to check if he wanted to do any trades based on "Cisco's strong numbers."

25. Recorded telephone conversations with CIBC establish that Ritchie Capital knew that mutual fund trades had to be submitted before 4:00 p.m. and that its late trading scheme was improper. On July 15, 2003, a Ritchie Capital trader called a CIBC employee at approximately 4:00 p.m. to tell him there would be no mutual fund trades that day unless the market moved "four or five points." The CIBC employee responded, "Well, you have got some time. Intel is coming out with numbers, so if things go really sour and you want to go out just give me a call...I can just say, 'hey, he called me at 4:00 -- check the phone records.'"

Ritchie Capital Profited from its Late Trading

26. Ritchie Capital profited as a result of its late trading activity. Specifically, Ritchie Capital's post-4:00 p.m. trading resulted in a benefit of approximately \$30 million to the RMS Fund between 2001 and 2003 for its domestic mutual fund late trading through Trautman and Bear Stearns.

Thane Ritchie Approved the Late Trading Arrangement

27. Thane Ritchie initially approved the late trading strategy and was fully aware that the mutual fund group was using late trading as a strategy to trade domestic and international mutual funds. Thane Ritchie also occasionally suggested to individuals in the mutual fund group about potential opportunities to late trade mutual funds on a given day.

28. In addition, Thane Ritchie monitored the performance of the mutual fund group, which included the late trading strategy.

Warren DeMaio Oversaw the Late Trading Strategy

29. In late 2001, DeMaio met with representatives from Trautman where Ritchie Capital was offered the opportunity to late trade mutual funds through Trautman. As a result of this meeting, Ritchie Capital began its late trading strategy through Trautman. DeMaio oversaw the late trading strategy. Also, on occasion, he suggested potential opportunities to late trade mutual funds to individuals in the mutual fund group.

30. In addition, DeMaio monitored the performance of the mutual fund group, which included the late trading strategy. He also conferred regularly with individuals in the mutual fund group on their progress, including the late trading strategy. DeMaio supervised the Ritchie Capital trader who was primarily responsible for placing late trades with Trautman, Bear Stearns, and CIBC. DeMaio also reported on the performance of the mutual fund group to his supervisor, Thane Ritchie.

Violations

31. As a result of the conduct described above, Ritchie Capital, RMS Fund, Thane Ritchie, and DeMaio willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

32. As a result of the conduct described above, Ritchie Capital, RMS Fund, Thane Ritchie, and DeMaio willfully aided and abetted and caused violations of Rule 22c-1 under the Investment Company Act by certain mutual funds, the funds' principal underwriters, persons designated in the funds' prospectuses as authorized to consummate transactions in the funds' securities, or dealers in the funds' securities. Rule 22c-1 requires mutual funds and their dealers to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to buy or redeem.

Undertakings

Ritchie Capital has undertaken to:

33. **Distribution Plan.**

1. Within 90 days of the entry of this Order, Ritchie Capital shall develop a Distribution Plan to distribute fairly and proportionately to the affected mutual funds the total disgorgement and civil penalties described in Section IV below. In developing the Distribution Plan, Ritchie Capital shall consult with the adviser for each affected mutual fund, or any successor fund. Ritchie Capital shall provide the adviser with (a) a copy

of this Order, (b) the proposed amount of disgorgement to be paid to the affected mutual fund, and (c) a description of the methodology used to calculate that amount.

2. Within 120 days of the entry of this Order, Ritchie Capital shall provide to the Commission staff a copy of the Distribution Plan.
3. Within 150 days of the entry of this Order, Ritchie Capital shall, if not unobjectionable to the Commission staff, submit the Distribution Plan to the Commission for the administration and distribution of disgorgement and civil penalties pursuant to Rule 1101 of the Commission's Rules on Fair Fund and Disgorgement Plans.
4. Following a Commission order approving the final Distribution Plan and appointment of a Plan Administrator, as provided in Rule 1104 of the Commission's Rules on Fair Fund and Disgorgement Plans. Ritchie Capital shall take all necessary and appropriate steps to assist the Commission-appointed Plan Administrator in the distribution of the disgorgement and civil penalties to the affected mutual funds.
5. Ritchie Capital shall bear the costs of administering and implementing the final Distribution Plan, including the costs of the Plan Administrator and a tax administrator for the distribution fund.

34. Independent Compliance Consultant.

1. Ritchie Capital shall retain, within 90 days of the date of entry of this Order, the services of an Independent Compliance Consultant not unacceptable to the staff of the Commission. The Independent Compliance Consultant's compensation and expenses shall be borne exclusively by Ritchie Capital. Ritchie Capital shall require the Independent Compliance Consultant to conduct a comprehensive review of its supervisory, compliance, and other policies and procedures designed to prevent and detect federal securities law violations by Ritchie Capital. Ritchie Capital shall cooperate fully with the Independent Compliance Consultant and shall provide the Independent Compliance Consultant with access to its files, books, records, and personnel as reasonably requested for the review.
2. Ritchie Capital shall require that, at the conclusion of the review, which in no event shall be more than 120 days after the date of entry of this Order, the Independent Compliance Consultant shall submit a Report to Ritchie Capital and the staff of the Commission regarding the adequacy of the Policies and Procedures. The Report shall include a description of the review performed, the conclusions reached and, if necessary, the Independent Compliance Consultant's recommendations for changes in or

improvements to policies and procedures of Ritchie Capital, and a procedure for implementing the recommended changes in or improvements to the Policies and Procedures.

3. Ritchie Capital shall adopt all recommendations contained in the Report of the Independent Compliance Consultant; provided, however, that within 60 days after the date of the submission of the Report ("Report Date"), Ritchie Capital shall in writing advise the Independent Compliance Consultant and the staff of the Commission of any recommendations that it considers to be unnecessary or inappropriate. With respect to any recommendation that Ritchie Capital considers unnecessary or inappropriate, Ritchie Capital need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose.
4. As to any recommendation with respect to which Ritchie Capital and the Independent Compliance Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 120 days of the Report Date. In the event Ritchie Capital and the Independent Compliance Consultant are unable to agree on an alternative proposal, Ritchie Capital will abide by the determinations of the Independent Compliance Consultant.
5. One year from the Report Date, Ritchie Capital shall submit an affidavit to the Commission staff stating that it has implemented any and all actions recommended or agreed to by the Independent Consultant, or explaining the circumstances under which it has not implemented such actions.
6. Ritchie Capital (i) shall not have the authority to terminate the Independent Compliance Consultant, without the prior written approval of the staff of the Commission; (ii) shall compensate the Independent Compliance Consultant, and persons engaged to assist the Independent Compliance Consultant, for services rendered pursuant to this Order at their reasonable and customary rates; (iii) shall not be in and shall not have an attorney-client relationship with the Independent Compliance Consultant and shall not seek to invoke the attorney-client or any other doctrine or privilege to prevent the Independent Compliance Consultant from transmitting any information, reports, or documents to its board of directors or the Commission.
7. Ritchie Capital shall require the Independent Compliance Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Compliance Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Ritchie Capital, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also

provide that the Independent Compliance Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Compliance Consultant in performance of his/her duties under this Order shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Ritchie Capital, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

35. **Continuing Application of Undertakings.** The undertakings of Ritchie Capital herein shall continue to apply respectively to Ritchie Capital or its successors for as long as Ritchie Capital or its successors continue to offer and sell securities or until an undertaking terminates according to its terms; provided, however, that any successor to Ritchie Capital may petition the Commission and obtain relief from such undertakings if the successor can demonstrate that it has sufficient controls and procedures reasonably designed and implemented to detect and prevent the occurrence of the conduct summarized herein.

36. **Deadlines.** For good cause shown, the Commission's staff may extend any of the procedural dates set forth above.

IV.

In view of the foregoing, the Commission deems it appropriate, and in the public interest, to impose the sanctions in the Offers submitted by the Respondents.

Accordingly, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, Sections 203(e) and 203(f) of the Advisers Act, and Section 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Ritchie Capital, RMS Fund, Thane Ritchie, and DeMaio shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Rule 22c-1 under the Investment Company Act.

B. Pursuant to Section 203(e) of the Advisers Act, Ritchie Capital is hereby censured.

C. Ritchie Capital and RMS Fund shall, within 7 days of the entry of this Order, pay disgorgement, jointly and severally, in the amount of \$30 million and prejudgment interest, jointly and severally, in the amount of \$7,441,966.82, to the Securities and Exchange Commission. 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 Ritchie Capital and RMS Fund as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Robert J. Burson, Senior Associate Regional Director, Chicago Regional Office, 175 West Jackson Street, Suite 900, Chicago, Illinois 60604.

D. Ritchie Capital and Thane Ritchie, shall, within 7 days of the entry of this Order, pay a civil money penalty, jointly and severally, in the amount of \$2.5 million to the Securities and Exchange Commission. Thane Ritchie shall, within 7 days of the entry of this Order, also pay disgorgement in the amount of \$1.00 to the Securities and Exchange Commission. Such payments 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 Ritchie Capital and Thane Ritchie as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Robert J. Burson, Senior Associate Regional Director, Chicago Regional Office, 175 West Jackson Street, Suite 900, Chicago, Illinois 60604.

E. Warren DeMaio shall, within 7 days of the entry of this Order, pay disgorgement in the amount of \$1.00 and a civil money penalty in the amount of \$250,000 to the Securities and Exchange Commission. Such payments 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 Warren DeMaio 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 Robert J. Burson, Senior Associate Regional Director, Chicago Regional Office, 175 West Jackson Street, Suite 900, Chicago, Illinois 60604.

F. It is further ordered that, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the disgorgement and penalties referenced in Section IV, paragraphs C, D, and E above. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that they should not, after offset or reduction in any Related Investor Action based on Respondents' payment of disgorgement in this action, argue that they shall be entitled to, nor shall they further benefit by offset or reduction of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private

damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

G. Ritchie Capital shall comply with the undertakings enumerated in Section III ¶¶ 33-36 above.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

Chairman Cox and
Commissioner Nazareth
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 28141 / February 5, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12948

In the Matter of

MICHAEL MAURIELLO

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 9(f) OF THE INVESTMENT COMPANY ACT OF 1940.

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Michael Mauriello.

II.

In anticipation of the institution of these proceedings, Michael Mauriello ("Mauriello" or 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, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 9(f) of the Investment Company Act of 1940 ("Order"), as set forth below.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Respondent

1. Michael Mauriello, age 49, was employed at Ritchie Capital Management, LLC ("Ritchie Capital"), an Illinois hedge fund adviser, from at least January 2001 through September 2003. Mauriello held an operations role in Ritchie Capital's mutual fund group. He was responsible for placing mutual fund trades with brokers on behalf of Ritchie Capital.

Overview

2. From at least January 2001 through September 2003, Ritchie Capital placed thousands of late trades in mutual fund shares and used post-4:00 p.m.² news and market information to make its mutual fund trading decisions while receiving the same day's net asset value ("NAV") for the mutual funds traded. During this time-period, Mauriello was primarily responsible for placing late trades for Ritchie Capital and placed these trades after consultation with Ritchie Capital traders. Ritchie Capital's mutual fund transactions were conducted using introducing brokers and dealers in fund securities or persons designated in a fund prospectus as authorized to consummate transactions in such fund's securities, such as Bear Stearns Securities Corp. ("Bear Stearns"), Trautman Wasserman & Co. ("Trautman"), Banc of America Securities, and CIBC World Markets Corp. ("CIBC").

Late Trading

3. "Late trading" refers to the practice of placing orders to buy or sell mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m.), but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market events that occur after 4:00 p.m. but that are not reflected in that day's price. In particular, the late trader obtains an advantage – at the expense of the other shareholders of the mutual fund – when he learns of market moving information and is able to purchase (or sell) mutual fund shares at prices set before the market moving information is released. Late trading violates Rule 22c-1(a) under the Investment Company Act and harms other shareholders when late trading dilutes the value of their shares.

Mauriello Placed Late Trades with Trautman

4. From at least January 2001 through September 2003, Ritchie Capital used Trautman to execute thousands of mutual fund trades after 4:00 p.m. Ritchie Capital's late

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

² This Order uses Eastern Time unless otherwise noted.

trading at Trautman was designed to allow Ritchie Capital to use post-4:00 p.m. information in making its trading decisions.

5. In 2001, Ritchie Capital devised a strategy for late trading domestic mutual funds. Specifically, Ritchie Capital's strategy primarily focused on market movement in the S&P 500 Index Futures after 4:00 p.m. Ritchie Capital believed there was a correlation between movement in the S&P 500 Index Futures and the domestic mutual funds that tracked the U.S. stock market. Thus, Ritchie Capital's strategy centered on the fact that post-4 p.m. movement in the S&P 500 Index Futures would not be reflected in domestic mutual funds' NAV that day, and thus would be incorporated into the next day's NAV.

6. Ritchie Capital also followed post-4:00 p.m. news, such as earnings and merger announcements, and political events, and occasionally used that information in making its trading decisions. Finally, on occasion, Ritchie Capital obtained the NAV for its most frequently traded domestic mutual funds, which was generally disclosed by the funds shortly after 4:00 p.m., and sometimes used that information before making its trading decisions.

7. By trading domestic mutual funds after 4:00 p.m., but at that day's NAV, Ritchie Capital was able to reap an advantage by having more information than the ordinary investor about whether to buy or sell mutual funds on any given day.

8. Mauriello placed late trades at Ritchie Capital. On an almost daily basis, by approximately 3:45 p.m., Mauriello sent to Trautman employees, via facsimile or electronic mail, spreadsheets that listed hundreds of potential mutual fund trades ("trade sheets"). These trade sheets, which were treated as order tickets, contained virtually every possible mutual fund trade that Ritchie Capital could place that day, including both purchases and sales of mutual funds.

9. Mauriello sent these trade sheets to Trautman before 4:00 p.m. Trautman employees collected these trade sheets and stamped them at approximately 3:45 p.m. Although the trade sheets had pre-4:00 p.m. time-stamps, Trautman did not enter these trades for execution into its mutual fund routing system when it received the trade sheets and time-stamped them.

10. On a daily basis, Mauriello received information from Ritchie Capital traders about the movement in the S&P 500 Index Futures and other post-4 p.m. news and market information. This information allowed Ritchie Capital traders to determine whether to buy or sell mutual funds that day in accordance with the late trading strategy. Mauriello, in consultation with others, determined which mutual funds Ritchie Capital could trade based on a spreadsheet he maintained that identified the dollar amount and number of trades Ritchie Capital could place at the mutual funds.

11. Mauriello called Trautman regularly after 4:00 p.m. to confirm, modify and/or cancel trades that were listed on the trade sheets. Because he had submitted pre-4 p.m. nearly all possible mutual funds trades that it could make every day, Mauriello's post-4 p.m. telephone call to Trautman primarily consisted of picking which trades it wished to make off the trade sheets and asking Trautman to "cancel" or disregard others.

12. Trautman did not enter trades until it received a phone call from Mauriello or others at Ritchie Capital after 4:00 p.m. that confirmed or canceled the trades that were on the pre-4:00 p.m. trade sheets. Indeed, Ritchie Capital's trade sheets stated that the orders listed were subject to "verbal confirmation." Banc of America Securities was the clearing firm for Trautman's mutual fund trades

13. On occasion, Mauriello, in consultation with others, also submitted wholly new orders after 4:00 p.m. that were not part of the trade sheets stamped before 4 p.m. Mauriello, in consultation with others, also sometimes changed the number of mutual fund shares that were traded post-4:00 p.m. from those listed on the trade sheets. Trautman entered these orders without creating new or modified trade sheets or restamping these sheets.

14. Recorded telephone conversations establish that Mauriello placed late trades, on behalf of Ritchie Capital, through Trautman. For example, on January 18, 2002 at 3:47 p.m., Mauriello called a Trautman employee and informed him that "the domestic, we really can't make. . . can't even make a call . . . until after the stock market closes . . . so unless the market rallies between . . . 4:00 and 4:15, we're not doing anything." On March 14, 2002 at 5:38 p.m., Mauriello told a Trautman employee that in order for Ritchie Capital to trade mutual funds that night, "the market has got to move a decent amount in these after hours here." On October 23, 2002 at 5:54 p.m., Mauriello instructed a Trautman employee on which mutual fund trades to execute and which to "throw out," and, referring to the trade sheets, also directed him to substitute one fund for another.

Mauriello Placed Late Trades Using the Bear Stearns Electronic Platform

15. From January 2001 through September 2003, Ritchie Capital placed thousands of late trades in mutual funds through Bear Stearns' mutual fund routing system ("MFRS"), an electronic trading platform, between 4:00 p.m. and 5:51 p.m. Bear Stearns' trading records clearly identify the input times of these trades through MFRS, which were after 4:00 p.m.

16. Between January 2001 and September 2003, Mauriello, in consultation with others, often placed mutual fund late trades through MFRS.

17. Recorded telephone conversations confirm that Mauriello placed late trades using MFRS. For example, in a recorded telephone conversation on October 17, 2002 between Mauriello and a representative from Bear Stearns, Mauriello called regarding a problem with an account at 5:22 p.m. and asked if he could still do trades through MFRS. The Bear Stearns representative replied affirmatively and stated: "You have until 5:45 p.m."

Mauriello Placed Late Trades through CIBC

18. Ritchie Capital also placed mutual fund late trades through CIBC. Although late trading through CIBC did not occur on a daily basis, between 2001 and 2003, Ritchie Capital had

the ability to and periodically did trade through CIBC as late as 4:30 p.m. Ritchie Capital's late trading was limited to trading in international mutual funds during this time-period.

19. On an almost daily basis, Mauriello, in consultation with others, sent, via facsimile or electronic mail, trade sheets to CIBC employees around 3:30 p.m. While Mauriello would usually call to confirm or cancel the trades shortly before or at 4:00 p.m., he would sometimes ask CIBC to hold the trade sheets past 4:00 p.m. In these circumstances, Mauriello would then call back to make a final decision between 4:00 and 4:30 p.m. on which mutual funds to trade that day.

20. Recorded telephone conversations demonstrate that Mauriello placed late trades with CIBC. For example, at 4:26 p.m. on August 21, 2001, Mauriello called a CIBC employee to ask if he could execute mutual fund trades. Referring to the trade sheets, the CIBC employee responded, "I'm going to have to take it out of the garbage, but yeah." On October 3, 2001, a CIBC employee called Mauriello at 4:03 p.m. to ask him if he still wanted to do their pre-4 p.m. submitted trades given that "they just hijacked another plane in India." Mauriello confirmed that the trades should still be processed. As another example, on May 7, 2002, a CIBC employee called Mauriello at 4:15 p.m. to check if he wanted to do any trades based on "Cisco's strong numbers."

Violations

21. As a result of the conduct described above, Mauriello caused violations of Rule 22c-1 under the Investment Company Act by certain mutual funds, the funds' principal underwriters, persons designated in the funds' prospectuses as authorized to consummate transactions in any such security, their principal underwriters, or dealers in the funds' securities. Rule 22c-1 requires mutual funds and their dealers to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to buy or redeem.

IV.

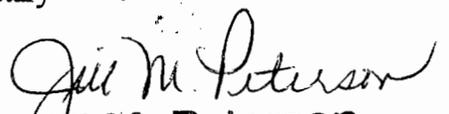
In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Section 9(f) of the Investment Company Act, it is hereby ORDERED that:

Mauriello shall cease and desist from committing or causing any violations and any future violations of Rule 22c-1 under the Investment Company Act.

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

Release No. 57275 / February 6, 2008

ADMINISTRATIVE PROCEEDING

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),

Respondents.

ORDER MAKING FINDINGS AND
REVOKING REGISTRATION OF
SECURITIES PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF
1934 AS TO TAM RESTAURANTS,
INC. AND DISMISSING AEROFOAM
METALS, INC.

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors to accept the Offer of Settlement submitted by TAM Restaurants, Inc. ("TAM" or "Respondent") pursuant to Rule 240(a) of the Rules of Practice of the Commission, 17 C.F.R. § 201.240(a), for the purpose of settlement of these proceedings initiated against Respondent on June 13, 2007, pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

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 it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 as to TAM Restaurants, Inc. ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that¹:

¹The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

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1. TAM (CIK No. 1048796) is a Delaware corporation located on Staten Island, New York with a class of equity securities registered with the Commission under Exchange Act Section 12. TAM's ticker symbol was TAMR.

2. TAM operated a restaurant, American Park at the Battery, in Battery Park on Manhattan. Due to its proximity to the World Trade Center, following the terrorist attacks of September 11, 2001, American Park at the Battery was unable to operate for several months. It eventually reopened, but TAM filed a Chapter 11 bankruptcy proceeding on May 19, 2003, and American Park at the Battery ceased operations in January 2004. The bankruptcy proceeding was terminated on May 16, 2005.

3. TAM has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended June 27, 2001, or following the terrorist attacks of September 11, 2001.

4. In 2006, Aerofoam Metals, Inc. ("Aerofoam Metals") purchased another entity named TAM Restaurants, Inc., a Delaware corporation. Following its purchase, Aerofoam Metals reverse merged into the entity it purchased. On June 15, 2006, Aerofoam Metals changed the TAMR ticker symbol to AFML, and changed TAM's CUSIP No. from 874835101 to 007772106. TAM did not consent to the change of its ticker symbol or CUSIP number. Aerofoam Metals is not a successor to TAM for purposes of Exchange Act Rules 12b-2 and 12g-3.

IV.

In view of the foregoing, the Commission deems it necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

Pursuant to Section 12(j) of the Exchange Act, the registration of each class of TAM's securities registered pursuant to Exchange Act Section 12 be, and hereby is, revoked.

It is FURTHER ORDERED that:

Aerofoam Metals is dismissed from these proceedings.

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, and 239

[RELEASE NOS. 33-8891; 34-57280; 39-2453; IC-28145;

FILE NO. S7-12-07]

RIN 3235-AJ87

ELECTRONIC FILING AND REVISION OF FORM D

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting rule amendments mandating the electronic filing of information required by Securities Act of 1933 Form D through the Internet. We also are adopting revisions to Form D and to Regulation D in connection with the electronic filing requirement. The revisions simplify and restructure Form D and update and revise its information requirements. The information required by Form D will be filed with us electronically through a new online filing system that will be accessible from any computer with Internet access. The data filed will be available on our Web site and will be interactive and searchable.

EFFECTIVE DATE: September 15, 2008 except the amendments to § 232.101(c)(6) and § 232.201(a) are effective [insert 30 days after publication of this release in the Federal Register], § 232.101(a)(1)(xiii) is effective March 16, 2009 and § 230.503T, § 232.101(b)(10) and § 239.500T are effective from September 15, 2008 to March 16, 2009.

FOR FURTHER INFORMATION CONTACT: Questions about this release should be addressed to Gerald J. Laporte, Chief, or Corey A. Jennings, Attorney-Advisor, Office of Small Business Policy, Division of Corporation Finance, or Mark W. Green, Senior Special Counsel

(Regulatory Policy), Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628, (202) 551-3460.

SUPPLEMENTARY INFORMATION: We are adopting revisions to Rules 100,¹ 101,² 104,³ 201,⁴ and 202⁵ of Regulation S-T,⁶ Rules 502⁷ and 503⁸ of Regulation D,⁹ and Form D¹⁰ under the Securities Act of 1933 (“Securities Act”).¹¹ We also are adding temporary Rule 503T and Temporary Form D under the Securities Act and temporary Rule 101(b)(10) of Regulation S-T.

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¹ 17 CFR 232.100.

² 17 CFR 232.101.

³ 17 CFR 232.104.

⁴ 17 CFR 232.201.

⁵ 17 CFR 232.202.

⁶ 17 CFR 232.10 et seq.

⁷ 17 CFR 230.502.

⁸ 17 CFR 230.503.

⁹ 17 CFR 230.501-508.

¹⁰ 17 CFR 239.500.

¹¹ 15 U.S.C. 77a et seq.

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I. EXECUTIVE SUMMARY AND BACKGROUND

A. History and Purpose of Form D

On June 29, 2007, we issued a release in which we proposed for public comment rule amendments mandating the electronic filing of Form D through the Internet and revisions to that form.¹² In this release, we are adopting the amendments substantially as proposed. As further described below, companies will be permitted to file Form D information voluntarily through the Internet when our new Form D electronic filing system becomes available on September 15, 2008 and will be required to file electronically through the Internet on and after March 16, 2009.

Form D serves as the official notice of an offering of securities made without registration under the Securities Act in reliance on an exemption provided by Regulation D.¹³ Both public and nonpublic companies file information using this form.

Regulation D was part of a Commission initiative in the early 1980s to provide a more coherent pattern of exemptive relief from the registration requirements of the Securities Act, and particularly to address the capital formation needs of small business.¹⁴ At the time, we intended the Form D filing requirement in Rule 503 of Regulation D to serve an important data collection objective.¹⁵ We expected that the empirical data derived from the Form D filings would enable

¹² We proposed the amendments in Release No. 33-8814 (June 29, 2007) [72 FR 37376]. The comment letters we received in response to the proposing release were filed in File Number S7-12-07 and are available at <http://www.sec.gov/comments/s7-12-07/s71207.shtml> or from our Public Reference Room at 100 F Street, NE, Washington, DC 20549.

¹³ Regulation D contains separate exemptions for limited offerings in Rules 504, 505 and 506. Form D also is to be used by issuers making offerings of securities without registration in reliance on the exemption contained in Section 4(6) of the Securities Act [15 U.S.C. 77d(6)]. Although we primarily discuss Regulation D in this release, the revised Form D also will continue to apply to Section 4(6) offerings. Regardless of the type of offering to which revised Form D applies, it will be required to be filed electronically after a transition period during which we will allow either paper or electronic filing.

¹⁴ We adopted Form D and Regulation D in 1982. Release No. 33-6389 (Mar. 8, 1982) [47 FR 11251] (adopting Form D as a replacement for Forms 4(6), 146, 240 and 242). They had been proposed in the previous year. Release No. 33-6339 (Aug. 7, 1981) [46 FR 41791] (proposing Regulation D and Form D).

¹⁵ We stated in the proposing release for the original Rule 503:

us to better evaluate the effectiveness of Regulation D as a capital raising device and eventually to further tailor our rules to provide appropriate support for both capital formation, especially as it relates to small business, and investor protection.¹⁶

We modified the requirements relating to Form D in 1986, making Form D a uniform notification form that could be filed with state securities regulators.¹⁷ This effort was undertaken with the cooperation of the North American Securities Administrators Association (NASAA), the organization of state securities regulators, as part of the Commission's efforts to reduce the costs of capital formation for small business and to promote uniformity between federal and state securities regulation. At that time, we also eliminated the requirement to amend a Form D filing for an offering every six months during the course of the offering and the requirement to make a final Form D filing within 30 days of the final sale in the offering. We left intact the requirement in Rule 503 to file a Form D notification within 15 days after the first sale of securities in an offering, leaving that as the sole current explicit requirement for a Form D filing.¹⁸

In 1989, we amended the Regulation D exemptions to eliminate the filing of Form D information as a condition to their availability.¹⁹ At that time, we also added Rule 507 to Regulation D to provide an incentive for issuers to make a Form D filing, even though it was no

"An important purpose of the notice . . . is to collect empirical data which will provide a basis for further action by the Commission either in terms of amending existing rules and regulations or proposing new ones Further, the proposed Form would allow the Commission to elicit information necessary in assessing the effectiveness of Regulation D as a capital raising device for small businesses."

Release No. 33-6339 (Aug. 7, 1981) [46 FR 41791, 41799].

¹⁶ Release No. 33-6339 (Aug. 7, 1981) [46 FR 41791, 471799].

¹⁷ Release No. 33-6663 (Oct. 2, 1986) [51 FR 36385].

¹⁸ 17 CFR 230.503.

¹⁹ Release No. 33-6825 (Mar. 15, 1989) [54 FR 11369].

longer a condition to the availability of the Regulation D exemptions.²⁰ Specifically, Rule 507 disqualifies an issuer from using a Regulation D exemption in the future if it has been enjoined by a court for violating Rule 503 by failing to file the information required by Form D.²¹ Consequently, an issuer has an incentive to make a Form D filing to avoid the possibility that a court will enjoin the issuer for violating Rule 503 and, as a result, disqualify the issuer from using a Regulation D exemption in the future.

In 1996, we proposed to eliminate the Form D filing requirement and replace it with an issuer obligation to complete a Form D and retain it for a period of time.²² At the time, our Task Force on Disclosure Simplification had suggested that the Commission consider the continued need for a Form D filing requirement.²³ After reviewing comments on the proposal, we determined that the information collected in Form D filings was still useful to us “in conducting economic and other analyses of the private placement market” and retained the requirement.²⁴ In 1998, we solicited public comment on, but did not propose, requiring electronic filing of the Form D notice.²⁵ The public comments generally favored electronic filing in principle but

²⁰ Id.

²¹ On August 3, 2007, we issued a release proposing changes to Regulation D. See Release No. 33-8828 (Aug. 3, 2007) [72 FR 45116]. Among those changes were moving Regulation D’s exemption disqualification provisions to a new subparagraph (e) of Rule 502 and adopting a new exemption that would appear in a revised Rule 507 of Regulation D. The Regulation D release also sought additional comment on the proposals we made in Release No. 33-8766 (Dec. 27, 2006) [72 FR 400] that concerned accredited investors in certain private pooled investment vehicles. Since we have not adopted and are still considering the changes proposed in the Regulation D release and the accredited investor changes proposed in the private pooled investment vehicle release, the new Form D and its implementing rules do not reflect those changes, as did the Form D in the Form D proposing release. We are still considering the proposed changes to Form D that would be necessary to reflect adoption of the Regulation D and private pooled investment vehicle changes, and may adopt the Form D changes if we adopt the Regulation D and private pooled investment vehicle changes.

²² Release No. 33-7301 (May 31, 1996) [61 FR 30405].

²³ SEC Task Force on Disclosure Simplification, Final Report 17 (Mar. 5, 1996), available at <http://www.sec.gov/news/studies/smpl.txt>.

²⁴ Release No. 33-7431, at 5 (July 18, 1997) [62 FR 39755, 39756].

²⁵ Release No. 33-7541 (May 21, 1998) [63 FR 29168].

expressed concern about Form D filers needing to follow the same procedures as then were required generally for filings through the Commission's electronic filing system, called the Electronic Data Gathering, Analysis and Retrieval or "EDGAR" system.

In summary, our previous statements on Form D have suggested that, at the federal regulatory level, the Form D filing serves two primary purposes:

- collection of data for use in the Commission's rulemaking efforts; and
- enforcement of the federal securities laws, including enforcement of the exemptions in Regulation D.²⁶

The information submitted in Form D filings also is useful for other purposes. The staffs of state securities regulators and the Financial Industry Regulatory Authority (FINRA), the successor to the member firm regulatory functions of the National Association of Securities Dealers, Inc. and NYSE Regulation, Inc., also use Form D information to enforce securities laws and the rules of securities self-regulatory organizations. Form D filings also have become a source of information for investors. Our Web site advises potential investors in Regulation D offerings to check whether the company making the offering has filed a Form D notice and advises that "[i]f the company has not filed a Form D, this should alert you that the company might not be in compliance with the federal securities laws."²⁷ In addition, the information in Form D filings serves as a source of business intelligence for commercial information vendors, as well as for participants in the venture capital, private equity, and other industries that rely on Regulation D offerings and for competitors of companies that file Form D information. Academic researchers use Form D information to conduct empirical research aimed at improving

²⁶ Release No. 33-6389 (Mar. 8, 1982) [47 FR 11251] and Release No. 33-7431 (July 18, 1997) [62 FR 39755].

²⁷ See <http://www.sec.gov/answers/formd.htm>.

the workings of these industries.²⁸ Journalists use Form D information to report on capital-raising in these industries.²⁹

B. Need to Update Form D and Require Electronic Filing

Currently, much of the information required by Form D appears to be useful and justified in the interests of investor protection and capital formation.³⁰ It also appears that some useful information that could be required by Form D is not required currently. On the other hand, Form D currently requires some information that may no longer be useful. Our staff receives many inquiries from market participants suggesting that Form D could be clarified and simplified. Moreover, the absence of an electronic system for filing Form D information prevents issuers from filing through efficient modern methods and limits the usefulness of the information collected on Form D. The rules we adopt today address deficiencies in the Form D data collection requirements and process.

1. Easing Filing Burdens

Our new Form D rules are intended to ease the costs and burdens of preparing and filing Form D information. The informational requirements will be streamlined and updated. The instructions will be clarified and simplified. Issuers will file Form D information electronically through a new online filing system that will be accessible from any computer with Internet access. Issuers will provide data by responding to discrete information requests. Appropriate

²⁸ For a discussion of how academic researchers are using available data on private investments to improve the workings of the venture capital industry, see A. Ginsberg, Truth, or Consequences: Academic Researchers are Helping Policy Makers and Practitioners Understand the Problems Facing the Venture Capital Industry, Innovation Review 8 (Berkeley Center for Entrepreneurial Studies, Fall 2002).

²⁹ See, e.g., R.J. Terry and B. Hammer, NEA Closes \$2.5 Billion Fund, Baltimore Bus. Journal, July 10, 2006.

³⁰ For example, information provided in response to the requirement to check the applicable specified exemptions from registration claimed by the issuer helps the Commission monitor and better evaluate use of the claimed exemptions in order to protect investors and facilitate the development of private and limited markets in which to raise capital.

data entries will be reviewed automatically for proper characters and consistency with entries in other fields. Data entry fields will be accompanied by links to instructions and other helpful information. We believe these system features, among others, will help facilitate a relatively easy-to-use filing process that will deliver accurate information quickly, reliably, and securely.³¹ The Form D filing will continue to be required within 15 days of an issuer's first sale in an offering without Securities Act registration in reliance on one or more of the exemptions provided in Regulation D, and the rules will clarify when amendments are required. Paper filing of Form D information will be eliminated after a transition period in which the information may be filed either electronically through the Internet or in paper.³²

2. Better Public Availability of Form D Information

Requiring the electronic filing of Form D data through the Internet will make the information filed more readily available to regulators and members of the public.³³ The information will be available on our Web site and, because the online filing system will automatically capture and tag data items, the data will be interactive and searchable. The Commission's public Web site at www.sec.gov will enable users to view the information in an easy-to-read format, download the information into an existing application, or create an

³¹ The new online filing system is discussed in further detail in Part III of this release.

³² Rule 101 of Regulation S-T, Rule 503 of Regulation D and the description of Form D will mandate electronic filing of Form D information subject to varied effective dates and temporary provisions, which together will permit the information to be filed either electronically through the Internet or in paper during the transition period. The transition period is discussed more fully in Part III.C below. Currently, our rules require issuers to file five paper copies of the Form D with us by mail or physical delivery to Commission headquarters. 17 CFR 230.503(a). The Commission received 27,843 Form D filings in its most recently ended fiscal year, 2007.

³³ Most filings made with us currently are filed electronically through our EDGAR system. We began to make EDGAR electronic filing mandatory in 1993. Initially, a number of forms – including Form D – were excluded from mandated electronic filing. Since the launch of the EDGAR system, we have increased the number of forms that are required to be filed electronically, but Form D has remained a paper-only filing. It will continue to remain so until the September 15, 2008 effective date of voluntary electronic filing, when companies will be able to file Form D information either in paper or electronically until the end of the phase-in period on March 16, 2009. Beginning on that date, Form D information will be required to be filed electronically through the Internet.

application to use the information.

Unlike information filed with us electronically, paper filings are available from us only in person in our Public Reference Room or by means of a mail request. We charge a nominal fee for copies of Form D filings. Some Form D filings are available at higher cost from private vendors through the Internet and telephone requests.

3. Federal and State Uniformity and Coordination; One-Stop Filing

For over 20 years, Form D has served as a means to promote federal and state uniformity and coordination in securities regulation by providing a uniform notification form that can be filed with the Commission and with state securities regulators.³⁴ The contemplated electronic filing system for Form D information will continue that tradition and can enhance the utility of Form D as a means to promote uniformity and coordination between federal and state securities regulation.

The availability of Form D information filed with us through a searchable electronic database will enable both federal and state securities regulators to monitor the exempt securities transaction markets more effectively. The system also will permit improved coordination among federal and state regulators, which is essential to efficient and effective capital formation through exempt transactions, especially by smaller companies, and to investor protection. State securities regulators will be able to access the information on our Web site to learn if new Form D information of interest to them has been filed.

The system will enhance uniformity and coordination even more if it results in “one-stop filing,” an approach we and NASAA are exploring. One-stop filing will enable companies to file

³⁴ According to a unit of the American Bar Association, 48 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands accept filings on Form D. New York prescribes its own Form 99. Florida does not require any filing for the types of transactions other jurisdictions require to be reported on Form D. See Report on Blue Sky Survey of the NSMIA Subcommittee, Committee on State Regulation of Securities, American Bar Association Business Law Section (Feb. 2006).

Form D information both with us and with the states they designate in one electronic transaction. While that capability will not be available when Form D electronic filing with the Commission begins, we have been working actively with NASAA to achieve that capability as soon as practicable. We understand that NASAA is considering establishing its own new electronic system that would interface with our system and would receive filings and collect fees on behalf of participating state securities regulators.³⁵ One-stop filing will reduce significantly the costs and burdens of preparing and filing Form D information with the Commission and with state securities regulators. This could represent a substantial savings for small businesses and others filing Form D information.

The commenters that responded to our Form D proposing release that addressed one-stop filing supported it,³⁶ but some made suggestions and some expressed concerns.³⁷ NASAA stated that it envisions a system that would direct issuers to a NASAA-hosted Web site that lists the fees for states a filer selects and enables the filer to make an electronic payment to those states that would include a modest service charge to defray costs of the site and service.³⁸ NASAA also stated that it envisions that the electronic payment would be made by means of an electronic funds transfer or credit card transaction. NASAA further envisions that, after payment, the system would allow a completed Form D to be filed with the Commission and distributed by the NASAA-hosted site to the states selected by the filer. Finally, NASAA anticipates that the

³⁵ The Commission's electronic filing system will not collect fees on behalf of any states.

³⁶ One commenter, for example, stated that if one-stop filing were implemented properly, it would reduce significantly the costs and burdens of preparing and filing Form D with the Commission and the states. See letter from American Bar Association, Section of Business Law, Committees on Federal Regulation of Securities and State Regulation of Securities (ABA).

³⁷ See letters from ABA, Coalition of Private Investment Companies (CPIC), Connecticut Department of Banking (Connecticut), Managed Funds Association (MFA), Massachusetts Securities Division (Massachusetts), NASAA and Pennsylvania Securities Commission (Pennsylvania).

³⁸ See letter from NASAA.

Commission would have no direct involvement or responsibility for the state distribution and payment system. Two commenters expressed concerns about one-stop filing, relating primarily to the prospects for timely state adoption³⁹ and, in one case, the use of the electronic system as it relates to the National Securities Markets Improvement Act of 1996.⁴⁰ Finally, one commenter expressed hope that companies would continue to be able to file a Form D notice with a particular state or states and not with the Commission where the company is comfortable relying on the Section 4(2) exemption from registration at the federal level and no federal Form D would be required.⁴¹ We have considered these comments and will continue to consider them as we work with NASAA in an effort to establish one-stop filing.

4. Improved Collection of Data for Commission Enforcement and Rulemaking Efforts

The conversion to electronic filing of Form D information through the Internet in an interactive data format will result in creation of a database of Form D information and allow us and others to better aggregate data on the private and limited offering securities markets and the use of the various Regulation D exemptions. Further, the software we will use for the Form D electronic filings will require that filers address each required data field in the form, thus reducing incomplete filings. Because of these and other features, our Form D electronic filing system should assist in our enforcement efforts and enhance our ability to use filed Form D information. The Form D information database will allow us to better evaluate our exemptive

³⁹ See letters from ABA and MFA.

⁴⁰ See letter from ABA (“There are several aspects of ‘one-stop’ filing about which we have particular reservations emanating . . . partly from a desire to delineate clear boundaries as a result of federal preemption under the National Securities Markets Improvement Act of 1996 . . .”). Section 102(a) of the National Securities Markets Improvement Act of 1996 (“NSMIA”) [Pub. L. No. 104-290 110 Stat. 3416 (Oct. 11, 1996)] enacted new Section 18 of the Securities Act [15 U.S.C. 77r], which, in part, limits the authority of the states to regulate offers and sales of securities exempt under “rules or regulations issued under section 4(2)” of the Act [15 U.S.C. 77d(2)], which includes Rule 506 but not Rules 504 or 505 of Regulation D.

⁴¹ See letter from ABA.

schemes on a continuing basis in order to facilitate capital formation in a manner consistent with investor protection. The evaluation could lead to improvements that would result in significant benefits to companies that rely on the Regulation D exemptions, especially smaller companies, as well as benefits to investors.

C. Summary of Adopted Amendments

In sum, the amendments will:

- mandate electronic filing of Form D information:
 - after a phase-in period during which electronic filing will be voluntary; and
 - through an online filing system that will
 - be accessible from any computer with Internet access; and
 - capture and tag data items, so that the data will be interactive and viewable in an easy-to-read format; and
- revise Form D's information requirements by:
 - permitting filers to identify all issuers in a multiple-issuer offering in one Form D filing;
 - deleting the current requirement to identify as "related persons" owners of 10 percent or more of a class of the issuer's equity securities;
 - replacing the current requirement to provide a business description of the issuer with a requirement to classify the issuer by industry from a pre-established list of industries;
 - requiring revenue range information for the issuer, or net asset value range information in the case of hedge funds (subject to an option to decline to disclose);

- requiring more specific information on the registration exemption claimed by the issuer in the Form D notice as well information on any exclusion claimed from the definition of “investment company” under the Investment Company Act of 1940 (“Investment Company Act”);⁴²
- requiring reporting of the date of first sale in the offering;
- specifying when amendments to a previously filed Form D notice are required by reason of mistakes of fact, errors or changes to information in a previously filed notice or the passage of a calendar year;
- requiring reporting of whether the offering is expected to last over a year;
- limiting reporting of the minimum investment amount accepted in the offering to the amount accepted from outside investors, so as not to affect employee stock ownership incentive plans adversely;
- requiring CRD numbers for both individual recipients of sales compensation and associated broker-dealers;
- replacing the current requirement to disclose information on a wide variety of expenses and applications of proceeds with a requirement to report expenses only as to amounts paid for sales commissions and, separately stated, finders’ fees, and report use of proceeds only as to the amount of proceeds used to make payments to executive officers, directors and promoters;
- replacing the current federal and state signature requirements with a combined signature requirement that includes an undertaking to provide offering documents to regulators on request (subject to applicable law), a consent to

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15 U.S.C. 80a-1 et seq.

service of process and a certification that the issuer is not disqualified by rule from relying on an exemption claimed; and

- permitting a limited amount of free writing in “clarification” fields to the extent necessary to clarify certain information provided.

The principal changes from the proposing release include:

- permitting free writing to clarify responses to a total of five requests for information;
- specifying that amendments to a previously filed Form D notice are required only for material mistakes of fact or errors, and not for any mistake of fact;
- providing additional exceptions from changes that otherwise would require amendments to a previously filed Form D notice;
- requiring an annual amendment to a Form D notice only if an entire calendar year has passed since the last filing, and not every year between January 1 and February 14; and
- requiring expense and use of proceeds information on amounts paid for sales commissions, finders’ fees, and payments to executive officers, directors and promoters, instead of eliminating those requirements.

II. DISCUSSION OF AMENDMENTS

As noted above, we believe the revisions we adopt today will have a positive effect in many areas of interest to the Commission, state securities regulators, investors, and companies that rely on Regulation D exemptions. The revisions generally involve simplifying Form D, easing the burdens of complying with the requirements of the form, and modernizing the information capture process.

For each offering of securities that is made without Securities Act registration in reliance on a claimed exemption under Regulation D, the issuer must file the information required by

Form D with the Commission no later than 15 days after the first sale of securities. The form calls for issuers to provide basic identifying information and fundamental information about the offering. Some of the requirements of Form D have become outdated with the passage of time since the Commission adopted them. Further, some of the current form's requirements and instructions could be clarified and made less burdensome. The revisions we adopt today address these issues. In addition, the move to electronic filing necessitates several modifications. We generally are adopting the amendments substantially as proposed. Where we are not, we so note below.

A. Amendments to Form D Content Requirements

Currently, Form D requires presentation of preliminary and other information required by five sections designated "A" through "E." The revisions organize the information requirements around 16 numbered "items" or categories of information. Instructions at the end of the form explain the requirements for each item. On the online form, terms and items at the front of the form will be linked to the instructions at the back, which will be available immediately by clicking on a particular term or item. In this regard, we are adding to the General Instructions a sentence that provides that terms used but not defined in the form that are defined in Rule 405⁴³ or Rule 501⁴⁴ have the meanings given to them in those rules. The sentence will clarify the application of Rule 501 and, to the extent it defines the term "promoter," Rule 405.⁴⁵

1. Basic Identifying and Contact Information

New Form D generally carries over the requirements from current Form D for basic identifying and contact information and information about related persons, but modifies or omits

⁴³ 17 CFR 230.405.

⁴⁴ 17 CFR 230.501.

⁴⁵ One commenter expressly supported defining the term "promoter" in the instructions. See letter from Connecticut.

some of these types of requirements. The requirements carried over, however, are restructured to reflect the electronic character of the filing.

Item 1, similar to current Form D, requires basic identifying information, such as the name of the issuer of the securities, any previous names, the type of legal entity and the issuer's year and place of incorporation or organization.⁴⁶ We are revising the form to provide specifically for the identification of multiple issuers in multiple-issuer offerings. Form D currently does not provide for this, sometimes raising questions as to how multiple-issuer offerings should be reported.⁴⁷ Although we proposed to add to the form a requirement to supply the issuer's Commission file number, if any, we have decided not to adopt that requirement. We believe requiring the Commission file number would add a burden but would provide limited benefits because most Form D filers are nonpublic companies and, as a result, would not have a Commission file number. Furthermore, it is possible to use other required information to aid in identifying issuers.

With regard to identifying issuers, two commenters responded to our solicitation of comment on whether Form D should require CUSIP numbers and trading symbols. One commenter favored adding such a requirement in order to help parse information and facilitate automating filing notices.⁴⁸ The other commenter, however, opposed adding the requirement as burdensome to issuers and resulting in information that is not useful.⁴⁹ We believe that the

⁴⁶ Issuers will specify their legal entity type (e.g., corporation or limited partnership).

⁴⁷ Currently, the Form D instructions do not specify whether all issuers in a multiple-issuer offering can be listed in the same Form D notice or whether each issuer must submit essentially the same notice. In this situation, the staff currently advises each issuer to submit a separate Form D notice because the filings are retrievable in our filing system only by reference to the name of one issuer. The changes clarify the requirements of this item and eliminate the burden on issuers to file what are essentially duplicate notices in order to comply with the requirement to file Form D information. The new online filing system will support multiple-issuer filings. As a result, all issuers easily can be identified in a single filing.

⁴⁸ See letter from Pink Sheets LLC.

⁴⁹ See letter from ABA.

system's data tagging features will facilitate parsing information and obtaining filing notices to such an extent that the burden of requiring CUSIP numbers and trading symbols would not be justified by the benefits to be gained.

In response to a comment letter,⁵⁰ we have provided a place to identify an issuer as "yet to be formed" instead of providing a year of organization. The current Form D provides this alternative.

Two commenters expressed concern as to whether a filer would be able to specify its particular foreign place of incorporation or organization rather than just be able to indicate that the location is foreign.⁵¹ We confirm that the online filing system will enable issuers to specify particular foreign jurisdictions.

Item 2, similar to current Form D, requires filers to provide place of business and telephone contact information.⁵²

The revised form will include instructions to clarify that post office box numbers and "care of" addresses are not acceptable as place of business information. One commenter asked that an issuer be permitted to provide a "care of" address because mail might not otherwise be delivered to the issuer where, for example, the issuer operates out of another entity's office and a separate address listing is precluded by lease restrictions or practical concerns.⁵³ We acknowledge the concern, but reiterate our statement in the proposing release that this information is not collected for mailing purposes. The purpose of this information is to allow

⁵⁰ See *id.*

⁵¹ See letters from ABA and Connecticut.

⁵² Some information of the type that Items 2 and 3 require will automatically appear in appropriate places when the filer accesses the new online filing system. The system will replicate information provided by the filer in the course of obtaining the identifying information needed to access the new online filing system or in updating such information. The filer will be able to make changes to such information.

⁵³ See letter from ABA.

securities enforcement authorities to determine the location of the issuer's operations and personnel responsible for the offering. Post office box numbers and "care of" addresses do not provide this information. In instances in which lease restrictions or other practical concerns arise, the issuer must make arrangements to provide acceptable place of business and contact information.

The revised form will differ from the proposed form as to place of business and telephone contact information. The proposed version would have required place of business and telephone contact information in a multiple-issuer offering only for the primary issuer and would not have permitted such information for the other issuers. In the proposing release, we reasoned that issuers in multiple-issuer transactions typically have the same place of business, and we generally do not need more than one address to contact the responsible personnel for enforcement purposes. In this regard and upon further consideration after reviewing the public comment letters, we have decided that the revised form will differ in one respect – it will permit, but not require, such information for issuers other than the primary issuer in a multiple-issuer offering. In so revising the form, we believe we address the concerns expressed by two commenters. One commenter asked that we require such information for all the issuers in multiple-issuer offerings to accommodate states that currently require a separate Form D from every issuer in a multi-issuer offering, or alternatively, that we require a separate Form D from each of the issuers.⁵⁴ The other commenter asked that we permit multiple issuers to provide separate addresses to avoid the implication that issuers are affiliated when they are not.⁵⁵ We believe these concerns are adequately addressed by permitting all issuers to provide the information because that enables issuers that are filing with states that otherwise would require

⁵⁴ See letter from Pennsylvania.

⁵⁵ See letter from ABA.

separate Forms D to include the information if they wish to avoid filing the separate forms, if permitted by state law.

One commenter asked that Form D require the name of a contact person for the primary issuer and any other issuers in a multiple-issuer offering.⁵⁶ The commenter stated that contact might be necessary in connection with the filing itself or in regard to litigation or enforcement or for other purposes. We believe, however, that address and telephone number information would be sufficient to make an initial contact and that it should be possible to proceed from that point to locate the most appropriate person based on the nature of the contact.

Item 3, similar to current Form D, requires information about related persons (executive officers, directors, and promoters).⁵⁷ As proposed, however, we are deleting the current requirement that issuers identify as “related persons” owners of 10 percent or more of a class of their equity securities.⁵⁸ In so proposing, we reasoned that

- investors should continue to have access to this information, if it is material, in the private placement memorandum customarily supplied to them or in other information made available through the issuer;⁵⁹

⁵⁶ See letter from NASAA.

⁵⁷ The instructions to Item 3 clarify that disclosure will be required of each person who has functioned as a promoter of the issuer within the past five years of the later of the first sale of securities or the date upon which the Form D filing was required to be made.

⁵⁸ We also are revising Item 3 to enable an issuer to clarify its response. This change is discussed more fully in Part II.C below.

⁵⁹ Under some circumstances, an issuer must provide, rather than merely make available, beneficial holder information. For example, an issuer that offers securities to non-accredited investors without registration under the Securities Act in reliance on an exemption provided by Rule 505 [17 CFR 230.505] or 506 [17 CFR 230.506] must provide beneficial holder information under the circumstances specified by Rule 502(b) [17 CFR 230.502(b)].

- we believe we can collect sufficient information to satisfy the regulatory objectives of Form D by requiring only the identification of executive officers, directors, and promoters; and
- issuers that are not reporting companies have raised privacy concerns with respect to the requirement to identify 10 percent equity owners who are not executive officers, directors, or promoters because they do not already have to disclose this information, and the widespread availability of the information on our Web site may raise additional privacy concerns for these companies as they seek to raise capital through a private offering.⁶⁰

Two commenters explicitly supported the proposal to delete the requirement to report publicly the names and addresses of 10 percent or greater equity holders.⁶¹ Both commenters cited privacy concerns. One of the commenters also stated that individual investors would have access to the information to the extent relevant and omitting the information would save time and eliminate filing burdens.⁶²

Four commenters objected to the proposal to delete the requirement to disclose 10 percent or greater holders, citing the usefulness of the information and, in some cases, questioning the validity of privacy concerns.⁶³ These commenters asserted, in essence, that the information is useful to:

⁶⁰ As we stated in the proposing release, from time to time issuers have asked us to grant confidential treatment to this information under Securities Act Rule 406 [17 CFR 230.406], but we have denied such requests consistently because the information currently is required by Form D. We estimated in the proposing release that about 95% of the companies filing Form D notices in 2006 were private companies, which frequently are not required to make public the names of their equity owners in accordance with the laws of the state or other jurisdiction of their organization.

⁶¹ See letters from ABA and MFA.

⁶² See letter from ABA.

⁶³ See letters from Chris Evans (claiming to represent the views of the vast majority of news organizations), Massachusetts, NASAA and Pennsylvania.

- state regulators because, for example, it enables them to determine whether the specified persons are disqualified from conducting an offering or have an enforcement history that warrants additional information and disclosure;⁶⁴
- the general public because it reveals the investment activity of public sector entities;⁶⁵ and
- investors because this degree of ownership control is material and it cannot be assumed this information will be provided even if material, especially where disclosure or fraud may be an issue.⁶⁶

We have considered the differing views on whether to retain the requirement to report publicly the names and addresses of 10 percent or greater equity holders. We still believe it is appropriate to delete the requirement for the reasons discussed above and in the proposing release. In this regard, we note that Item 3 will continue the current Form D requirement to report executive officers and directors based on the functions people perform rather than their titles. Issuers are required to report the names and addresses of promoters whether they act directly or indirectly.⁶⁷ We have modified the instructions to Item 3 slightly from the language proposed to clarify these requirements. As a result, the requirements should result in public reporting of all of a company's principal policymakers.

As proposed, we are deleting the requirement that issuers provide the name of the offering in Form D if the offering has a name. In so proposing, we stated that naming offerings

⁶⁴ See letters citing one or more of these examples from Massachusetts, NASAA and Pennsylvania.

⁶⁵ See letter from Chris Evans.

⁶⁶ See letters from Massachusetts and NASAA.

⁶⁷ The words "directly or indirectly" are used in the applicable definition of the term "promoter" in Rule 405.

reported on Form D is not as common today as it was before the 1986 tax reforms,⁶⁸ when the current Form D requirement was adopted. We understand that some issuers have found this requirement to be unclear. For these reasons, we are deleting the requirement.

2. Additional Information About Issuer

Item 4 of the new Form D requires issuers to identify their industry group from a specified list. The requirement to provide industry group information replaces the current requirement in Form D to provide a description of the issuer's business.⁶⁹ We believe simply selecting an industry group classification from a pre-established list is less burdensome for issuers and more useful for the regulatory purposes underlying the Form D filing requirement. The industry group classifications will provide us better, and more easily retrievable, information about industries and offerings where we may have identified policy issues.⁷⁰ As proposed, if a company selects the "Pooled Investment Fund" option, pop-up or other data fields will require the issuer also to select from among lower level options designating a specific type of pooled investment fund and to select between "yes" and "no" as to whether the issuer is registered as an investment company under the Investment Company Act.

We proposed that Item 5 would require all issuers, regardless of industry group, to either include revenue range information in the Form D filing or choose the "Decline to Disclose" option, which might be used if a private company considered its revenue range to be confidential

⁶⁸ Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (Oct. 22, 1986).

⁶⁹ The industry group list in the new form differs from the one in the proposing release primarily in two ways. First, the new form's list provides for additional choices under the heading "Energy" in order to reduce the number of issuers that would need to choose the less helpful alternative of "Other Energy." Second, the new form's list omits the specific choices that had been under the heading "Business Services" because we believe greater specificity is not necessary for issuers in that industry group.

⁷⁰ The instruction to Item 4 provides that an issuer or issuers that can be categorized in more than one industry group should be categorized based on the industry group that most accurately reflects the use of the bulk of the offering proceeds. The instruction also provides that, for purposes of responding to Item 4, the issuer should "use the ordinary dictionary and commonly understood meanings of the terms identifying the industry groups."

information.⁷¹ We further proposed that, if the business were not intended to produce revenue, such as a fund that seeks asset appreciation, it could select the “Not Applicable” option. We continue to believe that this information will help us to determine the types and sizes of most issuers that rely on the Regulation D and Section 4(6) exemptions. For instance, as noted in the proposing release, this information will increase significantly the effectiveness of the data collected as a tool for assessing the use of the Regulation D exemptions for small businesses and other different sizes of issuers.

We are adopting Item 5, as proposed, except as it will apply to issuers that classify themselves in Item 4 in the industry group “hedge funds” or as pooled investment funds other than venture capital and private equity funds. In order to obtain information on the size of these issuers, Item 5 will request them to provide aggregate net asset value range information.⁷² Consistent with the revenue range requirement applicable to other issuers, however, these issuers will be given the option to “Decline to Disclose” that information or to specify that such information is “Not Applicable.” This addition responds to a comment letter stating that “assets under management” is a more meaningful measure of the size of such issuers than revenues.⁷³ We believe we can obtain adequate size information about venture capital and private equity funds from the information on the total offering amount supplied in response to Item 13, because these types of funds typically do not engage in continuous offerings of indefinite amount, unlike hedge funds and some other types of pooled investment funds.

⁷¹ The revenue range will be for the most recently completed fiscal year. Where an issuer has been in existence for less than a year, it will identify its revenues to date.

⁷² The aggregate net asset value will be requested as of the most recent practicable date.

⁷³ See letter from MFA. Similarly, in commenting on Rel. No. 33-8766 (Dec. 27, 2006) [72 FR 399], another commenter stated that it believed it would be useful to the Commission and investors if Form D would require information on pooled investment funds’ assets under management. See letter from CPIC.

One commenter suggested that we eliminate the “Decline to Disclose” option from the proposed revenue range requirement⁷⁴ and another suggested that we eliminate the revenue range requirement entirely.⁷⁵ The commenter that suggested we eliminate the “Decline to Disclose” option reasoned that elimination would be necessary to make the requirement effective as an information collection tool. The commenter that suggested that we eliminate the requirement entirely reasoned that many companies will opt out, reducing the integrity of the information collected and possibly causing people to draw negative inferences about the company. The commenter went on to state that revenue information is not necessary for a notice filing, and requiring it is inconsistent with the prohibition on general solicitation and general advertising that applies to many offerings required to be reported on Form D.⁷⁶ We recognize that adopting the “Decline to Disclose” option will reduce the amount of information that we receive. We also recognize, however, that some companies may regard this type of information as confidential. Weighing these countervailing considerations in light of the importance of the information, we believe that, on balance, it is best to provide filing companies the option to decline to disclose their revenue range. Commenters did not specify any negative consequences that a company may suffer if it chooses to decline to disclose its revenue range. We believe the information will be useful for the reasons described above. Finally, we believe that revenue information in range form would not likely itself, or in combination with the other information the new form requires, raise general solicitation or general advertising issues.

⁷⁴ See letter from NASAA.

⁷⁵ See letter from ABA.

⁷⁶ See *id.* The ABA also stated that the form should not require asset value information for essentially the same reasons. A third commenter asked whether most private companies would decline to disclose, “thus calling into question the purpose of [the item].” The commenter did not suggest deleting the option to decline or deleting the entire requirement. See letter from Connecticut.

3. Identification of Claimed Exemptions and Exclusions

Item 6 requires the issuer to identify the exemption or exemptions being claimed for the offering, from among Rule 504's⁷⁷ paragraphs and subparagraphs, Rule 505, Rule 506, and Section 4(6), as applicable. This requirement, in general, is carried over from the current Form D requirement with added specificity, requiring the issuer to identify the specific paragraph or subparagraph of any Rule 504 exemption being claimed as well as any specific paragraph of Investment Company Act Section 3(c)⁷⁸ that the issuer claims for an exclusion from the definition of "investment company" under the Investment Company Act.⁷⁹ We are requiring this increased level of specificity and additional type of information in order to assist our policymaking and rulemaking efforts in various areas. Identification of a claimed exemption or exclusion often is key to analysis of the appropriateness of the claim. State securities regulators also use this information to determine the extent of their jurisdiction over the offering under NSMIA. Unlike the requirement in current Form D, however, Item 6 does not enable the issuer to check a box to indicate a claim to the Uniform Limited Offering Exemption (ULOE) from state securities law requirements. We believe that the ULOE box causes confusion and burdens for companies completing Form Ds without resulting in a significant amount of useful information. Most, if not all, companies claiming a ULOE exemption also will check the Rule 505 box, because Rule 505 is the Commission's companion exemption to the ULOE exemption.⁸⁰ Similarly, revised Form D omits all other references to ULOE and the provisions

⁷⁷ 17 CFR 230.504.

⁷⁸ 15 U.S.C. 80a-3(c).

⁷⁹ The issuer will be able to select all the exclusions on which it relies. Regulation D provides an exemption from the Securities Act and not an exclusion from the definition of the term "investment company" under the Investment Company Act. Some companies that use a Regulation D exemption, however, also are excluded from the definition of investment company under the Investment Company Act.

⁸⁰ See Release No. 33-7644 (Feb. 25, 1999) [64 FR 11090].

that, in general, require specified information on a state-by-state basis in an appendix to the form and require specified representations and undertakings. We believe that this information is burdensome to provide without sufficient benefits in terms of furthering the purposes of Form D.⁸¹

One commenter supported our proposal to delete the appendix portion of current Form D, asserting that it is burdensome and without sufficient benefits, but two other commenters objected.⁸² Another commenter, without expressly addressing the appendix, suggested that the form require related information.⁸³ One commenter objected to deleting any part of the appendix, claiming that the information required provides macro-level ownership information valuable to the Commission and other regulators in analyzing fund flows and capital sources in an otherwise opaque area.⁸⁴ One commenter stated that it did not advocate retaining the appendix in its current form but that the appendix requires information such as the amount of securities sold by state and the number and type of investors (accredited/non-accredited) that is useful to state regulators for enforcement purposes.⁸⁵ Finally, one commenter offered the related suggestion that the form should require issuers to specify the states in which they propose to offer or sell securities because that would provide useful information to state regulators in their efforts to uncover notice filing violations and other problems.⁸⁶

We believe the burden that would be imposed by a requirement to provide all information called for by the appendix or similar information is not justified by the value of the information

⁸¹ One commenter expressed general agreement with our views regarding ULOE. See letter from ABA.

⁸² See letters from ABA, Chris Evans and Connecticut, respectively.

⁸³ See letter from Massachusetts.

⁸⁴ See letters from Chris Evans.

⁸⁵ See letter from Connecticut.

⁸⁶ See letter from Massachusetts.

in furthering the purposes of Form D. In this regard, under appropriate circumstances, state regulators still would be able to require this type of information.⁸⁷ At present, the Commission does not require filing of information called for by the appendix, and most Form D filers do not file the appendix with us. They file appendix information only with those states that require it. We assume that states that require filing of appendix information that they are entitled to require may continue to do so. We also assume that the one-stop filing system that we are exploring with NASAA may facilitate the filing of this information with state regulators.

4. Indication of Type of Filing

a. General Requirements

New Item 7 carries over the current Form D requirement to indicate whether the filing is a new filing or an amendment. Including identification of a filing as new or an amendment is appropriate because the form permits amendments and issuers may have valid reasons to wish to update or correct information previously provided in a Form D filing. In addition, as discussed in the section immediately below, we intend to clarify the circumstances where amendments are required. As proposed, Item 7 requires that a new filing specify the date of first sale or indicate that the first sale has yet to occur. We believe that this information will be useful to regulators because it relates to the timeliness of the filing and helps to establish a context in which to evaluate other information provided.

Item 7 will differ from what we proposed in that it will not permit an issuer to designate the states to which the Form D is directed. As more fully discussed above, our system will not

⁸⁷ We note that, even where NSMIA applies, Section 18(c)(2)(A) of the Securities Act [15 U.S.C. 77r(c)(2)(A)] generally provides as to the offer and sale of non-exchange-listed securities that nothing under Section 18 prohibits “any State from requiring the filing of any document filed with the Commission [under the Securities Act], together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee.”

be capable of receiving filings directed to specific states when new Form D becomes effective for federal purposes, although we have been working actively with NASAA in an effort to achieve that capability.⁸⁸ In the interim, we expect that filers will direct filings to the states by mail, overnight delivery, fax or whatever means are permitted or required by the respective states. We expect that some states may permit issuers to file a printed copy of a new Form D filed with us.

One commenter objected to adding the requirement to report date of first sale information.⁸⁹ The commenter asserted that the definition of “first sale” is unclear and a failure to file in the timeframe Form D requires may be used by states to extract late filing penalties or attempt to circumvent the limits NSMIA imposes by claiming that an exemption under Rule 506 is unavailable due to non-compliance with the filing requirement of Rule 503(a), even though filing a Form D is not a condition to an exemption under Regulation D. We believe, however, that providing the date of first sale involves little burden and that it is not the reporting of the date that underlies the state-related concerns but rather the date itself in relation to the date of filing.

Two commenters objected to using the date of first sale as the trigger for the Form D filing deadline.⁹⁰ Both commenters based their objection on the Commission staff’s previously stated view that, solely for purposes of triggering the Form D filing requirement, in a minimum-maximum offering where the subscription funds are held in escrow pending receipt of

⁸⁸ We had proposed to permit issuers to designate the states to which the Form D is directed, on the assumption that some states would adopt one-stop filing and allow filings that specify that they are directed to those states to constitute filings with those states.

⁸⁹ See letter from ABA.

⁹⁰ See letters from ABA and Society of Corporate Secretaries and Governance Professionals (SCSGP).

minimum subscriptions, the date of first sale occurs when the first subscription agreement is received and first funds are deposited into escrow.⁹¹

We believe that the cited interpretation of the date of first sale is correct for purposes of triggering the Form D filing requirement. We believe the interpretation appropriately focuses on when the purchaser makes an investment decision and commits to purchase the securities offered. We also believe that it can be useful for regulatory purposes if an issuer files a Form D before an offering closes to enable regulators to consider the information provided before the offering process ends. If regulatory action is appropriate, earlier consideration potentially could cause it to be more timely and effective.⁹² We have added language to the instructions to Form D clarifying this meaning of date of first sale in accordance with this interpretation. Specifically, the instructions will state that the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor's subscription agreement or check.

b. Amendment of Previously Filed Form D

As proposed, we are clarifying Form D to address when, how, and why an amendment to a Form D may or must be filed. Those issues are not addressed expressly in the current form. While both Rule 503 and the instructions to the current Form D discuss the information that is required when an amendment is filed,⁹³ neither explicitly requires the filing of an amendment. In

⁹¹ See Release No. 33-6455, at Question 82 (Mar. 4, 1983) [48 FR 10045].

⁹² For example, one commenter noted that state regulators use Form D information for screening purposes to help prevent offerings by those subject to disqualification and aid enforcement efforts. See letter from NASAA.

⁹³ Current Rule 503(d) states that amendments to Form D "need only report the issuer's name and the information required by Part C and any material change in the facts from those set forth in Parts A and B." The current instructions to Form D set forth the information required in an amendment as only "the name of the issuer and offering, any changes thereto, the information requested in Part C, and any material changes from the information previously supplied in Parts A and B."

certain offerings and situations, however, an issuer may have made a material mistake of fact or committed another material error in the filed Form D. Situations also arise where changes occur and the initially filed Form D may not be an accurate expression of the current facts in an ongoing offering. Our staff currently interprets Rule 503 and the Form D instructions to require amendments in ongoing offerings where there has been a material change in information filed about the offering and where basic information previously submitted about the issuer has materially changed.

The staff has received questions regarding offerings of extended duration, and how to determine whether and how to file Form D amendments. For example, when offerings are expected to continue for an extended period, the Commission's staff often is asked to assist issuers in determining how to calculate an offering's aggregate offering price and when an amendment to the Form D should be filed. The staff's practice in this regard has been to advise issuers to use a good faith and reasonable belief standard to calculate the aggregate offering price and to amend the Form D annually.

We are revising Rule 503 and the instructions to and description of Form D to require amendments to the Form D notice in the following three instances only:

- to correct a material mistake of fact or error in the previously filed notice (as soon as practicable after discovery of the mistake or error);
- to reflect a change in the information provided in a previously filed notice (as soon as practicable after the change), except that no amendment is required to reflect a change

that occurs after the offering terminates or a change that occurs solely in the following information:⁹⁴

- the address or relationship to the issuer of a related person identified in response to Item 3 of Form D;
 - an issuer's revenues or aggregate net asset value;
 - the minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed notice, does not result in a decrease of more than 10%;
 - any address or state(s) of solicitation shown in response to Item 12 of Form D;
 - the total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice, does not result in an increase of more than 10%;
 - the amount of securities sold in the offering or the amount remaining to be sold;
 - the number of non-accredited investors who have invested in the offering, as long as the change does not increase the number to more than 35;
 - the total number of investors who have invested in the offering;
 - the amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice, does not result in an increase of more than 10%;
- and

⁹⁴

We believe the specified changes should not require an amendment because the burden would not justify the resulting benefits in terms of furthering the purposes of the form. Consequently, it is not necessary to report them for Form D to serve its primary function as a notice of an exempt offering.

- annually, on or before the first anniversary of the filing of the Form D or the filing of the most recent amendment, if the offering is continuing at that time.

Rule 503 also will require an issuer that files an amendment to provide current information in response to all requirements of Form D regardless of why the amendment is filed. We believe it will be relatively easy to provide such current information in most instances due to the form's streamlined information requirements, the likelihood that much of the information would not require change, and the fact that the new online filing system will make available to the issuer the version of the Form D to be amended to enable the issuer to respond only to the changed items.

The amendment requirements differ from what we proposed in that they will

- provide expressly that a mistake of fact or error in the information provided in a previously filed notice only requires an amendment when material;
- provide exceptions for changes in
 - the address or relationship to the issuer of a related person identified in response to Item 3 of Form D;
 - an issuer's aggregate net asset value;⁹⁵
 - the minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed notice, does not result in a decrease of more than 10%;
 - any address or state(s) of solicitation shown in response to Item 12 of Form D;
 - the total offering amount, if the change is a decrease;⁹⁶

⁹⁵ We had proposed an exception for changes in issuer size as measured by revenue consistent with proposed Item 5's requesting that issuers provide their revenue range. We are adopting an exception for changes in issuer size that relates to both revenue and aggregate net asset value to conform the exception to new Item 5. As previously discussed, new Item 5, as adopted, requests that issuers provide either their revenue range or aggregate net asset value, depending on their industry group.

- the amount of securities in the offering that remain to be sold;⁹⁷
- the total number of investors who have invested in the offering;⁹⁸
- the amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice, does not result in an increase of more than 10%;⁹⁹
- require amendments to report the addition of executive officers, directors and promoters in all offerings, and not provide an exception from this requirement for offerings that last more than a year in some circumstances; and
- prescribe that annual amendments are due on or before the first anniversary of the most recently filed Form D filing or amendment, if the offering is continuing at that time, rather than each year between January 1 and February 14.

We have expressly subjected the mistake of fact or error in information amendment requirements to a materiality standard in response to comments received to make explicit what

⁹⁶ We had proposed an exception for a change in the total offering amount, if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, would not result in an increase of more than 10%. We believe that decreases in the total offering amount need not trigger an amendment requirement.

⁹⁷ We had proposed an exception for a change in the amount of securities sold in the offering. An exception is similarly appropriate for the amount of securities that remain to be sold because that amount varies inversely with changes in the amount of securities sold.

⁹⁸ We had proposed an exception for changes in the number of accredited investors who have invested in the offering consistent with proposed Item 14's requiring a report of the number of accredited investors who have invested in the offering. We are adopting the exception relating to the total number of investors rather than the number of accredited investors to conform the exception to new Item 14. New Item 14, as adopted, requires disclosure of the total number of investors rather than the number of accredited investors who have invested in the offering.

⁹⁹ We believe that the additional specified exceptions should not require an amendment because, similar to the other exceptions proposed and adopted, the burden would not justify the resulting benefits in terms of furthering the purposes of the form. Consequently, it is not necessary to report them for Form D to serve its primary function as a notice of an exempt offering.

we intended.¹⁰⁰ We have required amendments upon the addition of related persons (executive officers, directors and promoters) without exception in order to limit the ability to circumvent the purpose of the Form D notice. We have adopted the one calendar year amendment requirement to clarify the due date in response to a comment¹⁰¹ and provide flexibility.¹⁰²

One commenter supported the amendment provisions as proposed,¹⁰³ one commenter objected to the requirement that every amendment contain current information,¹⁰⁴ one commenter both objected to the annual amendment requirement and suggested changes in the other amendment requirements¹⁰⁵ and one commenter said that it would be helpful to state regulators to add a requirement to file an amendment to report termination of offerings that last over a year.¹⁰⁶

The commenter that objected to the requirement to provide current information in every amendment stated that the requirement seems unnecessary, might cause inadvertent errors in re-entering unchanged information and make it difficult to determine what had changed.¹⁰⁷ The

¹⁰⁰ Three commenters suggested that we clarify that only a material mistake of fact or change can trigger an amendment requirement. See letters from ABA, MFA and SCSGP. We did not add a materiality reference to the amendment provision regarding changes in the information reported. We believe that such a reference would be inappropriate because any changes other than those specified as not requiring an amendment would be information regulators need to perform their regulatory functions.

¹⁰¹ One commenter stated that the due date for the proposed annual amendment was unclear. See letter from ABA.

¹⁰² The omission of a January/February filing window from the adopted annual amendment requirement will provide flexibility by, for example, permitting a series of issuers to be placed on the same administratively convenient annual amendment schedule in which they file outside of the January/February window proposed to be mandated.

¹⁰³ The commenter stated that the amendment requirements would ensure that available information would be relatively current and enable state regulators to screen, and provide responses to the public regarding, offerings conducted in their states more effectively. See letter from NASAA.

¹⁰⁴ See letter from SCSGP.

¹⁰⁵ See letter from ABA.

¹⁰⁶ See letter from Connecticut.

¹⁰⁷ See letter from ABA.

commenter suggested that, instead, amendments only should require information that has changed materially. As discussed above, we believe it will be relatively easy to provide such current information in most instances due to the form's streamlined information requirements, the likelihood that much of the information would not require change, and the fact that the new online filing system will make available to the issuer the version of the Form D to be amended to enable the issuer to respond only to the changed items. We also believe that it will be relatively easy to determine what has changed due to the limited amount of information required by the form and the ability to use the data tagging features to help determine changes. We believe that presentation only of those items that have changed materially would result in information being presented out of context and might transform a relatively light burden on the issuer to a relatively heavier burden on each user who accesses the information.

The commenter that objected to the annual amendment requirement did so primarily based on the commenter's assertions that it would be inconsistent with efforts to ease burdens and simplify. We believe the annual amendment requirement viewed in the context of the online filing system generally is consistent with efforts to ease burdens and simplify. We believe it will be relatively easy to file annual amendments in most instances for the reasons discussed above. We also believe that the express annual amendment requirement is clear and, to that extent, will serve to simplify the form.

The commenter that objected to the annual amendment requirement also stated that amendments should not be required when an issuer adds recipients of sales compensation or related persons.¹⁰⁸ Consistent with the requirements of the current form, we believe that requiring the names of additional recipients of sales compensation and related persons is

¹⁰⁸ See letter from ABA.

appropriate for a notice form and provides important information about the offering for regulatory purposes.

The same commenter essentially asked that that the proposed exception from the amendment requirements for additions of related persons be broadened.¹⁰⁹ As proposed, in offerings that last more than a year, a change in information on related persons would not trigger an amendment, if the change was due solely to the filling of a vacant position upon the death or departure in the ordinary course of business of the previous occupant of the position.¹¹⁰ Upon further consideration, we believe the exception for offerings that last more than a year may permit easy circumvention of the intent of the requirement. As adopted, the rule amendments will require a Form D amendment upon the addition of any related person, but will not require amendments to report changes of addresses of related persons.

The same commenter stated that an amendment should not be needed for an issuer to file with an additional state or states during an ongoing offering.¹¹¹ The amendment provisions would not require an amendment solely because an issuer wished to file with an additional state or states.

Finally, one commenter suggested that the new annual and other amendment rules not apply to paper Form D filings, asserting that, as to such filings, filing amendments would be overly burdensome because there would be no existing electronic version on the system to use as a starting point.¹¹² As further discussed below, there will be a period during which the amendments we adopt in this release would be effective except that electronic filing would be

¹⁰⁹ See letter from ABA.

¹¹⁰ For example, a change in information regarding related persons that occurs in connection with a change a change in control would not be in the ordinary course of business.

¹¹¹ See letter from ABA.

¹¹² Id.

optional rather than mandatory for a period of time after the electronic system becomes available. During that time, in general, an issuer will be able to file new Form D in either paper or electronic format or file current Form D in paper format. Also during that time, the new annual and other amendment rules will apply to all new Form D filings regardless of format and the current amendment requirements will apply to all current Form D filings in paper format. We believe that during the transition period this approach will provide adequate flexibility to issuers and consistency between the current and new versions of Form D and their respective amendment requirements. Once the transition period ends, all federal filings will be required to be on new Form D in electronic format and, accordingly, the new amendment rules will apply. We believe that applying the new amendment rules at that time even as to prior filings of current Form D in paper format would not create a significant additional burden due to the lack of a previous electronic version on the system and that confusion likely would result from the lack of a uniform approach to post-transition period amendments that itself could impose a burden.

5. Information About Offering

Items 8 through 16 will require factual information about the offering itself. Most of the information sought currently is required by Sections B and C of Form D.

Duration of Offering. Item 8 will require the issuer to indicate whether it intends that the offering will last over a year. Such information currently is not specifically required by Form D. The absence of an information requirement of this type has presented compliance questions because regulators may not know whether an offering may span an extended period of time based on the information currently required by Form D.

Type of Securities Offered. Item 9 will carry over the current requirement to specify the type of securities being offered, such as debt or equity, with additional categories of securities added. Some of the additional categories will provide more clarity. The rest of the additional

categories will identify types of securities, the specification of which we believe will help facilitate our rulemaking efforts.¹¹³ The issuer will be required to specify all categories that apply to the securities that are the subject of the exemption(s) specified in response to Item 6.

Business Combination Transaction. Form D currently requires that the issuer indicate only whether the offering is an exchange offer. New Item 10 will require the issuer to indicate whether the offering is being made in connection with a business combination such as an exchange (tender) offer, a merger or acquisition, regardless of the type of offering.¹¹⁴ We believe that, for purposes of Form D, it is important to identify whether an offering is being made in connection with a business combination transaction, whether structured as an exchange or in some other manner, because such transactions sometimes give rise to policy concerns.¹¹⁵

Minimum Investment Amount. Item 11 will, as proposed, carry over the requirement in Form D to specify the minimum investment amount per investor. We are maintaining this requirement because offerings that have low minimum investment amounts have presented particular enforcement challenges in the past. We have changed Item 11 from what we proposed to require specification of the minimum investment for outside investors only, so as not to affect employee stock ownership incentive plans adversely. Investors will be considered outside investors if they are not employees, officers, directors, general partners, trustees (where the issuer is a business trust), consultants, advisors or vendors of the issuer, its parents, its

¹¹³ The new categories would be “Security to be Acquired Upon Exercise of Option, Warrant or Other Right to Acquire Security,” “Pooled Investment Fund Interests,” “Tenant-in-Common Securities,” and “Mineral Property Securities.”

¹¹⁴ We also are revising Item 10 to enable an issuer to clarify its response. We discuss this change more fully in Part II.C below.

¹¹⁵ For example, business combination transactions may raise some of the types of policy concerns we intended to address in adopting rules and rule amendments relating to filings by reporting shell companies. Release No. 33-8587 (July 15, 2005) [70 FR 42234].

majority-owned subsidiaries, or majority-owned subsidiaries of the issuer's parent.¹¹⁶ We believe that low investment amounts are more likely to present enforcement challenges when offered to outside investors, and have changed the requirement as a result.

Sales Compensation. Item 12 generally will carry over but simplify the response to the requirements in Form D related to information on sales compensation, as we proposed. In addition, also as proposed, it will add a requirement to provide the CRD number of each person that is a compensation recipient named in response to Item 12, provided the person has a CRD number.¹¹⁷ In addition and as a complement to what we proposed, Item 12 also will require that when both a person that receives sales compensation and the person's associated broker-dealer are reported, the issuer must provide the CRD number, if any, for both. Also in addition to what we proposed, the instruction to Item 12 will clarify that the compensation that can result in a reporting requirement can be cash or other consideration; a finder or other person that does not have a CRD number need not obtain one in order to be listed; and, conversely, a finder or other person is required to be listed where called for, regardless whether the finder or other person has a CRD number.¹¹⁸ A CRD number corresponds to a broker or broker-dealer's record located in the Central Registration Depository, a computer database of brokers and broker-dealers that FINRA maintains. It should be relatively easy for an issuer to obtain the CRD numbers from the

¹¹⁶ The standard for determining who is an "outside investor" is similar to the standard in Securities Act Rule 701 [17 CFR 230.701] and Securities Act Form S-8 [17 CFR 239.16b] for determining who is an eligible investor, except that for Form D purposes vendors are included and certain family members are excluded.

¹¹⁷ The instruction to new Item 12 uses the term "person" rather than the proposed term "individual" to describe the sales compensation recipients that an issuer must list. The term "person" is used in order to clarify that, as intended in the proposed instruction, new Item 12 carries over the requirement in current Form D that references the term "person" to identify recipients of sales compensation regardless of whether the recipient is a natural person.

¹¹⁸ We believe this clarification generally would be responsive to several comments related to Item 12. One commenter suggested that the form clarify that cash and non-cash compensation could trigger a reporting requirement and not every person has a CRD number. See letter from Connecticut. Another commenter suggested that the form clarify that issuers must report the names of persons regardless whether they have CRD numbers. See letter from NASAA.

brokers and broker-dealers it retains. We have added instructions to Form D informing filers where to obtain CRD numbers on the Internet.¹¹⁹ Requiring reporting of the CRD numbers will facilitate checking a broker's or broker-dealer's records. Requiring reporting of the CRD numbers of listed persons as well as any associated broker-dealers will enhance the informational value of the item.

Two commenters supported requiring CRD numbers in particular,¹²⁰ while one commenter objected to Item 12 as proposed, stating that the item could discourage users from using Regulation D, should not require the names of individual recipients of sales compensation and, if it did require their names, it should not require their CRD numbers.¹²¹ Consistent with current Form D's requirement to name up to five persons associated with a particular broker-dealer that receive compensation in connection with sales of securities in an offering and any associated broker-dealer, we continue to believe that such information is important. Also consistent with current Form D's requirements, we continue to believe that it is useful to have the names of individuals regardless of whether they are associated with a broker-dealer. Once more than five individuals associated with the same broker-dealer otherwise would be named, however, the burden of listing additional names does not justify the benefit and it is sufficient in that case to have the name of the associated broker-dealer alone.

We believe that the new sales compensation disclosure requirements will not discourage issuers from using Regulation D any more than the current sales compensation reporting requirements do. The concern about discouraging issuers from using Regulation D appears to be

¹¹⁹ Anyone with access to the Internet can check a broker's CRD number and record by visiting <http://brokercheck.finra.org>. CRD numbers also can be obtained by calling a state regulator or FINRA's public disclosure hotline at 800-289-9999. See http://www.nasaa.org/Investor_Education/Investor_Alerts_Tips/292.cfm.

¹²⁰ See letters from Massachusetts and NASAA.

¹²¹ See letter from ABA.

rooted in a concern about regulator background checks on named persons. In this regard, we note that background checks are possible under the requirements of current Form D, and the only additional sales compensation requirement under the new form, CRD numbers, merely would facilitate that check.

Finally, one commenter asked us to clarify the extent to which new Item 12's sales compensation recipient disclosure requirement will apply to foreign sales.¹²² Consistent with Preliminary Note 7 to Regulation D, Regulation D's requirements and, as a result, Form D's requirements, including new Item 12, will apply to foreign sales to the extent the issuer seeks to rely on an exemption under Regulation D for such foreign sales.¹²³

Offering and Sales Amounts. Item 13 will carry over the current requirements to provide the amount of total sales and the total offering amount, but in a restructured, simplified format. Instructions have been added to clarify interpretive issues that have arisen in completing the form, such as how to respond to this requirement if the amount of an offering is undetermined when the Form D filing is made.¹²⁴ One commenter suggested that the form require a final report of actual sales results and be due not later than 15 business days after the close of the offering.¹²⁵ The commenter asserted that this would better meet the practical needs of issuers in terms of determining the trigger date for the Form D filing requirement, coordinating the filing of

¹²² See letter from ABA.

¹²³ Preliminary Note 7 to Regulation D provides as follows: "Securities offered and sold outside the United States in accordance with Regulation S need not be registered under the [Securities] Act. See Release No. 33-6863. Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this note, however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States."

¹²⁴ We also are revising Item 13 to enable an issuer to clarify its response. We discuss this change more fully in Part II.C below.

¹²⁵ See letter from Stephen A. Marcus.

Form D with the Commission with state filing and fee calculation requirements, and determining the need for amendments as the sales process proceeds. As previously noted, we believe that it can be useful for regulatory purposes if an issuer files a Form D before an offering closes to enable regulators to consider the information provided before the offering process ends. If regulatory action is appropriate, earlier consideration potentially could cause it to be more timely and effective. We also believe that issuers have been and will continue to be able to coordinate their federal Form D and state filings without requiring Form D to contain final sale information rather than offering information as of an earlier time. Finally, we believe that any uncertainties as to when to amend will be substantially resolved by the provisions we are adding to the form requirements.

Investors. Item 14 will elicit information on whether the issuer intends to sell securities to persons who do not qualify as accredited investors and the number of such persons who already have invested. It will elicit information on the total number of investors who already have purchased securities in the offering. The form currently requires this information because it affects how we and state securities regulators evaluate claimed exemptions and allocate enforcement resources. We have modified Item 14 slightly from the proposed version by requiring the issuer to specify the total number of investors in the offering, rather than the number of accredited investors, so that examiners can readily see that number, rather than being required to add the numbers of accredited and non-accredited investors, as was the case in the proposed version.

Expenses and Use of Proceeds of Offering. We proposed to eliminate the items requiring information on expenses and use of proceeds of the offering. The current requirements frequently do not yield information necessary for an evaluation of the claimed exemption or for enforcement or rulemaking efforts. Many, if not most, Form D filings do not provide use of

proceeds information that serves the form's purposes, because they specify only that the majority of proceeds will be used for "working capital" or "general corporate purposes." In addition, because of the diversity in use of proceeds in Regulation D offerings, attempting to standardize responses to provide searchable data may be challenging and not worthwhile.

Commenters expressed mixed views on eliminating the requirements for information on expenses and use of proceeds of the offering. One commenter agreed with the Commission's view that the information is not necessary and stated that providing the information is problematic because of issuer burden, lack of applicable accounting standards and category definitions, and estimated amounts.¹²⁶ Commenters that objected to deleting the requirements essentially stated that the information helps to enable state regulators to screen offerings for potential problems.¹²⁷ One of these commenters addressed the issues of burden and lack of specificity as to use of proceeds information by suggesting that the form provide more checkboxes but exclude from those checkboxes one that provides for general corporate purposes.¹²⁸

We have considered the comments and, as a result, rather than deleting the current expenses and use of proceeds requirements in their entirety, we are deleting most of them and adopting the rest of them in new Items 15 and 16. New Item 15 will require the issuer to provide only the amounts paid for sales commissions and, separately stated, finders' fees in connection with the offering. New Item 16 will require reporting of the amount of the gross proceeds the issuer used or proposes to use for payments to related persons.¹²⁹ New Items 15 and 16 will

¹²⁶ See letter from ABA.

¹²⁷ See letters from Connecticut, Massachusetts, NASAA and Pennsylvania.

¹²⁸ See letter from NASAA.

¹²⁹ For purposes of new Item 15, "Related Persons" are those persons new Item 3 requires the issuer to report in the Form D notice.

permit clarification where necessary to prevent the information supplied from being misleading.¹³⁰ Both items will require substantially less information relating to offering expenses and use of proceeds and, thereby, result in a substantially reduced burden. The information new Items 15 and 16 will require is limited to expenses in connection with the offering process and payments to related persons. We believe that these types of expenses and payments are most likely to be of regulatory interest. Consequently, we believe the benefits from providing this information will justify the burdens in relation to information necessary for regulatory purposes.

6. Signature and Submission

We are combining the federal and state signature requirements currently in Sections D and E of Form D into one signature requirement. This will simplify the filing and make it consistent with other signature requirements of Commission forms. We are incorporating into the signature block a consent to service of process similar to the one currently in Form U-2, which is required to be filed separately but simultaneously with a Form D by many states. Our intention in making these changes is to maintain the usefulness of the signature block to regulators in a manner that is consistent with easing burdens on filers.

The combined signature requirement, in general, provides that each issuer signing the revised Form D¹³¹ has read the Form D, knows the contents to be true, has duly caused the Form D to be signed on its behalf by the undersigned duly authorized person, and is¹³²

¹³⁰ We discuss the ability to clarify items in Part II.C below.

¹³¹ Each issuer in a multiple-issuer offering will be required to sign the Form D. If all issuers authorize the same person to sign on their behalf, however, only that person will need to sign.

¹³² Both the current federal and state signature requirements expressly provide that the issuer has duly caused the Form D to be signed on its behalf by the undersigned duly authorized person. Only the current state signature requirement, however, expressly provides that the issuer has read the Form D and knows the contents to be true.

- notifying the Commission and the states in which the Form D is filed of the offering and undertaking to furnish to them, on written request, the information provided by each issuer to offerees in accordance with applicable law;
- consenting to service of process on individuals holding specified positions; and
- certifying that, if the issuer is claiming a Rule 505 exemption, it is not disqualified from relying on Rule 505 for one of the reasons stated in Rule 505(b)(2)(iii).

In undertaking to furnish to the states in which the Form D is filed, on written request, the information provided to offerees, the issuer will not be affecting any legal limits on the ability of these states to require information.¹³³

The signature requirement will be more extensive than the current federal signature requirement and will differ in various ways from the current state signature requirement. The proposed signature requirement will be more extensive than the current state signature requirement, for example, by including a consent to service of process. The signature requirement also will be less extensive than the current state signature requirement in several ways.¹³⁴

The signature requirement also will differ in several ways from the Form U-2 signature requirement. The principal difference between the signature requirement and the Form U-2 signature requirement is that Form U-2 requires the notarized signature of a corporate officer (or

¹³³ See Section 18 under the Securities Act as discussed in Part I.B.3.

¹³⁴ The new signature requirement, unlike the current state signature requirement, will omit both an undertaking to provide a Form D to specified state administrators and a representation regarding ULOE. As noted above, however, under the new signature requirement, issuers will undertake to furnish to the states in which the Form D filing is made, on written request, the information provided by each issuer to offerees. Also as noted above, revised Form D will omit all references to ULOE and the provisions that, in general, require specified information on a state-by-state basis in an appendix to the form and require specified representations and undertakings.

that person's equivalent in the case of other entities) and requires a consent to jurisdiction and venue as well as a consent to service of process.¹³⁵

Some commenters expressly supported a combined signature requirement,¹³⁶ but they and other commenters expressed concerns. Two commenters expressed the concern that the undertaking to provide offering materials could be read in a manner inconsistent with NSMIA,¹³⁷ one commenter asked for clarification regarding the application of NSMIA,¹³⁸ and two commenters expressed the concern that the combined signature requirement was too narrow because it did not contain all that is contained in the current state signature requirement and Form U-2.¹³⁹

The commenters that expressed the concern that the undertaking to provide offering materials could be read in a manner inconsistent with NSMIA stated that the undertaking could be misunderstood to mean that, as a result of the undertaking, states could require the offering materials in all instances regardless of the limits NSMIA otherwise would impose on their ability to do so.¹⁴⁰ Both of these commenters suggested that Commission could resolve the concern by omitting the undertaking, and one of these commenters¹⁴¹ suggested that, in the alternative, the Commission could clarify that the undertaking would be inapplicable to offerings under Rule 506. In response to these concerns, the new form will clarify in the context of the offering

¹³⁵ The new signature requirement's addressing consent to service but not consent to jurisdiction or venue is consistent with the signature requirement in Form ADV [17 CFR 279.1], which can satisfy both federal and state filing requirements for investment adviser registration.

¹³⁶ See letters from ABA and NASAA.

¹³⁷ See letters from ABA and MFA.

¹³⁸ See letter from ABA.

¹³⁹ See letters from Connecticut and NASAA.

¹⁴⁰ See letters from ABA and MFA.

¹⁴¹ See letter from ABA.

materials undertaking that where securities that are the subject of the Form D are covered securities under NSMIA, whether in all instances or due to the nature of the offering that is the subject of the Form D, the states cannot routinely require the offering materials under the undertaking or otherwise and can require the offering materials only to the extent Section 18(c)(1) permits them to do so under its preservation of their anti-fraud authority. Also, we have added language to the undertaking specifying that it only applies to written requests made “in accordance with applicable law.”

The commenter that requested the NSMIA-related clarification asked that we clarify the relationship between Section 18(c)(2)(A) and the new signature requirement’s consent to service provision in particular and between Section 18(b)(4)(D) and new Form D in general. Section 18(c)(2)(A) generally provides, in relevant part, that the states retain the right under NSMIA to obtain a consent to service of process from an issuer engaged in an offering under Rule 506 of Regulation D. Section 18(b)(4)(D) generally provides that the states retain the right under NSMIA to impose on an issuer engaged in an offering under Rule 506 “notice filing requirements that are substantially similar to those required by rule or regulation under section 4(2) that are in effect on September 1, 1996.” Similarly to what we noted above in regard to the undertaking to provide offering materials, neither the consent to service provision nor anything else related to new Form D affects any legal limits on the ability of the states to require information.

Both commenters that expressed the narrowness concern addressed the consent to service provision. One commenter stated that the consent to service should be broadened to include consents to jurisdiction and venue as are contained in Form U-2 to eliminate fully the need to file Form U-2 and enable investors to avoid needing to plead and prove jurisdiction as an issuer

should that wants to offer or sell in a state.¹⁴² The other commenter stated that the consent to service provision should be broadened to apply to a broader array of acts, as does Form U-2, and to include the Rule 262 disqualification provision we proposed to delete.¹⁴³ The commenter reasoned that the form should include the Rule 262 disqualification provision because state bad actor provisions might apply to offerings under Rule 504 or 505.

We believe that the consent to service provision as proposed and adopted strikes the right balance between regulatory benefit and issuer burden. We acknowledge that the consent to service will not be as broad in effect as Form U-2 because that form's consent to service applies to a somewhat broader array of acts and that form also contains consents to jurisdiction and venue. We believe, however, that the Form D consent provision's application to a somewhat narrower array of facts is appropriate because the facts it applies to are tailored to the subject matter of Form D. The Form D consent to service provision generally applies to "any activity in connection with the offering of securities that is the subject of this [Form D]." In contrast, the Form U-2 consent to service provision generally applies to actions relating to "the sale of securities." Finally, although Form D will not require consents to jurisdiction and venue, we note that under appropriate circumstances, state regulators still would be able to require this type of information.

B. Electronic Filing of Form D

We are amending Regulation S-T,¹⁴⁴ Rule 503 of Regulation D, and Form D to implement the requirement for issuers to file the information required by Form D with us

¹⁴² See letter from NASAA.

¹⁴³ See letter from Connecticut.

¹⁴⁴ Regulation S-T is the Commission's general regulation governing electronic filing.

electronically through an online filing system.¹⁴⁵ A large majority of commenters supported electronic filing, but some expressed concern about whether electronic filing would impose more burdens on issuers¹⁴⁶ or raise general solicitation issues.¹⁴⁷ The concerns regarding burdens generally related to the operation of the online system, and we address those concerns below where we discuss the operation of the system in more detail.¹⁴⁸

One commenter expressed the concern that, even though Forms D currently are publicly accessible, their increased public accessibility as a result of mandated electronic filing would encourage third parties to use Form D for purposes beyond its original intent or current use and might result in issuers making less use of Form D than they do now and, thereby, deprive them of the benefits of the use of Regulation D and cause the Commission to receive less information than it does now.¹⁴⁹ The commenter suggested that, as an alternative, the Commission permit Form D filings to be confidential for a specified amount of time, such as a year, if the issuer has made no public disclosure of the offering. The Form D would, however, be available to the Commission and states with which it was filed during that time. We acknowledge the commenter's concerns. As we discussed in the proposing release and above, however, public availability of Form D provides a measure of investor disclosure and serves other useful purposes. In addition, as a practical matter, even if we were to permit confidential filing, Forms D would be subject to requests under the Freedom of Information Act ("FOIA").¹⁵⁰

¹⁴⁵ The online filing system will automatically capture and tag data items and is discussed in further detail in Part III of this release.

¹⁴⁶ See letters from ABA, Stephen A. Marcus and SCSGP.

¹⁴⁷ See letters from Connecticut, Massachusetts and NASAA.

¹⁴⁸ We address the concerns relating to general solicitation issues in Part II.C below.

¹⁴⁹ See letter from ABA.

¹⁵⁰ 5 U.S.C. 552 et seq. The Commission's regulations that implement that statute are at 17 CFR 200.80 et seq.

Rule 101(c)(6) of Regulation S-T¹⁵¹ currently requires the information required by Form D to be filed in paper format. The amendments will delete the reference to Form D from Rule 101(c)(6) and will revise subparagraph (a)(1) of Rule 101¹⁵² to add a new subparagraph (xiii) that will add Form D to the rule's list of documents required to be filed electronically.

Rule 100 of Regulation S-T,¹⁵³ which specifies the persons or entities subject to the electronic filing requirements of Regulation S-T, expressly includes, among others, Exchange Act reporting companies whose filings (such as Form D) are subject to review by the Division of Corporation Finance. In order to assure that Rule 100 also will apply to non-reporting companies that file Form D, the amendments revise paragraph (a) of Rule 100 of Regulation S-T¹⁵⁴ to add a reference to entities that are not Exchange Act reporting companies but whose filings are subject to review by the Division of Corporation Finance.

We also are amending Regulation S-T, as proposed, to make hardship exemptions unavailable for Form D filings.¹⁵⁵ The amendments revise subparagraph (a) of Rules 201¹⁵⁶ and 202¹⁵⁷ to exclude Form D from the filings for which hardship exemptions are available. We believe hardship exemptions should not be available for Form D filings because of the relative ease of electronic filing, the limited value of paper filings and the utility of a uniform,

¹⁵¹ 17 CFR 232.101(c)(6).

¹⁵² 17 CFR 232.101(a)(1).

¹⁵³ 17 CFR 232.100.

¹⁵⁴ 17 CFR 232.100(a).

¹⁵⁵ We note, however, that a filer may request a filing date adjustment under Rule 13(b) of Regulation S-T [17 CFR 232.13(b)]. This rule addresses circumstances where an electronic filer attempts in good faith to file a document with the Commission in a timely manner but the filing is delayed due to technical difficulties beyond the filer's control. In those instances, the filer may request an adjustment of the document's filing date. The staff may grant the request if it appears that the adjustment is appropriate and consistent with the public interest and the protection of investors.

¹⁵⁶ 17 CFR 232.201(a).

¹⁵⁷ 17 CFR 232.202(a).

comprehensive database. In adopting the conversion of the Form D filing from a paper system to an electronic system, we assume that issuers will have access to a computer and the Internet. In the absence of an issuer's having a personal or office computer and Internet access, public libraries around the country often have computer and Internet access that an issuer could use. We therefore do not envision the need for a hardship exemption to permit paper filing.¹⁵⁸

The amendments revise Rule 503 of Regulation D and Form D in several ways related to electronic filing. The amendments delete from Rule 503 references to the paper-based concept of copies in subparagraphs (a) and (b) and a manual signature in subparagraph (b).

Subparagraph (a) will continue to specify when a notice on Form D initially must be filed and will be revised to specify also when an amendment to a Form D filing must or could be filed.¹⁵⁹

One commenter¹⁶⁰ suggested that we ease burdens by extending the filing deadline to at least 30 days from the date of first sale,¹⁶¹ defining the date of first sale as the consummation of the first closing of a sale of securities in the offering, extending the cut-off time for electronic filing from 5:30 to 10:00 p.m. Eastern time¹⁶² and providing that when a Form D otherwise

¹⁵⁸ We also are adopting an amendment to Rule 104(a) of Regulation S-T [17 CFR 232.104(a)] to make it clear that unofficial PDF copy submissions are unavailable for Form D notices. The new online filing system, further described below, will make filed Form D information available on our Web site in what we believe will be an easy-to-read format similar to that which could be provided through an unofficial PDF copy.

¹⁵⁹ Subparagraph (a) will continue to provide that an issuer must file the Form D no later than 15 calendar days after the first sale of securities in the offering. As currently, an issuer could file the Form D at any time before that if it has determined to make the offering. Also as currently, a mandatory capital commitment call would not constitute a new offering, but would be made under the original offering, so no new Form D filing would be required solely as a result. See Part II.A.4.b of this release for a discussion of when an amendment must or could be filed.

¹⁶⁰ See letter from ABA.

¹⁶¹ As discussed above in connection with Item 13 in Part II.A.5, another commenter suggested that the form require a final report of actual sales results and be due not later than 15 business days after the close of the offering.

¹⁶² Rule 13 of Regulation S-T [17 CFR 232.13] generally provides that a filing by direct transmission beginning on or before 5:30 p.m. Eastern time on a business day is deemed filed that day and, if such a filing were to begin after that time, it would be deemed filed on the next business day. Rule 13 also provides, however, that a 10:00 p.m. deadline applies for registration statements and post-effective amendments filed under Rule 462(b) [17 CFR 230.462(b)] and beneficial ownership reports filed

would be due on a weekend or holiday it be deemed due on the next business day. We are not aware of the current deadline's having been difficult to meet in the past and believe that carrying it forward is not likely to cause problems in the future. For the same reasons, we believe that it is not necessary to extend the cut-off time from 5:30 to 10:00 p.m. In this regard, we note that filings under Rule 462(b) and Section 16(a) to which the extended cut-off time applies typically must be made much more quickly than a filing on Form D.¹⁶³ We are, however, further revising Rule 503(a)(1) to provide that when a Form D filing otherwise would be due on a weekend or holiday it will be deemed due on the next business day. This approach is consistent with the way Exchange Act Rule 0-3(a)¹⁶⁴ generally treats filing deadlines under the Exchange Act.¹⁶⁵

Subparagraph (b) of Rule 503 will continue to require a signature. Rule 302 of Regulation S-T,¹⁶⁶ which governs the manner of signature for electronic filings, will apply to Form D.¹⁶⁷ The amendments also add to subparagraph (b) a statement that electronic Form D filing through our new online filing system is mandatory. In addition, the amendments delete subparagraphs (c), (d), and (e). Subparagraph (c) requires an issuer that makes sales under Rule

under Section 16(a) [15 U.S.C. 78p(a)], in general, by officers, directors and principal security holders of reporting companies that have a class of equity securities registered under Section 12 [15 U.S.C. 78l] of the Exchange Act.

¹⁶³ For example, Section 16(a)(2)(C) [15 U.S.C. 78p(a)(2)(C)] generally requires that insiders file reports of changes in beneficial ownership within two business days of the change.

¹⁶⁴ 17 CFR 240.0-3(a).

¹⁶⁵ As the commenter that raised the weekend/holiday issue pointed out, current Rule 503(e)(2) addresses the issue by providing that a Form D we do not physically receive by the end of the 15-day period is deemed filed on the date it is sent by certified or registered U.S. mail. Consequently, an issuer currently may send a Form D as late as the end of the 15-day period. In proposing to delete Rule 503(e)(2), it was not our intention to shorten the Form D filing deadline.

¹⁶⁶ 17 CFR 232.302.

¹⁶⁷ Rule 302 requires, in general, that electronic filings contain typed signatures, that each signer manually sign a signature page or other document confirming the typed signature by the time the filing is made, and that the issuer maintain the manually signed document for five years and make it available to the Commission and its staff upon their request. We also are adding to Form D's signature instruction a summary of Rule 302's requirements as a convenience.

505 to provide an undertaking on its Form D to provide specified information to the Commission upon the staff's written request. This paragraph no longer will be necessary because, as noted above, the revised signature requirement will provide that each issuer signing the Form D will be undertaking to furnish to the Commission and the states with which the Form D is filed, on written request, the information provided by each issuer to offerees. Subparagraph (d), regarding amendments, no longer will be necessary because subparagraph (a) will address when to file amendments and the new online filing system will make available to the issuer the version of the Form D to be amended to enable the issuer to key in only the changes. Subparagraph (e), regarding the date a Form D filing is considered filed, no longer will be necessary because Rule 13 of Regulation S-T will specify the way to determine the filing date for a Form D filing as it does for electronic filings generally and new Rule 503(a)(1) will provide that when a Form D otherwise would be due on a weekend or holiday it will be deemed due on the next business day.¹⁶⁸ Finally, the amendments similarly will revise the General Instructions of Form D regarding copies required, manual signatures, amendments, mandatory electronic filing and filing date.

C. General Solicitation and General Advertising Issues Presented by Electronic Filing of Form D

Rule 502(c) of Regulation D¹⁶⁹ sets forth the prohibition on general solicitation and general advertising applicable to most Regulation D offerings. Specifically, issuers and persons acting on the issuer's behalf are prohibited from offering or selling securities by any form of general solicitation or general advertising. Information filed using Form D has up to now been available to the general public. The electronic filing and availability of Form D information,

¹⁶⁸ The description of Form D at 17 CFR 239.500 is similar to Rule 503 and is being amended similarly.

¹⁶⁹ 17 CFR 230.502(c).

however, may present the concern that the filing could be used as a marketing document to generate interest in offerings because the information would be easily and broadly available. This, in turn, may raise concerns regarding compliance with Regulation D's prohibition on the use of general solicitation and general advertising. To address these compliance concerns, we are revising Rule 502(c) to include a safe harbor from the prohibition on "general solicitation" and "general advertising" for information provided in a Form D filed with the Commission if the information is provided in good faith and the issuer makes reasonable efforts to comply with the requirements of Form D. An issuer that complies with the terms of the safe harbor is assured that the electronic availability of its Form D filing would not, in and of itself, cause the issuer to have violated this prohibition.

Such a safe harbor would not be warranted if it merely shielded activity that is, in fact, intended to generate interest in the offering in violation of law. Accordingly, we are limiting the amount of information submitted on the form and limiting the application of the safe harbor to where the information is provided with a good faith and reasonable effort to comply with the requirements of Form D.¹⁷⁰ Limiting the safe harbor to information provided with a good faith and reasonable effort to comply with the requirements of Form D would be consistent with Preliminary Note 6¹⁷¹ to Regulation D, Rule 508,¹⁷² and the "notification" nature of Form D's requirements.

¹⁷⁰ Similarly, current Rule 502(c) includes a safe harbor from the prohibition on general solicitation and general advertising for a notification in compliance with Rule 135c of an unregistered offering by an issuer required to file reports under Section 13 or 15(d) of the Exchange Act. The information allowed to be included in a Rule 135c notification is limited to very basic identifying information about the issuer and the offering.

¹⁷¹ Preliminary Note 6 to Regulation D provides, in part, that "Regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the [Securities] Act."

¹⁷² 17 CFR 230.508. Rule 508 provides, in part, that "A failure to comply with a term, condition or requirement of [specified rules under Regulation D] will not result in the loss of [an] exemption . . . if the

As proposed, electronic Form D would not have contained any place where “free writing” could occur.¹⁷³ When submitting a paper filing, filers may insert information that is not required by the form, but that could be a vehicle for soliciting investors illegally. Prohibiting free writing in the electronic form would prevent such misuse. One commenter favored the total bar against free writing as necessary to safeguard against this misuse.¹⁷⁴ Another commenter, however, favored allowing issuers to clarify responses, asserting that permitting issuers to do so would avoid a disincentive to filing by enabling issuers to present more accurate information that would be more useful.¹⁷⁵ The commenter also asserted that permitting clarification to ensure accuracy would not transform the Form D into a marketing document and would be consistent with the proposed safe harbor because the information would be provided with a good faith and reasonable effort to comply with the requirements of Form D.

We are persuaded that, on balance, it is appropriate to permit issuers to engage in a limited amount of free writing to the extent necessary to clarify responses as consistent with the safe harbor. In order to limit the amount of free writing, however, we are reducing the need for it by offering additional response choices for some items¹⁷⁶ and permitting free writing to clarify responses in separate fields using a limited number of characters only for those items for which it seems appropriate. Accordingly, and as noted above in the context of discussing particular items of new Form D, we will permit free writing to clarify responses to the following items:

person relying on the exemption shows . . . [a] good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of [such rules].”

¹⁷³ As proposed and adopted, however, Form D will require an issuer to provide further detail in a textual response if the issuer must choose “Other” in response to Item 1 regarding legal entity type or Item 9 regarding security type.

¹⁷⁴ See letter from NASAA.

¹⁷⁵ See letter from ABA.

¹⁷⁶ For example, we have modified the proposed version of Item 1 to permit an issuer to choose “yet to be formed” instead of providing a year of organization in response to that item.

- Item 3 – Related Persons;
- Item 10 – Business Combination Transactions;
- Item 13 – Offering and Sales Amounts;
- Item 15 – Sales Commissions and Finders’ Fee Expenses; and
- Item 16 – Use of Proceeds.¹⁷⁷

Two commenters urged that we provide additional safeguards to support the ban on general solicitation and general advertising.¹⁷⁸ Both commenters suggested prominent warnings in connection with the display of Form D information. One of them also favored limiting public access to some types of information, clarifying in connection with adopting the amendments that electronic filing does not eliminate the ban and amending Regulation D to require companies to return any unsolicited payments submitted to purchase securities.¹⁷⁹ We believe that limiting the types and amount of information in Form D filings and providing a carefully tailored safe harbor should prevent the electronic availability of Form D filings from undermining the ban.

III. ELECTRONIC FILING PROCEDURE

We are mandating electronic filing of the Form D notice through an online filing system in development that will be accessible from any computer with Internet access. The information filed will be available on our Web site and, because the online filing system will automatically capture and tag data items, the data will be interactive and searchable. Our Web site will enable users to view the information in an easy-to-read format, download the information into an

¹⁷⁷ The commenter that suggested that we permit free writing cited Items 1, 3, 9, 10 and 13 as examples of items for which it may be appropriate to permit free writing. See letter from ABA. As noted, we have added an additional response choice to the proposed version of Item 1 and Items 3, 10 and 13 all will permit free writing to clarify responses. In that regard, we choose not to revise further Item 9, regarding security type, because it already requires an issuer to provide further detail in a textual response if the issuer must choose “Other” as its initial response.

¹⁷⁸ See letters from Connecticut and NASAA.

¹⁷⁹ See letter from NASAA.

existing application, or create an application to use the information. As discussed above, our objectives in converting Form D filings to an electronic format include lessening the burden on issuers of filing the Form D notice, enhancing federal and state coordination, increasing the information available regarding the effectiveness of our Securities Act exemptions and increasing the information available to researchers using Form D data to conduct empirical research aimed at improving the efficiency and effectiveness of our private markets.

We believe our approach to filing and dissemination formats will make it relatively easy to file, access and analyze Form D information. As discussed in the proposing release, using this system will result in the Form D information being filed in the standard format of eXtensible Markup Language (XML) and we would disseminate the information in a format that provides normal text for reading and XML-tagged data for analysis. Three commenters suggested that the system tag the Form D information with the eXtensible Business Reporting Language (XBRL) system rather than the standard format of XML.¹⁸⁰ XBRL is an XML-based language that is intended to tag a wide range of business data. Because Form D information consists of relatively simple facts, XML is a sufficient technological solution, and we expect the information tagged in XML will be compatible with systems designed for more sophisticated XBRL reporting. The Commission can also take advantage of its experience in developing data tags for information filed under Section 16, which is currently filed with the Commission using XML technology.

A. Mechanics

The new online filing system for Form D information will be accessible from any computer with Internet access. An issuer will be able to both submit and amend its Form D

¹⁸⁰ See letters from Center for Audit Quality, EDGAR Online, Inc. and XBRL US, Inc..

filing through this system.¹⁸¹ The Form D itself will include guidance functions to assist in completing the form.¹⁸²

In order to file, issuers will need the same codes as are required to file on our electronic filing system, EDGAR, today. An issuer that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a “Central Index Key (CIK)” code, will obtain the codes by filing electronically a Form ID¹⁸³ at <https://www.filermanagement.edgarfiling.sec.gov> and filing, in paper by fax within two business days before or after filing the Form ID, a notarized authenticating document. The authenticating document will be manually signed by the applicant over the applicant’s typed signature, include the information contained in the Form ID, confirm the authenticity of the Form ID¹⁸⁴ and, if filed after electronically filing the Form ID, include the accession number assigned to the electronically filed Form ID as a result of its filing.¹⁸⁵ Under the online system, if the Form D filing is made on behalf of multiple issuers, each issuer will be required to have its own CIK code and a confirming code, which we call a “CIK Confirmation Code (CCC),” for validation.

Two commenters expressed concern about the need for an issuer to obtain access codes through the Form ID process in order to file through the new online system.¹⁸⁶ We plan to

¹⁸¹ In the proposing release, we stated our expectation that the system would permit an issuer, in Item 7, to designate the states to which the Form D is directed on the assumption that some states would adopt one-stop filing and allow filings that specify that they are directed to those states to constitute filings with them. As discussed above in more detail in Part I.B.3, we have been working actively with NASAA to achieve one-stop filing capability but it would not be available when electronic filing of Form D begins.

¹⁸² For example, the system might use drop-down menus as a guidance function.

¹⁸³ 17 CFR 239.63, 249.446, 269.7 and 274.402.

¹⁸⁴ An issuer could confirm the authenticity of a Form ID by, for example, stating that “[name of issuer] hereby confirms the authenticity of the Form ID [filed] [to be filed] on [specify date] containing the information contained in this document.”

¹⁸⁵ 17 CFR 232.10(b). An “accession number” is a unique number generated by EDGAR for each electronic submission. Assignment of an accession number does not mean that EDGAR has accepted a submission.

¹⁸⁶ See letters from ABA (focusing particularly on the burden on non-reporting companies) and Stephen A.

consider ways to simplify the authentication process in order to replace the requirement to fax the notarized authenticating document, and expect that a more simplified process may be available by the time electronic Form D filing is mandated.¹⁸⁷

To access and file a Form D through the new online system, issuers will begin by having a valid identification number, confirming code and separate password, which we call a “Password” and logging on to the system. The identification number, confirming code and password, together with a password modification authorization code, are referred to as “EDGAR access codes.” Data entry will be required to be performed quickly enough to avoid time-outs that end the session. A time-out most likely will occur no less than one hour following the user’s last activity on the system. Time-outs will be implemented due to cost and technical limitations, but it would be possible to extend a session with any keystroke.¹⁸⁸

Two commenters suggested that the system provide a way to save an incomplete form and one of them stated that it would be desirable as a practical matter for the system to enable an issuer to prepare a filing offline and then access the system to submit it.¹⁸⁹ One commenter stated that a saving feature was needed to avoid time-outs.¹⁹⁰ The other commenter stated that

Marcus.

¹⁸⁷ In the proposing release, we solicited comment on whether issuers that only file Form D with the Commission should be able to authenticate a Form ID by providing to the Commission a copy of a local business license rather than by faxing the otherwise required notarized authenticating document. We received no responses to this question.

¹⁸⁸ The new online filing system technically will be part of EDGAR but likely in some respects will be similar to the online filing system for Forms 3 [17 CFR 249.103 and 274.202], 4 [17 CFR 249.104 and 274.203], and 5 [17 CFR 249.105] filed under Section 16(a) of the Exchange Act, in general, by officers, directors and principal security holders of reporting companies that have a class of equity securities registered under Section 12 of the Exchange Act. Form D filers will access the online filing system and, essentially, prepare the filing by responding to questions and filling in blanks. The online filing system for Forms 3, 4 and 5 does not provide a way to save an incomplete form, but does provide the alternative of preparing filings before accessing the system and then submitting them through, rather than preparing them on, the online system.

¹⁸⁹ See letters from ABA and SCSGP.

¹⁹⁰ See letter from SCSGP.

the absence of a saving feature would virtually require that a careful filer prepare a Form D offline on a specially created template and then input all the information again online and, as a result, would risk inputting incorrect information and waste time and money.¹⁹¹

We agree that it would be useful to filers to be able to avoid the need to provide all of the required information both online and in a single session. Contrary to our earlier expectation, we anticipate that the system will provide a way to avoid the need to provide all of the required information both online and in a single session. For example, the system may permit the issuer to prepare the filing offline and submit it online or to save an incomplete form online from session to session for a short period of time, such as six calendar days, between sessions.¹⁹²

An issuer will be able to prepare an amendment based on the content of a previously filed form.¹⁹³ The system will validate as many fields as possible for data type and required fields while the filer fills in the fields on the screen. Issuers will have an opportunity to correct errors and verify the accuracy of the information before submitting the filing. Links will be available to enable issuers to access information, such as the instructions to Form D.

The issuer will be able to download and print the filing before and after submission.¹⁹⁴ Once the filing is submitted, the system will indicate receipt of the filing. In many cases, the

¹⁹¹ See letter from ABA.

¹⁹² Some information provided by the filer in the course of obtaining EDGAR access codes or updating such information will automatically appear in appropriate places when the filer accesses the new online filing system. As a result, in order to make changes to such information, it generally will be necessary to do so through an updating process through the main EDGAR system rather than the Form D online filing system. The updating process is a well-established typically online process applicable to EDGAR filers generally that would be relatively easy to complete.

¹⁹³ When an issuer files an amendment to a Form D filing, it will access its Form D filing on the online filing system and type over the inaccurate information. In that case, the online filing system will replace the inaccurate information with the new information, save the revised version of the Form D filing in its amended state causing it to be an amendment and a new filing, and record the date of amendment. The information in the Form D that was accessed for purposes of the amendment will, however, remain unchanged on the system accessible to the public.

¹⁹⁴ We believe the ability to download and print the filing before and after submission meets the concerns of

system will display a unique number assigned to the submission, which we call an “accession number” but, in any event, the accession number will follow in an e-mail notification to the filer. A filer will be able to see the filing on our Web site shortly after filing.

Upon filing of the Form D notice with the Commission, state securities regulators will be able to identify on our Web site Form D filings that specify their states.¹⁹⁵ Filers generally would specify one or more states in response to proposed Items 1 (jurisdiction of incorporation or organization), 2 (principal place of business and contact information), 3 (related person addresses) and 12 (addresses of recipients of sales compensation) of Form D.¹⁹⁶ State specification information will be interactive and searchable because the new online filing system will automatically capture and tag that information as it will other Form D filing information.

Most Form D filings currently are made by law firms on behalf of issuers.¹⁹⁷ We expect that the simplification and restructuring of Form D and the conversion of Form D filings to an electronic system may decrease legal fees to make Form D filings and perhaps allow more issuers to file a Form D notice themselves without the assistance of a law firm.

B. Database Capabilities of Electronic Form D Repository

the commenter that asked that the system allow the user to view the information before submission and print an as-filed version after submission. See letter from ABA.

¹⁹⁵ In Release No. 33-6339 (Aug. 18, 1981) [46 FR 41791], the Commission stated the following in its discussion of Rule 503: “It should be noted that, although the revised filing requirements do not require that the user also file a notice with the state(s) in which the offering is to be sold, it is anticipated that the Commission will routinely furnish copies of the notice forms to the appropriate state commissions.”

¹⁹⁶ As discussed above in more detail, we no longer contemplate effectuating a one-stop filing system by giving filers an opportunity to direct their filings to designated states as provided by proposed Item 7, but we have been working actively with NASAA in an effort to accomplish this in a different manner. Consequently, Item 7 does not provide for designation of states.

¹⁹⁷ Our Division of Corporation Finance conducted a one-month review of Form D filings and determined that, based primarily on the cover letters that accompany most paper Form D filings, about 75% of the filings were made by law firms on behalf of issuers.

A review of Form D filings by our Division of Corporation Finance uncovered errors and omissions in the information provided.¹⁹⁸ In an effort to enhance the quality of the data collected by the proposed electronic Form D, we are including internal checks in the new online system that should decrease the number of errors and omissions in Form D filings. The system will prevent an issuer from submitting Form D information electronically unless all necessary data fields are completed in a manner consistent with the nature of each field¹⁹⁹ and the logical relationships between or among the fields.²⁰⁰ This will not only promote the integrity of the data collected by the Form D repository, but also will make it easier for issuers to complete or amend their filings.

C. System Implementation

The new online system is expected to be available to receive filings on a voluntary basis on September 15, 2008. Electronic filing will be required for all filings on or after March 16, 2009. We are treating the period between the two dates as a transition period during which electronic filing of Form D information with us using the new online filing system will be voluntary. Issuers may also file a paper version of the new Form D with us during the transition period, without using the online filing system.

The transition period serves several purposes. It should both enable issuers to become familiar with the new Form D and online filing system and help alert us to any problems. One

¹⁹⁸ Some of the most frequent errors were failures to indicate whether a filing is an amendment or a new filing and claims that do not match the facts described (for example, issuers claiming that an offering is limited to accredited investors and then including information regarding participation of non-accredited investors in the offering).

¹⁹⁹ The system will check, for example, to make sure that number characters are used in responding to the field in proposed Item 13 for the offering and sales amounts.

²⁰⁰ Where, for example, the filer claims a Rule 505 or Rule 506 exemption in response to Item 6 and specifies that more than 35 non-accredited investors have invested in response to Item 14, a pop-up or other feature will warn that only 35 non-accredited investors are permitted in these types of offerings and require the filer to select "OK" before proceeding.

commenter suggested that we permit voluntary filing for a period of at least a year to work out any issues that arise and provide time to allow states to adopt conforming one-stop filing rules and set up a central payment system.²⁰¹ We believe that a shorter period of time should be adequate for discovering and addressing any issues in the new form or system that might arise. We also believe mandating electronic filing of Form D as soon as feasible even without a one-stop filing capability in place is preferable, in order to realize without unnecessary delay the many benefits we believe mandated electronic filing will provide separate and apart from the benefits that one-stop filing would provide. In this regard, we believe that beginning to mandate electronic filing without one-stop filing in place will not delay, and in fact will facilitate, the development of one-stop filing on which we are working actively with NASAA.

Issuers that choose not to file electronically during the transition period may use either the current paper form or a paper version of the new Form D. Although the information in new Form D is somewhat different from that in current paper Form D, we believe a short period when either version of the form can be used is appropriate. Similarly, we will permit an amendment to be filed in paper format using either version of the form until electronic filing becomes mandatory. As previously discussed, however, the new annual and other amendment rules will apply to all new Form D filings regardless of format and the current amendment requirements will apply to all current Form D filings in paper format. By the time electronic filing is mandated, however, we believe an adequate amount of time will have passed since electronic filing will have become voluntary for Form D filings that it would be appropriate to require electronic filing using new Form D of initial filings and all amendments applying the new amendment rules regardless whether the filing being amended was filed on current or new Form D.

²⁰¹ See letter from ABA.

We are establishing the transition period by delaying until the end of the period the effective date of new Item 101(a)(1)(xiii), which mandates electronic filing of new Form D, and adopting temporary provisions that will apply only during the transition period.²⁰² We are adopting temporary Item 101(b)(10) of Regulation S-T to permit but not require electronic filing of new Form D during the period. We are adopting temporary Rule 503T and Temporary Form D, which are similar to current Rule 503 and Form D, respectively, and, in general, will enable filers to file current or new Form D in paper format during the transition period.²⁰³

Two commenters addressed the question in the proposing release as to whether, in the future, public companies should be exempted from the Form D filing requirement in Rule 503 and instead be required to file Form D information as part of a periodic or current report.²⁰⁴ Both commenters suggested that we defer consideration of such an exemption. One commenter cited concerns with the potential for confusion and problems with differing formats and retrieval.²⁰⁵ The other commenter cited risks to uniformity between federal and state requirements, additional costs and potential inadvertent violations.²⁰⁶ We intend to consider in the future the issues that these comments raise.

IV. PAPERWORK REDUCTION ACT ANALYSIS

²⁰² Most of the provisions we adopt today will be effective on September 15, 2008 when the transition period begins. We are, however, providing earlier effective dates for the changes to Items 101(c)(6) and 201(a) of Regulation S-T. The change to Item 101(c)(6) will remove Form D from the list of documents that cannot be filed electronically and the change to Item 201(a) will add Form D to the list of documents for which a temporary hardship exemption from electronic filing will not be available. The earlier effective date will have no practical effect on the Form D filing requirements but will facilitate the Commission's consideration and potential adoption of other revisions to Items 101(c)(6) and 201(a) that it proposed in Release No. 33-8859 (Nov. 1, 2007) [72 FR 63513].

²⁰³ Among the differences between the current and temporary versions of Rule 503 and Form D is a reduction in the number of paper copies required to be filed from five to two (one of which, in each case, must be a manually signed original).

²⁰⁴ See letters from Connecticut and NASAA.

²⁰⁵ See letter from Connecticut.

²⁰⁶ See letter from NASAA.

A. Background

The amendments will affect two forms that contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).²⁰⁷ The titles of the affected information collections are Form D (OMB Control No. 3235-0076) and Form ID (OMB Control No. 3235-0328). The purposes of the amendments are, in general, to clarify, simplify and update the information requirements of Form D and modernize the related information capture process. We published a notice requesting comment on the collection of information requirements in the proposing release, and submitted a request to the Office of Management and Budget (“OMB”) for review under 44 U.S.C. 3507(d) and 5 CFR 1320.11. As we discuss in more detail below, we have withdrawn that request and plan to replace it in order to reflect a new estimate based on the most recently ended fiscal year that had not yet ended at the time we submitted the original request to OMB. When we receive OMB clearance, we will publish notice in the Federal Register. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid control number. Compliance with the collections of information as revised will be mandatory. The information required by the collection of information in Form D as revised will not be kept confidential by the Commission; the information required by Form ID will be kept non-public, subject to a request under FOIA.

Form D is filed by issuers as a notice of sales without registration under the Securities Act based on claims of exemption under Regulation D or Section 4(6) of the Securities Act.

Form ID is filed by registrants, individuals, transfer agents, third-party filers or their agents to request the assignment of access codes that permit the filing of securities documents on EDGAR. This form enables the Commission to assign an identification number (CIK),

²⁰⁷ 44 U.S.C. 3501 et seq.

confirmation code (CCC), password and password modification authorization code to each EDGAR filer, each of which is designed to protect the security of the EDGAR system.

B. Estimated Collection of Information Burdens

As we previously expected and discussed in the proposing release as to the proposed amendments, we expect that the adopted amendments will not affect the overall collection of information burden of Form D but will cause additional respondents to file a Form ID each year and, as a result, will increase the annual collection of information burden. We have, however, as further discussed below, refined and updated the information we used to arrive at our estimate of the effect of the amendments. As a result, we have revised our estimate of the current number of respondents that file Form ID each year without the effect of the amendments and the additional number of respondents that will file Form ID each year as a result of the amendments.

We expect that the amendments will not affect the number of Form D filings made and, on balance, will obligate issuers to report on Form D essentially the same amount of information as they are required to report on Form D today. As previously noted, we are adopting the amendments substantially as proposed. We expect nearly all of the variations between what we expressly proposed and what we adopted to lessen the collection of information burden or not affect it. We expect a small minority of variations to increase the collection of information burden. On balance, however, we expect the variations will not increase the collection of information burden.

We expect that the following variations from the proposals will lessen the collection of information burden of Form D:

- provide that if a Form D filing otherwise is due on a Saturday, Sunday or holiday, it will be due on the first business day following;

- eliminate the proposed requirement to provide the issuer's Commission file number (if any);
- provide additional exceptions from the requirement to amend Form D for changes in:
 - the address or relationship to the issuer of a related person identified in response to Item 3 of Form D;
 - the minimum investment amount, if the change is an increase, or if the change, together with all other changes in the amount since the previously filed notice, does not result in a decrease of more than 10%;
 - any address or state(s) of solicitation shown in response to Item 12 of Form D;
 - the total offering amount (if the change is a decrease); and
 - the amount of securities in the offering that remain to be sold; and
- prescribe that annual amendments are due on or before the first anniversary of the most recently filed Form D filing or amendment, if the offering is continuing at that time, rather than each year between January 1 and February 14.

We expect that the following variations from the proposals will not affect the collection of information burden of Form D:

- provide clarifications;
- permit issuers to provide information that is not required;
- permit issuers to clarify information;
- request but not require that issuers in specified industry groups provide their aggregate net asset value range (and provide an additional exception from the requirement to amend Form D for changes in aggregate net asset value);
- eliminate the ability to specify states to which the Form D is directed;

- prescribe that the minimum investment amount relates to outside investors rather than all investors;
- prescribe disclosure of the total number of investors rather than the number of accredited investors; and
- provide temporary rules that, in conjunction with varied effective dates, establish the transition period during which electronic filing of Form D proceeds from prohibited to optional to mandated.

Finally, we expect that the following variations from the proposals will increase the collection of information burden of Form D:

- require amendments to report the addition of executive officers, directors and promoters in all offerings, and not provide an exception from this requirement for offerings that last more than a year in some circumstances;
- require that when both an individual and the individual's associated broker-dealer are disclosed, the issuer must present the CRD number, if any, for both rather than just one; and
- require disclosure of the following amounts or, if not known, an estimate:
 - expenses for amounts paid for sales commissions and, separately stated, finders' fees; and
 - use of proceeds but only as to the amount used to make payments to executive officers, directors and promoters.²⁰⁸

As noted above, we expect that, on balance, the variations from the proposals will not increase the collection of information burden. Consequently, we continue to believe that the

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While we expect the requirement to disclose these expense and use of proceeds amounts will increase the collection of information burden of Form D, we also expect that our adoption of an additional exception from the requirement to amend Form D for specified changes in these amounts will limit the increase.

overall information collection burden of Form D will remain approximately the same as it is today.²⁰⁹

In the proposing release, we stated our then current estimate that, without the effect of the amendments, 196,800 respondents file Form ID each year at an estimated burden of .15 hours per response, all of which is borne internally by the respondent for a total annual burden of 29,520 hours. We later refined the estimate to the extent that we reduced from 196,800 to 46,400 the estimated number of respondents that file Form ID each year resulting in a total annual burden of 6960 hours. We reduced the estimate primarily based on the actual number of Forms ID per year we recently have received. We reflected the new estimate in the request we submitted to OMB rather than the estimate used in the proposing release.

Also in the proposing release, we stated our then current estimate that an additional 18,600 respondents would file Form ID each year and, as a result, would cause an additional annual burden of 2790 hours. We now are revising that estimate as a result of using updated information for our most recently ended fiscal year that ended after we issued the proposing release and submitted the related request to OMB.²¹⁰ Our new estimate is that, as a result of the amendments, an additional 19,300 respondents will file a Form ID each year and, consequently, will cause an additional burden of 2895 hours.²¹¹ Accordingly, we have withdrawn the request we submitted to OMB and plan to replace it with a new request.

²⁰⁹ We estimate the burden of Form D to be 4.0 hours per response of which one hour is borne internally and three hours are borne externally.

²¹⁰ Also after we issued the proposing release and submitted the related request to OMB, we obtained slight corrections to the fiscal year 2006 data we provided in the proposing release and request. The corrected data for fiscal year 2006 is that 16,879 companies made 25,717 Form D filings and, of these companies, 15,969 (94.6%) did not report under the Exchange Act and 910 (5.4%) did report under the Exchange Act. If we had calculated the estimate in the proposing release using the corrected figures for fiscal year 2006, we would have estimated that, as a result of the proposed amendments, an additional 18,700 respondents would file a Form ID each year and, as a result, would cause an additional burden of 2805 hours.

²¹¹ We arrived at our revised estimate that an additional 19,300 respondents would file a Form ID each year based on the following information and analysis. In fiscal year 2007, 17,519 companies made 27,843 Form

Consistent with our belief that the variations between what we expressly proposed and what we adopted will not affect the number of Forms D filed, we believe that the variations will not affect our estimate of the Form ID collection of information burden.

C. Comments on Collection of Information Burdens

We solicited comment in the proposing release on the PRA estimates we provided there and we solicit comment on the revised estimates we now provide in this release.

One commenter expressly addressed our PRA estimate of the amount of the estimated burden per response for Form ID and that commenter²¹² and another commenter²¹³ expressed concern about the potential burdens resulting from the requirement to file Form ID in order to obtain the access codes necessary to file a Form D on EDGAR. The commenter that expressly addressed our PRA estimate of .15 hours per response for Form ID stated that the estimate is not consistent with the experiences of several members of the committees that together provided the comment. We are not aware of respondents generally incurring response time in excess of our estimate of .15 hours per response for Form ID and continue to believe the estimate to be

D filings. Of these companies, 16,655 (95.1%) did not report under the Exchange Act and 864 (4.9%) did report under the Exchange Act. The annual number of Form D filings rose from 17,390 in fiscal year 2002 to 27,843 in fiscal year 2007 for an average increase of approximately 2100 Form D filings per year. Assuming the number of Form D filings continues to increase by 2100 filings per year for each of the next three years, the average number of Form D filings in each of the next three years would be about 32,100. Assuming that the ratio of the number of companies that make a Form D filing to the number of Form D filings in fiscal year 2007 remains constant over the next three years, an average of about 20,200 companies would make Form D filings in each of the next three years. Assuming also that the ratio between the number of non-reporting and reporting companies under the Exchange Act that made Form D filings in fiscal year 2007 remains constant over the next three years, an average of about 19,300 non-reporting and 900 reporting companies would make Form D filings in each of the next three years. Assuming further that all non-reporting companies that would make a Form D filing would not already have EDGAR access codes and, as a result, would be required to file a Form ID, the number of companies that would need to file a Form ID as a result of the amendments would on average be about 19,300 per year over the next three years. Because each Form ID filing is estimated to require .15 hours, the total additional burden would, on average, be about 2895 hours per year over the next three years (19,300 Forms ID x .15 hours per Form ID). We consider the average number of Form ID filings expected to be made per year over the next three years because the PRA requires that our estimates represent the average yearly burden over a three-year period.

²¹² See letter from ABA (focusing particularly on the burden on non-reporting companies).

²¹³ See letter from Stephen A. Marcus.

appropriate. We acknowledge the general concerns with the Form ID process but we believe it should be required for Form D filers as it is for other filers on EDGAR.

We believe that the new online system should be as secure as our EDGAR system in general because it will be a part of the EDGAR system and, as such, its filings will be disseminated on EDGAR and displayed on the Commission's public Web site. In order to achieve that uniform degree of security, we believe it is appropriate to require issuers that seek to file Form D to complete the same Form ID authentication process to obtain the same access codes as those persons or entities who seek to file with the Commission for many other reasons.

We solicit comment on the expected PRA effects of the amendments, including the following:

- the accuracy of our estimates of the additional burden hours that will result from adoption of the amendments;
- whether the adopted changes to the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- ways to enhance the quality, utility and clarity of the information to be collected;
- ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- any effects of the amendments on any other collections of information not previously identified.

Any member of the public may direct to us any comments concerning these burden estimates and suggestions for reducing the burdens. Persons submitting comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for

the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303, with reference to File No. S7-12-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-12-07, and be submitted to the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549. OMB is required to make a decision concerning the collection 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.

V. COST-BENEFIT ANALYSIS

A. Background

As proposed, the adopted amendments restructure the information required by Form D and mandate the electronic filing of Form D information after a period of time during which electronic filing is voluntary. Currently, much of the information required by Form D appears to be useful and justified in the interests of investor protection and capital formation. It also appears that some useful information that could be required by Form D is not required currently. On the other hand, Form D currently requires some information that may no longer be useful. Our staff receives many inquiries from market participants suggesting that Form D could be clarified and simplified. Moreover, the absence of an electronic system for filing Form D information prevents issuers from filing through efficient modern methods and limits the usefulness of the information collected on Form D. The rules we adopt today address deficiencies in the Form D data collection requirements and process. We expect that the amendments, in general, will provide benefits by clarifying, simplifying and updating the information requirements of Form D and modernizing the related information capture process.

We solicited comment on the expected benefits and costs and on any others that may result from adoption of the proposed changes as well as suggested alternatives. We also requested that commenters provide empirical data and other factual support for their views to the extent possible. No commenter expressly addressed the cost-benefit analysis in the proposing release but some commenters cited benefits consistent with those described immediately above in the course of making a variety of suggestions and observations. We discuss these comments throughout the release as applicable.²¹⁴

²¹⁴ As to benefits, for example, we noted that one commenter stated that if one-stop filing were implemented properly, it would reduce significantly the costs and burdens of preparing and filing Form D with the Commission and the states. See letter from ABA. As to costs, for example, we noted that the same

B. Benefits

We expect the amendments to benefit issuers, regulators and members of the public. In particular, the amendments should

- ease filing burdens;
- result in better public availability of Form D information;
- enhance the utility of Form D as a means to promote federal and state uniformity and coordination; and
- improve collection of data for Commission enforcement and rulemaking efforts.

The amendments should ease filing burdens because filers should find it easier to respond to the revised information requirements of Form D.²¹⁵ It should be easier to respond to the revised information requirements of Form D because they would be clarified, simplified and updated. It should be easier to file the responsive information because issuers will be able to use efficient modern methods of information transfer through electronic filing. Issuers will provide the information in data fields by responding to a series of discrete requests for information. The fields will be checked automatically for appropriate characters and consistency with other fields and the questions will be accompanied by links to clear instructions, definitions, and other helpful information. These system features, among others, should help to facilitate a relatively easy-to-use filing process that will deliver accurate information quickly, reliably, and securely.

Electronic filing of Form D information will result in increased availability of Form D information for regulators and members of the public. The information will be available on our Web site and, because the Form D filing system will automatically capture and tag data items,

commenter stated that the absence of a saving feature in the Form D filing system would virtually require that a careful filer prepare a Form D offline on a specially created template and then input all the information online and, as a result, would risk inputting incorrect information and waste time and money.

²¹⁵ Although we believe it will be easier to respond to the revised information requirements of Form D, as discussed in Part IV regarding the PRA, we believe the overall collection of information burden of Form D will remain approximately the same as it is today.

the data will be interactive and searchable. Our Web site will enable users to view the information in an easy-to-read format, download the information into an existing application, or create an application to use the information. Unlike information filed with us electronically, paper filings are available from us only in person in our Public Reference Room or by means of a mail request. We charge a nominal fee for copies of Form D filings. Some Form D filings are available at higher cost through private vendors over the Internet and through telephone requests.

For over 20 years, Form D has served as a means to promote federal and state uniformity and coordination in securities regulation by providing a uniform notification form that can be filed with the Commission and with state securities regulators. The contemplated electronic filing system for Form D information will continue that tradition and can enhance the utility of Form D as a means to promote uniformity and coordination between federal and state securities regulation.

The availability of Form D information filed with us through an searchable electronic database will enable both federal and state securities regulators to monitor the exempt securities transaction markets more effectively. The system also will permit improved coordination among federal and state regulators, which is essential to efficient and effective capital formation through exempt transactions, especially by smaller companies, and to investor protection. State securities regulators will be able to access the information on our Web site to learn if new Form D information of interest to them has been filed.

The system will enhance uniformity and coordination even more if it results in “one-stop filing,” as we and NASAA are exploring. One-stop filing will enable companies to file Form D information both with us and with the states they designate in one electronic transaction. While that capability will not be available when Form D electronic filing with the Commission begins, we have been working actively with NASAA to achieve that capability as soon as practicable.

We understand that NASAA is considering establishing its own new electronic system that would interface with our system and would receive filings and collect fees on behalf of participating state securities regulators.²¹⁶ One-stop filing will reduce significantly the costs and burdens of preparing and filing Form D information with the Commission and with state securities regulators. This could represent a substantial savings for small businesses and others filing Form D information.

The conversion to electronic filing of Form D information through the Internet in an interactive data format will result in creation of a database of Form D information that will allow us and others to better aggregate data on the private and limited offering securities markets and the use of the various Regulation D exemptions. Further, the software we will use for the Form D electronic filings will require that filers address each required data field in the form, thus reducing incomplete filings. Because of these and other features, our Form D electronic filing system should assist in our enforcement efforts and ease our ability to make use of filed Form D information. The Form D information database will allow us to better evaluate our exemptive schemes on a continuing basis in order to facilitate capital formation in a manner consistent with investor protection. The evaluation could lead to improvements that would result in significant benefits to companies that rely on the Regulation D exemptions, especially smaller companies, as well as benefits to investors.

C. Costs

We expect that the amendments will result in some initial and ongoing costs to issuers. We also expect, however, that many issuers will not bear the full range of costs that may result from the amendments for the reasons described below.

²¹⁶ The Commission's electronic filing system will not collect fees on behalf of any states.

Initial costs will be associated with filing a Form ID in order to obtain the access codes needed to file Form D information electronically and otherwise preparing to make an initial filing of Form D information.²¹⁷ To file a Form ID, an issuer must 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.²¹⁸ Similarly, in order otherwise to prepare to make an initial electronic filing of Form D information, an issuer must learn about the revised Form D information content and electronic filing requirements, obtain access to a computer and the Internet, use the computer to access the Form D filing system and respond to Form D's information requirements.

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 filing of Form D information.

We expect that the vast majority of issuers will incur few, if any, additional costs related to obtaining computer and Internet access. We believe that the vast majority of issuers already will have access to a computer and the Internet.²¹⁹

²¹⁷ Issuers that already have EDGAR access codes would not need to file a Form ID. As further discussed in Part IV, however, we assume that about 95% of Form D filers do not already have the codes.

²¹⁸ As discussed in the Part IV regarding the PRA, the Commission estimates that approximately 46,400 respondents file Form ID each year at an estimated burden of .15 hours per response, all of which is borne internally by the respondent, for a total annual burden of 6960 hours. As also discussed in Part IV, we expect that the amendments will cause an additional 19,300 respondents to file a Form ID each year and, as a result, cause an additional annual burden of 2895 hours. Assuming a cost of \$175 per hour for in-house professional staff, we estimate the current Form ID burden cost at \$1,218,000 per year (6960 hours per year x \$175 per hour), the additional Form ID burden cost resulting from adoption of the amendments at \$506,625 per year (2895 hours per year x \$175 per hour) and the total Form ID burden cost that will result from adding the estimated additional Form ID burden cost to the estimated current Form ID burden cost will be \$1,724,625 per year ((6960 hours per year + 2895 hours per year) = 9855 hours per year; 9855 hours per year x \$175 per hour = \$1,724,625 per year).

²¹⁹ A person from an issuer that does not already own a computer with Internet access may, for example, go to a public library to use its computer and obtain Internet access.

VI. CONSIDERATION OF IMPACT ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 23(a)(2) of the Exchange Act²²⁰ requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, Section 2(b) of the Securities Act,²²¹ Section 3(f) of the Exchange Act,²²² and Section 2(c) of the Investment Company Act²²³ require us, when engaged in rulemaking where we are required 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.

The amendments will restructure and mandate the electronic filing of the information required by Form D after a period of time during which electronic filing is voluntary. We believe the amendments, in general, will provide benefits by clarifying, simplifying and updating the information requirements of Form D and modernizing the related information capture process. In particular, as discussed in further detail above, the amendments should

- ease filing burdens;
- result in better public availability of Form D information;
- enhance the utility of Form D as a means to promote federal and state uniformity and coordination; and
- improve collection of data for Commission enforcement and rulemaking efforts.

²²⁰ 15 U.S.C. 78w(a)(2).

²²¹ 15 U.S.C. 77b(b).

²²² 15 U.S.C. 78c(f).

²²³ 15 U.S.C. 80a-2(c).

We understand that private sector businesses currently make Form D information available to the public for a fee. Although the ready accessibility of this information at no cost will affect these businesses, we believe that the interactive online system used for Form D information will not discourage the development by private sector businesses of additional features that the new online system will not provide. Consequently, we believe that the amendments will not have a burden on competition that is not necessary or appropriate and might promote competition in providing Form D information through additional features including those related to the tagged data aspect of the system.

Eased filing burdens and better public availability of Form D information should promote efficiency. For example, the online system will enable issuers to provide Form D information with modern, rapid and accurate methods and will enable users of the system to access Form D information more quickly and easily than through a review of paper documents.

Improved collection of data for Commission enforcement and rulemaking efforts resulting from the amendments will create a Form D information database that will allow us to better evaluate our exemptive schemes on a continuing basis in order to facilitate capital formation in a manner consistent with investor protection and the evaluation may lead to improvements that will promote our capital markets. Similarly, the enhanced utility of Form D as a means to promote federal and state uniformity and coordination resulting from the amendments, and in the future, “one-stop” filing as we and NASAA are exploring, should lead to improved coordination which will promote capital formation.

In the proposing release, we considered the amendments in light of the standards set forth in the above statutory sections. We requested comment on whether the proposed amendments, if adopted, would impose a burden on competition or promote efficiency, competition and capital formation. No commenter expressly addressed competition. Commenters generally addressed

issues relating to the content and mandated electronic filing of information required by Form D. As a result, the comments generally related to efficiency and capital formation. We discuss these comments throughout this release, as applicable.

VII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to amendments regarding the content and mandated electronic filing of information required by Form D.

A. Reasons for, and Objectives of, the Adopted Amendments

The primary purpose of the amendments adopted is to clarify, simplify and update the information requirements of Form D and modernize the related information capture process. Currently, much of the information required by Form D appears to be useful and justified in the interests of investor protection and capital formation. It also appears that some useful information that could be required by Form D is not required currently. On the other hand, Form D currently requires some information that may no longer be useful. Our staff receives many inquiries from market participants suggesting that Form D could be clarified and simplified. Moreover, the absence of an electronic system for filing Form D information prevents issuers from filing through efficient modern methods and limits the usefulness of the information collected on Form D. We believe the amendments, in general, will address the deficiencies in the Form D data collection process by clarifying, simplifying and updating the information requirements of Form D and modernizing the related information capture process.

B. Significant Issues Raised by Public Comment

The Initial Regulatory Flexibility Act Analysis ("IRFA") appeared in the proposing release. We requested comment on any aspect of the IRFA, including the number of small

entities that would be affected by the proposals, the nature of the impact, and how to quantify the impact of the proposals. No commenter responded to the request.

C. Small Entities Subject to the Amendments

The amendments will affect issuers that are small entities. Exchange Act Rule 0-10(a)²²⁴ defines an issuer, other than an investment company, to be a “small business” or “small organization” for purposes of the Regulatory Flexibility Act if it had total assets of \$5 million or less on the last day of its most recent fiscal year.²²⁵ Investment Company Act Rule 0-10(a) defines an investment company as a “small business” or “small organization” for purposes of the Regulatory Flexibility Act if it, together with other investment companies in the same group of related investment companies, had net assets of \$50 million or less as of the end of its most recent fiscal year.²²⁶ The amendments will apply to all issuers that file Form D.

As previously noted, in fiscal year 2007, 17,519 issuers made Form D filings. We believe that many of these issuers are small entities but we currently we do not collect information on total assets to determine if they are small entities for purposes of this analysis.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

Before the effective date of the rule and form amendments adopted in this release, issuers must file Form D information in paper. The amendments will require all issuers, including small entities, to submit somewhat different Form D information online using the Internet after a

²²⁴ 17 CFR 240.0-10(a).

²²⁵ Securities Act Rule 157(a) [17 CFR 230.157(a)] generally defines an issuer, other than an investment company, to be a “small business” or “small entity” for purposes of the Regulatory Flexibility Act if it had total assets of \$5 million or less on the last day of its most recent fiscal year and it is conducting or proposing to conduct a securities offering of \$5 million or less. For purposes of our analysis of issuers other than investment companies in this Part VII of the release, however, we use the Exchange Act definition of “small business” or “small entity” because that definition includes more issuers than does the Securities Act definition and, as a result, assures that the definition we use would not itself lead to an understatement of the impact of the amendments on small entities.

²²⁶ 17 CFR 270.0-10(a).

phase-in period during which electronic filing is optional. All issuers filing electronically will need to file a Form ID electronically to obtain the access codes needed to use the Form D filing system if they do not already have the codes.²²⁷ The only additional professional skills required will be those required to file electronically.²²⁸

We expect that filing electronically will increase initial and ongoing costs incurred by some small entities. We also expect, however, that many small entities will not bear the full range of costs that will 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 file Form D information electronically and otherwise preparing to make an initial filing of Form D information. To file a Form ID, an issuer must 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.²²⁹ Similarly, in order otherwise to prepare to make an initial electronic filing of Form D information, an issuer must learn about the revised Form D information content and electronic filing requirements, obtain access to a computer and the Internet, use the computer to access the Form D filing system and respond to Form D's information requirements.

²²⁷ As further discussed in Part IV, however, we assume that about 95% of Form D filers will not already have the codes.

²²⁸ Although we believe it will be easier to respond to the revised information requirements of Form D, as discussed in Part IV, we believe the overall collection of information burden of the form will remain approximately the same.

²²⁹ As discussed in Part IV, the Commission has estimated the collection of information burden of Form ID as .15 hours per response, all of which is borne internally by the respondent.

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 filing of Form D information.

We expect that the vast majority of small entities will need to incur few, if any, additional costs related to obtaining computer and Internet access. We believe that the vast majority of small entities already will have access to a computer and the Internet.²³⁰

E. Agency Action to Minimize Effect on Small Entities

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 amendments, we considered the following alternatives:

- establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- further clarifying, consolidating or simplifying the requirements;
- using performance rather than design standards; and
- providing an exemption from the adopted requirements, or any part of them, for small entities.

We believe that, as to small entities, differing compliance, reporting or timetable requirements, a partial or complete exemption from the requirements or the use of performance rather than design standards would be inappropriate because these approaches would detract from the completeness and uniformity of the Form D database and, as a result, reduce the expected benefits of better public availability of Form D information, enhanced utility of Form D as a means to promote federal and state uniformity, and improved collection of data for

²³⁰ A person from a small entity that does not already own a computer with Internet access can, for example, go to a public library to use its computer and obtain Internet access.

Commission enforcement and rulemaking efforts. Further, we believe the adopted Form D filing system will be relatively easy to use.

We considered further clarifying, consolidating or simplifying the adopted Form D information and electronic filing requirements. During 2003, the Commission's Office of Small Business Policy (OSBP) reviewed the types of errors, omissions, and misstatements more commonly found in Form D filings as well as the types of questions typically received through phone calls from the public associated with the form. We also have considered the electronic filing requirements related to Exchange Act Forms 3, 4 and 5, the manner in which their online filing system has operated and the suitability of that system as a model for the online system for Form D information. Based in part on OSBP's review and our consideration of the electronic filing of Forms 3, 4 and 5, we believe that the adopted Form D information and electronic filing requirements are clear and straightforward.

We solicited comment on whether differing compliance, reporting or timetable requirements, a partial or complete exemption, or the use of performance rather than design standards would be consistent with our described main goal of addressing deficiencies in the Form D data collection process. We also solicited comment on the availability of technology to complete Form D online and whether public companies should be phased in to mandated electronic Form D filing sooner than private companies. No commenter responded to these requests. As discussed previously in this release, however, we are providing a period during which issuers, regardless of size, will have the option of filing electronically or in paper.

VIII. STATUTORY BASIS AND TEXT OF AMENDMENTS

We are adopting the amendments this release describes under the authority in sections 2(a), 3(b), 4(2), 19(a), 19(d), and 28 of the Securities Act,²³¹ sections 3(b), 23(a), and 35A of the

²³¹ 15 U.S.C. 77b(a), 77c(b), 77d(2), 77s(a), 77s(d), and 77z-3.

Exchange Act,²³² section 319(a) of the Trust Indenture Act,²³³ and section 38 of the Investment Company Act.²³⁴

List of Subjects in

17 CFR Parts 230, 232 and 239

Reporting and recordkeeping requirements, Securities.

TEXT OF AMENDMENTS

For the reasons set out in the preamble, we 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. Amend § 230.502 by revising paragraph (c) to read as follows:

§ 230.502 General conditions to be met.

* * * * *

(c) Limitation on manner of offering. Except as provided in § 230.504(b)(1), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

- (1) Any advertisement, article, notice or other communication published in any

²³² 15 U.S.C. 78c(b), 78w(a), and 78ll.

²³³ 15 U.S.C. 77sss(a).

²³⁴ 15 U.S.C. 80a-37.

newspaper, magazine, or similar media or broadcast over television or radio; and

(2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising; Provided, however, that publication by an issuer of a notice in accordance with § 230.135c or filing with the Commission by an issuer of a notice of sales on Form D (17 CFR 239.500) in which the issuer has made a good faith and reasonable attempt to comply with the requirements of such form, shall not be deemed to constitute general solicitation or general advertising for purposes of this section; Provided further, that, if the requirements of § 230.135e are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this section.

* * * * *

3. Add § 230.503T to read as follows:

§ 230.503T Filing of notice of sales.

Note to Rule 503T: This is a special temporary section that applies instead of § 230.503 only to issuers that file with the Commission a notice on Temporary Form D (17 CFR 239.500T) or Form D (17 CFR 239.500) or an amendment to such a notice in paper format on or after September 15, 2008 but before March 16, 2009.

(a) An issuer offering or selling securities in reliance on § 230.504, § 230.505, or § 230.506 shall file with the Commission at its principal office at 100 F Street, N.E., Washington D.C. 20549 two copies in paper format of a notice on Temporary Form D (17 CFR 239.500T) or Form D (17 CFR 239.500) in paper format no later than 15 days after the first sale of securities.

(b) One copy of every notice on Form D shall be manually signed by a person duly authorized by the issuer.

(c) If sales are made under § 230.505 and the issuer files Temporary Form D (17 CFR 239.500T), the filing shall contain an undertaking by the issuer to furnish the Commission, upon the written request of its staff, the information furnished by the issuer under § 230.502(b)(2) to any purchaser that is not an accredited investor.

(d) Amendments in paper format:

(1) To the notices described in paragraphs (d)(1)(i) and (ii) of this section, must use Temporary Form D (17 CFR 239.500T) but need only report the issuer's name and the information required by Part C and any material change in the facts from those set forth in Parts A and B:

(i) Notices filed before September 15, 2008; and

(ii) Notices filed on or after September 15, 2008 in paper format under paragraph (a) of this § 230.503T using Temporary Form D (17 CFR 239.500T).

(2) To a notice filed in paper or electronic format on or after September 15, 2008 using Form D (17 CFR 239.500), must use Form D (17 CFR 239.500) and comply with § 230.503 regarding when an amendment can or must be filed and what an amendment must contain.

(e) A notice on Form D shall be considered filed with the Commission under paragraph (a) of this section:

(1) As of the date on which it is received at the Commission's principal office in Washington, DC; or

(2) As of the date on which the notice is mailed by means of United States registered or certified mail to the Commission's principal office in Washington, DC, if the notice is delivered to such office after the date on which it is required to be filed.

(f) This temporary § 230.503T and accompanying note will expire on March 16, 2009.

4. Revise § 230.503 to read as follows:

§ 230.503 Filing of notice of sales.

(a) When notice of sales on Form D is required and permitted to be filed.

(1) An issuer offering or selling securities in reliance on § 230.504, § 230.505, or § 230.506 must file with the Commission a notice of sales containing the information required by Form D (17 CFR 239.500) for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering, unless the end of that period falls on a Saturday, Sunday or holiday, in which case the due date would be the first business day following.

(2) An issuer may file an amendment to a previously filed notice of sales on Form D at any time.

(3) An issuer must file an amendment to a previously filed notice of sales on Form D for an offering:

(i) To correct a material mistake of fact or error in the previously filed notice of sales on Form D, as soon as practicable after discovery of the mistake or error;

(ii) To reflect a change in the information provided in the previously filed notice of sales on Form D, as soon as practicable after the change, except that no amendment is required to reflect a change that occurs after the offering terminates or a change that occurs solely in the following information:

(A) The address or relationship to the issuer of a related person identified in response to Item 3 of the notice of sales on Form D;

(B) An issuer's revenues or aggregate net asset value;

(C) The minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in a decrease of more than 10%;

(D) Any address or state(s) of solicitation shown in response to Item 12 of the notice of sales on Form D;

(E) The total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%;

(F) The amount of securities sold in the offering or the amount remaining to be sold;

(G) The number of non-accredited investors who have invested in the offering, as long as the change does not increase the number to more than 35;

(H) The total number of investors who have invested in the offering; or

(I) The amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%; and

(iii) Annually, on or before the first anniversary of the filing of the notice of sales on Form D or the filing of the most recent amendment to the notice of sales on Form D, if the offering is continuing at that time.

(4) An issuer that files an amendment to a previously filed notice of sales on Form D must provide current information in response to all requirements of the notice of sales on Form D regardless of why the amendment is filed.

(b) How notice of sales on Form D must be filed and signed.

(1) A notice of sales on Form D must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) in accordance with EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) Every notice of sales on Form D must be signed by a person duly authorized by the issuer.

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

5. 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.

* * * * *

6. Amend § 232.100 by revising paragraph (a) to read as follows:

§ 232.100 Persons and entities subject to mandated electronic filing.

* * * * *

(a) Registrants and other entities whose filings are subject to review by the Division of Corporation Finance;

* * * * *

7. Amend § 232.101 by:

- a. Removing the word “and” at the end of paragraph (a)(1)(xi);
- b. Removing the period and adding “; and” at the end of paragraph (a)(1)(xii);
- c. Adding paragraph (a)(1)(xiii);
- d. Removing the word “and” at the end of paragraph (b)(8)(ii);
- e. Removing the period and adding “; and” at the end of paragraph (b)(9);

f. Adding paragraph (b)(10); and

g. Removing “, Regulation D (§§ 230.501-230.506 of this chapter)” from paragraph (c)(6).

The added paragraphs read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(xiii) Form D (§ 239.500 of this chapter).

* * * * *

(b) * * *

(10) Form D (§ 239.500 of this chapter) but this temporary § 232.101(b)(10) will expire on March 16, 2009.

* * * * *

8. Amend § 232.104 by revising paragraph (a) to read as follows:

§ 232.104 Unofficial PDF copies included in an electronic submission.

(a) An electronic submission, 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 a Form D (§ 239.500 of this chapter), may include one unofficial PDF copy of each electronic document contained within that submission, tagged in the format required by the EDGAR Filer Manual.

* * * * *

9. Amend § 232.201 by revising paragraph (a) introductory text to read as follows:

§ 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 a Form D (§ 239.500 of this chapter), 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.

* * * * *

10. Amend § 232.202 by revising paragraph (a) introductory text to read as follows:

§ 232.202 Continuing hardship exemption.

(a) An electronic filer may apply in writing for a continuing hardship exemption if all or part of a filing or group of filings, other than a Form ID (§§ 239.63, 249.446, 269.7 and 274.402 of this chapter) or a Form D (§ 239.500 of this chapter), otherwise to be filed in electronic format cannot be so filed without undue burden or expense. Such written application shall be made at least ten business days prior to the required due date of the filing(s) or the proposed filing date, as appropriate, or within such shorter period as may be permitted. The written application shall contain the information set forth in paragraph (b) of this section.

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

11. The authority citation for Part 239 continues to read in part 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, 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.

* * * * *

12. Add § 239.500T and Temporary Form D (referenced in § 239.500T) to read as follows:

§ 239.500T Temporary Form D, notice of sales of securities under Regulation D and section 4(6) of the Securities Act of 1933.

Note to § 239.500T: This is a special temporary section that applies instead of § 239.500 only to issuers that file with the Commission a notice on Temporary Form D (17 CFR 239.500T) or an amendment to such a notice in paper format on or after September 15, 2008 but before March 16, 2009. During that period, an issuer also may file in paper format an initial notice using Form D (17 CFR 239.500) but, if it does, the issuer must file amendments using Form D (17 CFR 239.500) and otherwise comply with all the requirements of § 230.503T.

(a) Two copies of a notice on this form shall be filed with the Commission no later than 15 days after the first sale of securities in an offering under Regulation D (§§ 230.501-230.508 of this chapter) or under section 4(6) of the Securities Act of 1933.

(b) One copy of every notice on Form D shall be manually signed by a person duly authorized by the issuer.

(c) When sales are made under § 230.505, the notice shall contain an undertaking by the issuer to furnish to the Commission, upon the written request of its staff, the information furnished to non-accredited investors.

(d) Amendments to notices filed under paragraph (a) need only report the issuer's name and the information required by Part C and any material change in the facts from those set forth in Parts A and B.

(e) A notice on Form D shall be considered filed with the Commission under paragraph (a) of this section:

(1) As of the date on which it is received at the Commission's principal office in Washington, DC; or

(2) As of the date on which the notice is mailed by means of United States registered or certified mail to the Commission's principal office in Washington, DC, if the notice is delivered to such office after the date on which it is required to be filed.

(f) This temporary § 239.500T and accompanying note will expire on March 16, 2009.

Note – The text of Temporary Form D (referenced in § 239.500T) does not and this amendment will not appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

OMB APPROVAL
OMB Number: 3235-0076
Expires: April 30, 2008
Estimated average burden hours per response 16.00

TEMPORARY
FORM D
NOTICE OF SALE OF SECURITIES
PURSUANT TO REGULATION D,
SECTION 4(6), AND/OR
UNIFORM LIMITED OFFERING EXEMPTION

Name of Offering <input type="checkbox"/> (check if this is an amendment and name has changed, and indicate change.)	
Filing Under (Check box(es) that apply): <input type="checkbox"/> Rule 504 <input type="checkbox"/> Rule 505 <input type="checkbox"/> Rule 506 <input type="checkbox"/> Section 4(6) <input type="checkbox"/> ULOE	
Type of Filing: <input type="checkbox"/> New Filing <input type="checkbox"/> Amendment	
A. BASIC IDENTIFICATION DATA	
1. Enter the information requested about the issuer	
Name of Issuer <input type="checkbox"/> (check if this is an amendment and name has changed, and indicate change.)	
Address of Executive Offices (Number and Street, City, State, Zip Code)	Telephone Number (Including Area Code)
Address of Principal Business Operations (Number and Street, City, State, Zip Code) (if different from Executive Offices)	Telephone Number (Including Area Code)
Brief Description of Business	
Type of Business Organization <input type="checkbox"/> corporation <input type="checkbox"/> limited partnership, already formed <input type="checkbox"/> other (please specify)	
<input type="checkbox"/> business trust <input type="checkbox"/> limited partnership, to be formed	
Actual or Estimated Date of Incorporation or Organization:	Month Year <input type="checkbox"/> Actual <input type="checkbox"/> Estimated
Jurisdiction of Incorporation or Organization:	(Enter two-letter U.S. Postal Service abbreviation for State; CN for Canada; FN for other foreign jurisdiction) <input type="checkbox"/>

GENERAL INSTRUCTIONS

Note: This is a special Temporary Form D (17 CFR 239.500T) that is available to be filed instead of Form D (17 CFR 239.500) only to issuers that file with the Commission a notice on Temporary Form D (17 CFR 239.500T) or an amendment to such a notice in paper format on or after September 15, 2008 but before March 16, 2009. During that period, an issuer also may file in paper format an initial notice using Form D (17 CFR 239.500) but, if it does, the issuer must file amendments using Form D (17 CFR 239.500) and otherwise comply with all the requirements of § 230.503T.

Federal:

Who Must File: All issuers making an offering of securities in reliance on an exception under Regulation D or Section 4(6), 17 CFR 230.501 et seq. or 15 U.S.C. 77d(6).

When To File: A notice must be filed no later than 15 days after the first sale of securities in the offering. A notice is deemed filed with the U.S. Securities and Exchange Commission (SEC) on the earlier of the date it is received by the SEC at the address given below or, if received at that address after the date on which it is due, on the date it was mailed by United States registered or certified mail to that address.

Where To File: U.S. Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549.

Copies Required: Two (2) copies of this notice must be filed with the SEC, one of which must be manually signed. The copy not manually signed must be a photocopy of the manually signed copy or bear typed or printed signatures.

Information Required: A new filing must contain all information requested. Amendments need only report the name of the issuer and offering, any changes thereto, the information requested in Part C, and any material changes from the information previously supplied in Parts A and B. Part E and the Appendix need not be filed with the SEC.

Filing Fee: There is no federal filing fee.

State:

This notice shall be used to indicate reliance on the Uniform Limited Offering Exemption (ULOE) for sales of securities in those states that have adopted ULOE and that have adopted this form. Issuers relying on ULOE must file a separate notice with the Securities Administrator in each state where sales are to be, or have been made. If a state requires the payment of a fee as a precondition to the claim for the exemption, a fee in the proper amount shall accompany this form. This notice shall be filed in the appropriate states in accordance with state law. The Appendix to the notice constitutes a part of this notice and must be completed.

ATTENTION

Failure to file notice in the appropriate states will not result in a loss of the federal exemption. Conversely, failure to file the appropriate federal notice will not result in a loss of an available state exemption unless such exemption is predicated on the filing of a federal notice.

Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB number.

A. BASIC IDENTIFICATION DATA

2. Enter the information requested for the following:

- Each promoter of the issuer, if the issuer has been organized within the past five years;
- Each beneficial owner having the power to vote or dispose, or direct the vote or disposition of, 10% or more of a class of equity securities of the issuer;
- Each executive officer and director of corporate issuers and of corporate general and managing partners of partnership issuers; and
- Each general and managing partner of partnership issuers.

Check Box(es) that Apply: Promoter Beneficial Owner Executive Officer Director General and/or Managing Partner

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Check Box(es) that Apply: Promoter Beneficial Owner Executive Officer Director General and/or Managing Partner

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Check Box(es) that Apply: Promoter Beneficial Owner Executive Officer Director General and/or Managing Partner

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Check Box(es) that Apply: Promoter Beneficial Owner Executive Officer Director General and/or Managing Partner

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Check Box(es) that Apply: Promoter Beneficial Owner Executive Officer Director General and/or Managing Partner

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Check Box(es) that Apply: Promoter Beneficial Owner Executive Officer Director General and/or Managing Partner

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Check Box(es) that Apply: Promoter Beneficial Owner Executive Officer Director General and/or Managing Partner

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

(Use blank sheet, or copy and use additional copies of this sheet, as necessary.)

B. INFORMATION ABOUT OFFERING

1. Has the issuer sold, or does the issuer intend to sell, to non-accredited investors in this offering?..... Yes No
 Answer also in Appendix, Column 2, if filing under ULOE.
2. What is the minimum investment that will be accepted from any individual?..... \$ _____
 Yes No
3. Does the offering permit joint ownership of a single unit?
4. Enter the information requested for each person who has been or will be paid or given, directly or indirectly, any commission or similar remuneration for solicitation of purchasers in connection with sales of securities in the offering. If a person to be listed is an associated person or agent of a broker or dealer registered with the SEC and/or with a state or states, list the name of the broker or dealer. If more than five (5) persons to be listed are associated persons of such a broker or dealer, you may set forth the information for that broker or dealer only.

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Name of Associated Broker or Dealer

States in Which Person Listed Has Solicited or Intends to Solicit Purchasers

(Check "All States" or check individual States)..... All States

AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID
IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA
RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Name of Associated Broker or Dealer

States in Which Person Listed Has Solicited or Intends to Solicit Purchasers

(Check "All States" or check individual States)..... All States

AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID
IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA
RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR

Full Name (Last name first, if individual)

Business or Residence Address (Number and Street, City, State, Zip Code)

Name of Associated Broker or Dealer

States in Which Person Listed Has Solicited or Intends to Solicit Purchasers

(Check "All States" or check individual States)..... All States

AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID
IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA
RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR

(Use blank sheet, or copy and use additional copies of this sheet, as necessary.)

C. OFFERING PRICE, NUMBER OF INVESTORS, EXPENSES AND USE OF PROCEEDS

1. Enter the aggregate offering price of securities included in this offering and the total amount already sold. Enter "0" if the answer is "none" or "zero." If the transaction is an exchange offering, check this box and indicate in the columns below the amounts of the securities offered for exchange and already exchanged.

Type of Security	Aggregate Offering Price	Amount Already Sold
Debt	\$ _____	\$ _____
Equity	\$ _____	\$ _____
<input type="checkbox"/> Common <input type="checkbox"/> Preferred		
Convertible Securities (including warrants)	\$ _____	\$ _____
Partnership Interests	\$ _____	\$ _____
Other (Specify _____)	\$ _____	\$ _____
Total	\$ _____	\$ _____

Answer also in Appendix, Column 3, if filing under ULOE.

2. Enter the number of accredited and non-accredited investors who have purchased securities in this offering and the aggregate dollar amounts of their purchases. For offerings under Rule 504, indicate the number of persons who have purchased securities and the aggregate dollar amount of their purchases on the total lines. Enter "0" if answer is "none" or "zero".

	Number of Investors	Aggregate Dollar Amount of Purchases
Accredited Investors	_____	\$ _____
Non-accredited Investors	_____	\$ _____
Total (for filings under Rule 504 only)	_____	\$ _____

Answer also in Appendix, Column 4, if filing under ULOE.

3. If this filing is for an offering under Rule 504 or 505, enter the information requested for all securities sold by the issuer, to date, in offerings of the types indicated, in the twelve (12) months prior to the first sale of securities in this offering. Classify securities by type listed in Part C—Question 1.

Type of Offering	Type of Security	Dollar Amount Sold
Rule 505	_____	\$ _____
Regulation A	_____	\$ _____
Rule 504	_____	\$ _____
Total	_____	\$ _____

4. a. Furnish a statement of all expenses in connection with the issuance and distribution of the securities in this offering. Exclude amounts relating solely to organization expenses of the issuer. The information may be given as subject to future contingencies. If the amount of an expenditure is not known, furnish an estimate and check the box to the left of the estimate.

Transfer Agent's Fees	<input type="checkbox"/>	\$ _____
Printing and Engraving Costs	<input type="checkbox"/>	\$ _____
Legal Fees	<input type="checkbox"/>	\$ _____
Accounting Fees	<input type="checkbox"/>	\$ _____
Engineering Fees	<input type="checkbox"/>	\$ _____
Sales Commissions (specify finders' fees separately)	<input type="checkbox"/>	\$ _____
Other Expenses (identify) _____	<input type="checkbox"/>	\$ _____
Total	<input type="checkbox"/>	\$ _____

b. Enter the difference between the aggregate offering price given in response to Part C—Question 1 and total expenses furnished in response to Part C—Question 4.a. This difference is the “adjusted gross proceeds to the issuer.” \$ _____

5. Indicate below the amount of the adjusted gross proceed to the issuer used or proposed to be used for each of the purposes shown. If the amount for any purpose is not known, furnish an estimate and check the box to the left of the estimate. The total of the payments listed must equal the adjusted gross proceeds to the issuer set forth in response to Part C—Question 4.b above.

	<input type="checkbox"/>	Payments to Officers, Directors, & Affiliates	<input type="checkbox"/>	Payments to Others
Salaries and fees	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Purchase of real estate	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Purchase, rental or leasing and installation of machinery and equipment	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Construction or leasing of plant buildings and facilities	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Acquisition of other businesses (including the value of securities involved in this offering that may be used in exchange for the assets or securities of another issuer pursuant to a merger)	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Repayment of indebtedness	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Working capital	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Other (specify): _____ _____	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Column Totals	<input type="checkbox"/>	\$ _____	<input type="checkbox"/>	\$ _____
Total Payments Listed (column totals added)		<input type="checkbox"/>		\$ _____

D. FEDERAL SIGNATURE

The issuer has duly caused this notice to be signed by the undersigned duly authorized person. If this notice is filed under Rule 505, the following signature constitutes an undertaking by the issuer to furnish to the U.S. Securities and Exchange Commission, upon written request of its staff, the information furnished by the issuer to any non-accredited investor pursuant to paragraph (b)(2) of Rule 502.

Issuer (Print or Type)	Signature	Date
Name of Signer (Print or Type)	Title of Signer (Print or Type)	

ATTENTION

Intentional misstatements or omissions of fact constitute federal criminal violations. (See 18 U.S.C. 1001.)

E. STATE SIGNATURE

1. Is any party described in 17 CFR 230.262 presently subject to any of the disqualification provisions of such rule? Yes No

See Appendix, Column 5, for state response.

2. The undersigned issuer hereby undertakes to furnish to any state administrator of any state in which this notice is filed a notice on Temporary Form D (17 CFR 239.500T) at such times as required by state law.
3. The undersigned issuer hereby undertakes to furnish to the state administrators, upon written request, information furnished by the issuer to offerees.
4. The undersigned issuer represents that the issuer is familiar with the conditions that must be satisfied to be entitled to the Uniform limited Offering Exemption (ULOE) of the state in which this notice is filed and understands that the issuer claiming the availability of this exemption has the burden of establishing that these conditions have been satisfied.

The issuer has read this notification and knows the contents to be true and has duly caused this notice to be signed on its behalf by the undersigned duly authorized person.

Issuer (Print or Type)	Signature	Date
Name (Print or Type)	Title (Print or Type)	

Instruction:

Print the name and title of the signing representative under the representative's signature for the state portion of this form. One copy of every notice on Form D must be manually signed. A copy not manually signed must be a photocopy of the manually signed copy or bear typed or printed signatures.

APPENDIX

1 State	2 Intend to sell to non-accredited investors in State (Part B-Item 1)		3 Type of security and aggregate offering price offered in state (Part C-Item 1)	4 Type of investor and amount purchased in State (Part C-Item 2)				5 Disqualification under State ULOE (if yes, attach explanation of waiver granted) (Part E-Item I)	
	Yes	No		Number of Accredited Investors	Amount	Number of Non-Accredited Investors	Amount	Yes	No
AL									
AK									
AZ									
AR									
CA									
CO									
CT									
DE									
DC									
FL									
GA									
HI									
ID									
IL									
IN									
IA									
KS									
KY									
LA									
ME									
MD									
MA									
MI									
MN									
MS									

APPENDIX

1 State	2 Intend to sell to non-accredited investors in State (Part B-Item 1)		3 Type of security and aggregate offering price offered in state (Part C-Item 1)	4 Type of investor and amount purchased in State (Part C-Item 2)				5 Disqualification under State ULOE (if yes, attach explanation of waiver granted) (Part E-Item 1)	
	Yes	No		Number of Accredited Investors	Amount	Number of Non-Accredited Investors	Amount	Yes	No
MO									
MT									
NE									
NV									
NH									
NJ									
NM									
NY									
NC									
ND									
OH									
OK									
OR									
PA									
RI									
SC									
SD									
TN									
TX									
UT									
VT									
VA									
WA									
WV									
WI									

APPENDIX

APPENDIX									
1	2		3	4				5	
	Intend to sell to non-accredited investors in State (Part B-Item 1)		Type of security and aggregate offering price offered in state (Part C-Item 1)	Type of investor and amount purchased in State (Part C-Item 2)				Disqualification under State ULOE (if yes, attach explanation of waiver granted) (Part E-Item I)	
State	Yes	No		Number of Accredited Investors	Amount	Number of Non-Accredited Investors	Amount	Yes	No
WY									
PR									

13. Revise § 239.500 and Form D (referenced in § 239.500) to read as follows:

§ 239.500 Form D, notice of sales of securities under Regulation D and section 4(6) of the Securities Act of 1933.

(a) When notice of sales on Form D must be filed.

(1) An issuer offering or selling securities in reliance on § 230.504, § 230.505, or § 230.506 of this chapter or section 4(6) of the Securities Act of 1933 must file with the Commission a notice of sales containing the information required by this form for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering, unless the end of that period falls on a Saturday, Sunday or holiday, in which case the due date would be the first business day following.

(2) An issuer may file an amendment to a previously filed notice of sales on Form D at any time.

(3) An issuer must file an amendment to a previously filed notice of sales on Form D for an offering:

(i) To correct a material mistake of fact or error in the previously filed notice of sales on Form D, as soon as practicable after discovery of the mistake or error;

(ii) To reflect a change in the information provided in the previously filed notice of sales on Form D, as soon as practicable after the change, except that no amendment is required to reflect a change that occurs after the offering terminates or a change that occurs solely in the following information:

(A) The address or relationship to the issuer of a related person identified in response to Item 3 of the notice of sales on Form D;

(B) An issuer's revenues or aggregate net asset value;

(C) The minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in a decrease of more than 10%;

(D) Any address or state(s) of solicitation shown in response to Item 12 of the notice of sales on Form D;

(E) The total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%;

(F) The amount of securities sold in the offering or the amount remaining to be sold;

(G) The number of non-accredited investors who have invested in the offering, as long as the change does not increase the number to more than 35;

(H) The total number of investors who have invested in the offering;

(I) The amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%; and

(iii) Annually, on or before the first anniversary of the filing of the notice of sales on Form D or the filing of the most recent amendment to the notice of sales on Form D, if the offering is continuing at that time.

(4) An issuer that files an amendment to a previously filed notice of sales on Form D must provide current information in response to all requirements of the notice of sales on Form D regardless of why the amendment is filed.

(b) How notice of sales on Form D must be filed and signed.

(1) A notice of sales on Form D must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) in accordance with EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) Every notice of sales on Form D must be signed by a person duly authorized by the issuer.

Note – The text of Form D (referenced in § 239.500) does not and this amendment will not appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

OMB APPROVAL
OMB Number: 3235-0076
Expires: April 30, 2008
Estimated average burden hours per response: .400

FORM D

NOTICE OF EXEMPT OFFERING OF SECURITIES

Intentional misstatements or omissions of fact constitute federal criminal violations. See 18 U.S.C. 1001.

You must follow the accompanying instructions in submitting this notice.

1. **Issuer's Identity**

Name of Issuer _____

Previous Name(s) _____ None

Jurisdiction of Incorporation/Organization (dropdown or other list selection feature)

Entity Type (dropdown or other list selection feature)

Year of Incorporation/Organization (dropdown or other list selection feature to select year or "Yet to Be Formed")

Add Issuer

2. **Principal Place of Business and Contact Information**

Street Address _____

City _____ State/Province ___ (dropdown or other list selection feature)

Zip/Postal Code _____

Country

- U.S.
- Canada
- Other (dropdown or other list selection feature for countries if answer is "Other" than U.S. or Canada)

Telephone Number _____

Add Information for Additional Issuer(s)

3. **Related Persons**

<u>Full Name</u>	<u>Relationship</u>	<u>Address</u>
_____	<input type="checkbox"/> Executive Officer	_____
	<input type="checkbox"/> Director	_____
	<input type="checkbox"/> Promoter	_____

Clarification of Response (if Necessary): _____

Add Related Person

4. **Industry Group (dropdown or other list selection feature)**

5. **Issuer Size**

Revenue Range (for issuers that do not specify "Hedge Fund" or "Other Investment Fund" in response to Item 4)

- No Revenues
- \$1 - \$1,000,000
- \$1,000,001 - \$5,000,000
- \$5,000,001 - \$25,000,000
- \$25,000,001 - \$100,000,000
- Over \$100,000,000
- Decline to Disclose
- Not Applicable

Aggregate Net Asset Value Range (for issuers that specify "Hedge Fund" or "Other Investment Fund" in response to Item 4)

- No Aggregate Net Asset Value
- \$1 - \$5,000,000

- \$5,000,001 - \$25,000,000
- \$25,000,001 - \$50,000,000
- \$50,000,001 - \$100,000,000
- Over \$100,000,000
- Decline to Disclose
- Not Applicable

6. **Federal Exemption(s) and Exclusion(s) Claimed (select all that apply)**

- | | |
|--|---|
| <input type="checkbox"/> Rule 504(b)(1) (not (i), (ii) or (iii)) | <input type="checkbox"/> Rule 506 |
| <input type="checkbox"/> Rule 504(b)(1)(i) | <input type="checkbox"/> Securities Act Section 4(6) |
| <input type="checkbox"/> Rule 504(b)(1)(ii) | <input type="checkbox"/> Investment Company Act Section 3(c) ¹ |
| <input type="checkbox"/> Rule 504(b)(1)(iii) | |
| <input type="checkbox"/> Rule 505 | |

7. **Type of Filing**

- New Notice (dropdown or other feature to select “Date of First Sale” or “First Sale Yet to Occur”)
- Amendment

8. **Duration of Offering**

Does the issuer intend this offering to last more than one year?

- Yes
- No

9. **Type(s) of Securities Offered (select all that apply)**

- Equity
- Debt
- Option, Warrant or Other Right to Acquire Another Security
- Security to be Acquired Upon Exercise of Option, Warrant or Other Right to Acquire Security
- Pooled Investment Fund Interests
- Tenant-in-Common Securities
- Mineral Property Securities
- Other (Describe: _____)

10. **Business Combination Transaction**

Is this offering being made in connection with a business combination transaction, such as a merger, acquisition or exchange offer?

- Yes
- No

Clarification of Response (if Necessary): _____

11. **Minimum Investment**

¹ If the filer selects the Investment Company Act Section 3(c) checkbox, a pop-up or other feature will require the filer to select all claimed exclusions from the definition of “investment company” from among Sections 3(c)(1) through Section 3(c)(14) (except for Section 3(c)(8)).

Minimum investment accepted from any outside investor \$ _____

12. Sales Compensation

Recipient	Recipient CRD Number	Associated Broker or Dealer	Broker or Dealer CRD Number	Street Address	State(s) of Solicitation (dropdown or other list selection feature)

Add Recipient

13. Offering and Sales Amounts

Total Offering Amount \$ _____ or Indefinite
 Total Amount Sold \$ _____
 Total Remaining to be Sold \$ [auto subtract] _____ or Indefinite
 Clarification of Response (if Necessary): _____

14. Investors

Select if securities in the offering have been or may be sold to persons who do not qualify as accredited investors, and enter the number of such non-accredited investors who already have invested in the offering: _____

Regardless whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors, enter the total number of investors who already have invested in the offering: _____

15. Sales Commissions and Finders' Fees Expenses

Provide separately the amounts of sales commissions and finders' fees expenses, if any. If the amount of an expenditure is not known, provide an estimate and check the box next to the amount(s).

Sales Commissions \$ _____ Estimate
 Finders' Fees \$ _____ Estimate
 Clarification of Response (if Necessary): _____

16. Use of Proceeds

Provide the amount of the gross proceeds of the offering that has been or is proposed to be used for payments to any of the persons required to be named as executive officers, directors or promoters in response to Item 3 above. If the amount is unknown, provide an estimate and check the box next to the amount.

\$ _____ Estimate
 Clarification of Response (if Necessary): _____

Signature and Submission

Terms of Submission: Please verify the information you have entered and review the Terms of Submission below before signing and clicking SUBMIT below to file this notice.

[Printable Version](#)

In submitting this notice, each issuer named above is:

- Notifying the SEC and/or each State in which this notice is filed of the offering of securities described and undertaking to furnish them, upon written request in accordance with applicable law, the information furnished to offerees.*
- Irrevocably appointing each of the Secretary of the SEC and the Securities Administrator or other legally designated officer of the State in which the issuer maintains its principal place of business and any State in which this notice is filed, as its agents for service of process, and agreeing that these persons may accept service on its behalf, of any notice, process or pleading, and further agreeing that such service may be made by registered or certified mail, in any Federal or state action, administrative proceeding, or arbitration brought against the issuer in any place subject to the jurisdiction of the United States, if the action, proceeding or arbitration (a) arises out of any activity in connection with the offering of securities that is the subject of this notice, and (b) is founded, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these statutes; or (ii) the laws of the State in which the issuer maintains its principal place of business or any State in which this notice is filed.
- Certifying that, if the issuer is claiming a Rule 505 exemption, the issuer is not disqualified from relying on Rule 505 for one of the reasons stated in Rule 505(b)(2)(iii).

Each issuer identified above has read this notice, knows the contents to be true, and has duly caused this notice to be signed on its behalf by the undersigned duly authorized person.

Signature

* This undertaking does not affect any limits Section 102(a) of the National Securities Markets Improvement Act of 1996 ("NSMIA") [Pub. L. No. 104-290, 110 Stat. 3416 (Oct. 11, 1996)] imposes on the ability of States to require information. As a result, if the securities that are the subject of this Form D are "covered securities" for purposes of NSMIA, whether in all instances or due to the nature of the offering that is the subject of this Form D, States cannot routinely require offering materials under this undertaking or otherwise and can require offering materials only to the extent NSMIA permits them to do so under NSMIA's preservation of their anti-fraud authority.

Signature: _____ Title: _____ Date: _____

By clicking on SUBMIT below, you are agreeing to the Terms of Submission above.

SUBMIT

Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

Instructions for Submitting Notice

General Instructions

- **Who must file:**
 - Each issuer of securities that sells its securities in reliance on an exemption provided in Regulation D or Section 4(6) of the Securities Act of 1933 must file this notice containing the information requested with the U.S. Securities and Exchange Commission (SEC) and with the state(s) requiring it. If more than one issuer has sold its securities in the same transaction, all issuers should be identified in one filing with the SEC, but some states may require a separate filing for each issuer or security sold.

- **When to file:**
 - An issuer must file a new notice with the SEC for each new offering of securities no later than 15 calendar days after the “date of first sale” of securities in the offering as explained in Instruction 7. For this purpose, the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor’s subscription agreement or check. An issuer may file the notice at any time before that if it has determined to make the offering. An issuer must file a new notice with each state that requires it at the

time set by the state. For state filing information, go to www.NASAA.org. A mandatory capital commitment call does not constitute a new offering, but is made under the original offering, so no new Form D filing is required.

- An issuer may file an amendment to a previously filed notice at any time.
- An issuer must file an amendment to a previously filed notice for an offering:
 - to correct a material mistake of fact or error in the previously filed notice, as soon as practicable after discovery of the mistake or error;
 - to reflect a change in the information provided in the previously filed notice, except as provided below, as soon as practicable after the change; and
 - annually, on or before the first anniversary of the most recent previously filed notice, if the offering is continuing at that time.
- **When amendment is not required:** An issuer is not required to file an amendment to a previously filed notice to reflect a change that occurs after the offering terminates or a change that occurs solely in the following information:
 - the address or relationship to the issuer of a related person identified in response to Item 3;
 - an issuer's revenues or aggregate net asset value;
 - the minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed notice, does not result in a decrease of more than 10%;
 - any address or state(s) of solicitation shown in response to Item 12;

- the total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice, does not result in an increase of more than 10%;
 - the amount of securities sold in the offering or the amount remaining to be sold;
 - the number of non-accredited investors who have invested in the offering, as long as the change does not increase the number to more than 35;
 - the total number of investors who have invested in the offering;
 - the amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice, does not result in an increase of more than 10%.
- **Saturdays, Sundays and Holidays:** If the date on which a notice or an amendment to a previously filed notice is required to be filed falls on a Saturday, Sunday or holiday, the due date is the first business day following.
 - **Amendment content:** An issuer that files an amendment to a previously filed notice must provide current information in response to all items of this Form D, regardless of why the amendment is filed.
 - **How to File:** Issuers must file this notice with the SEC in electronic format. For state filing information, go to www.NASAA.org.
 - **Filing Fee:** There is no federal filing fee. For information on state filing fees, go to www.NASAA.org.
 - **Definitions of Terms:** Terms used but not defined in this form that are defined in Rule 405 and Rule 501 under the Securities Act of 1933, 17 CFR 230.405 and 230.501, have the meanings given to them in those rules.

Item-by-Item Instructions

1. **Issuer's Identity.** Identify each legal entity issuing any securities being reported as being offered by entering its full name; any previous name used within the past five years; and its jurisdiction of incorporation or organization, type of legal entity, and year of incorporation or organization within the past five years or status as formed over five years ago or not yet formed. If more than one entity is issuing the securities, identify a primary issuer in the first fields shown and identify additional issuers in the fields that appear.
2. **Principal Place of Business and Contact Information.** Enter a full street address of the issuer's principal place of business. Post office box numbers and "In care of" addresses are not acceptable. Enter a contact telephone number for the issuer. If you identified more than one issuer in response to Item 1, enter the requested information for the primary issuer you identified in response to that item and, at your option, for any or all of the other issuers you identified in the fields that appear.
3. **Related Persons.** Enter the full name and address of each person having the specified relationships with any issuer and identify each relationship:
 - Each executive officer and director of the issuer and person performing similar functions (title alone is not determinative) for the issuer, such as the general and managing partners of partnerships and managing members of limited liability companies; and
 - Each person who has functioned directly or indirectly as a promoter of the issuer within the past five years of the later of the first sale of securities or the date upon which the Form D filing was required to be made.

If necessary to prevent the information supplied from being misleading, also provide a clarification in the space provided.

4. **Industry Group.** Select the issuer's industry group. If the issuer or issuers can be categorized in more than one industry group, select the industry group that most accurately reflects the use of the bulk of the proceeds of the offering. For purposes of this filing, use the ordinary dictionary and commonly understood meanings of the terms identifying the industry group.
5. **Issuer Size.**
 - Revenue Range (for issuers that do not specify "Hedge Fund" or "Other Investment Fund" in response to Item 4): Enter the revenue range of the issuer or of all the issuers together for the most recently completed fiscal year available, or, if not in existence for a fiscal year, revenue range to date. Domestic SEC reporting companies should state revenues in accordance with Regulation S-X under the Securities Exchange Act of 1934. Domestic non-reporting companies should state revenues in accordance with U.S. Generally Accepted Accounting Principles (GAAP). Foreign issuers should calculate revenues in U.S. dollars and state them in accordance with U.S. GAAP, home country GAAP or International Financial Reporting Standards. If the issuer(s) declines to disclose its revenue range, enter "Decline to Disclose." If the issuer's(s') business is intended to produce revenue but did not, enter "No Revenues." If the business is not intended to produce revenue (for example, the business seeks asset appreciation only), enter "Not Applicable."
 - Aggregate Net Asset Value (for issuers that specify "Hedge Fund" or "Other Investment Fund" in response to Item 4): Enter the aggregate net asset value range of the issuer or of all the issuers together as of the most recent practicable date. If the

issuer(s) declines to disclose its aggregate net asset value range, enter “Decline to Disclose.”

6. **Federal Exemption(s) and Exclusion(s) Claimed.** Select the provision(s) being claimed to exempt the offering and resulting sales from the federal registration requirements under the Securities Act of 1933 and, if applicable, to exclude the issuer from the definition of “investment company” under the Investment Company Act of 1940. Select “Rule 504(b)(1) (not (i), (ii) or (iii))” only if the issuer is relying on the exemption in the introductory sentence of Rule 504 for offers and sales that satisfy all the terms and conditions of Rules 501 and 502(a), (c) and (d).
7. **Type of Filing.** Indicate whether the issuer is filing a new notice or an amendment to a notice that was filed previously. If this is a new notice, enter the date of the first sale of securities in the offering or indicate that the first sale has “Yet to Occur.” For this purpose, the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor’s subscription agreement or check.
8. **Duration of Offering.** Indicate whether the issuer intends the offering to last for more than one year.
9. **Type(s) of Securities Offered.** Select the appropriate type or types of securities offered as to which this notice is filed. If the securities are debt convertible into other securities, however, select “Debt” and any other appropriate types of securities except for “Equity.” For purposes of this filing, use the ordinary dictionary and commonly understood meanings of these categories. For instance, equity securities would be securities that represent proportional ownership in an issuer, such as ordinary common and preferred

stock of corporations and partnership and limited liability company interests; debt securities would be securities representing money loaned to an issuer that must be repaid to the investor at a later date; pooled investment fund interests would be securities that represent ownership interests in a pooled or collective investment vehicle; tenant-in-common securities would be securities that include an undivided fractional interest in real property other than a mineral property; and mineral property securities would be securities that include an undivided interest in an oil, gas or other mineral property.

10. **Business Combination Transaction.** Indicate whether or not the offering is being made in connection with a business combination, such as an exchange (tender) offer or a merger, acquisition, or other transaction of the type described in paragraph (a)(1), (2) or (3) of Rule 145 under the Securities Act of 1933. Do not include an exchange (tender) offer for a class of the issuer's own securities. If necessary to prevent the information supplied from being misleading, also provide a clarification in the space provided.
11. **Minimum Investment.** Enter the minimum dollar amount of investment that will be accepted from any outside investor. If the offering provides a minimum investment amount for outside investors that can be waived, provide the lowest amount below which a waiver will not be granted. If there is no minimum investment amount, enter "0." Investors will be considered outside investors if they are not employees, officers, directors, general partners, trustees (where the issuer is a business trust), consultants, advisors or vendors of the issuer, its parents, its majority owned subsidiaries, or majority owned subsidiaries of the issuer's parent.
12. **Sales Compensation.** Enter the requested information for each person that has been or will be paid directly or indirectly any commission or other similar compensation in cash or other consideration in connection with sales of securities in the offering, including

finders. Enter the CRD number for every person identified and any broker and dealer listed that has a CRD number. CRD numbers can be found at <http://brokercheck.finra.org>. A person that does not have a CRD number need not obtain one in order to be listed, and must be listed when required regardless of whether the person has a CRD number. In addition, enter the State(s) in which the named person has solicited or intends to solicit investors. If more than five persons to be listed are associated persons of the same broker or dealer, enter only the name of the broker or dealer, its CRD number and street address, and the State(s) in which the named person has solicited or intends to solicit investors.

13. **Offering and Sales Amounts.** Enter the dollar amount of securities being offered under a claim of federal exemption identified in Item 6 above. Also enter the dollar amount of securities sold in the offering as of the filing date. Select the “Indefinite” box if the amount being offered is undetermined or cannot be calculated at the present time, such as if the offering includes securities to be acquired upon the exercise or exchange of other securities or property and the exercise price or exchange value is not currently known or knowable. If an amount is definite but difficult to calculate without unreasonable effort or expense, provide a good faith estimate. The total offering and sold amounts should include all cash and other consideration to be received for the securities, including cash to be paid in the future under mandatory capital commitments. In offerings for consideration other than cash, the amounts entered should be based on the issuer’s good faith valuation of the consideration. If necessary to prevent the information supplied from being misleading, also provide a clarification in the space provided.

14. **Investors.** Indicate whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors as defined in Rule 501(a) and provide the number of such investors who already have already invested in the offering. In addition, regardless whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors, specify the total number of investors who already have invested.
15. **Sales Commission and Finders' Fees Expenses.** The information on sales commissions and finders' fees expenses may be given as subject to future contingencies.
16. **Use of Proceeds.** No additional instructions.

Signature and Submission. An individual who is a duly authorized representative of each issuer identified must sign, date and submit this notice for the issuer. The capacity in which the individual signed should be set forth in the "Title" space.

Each individual must:

- sign with a typed signature; and
- manually sign a signature page or other document authenticating, acknowledging or otherwise adopting the signature that appears in typed form in the Form D filing on or before the time of filing the Form D.

Each issuer must:

- retain the manually signed document signed on its behalf for five years; and
- provide a copy of the manually signed document to the SEC or its staff upon request.

Entity Type (for Item 1)

- Corporation
- Limited Partnership
- Limited Liability Company
- General Partnership
- Business Trust

Other (Specify)

Year of Incorporation/Organization (for Item 1)

Yet to Be Formed

Within Last Five Years (Specify Year)

Over Five Years Ago

Industry Groups (for Item 4)

Agriculture

Banking & Financial Services

Commercial Banking

Insurance

Investing

Investment Banking

Pooled Investment Fund*

Hedge Fund

Private Equity Fund

Venture Capital Fund

Other Investment Fund

Other Banking & Financial Services

Business Services

Energy

Coal Mining

Electric Utilities

Energy Conservation

Environmental Services

Oil & Gas

Other Energy

Health Care

Biotechnology

Health Insurance

Hospitals & Physicians

* If the Pooled Investment Fund checkbox is selected, pop-ups or other features also will require the filer to select one of the lower level checkboxes designating a specific type of investment fund and select a "yes" or "no" checkbox as to whether the filer is registered as an investment company under the Investment Company Act of 1940. If the "Hedge Fund" or "Other Investment Fund" option is selected, the filer will be asked to specify its aggregate net asset value range or to "Decline to Disclose" that value or specify that the information request is "Not Applicable."

- Pharmaceuticals
- Other Health Care

Manufacturing

Real Estate

- Commercial
- Construction
- REITS & Finance
- Residential
- Other Real Estate

Retailing

Restaurants

Technology

- Computers
- Telecommunications
- Other Technology

Travel

- Airlines & Airports
- Lodging & Conventions
- Tourism & Travel Services
- Other Travel

Other

By the Commission.



Nancy M. Morris
Secretary

Dated: February 6, 2008

*Commissioner Casey
Not Participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57282 / February 6, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2782 / February 6, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12949

In the Matter of

WILLIAM PATRICK
BORCHARD (CPA),

Respondent.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO RULE
102(e) OF THE COMMISSION'S RULES OF
PRACTICE, 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 against William Patrick Borchard ("Respondent" or "Borchard") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.¹

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

¹ Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

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.2. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, 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. Borchard, age 28, is and has been a certified public accountant licensed to practice in the State of California since September 15, 2006. He worked at PricewaterhouseCoopers LLP ("PWC") from 2001 until 2007.

2. On January 15, 2008, the Commission filed a complaint against Borchard in SEC v. Gregory B. Raben, et al. (Civil Action No. CV-08-0250-EMC). On January 25, 2008, the court entered an order permanently enjoining Borchard, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. Borchard was also ordered to pay a \$20,835.57 civil money penalty.

3. The Commission's complaint alleged, among other things, that Borchard passed material, non-public information that Borchard learned through his job on to a PWC colleague, who then traded on the inside information. Specifically, the complaint alleged that, from February to October 2006, Borchard provided his PWC colleague with material, non-public information about six publicly-held companies that Borchard had learned were potential acquisition targets, and that Borchard's PWC colleague then traded on the basis of Borchard's material, non-public information, reaping ill-gotten gains of over \$20,000.00.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Borchard is suspended from appearing or practicing before the Commission as an accountant.

B. After three years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such

an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in Respondent's or the firm's quality control system that would indicate that Respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and.

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8892 / February 7, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12950

In the Matter of

KENNETH M. CHRISTISON, ESQ.,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS, MAKING
FINDINGS AND IMPOSING A CEASE-
AND-DESIST ORDER PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933**

I.

The Securities and Exchange Commission (the "Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") against Kenneth M. Christison, Esq. ("Respondent" or "Christison").

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 proceeding 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, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act (the "Order"), as set forth below.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

A. RESPONDENT

1. Christison, age 65, is a resident of Mill Valley, California and a member of the State Bar of California. During 2004, Christison received compensation from Michael Saquella, a.k.a. Michael Paloma ("Paloma"), for providing opinion of counsel letters that were used by Paloma to facilitate an elaborate market manipulation scheme. Christison previously served as Paloma's legal counsel in connection with a 2002 settled Commission district court action in which Paloma was permanently enjoined from violating the registration and antifraud provisions of the federal securities laws, barred from acting as an officer or director of a public company, and ordered to pay more than \$500,000 in disgorgement, civil penalties, and prejudgment interest. See SEC v. Michael Paloma, Civ. Action No. 1:02CV00645 (D.D.C., final judgment entered against Paloma on June 6, 2002) (the "2002 Settled Action").

B. OTHER RELEVANT PARTIES

2. Paloma, age 45, is a resident of Mesa, Arizona. Paloma's most recent market manipulation scheme involved unlawfully taking public several microcap companies, inflating their share prices, and dumping millions of shares into the public market. Paloma controlled a number of entities (collectively, the "Paloma-controlled entities") that either facilitated unlawful public offerings or received shares in unregistered offerings involving shares of Courtside Products, Inc. ("Courtside Products"), Xtreme Technologies, Inc. ("Xtreme Technologies"), Latin Heat Entertainment, Inc. ("Latin Heat") and Commanche Properties, Inc. ("Commanche Properties"). See SEC v. Michael Saquella, a.k.a. Michael Paloma, and Lawrence Kaplan, Civ. Action No. 1:07CV895 (E.D. Va., final judgment entered September 6, 2007).

C. BACKGROUND

3. Under the federal securities laws, an issuer cannot lawfully distribute stock to public investors without first registering the offering with the Commission or having a valid exemption from registration for the transaction. Registration requires a company to provide important information about its finances and business to potential investors.

4. In conducting the offerings described herein, neither Paloma nor the issuers complied with requirements of Rule 504 of Regulation D, or any other provisions that exempt or except securities offerings from the registration requirements of the federal securities laws. No

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

registration statement was filed with the Commission or was in effect as to the shares of each issuer sold to the public by Paloma.

5. The Paloma-controlled entities obtained the stock from a person directly or indirectly controlling or controlled by each issuer, or under direct or indirect common control with each issuer, with a view to distributing the stock to the public.

6. On four occasions between May 1, 2004, and November 30, 2004, Paloma hired Christison to issue opinion of counsel letters warranting that certain offerings of securities of issuers were exempt from the registration provisions of the federal securities laws and that there was no restriction on resale of the securities sold in those offerings pursuant to Rule 504 of Regulation D under the Securities Act. Citing Rule 504 of Regulation D and Rule 109.3(c)(1) of the Texas Administrative Code, Christison's opinion letters concluded that if the proposed purchasers qualified as accredited investors who purchased with investment intent, the offerings were exempt from registration and there would be no restriction on the resale of the securities issued.

7. Based on the opinion letters, a transfer agent issued shares for each issuer without restrictive legends that would otherwise provide potential third party purchasers and financial intermediaries with notice that the shares were restricted as to transferability.

8. In each of the offerings described herein, the transfer agent issued unlegended shares to one or more of the Paloma-controlled entities.

9. When issuing his opinion letters, Christison, who represented Paloma in the 2002 Settled Action, knew of Paloma's consent to the entry of an injunction prohibiting him from violating the registration and antifraud provisions of the Securities Act and the Securities Exchange Act of 1934 ("Exchange Act"). In addition, Christison possessed documents and other information signaling Paloma's intent to distribute securities to unaccredited investors. Despite being in possession of such information, Christison, when preparing his opinion letters, performed insufficient due diligence regarding the facts and circumstances underlying the proposed distributions. In each instance, Christison knew or should have known that his issuance of an opinion of counsel letter would contribute to Paloma's unregistered public distribution of securities through non-exempt transactions.

D. COURTSIDE PRODUCTS, INC.

10. Courtside Products, founded by Lola Emter ("Emter"), is a Spokane, Washington-based company that manufactures sports bags.

11. At Paloma's direction, on September 28, 2004, Emter instructed First American Stock Transfer, Inc. ("First American"), a Phoenix, Arizona-based transfer agent, to issue 18.75 million shares of Courtside Products stock to three Paloma-controlled entities. These shares were issued without a restrictive legend pursuant to an opinion of counsel letter signed on September 24, 2004, by Christison. While purporting to rely on Rule 504 of Regulation D of the

Securities Act and Rule 109.3(c)(1) of the Texas Administrative Code, Christison's opinion letter concluded that if the proposed purchasers qualified as accredited investors who purchased with investment intent, the offering was exempt from registration and there was no restriction on the resale of the securities issued.

12. Having represented Paloma in the 2002 Settled Action, Christison knew that Paloma had consented to an injunction from securities registration and antifraud violations. Moreover, Christison was in possession of documents and other information signaling Paloma's intent to distribute the issuer's securities to unaccredited investors. Despite being in possession of such information, Christison, when preparing his opinion letter, conducted insufficient due diligence regarding the facts and circumstances underlying the proposed distribution. Following the issuance of Christison's opinion of counsel letter, the Paloma-controlled entities subsequently sold the issuer's securities in unregistered, nonexempt transactions to the public. Christison knew or should have known that his issuance of an opinion of counsel letter would contribute to Paloma's unlawful distribution.

13. Following this issuance, the Paloma-controlled entities held 100% of the purportedly "freely tradable" shares of Courtside Products, which were subsequently sold in unregistered, non-exempt transactions to the public.

14. On January 28, 2005, the Commission suspended trading in shares of the company based upon questions concerning its reliance on Rule 504 of Regulation D of the Securities Act in conducting a distribution of its securities which failed to comply with the resale restrictions of Regulation D. See In the Matter of Courtside Products, Inc., Release No. 34-51087 (order of suspension of trading entered January 28, 2005).

E. LATIN HEAT ENTERTAINMENT, INC.

15. Latin Heat, founded in 1992 by Belarmina "Bel" Hernandez ("Hernandez"), is a West Covina, California-based company that publishes an online newsletter and hardcopy magazine reporting on Latino entertainers in the television, music and film industries.

16. At Paloma's direction, in early May 2004, Hernandez instructed First American to issue 12.75 million shares of Latin Heat stock to two Paloma-controlled entities. These shares were issued without a restrictive legend pursuant to an opinion of counsel letter signed on May 6, 2004, by Christison. While purporting to rely on Rule 504 of Regulation D of the Securities Act and Rule 109.3(c)(1) of the Texas Administrative Code, Christison's opinion letter concluded that if the proposed purchasers qualified as accredited investors who purchased with investment intent, the offering was exempt from registration and there was no restriction on the resale of the securities issued.

17. Having represented Paloma in the 2002 Settled Action, Christison knew that Paloma had consented to an injunction from securities registration and antifraud violations. Despite having this knowledge, Christison, when preparing his opinion letter, conducted insufficient due diligence regarding the facts and circumstances underlying the proposed

distribution. Following the issuance of Christison's opinion of counsel letter, the Paloma-controlled entities subsequently sold the issuer's securities in unregistered, nonexempt transactions to the public. Christison knew or should have known that his issuance of an opinion of counsel letter would contribute to Paloma's unlawful distribution.

18. Following this issuance, the Paloma-controlled entities held 100% of the purportedly "freely tradable" shares of Latin Heat, which were subsequently sold in unregistered, non-exempt transactions to the public.

F. XTREME TECHNOLOGIES, INC.

19. Xtreme Technologies, founded in 1998 by Michael Burk ("Burk"), is a Spokane, Washington-based telecommunications consulting service.

20. At Paloma's direction, in September 2004, Burk instructed First American to issue 18.75 million shares of Xtreme Technologies stock to three Paloma-controlled entities. These shares were issued without a restrictive legend pursuant to an opinion of counsel letter signed on September 9, 2004, by Christison. While purporting to rely on Rule 504 of Regulation D of the Securities Act and Rule 109.3(c)(1) of the Texas Administrative Code, Christison's opinion letter concluded that if the proposed purchasers qualified as accredited investors who purchased with investment intent, the offering was exempt from registration and there was no restriction on the resale of the securities issued.

21. Having represented Paloma in the 2002 Settled Action, Christison knew that Paloma had consented to an injunction from securities registration and antifraud violations. Moreover, Christison was in possession of documents and other information signaling Paloma's intent to distribute the issuer's securities to unaccredited investors. Despite being in possession of such information, Christison, when preparing his opinion letter, conducted insufficient due diligence regarding the facts and circumstances underlying the proposed distribution. Following the issuance of Christison's opinion of counsel letter, the Paloma-controlled entities subsequently sold the issuer's securities in unregistered, nonexempt transactions to the public. Christison knew or should have known that his issuance of an opinion of counsel letter would contribute to Paloma's unlawful distribution.

22. With these issuances, the Paloma-controlled entities held 100% of the purportedly "freely tradable" shares of Xtreme Technologies, which were subsequently sold in unregistered, non-exempt transactions to the public.

G. COMMANCHE PROPERTIES, INC.

23. Commanche Properties was a Tucson, Arizona-based entertainment company operated by Anthony Tarantola and Bill Bonanno.

24. On November 12, 2004, ten million shares of Commanche Properties were issued by First American to two Paloma-controlled entities. These shares were issued without a restrictive legend pursuant to an opinion of counsel letter signed on November 5, 2004, by Christison. While purporting to rely on Rule 504 of Regulation D of the Securities Act and Rule 109.3(c)(1) of the Texas Administrative Code, Christison's opinion letter concluded that if the proposed purchasers qualified as accredited investors who purchased with investment intent, the offering was exempt from registration and there was no restriction on the resale of the securities issued.

25. Having represented Paloma in the 2002 Settled Action, Christison knew that Paloma had consented to an injunction from securities registration and antifraud violations. Moreover, Christison was in possession of documents and other information signaling Paloma's intent to distribute the issuer's securities to unaccredited investors. Despite being in possession of such information, Christison, when preparing his opinion letter, conducted insufficient due diligence regarding the facts and circumstances underlying the proposed distribution. Following the issuance of Christison's opinion of counsel letter, the Paloma-controlled entities subsequently sold the issuer's securities in unregistered, nonexempt transactions to the public. Christison knew or should have known that his issuance of an opinion of counsel letter would contribute to Paloma's unlawful distribution.

26. Following this issuance, the Paloma-controlled entities sold shares of Commanche Properties in unregistered, non-exempt transactions to the public.

27. On January 31, 2005, the Commission suspended trading in shares of Commanche Properties based upon questions concerning the company's reliance on Rule 504 of Regulation D of the Securities Act in conducting a distribution of its securities which failed to comply with the resale restrictions of Regulation D. See In the Matter of Commanche Properties, Inc., Release No. 34-51105 (order of suspension of trading entered January 31, 2005).

H. VIOLATIONS

28. Section 5(a) of the Securities Act prohibits the use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell a security unless a registration statement is in effect as to such security. Section 5(c) of the Securities Act prohibits the use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy a security unless a registration statement has been filed as to such security.

29. As a result of the conduct described above, Paloma violated Sections 5(a) and 5(c) of the Securities Act. Paloma has consented to the entry of a final judgment permanently enjoining him from violating, among other provisions of the federal securities laws, Sections 5(a) and 5(c) of the Securities Act. See supra, Section III.A.2.

30. As a result of the conduct described above, Respondent caused Paloma's violations of Sections 5(a) and 5(c) of the Securities Act. The Commission previously has charged attorneys for causing Section 5 violations. See In the Matter of John L. Milling, Esq., Administrative Proceeding File No. 3-11027 (order entered February 3, 2003); and In the Matter of Google, Inc. and David C. Drummond, Administrative Proceeding File No. 3-11795 (order entered January 13, 2005).

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 8A of the Securities Act, Respondent cease and desist from committing or causing violations and any future violations of Sections 5(a) and 5(c) of the Securities Act.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 57292 / February 7, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-12951

In the Matter of

MITCHELL S. DRUCKER, Esq.

Respondent:

ORDER INSTITUTING PUBLIC
ADMINISTRATIVE PROCEEDINGS AND
IMPOSING TEMPORARY SUSPENSION
PURSUANT TO RULE 102(e)(3)(i) OF THE
COMMISSION'S RULES OF PRACTICE

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 Rule 102(e)(3)(i)¹ of the Commission's Rules of Practice against Mitchell S. Drucker ("Respondent" or "Drucker").

II.

The Commission finds that:

A. RESPONDENT

1. Drucker is and has been an attorney licensed to practice in the State of New York.

¹ Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . attorney . . . who has been by name . . . (A) permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating . . . any provision of the Federal securities laws or of the rules and regulations thereunder.

B. COURT FINDINGS & INJUNCTION

2. On December 26, 2007, the U.S. District Court for the Southern District of New York entered its final judgment against Drucker, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, as well as Rule 10b-5 thereunder. Securities and Exchange Commission v. Mitchell S. Drucker, et al., Case No. 06-CV-1644 (S.D.N.Y.).

III.

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has permanently enjoined Drucker, an attorney, from violating the Federal securities laws within the meaning of Rule 102(e)(3)(i)(A) of the Commission's Rules of Practice. In view of these findings, the Commission deems it appropriate and in the public interest that Drucker be temporarily suspended from appearing or practicing before the Commission.

IT IS HEREBY ORDERED that Drucker be, and hereby is, temporarily suspended from appearing or practicing before the Commission. This Order will be effective upon service on the Respondent.

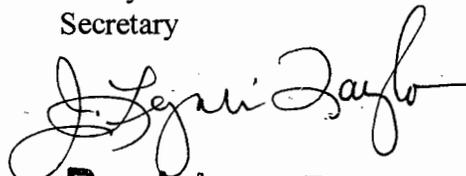
IT IS FURTHER ORDERED that Drucker may, within thirty days after service of this Order, file a petition with the Commission to lift the temporary suspension. If the Commission receives no petition within thirty days after service of the Order, the suspension will become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission will, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Drucker personally or by certified mail at his last known address.

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

*Commissioner Casey
Not Participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57307 / February 11, 2008

INVESTMENT ADVISERS ACT OF 1940
Release No. 2703 / February 11, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12954

In the Matter of

JUSTIN M. PAPERNY,

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 Justin M. Paperny ("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 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.

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III.

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

1. Paperny was a registered representative at UBS Financial Services, Inc., a broker-dealer and investment adviser registered with the Commission, from June 2001 to February 2005. Paperny, age 32, is a resident of Studio City, California.

2. On January 23, 2008, a final judgment was entered by consent against Paperny, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Justin M. Paperny, Civil Action Number CV-08-00213 CAS (VBKx), in the United States District Court for the Central District of California.

3. The Commission's complaint alleged that, in connection with the sale of limited partnership interests in a purported hedge fund, Paperny falsely stated indirectly to prospective investors and their representatives that the hedge fund would receive shares in a highly anticipated initial public offering, that it had achieved high average yearly returns, and that it used a particular investment strategy. The complaint also alleged that Paperny aided and abetted the investment adviser's securities fraud by processing Paperny's customer's investments in the hedge fund and executing trades for the hedge fund despite knowing that the adviser was defrauding the hedge fund and its investors by misappropriating funds from the hedge fund. The complaint further alleged that Paperny sold unregistered securities.

IV.

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























UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 57333 / February 14, 2008

ACCOUNTING AND AUDITING ENFORCEMENT

Release No. 2785 / February 14, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-12957

In the Matter of

**WESTINGHOUSE AIR BRAKE
TECHNOLOGIES CORPORATION,**

Respondent.

**ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION
21C OF THE SECURITIES EXCHANGE ACT
OF 1934, MAKING FINDINGS, AND
IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Westinghouse Air Brake Technologies Corporation ("Wabtec" 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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.¹

¹ On February 14, 2008, the Commission filed a complaint against Wabtec in the United States District Court for the Eastern District of Pennsylvania alleging violations of Sections 13(b)(2)(A), 13(b)(2)(B) and 30A of the Exchange Act and seeking the imposition of a civil penalty. Without admitting or denying the Commission's allegations, Wabtec has consented to the entry of a final judgment that requires Wabtec to pay a civil penalty of \$87,000. See SEC v. Westinghouse Air Brake Technologies Corporation, Civil Action No. 08-CV-706 (E.D.Pa.).

III.

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

Summary

1. This matter involves violations of the Foreign Corrupt Practices Act of 1977 ("FCPA") by Westinghouse Air Brake Technologies Corporation. From at least 2001 through 2005, Wabtec, through its Indian subsidiary, Pioneer Friction Limited ("Pioneer"), made unlawful payments to employees of the Indian government in connection with Pioneer's efforts to obtain and retain business from the Indian national railway system. During this time period, Pioneer made over \$137,400 in improper cash payments to employees of the Indian government in order to have its competitive bids for government business granted or considered. None of these payments were accurately reflected on Wabtec's books and records and Wabtec failed to prevent or detect these payments.

Respondent

2. Wabtec, incorporated in Delaware and headquartered in western Pennsylvania, manufactures brake subsystems and related products for locomotives, freight cars and passenger vehicles, among other things. Wabtec employs approximately 5,000 people in 40 manufacturing plants, service centers, and sales offices located in the United States, Canada, Mexico, Europe, Asia, Australia and South America. Wabtec's stock is registered pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. Wabtec files reports with the Commission pursuant to Section 13 of the Exchange Act.

Other Relevant Entity

3. Pioneer Friction Limited, incorporated and headquartered in India, manufactures low and high friction brake blocks for rail operations. Pioneer is a fourth tier, wholly-owned subsidiary of Wabtec. Two of the intermediate subsidiaries are Australian companies which are, in turn, owned by a U.S. holding company. Pioneer's financial results are reported on a consolidated basis as part of Wabtec's consolidated financial statements.

Facts

A. The Unlawful Payments

4. Pioneer sells brake blocks in India to Original Equipment Manufacturers ("OEM") and aftermarket customers. The OEM market includes train car manufacturers owned or controlled by the Indian government. The national railway system in India is controlled by the Indian government through the Ministry of Railroads ("MOR"). The Indian Railway Board ("IRB") is the operating arm of the MOR. The IRB includes sixteen "Zonal Railways."

5. The IRB and Zonal Railways solicit sealed bids for specific quantities of certain low friction products from various companies located in India (the "tender process"). The IRB and Zonal Railways award the contract to the lowest bidder (the "primary contract") and notify the higher bidders of the lowest bid. Because the IRB's and Zonal Railways' requirements often exceed the production capacity of any single manufacturer, after awarding the contract to the lowest bidder, the IRB engages in negotiations with the higher bidders. In most cases, the IRB will award the higher bidders some business at the low bidder's price.

6. From at least 2001 through 2005, employees of the IRB and Zonal Railways solicited from Pioneer two types of cash payments in connection with the tender process. First, during the times that the IRB was evaluating various bids received from Pioneer and others, employees of the IRB and Zonal Railways solicited cash payments from Pioneer in order for the IRB to approve Pioneer's contract price (hereinafter referred to as the "IRB Payments"). For the years 2001 through 2004, Pioneer paid approximately \$85,000 in cash to employees of the IRB to obtain business from the IRB. In 2005, Pioneer paid \$21,217 in IRB payments to employees of the IRB for the same purpose.

7. In addition, employees of the IRB and Zonal Railways solicited payments from Pioneer to ensure that the IRB and Zonal Railways would consider Pioneer's bids in the tender process and that Pioneer would be given the opportunity to sell additional quantities of certain products at the awarded price without going through a new tender process (hereinafter referred to as the "Ordering Payments"). For years 2001 through 2004, Pioneer paid approximately \$25,000 in cash in Ordering Payments to employees of the IRB and Zonal Railways for consideration of its bids and to obtain other business. In 2005, Pioneer paid approximately \$6,250 in cash in Ordering Payments to employees of the IRB and Zonal Railways for the same purpose.

8. In 2005, the IRB awarded Pioneer the primary contract and other related contracts. As a result of being awarded the contracts in 2005, Pioneer realized profits of \$259,000.

9. Pioneer's Chairman, a non-U.S. citizen and resident who is also a Vice President of Wabtec, knew about and did nothing to prevent the Ordering Payments and the IRB Payments.

B. Improper Recording of the Unlawful Payments

10. Pioneer made the Ordering Payments and IRB Payments with cash accumulated throughout the year primarily from "marketing agents." Marketing agents are typically companies that send invoices and collect payment on behalf of another company that has provided some service or sold some product. To generate the necessary cash, Pioneer asked certain marketing agents to invoice it for services rendered in connection with particular IRB and Zonal Railways contracts. In fact, the invoices were fictitious. No one rendered any services; the sole purpose of the invoices was to generate cash to make the unlawful payments. Pioneer issued checks to the marketing agent for the amount of the invoice less withholdings for taxes. The marketing agent then returned cash to Pioneer, less a service commission. Other marketing agents submitted invoices for materials that Pioneer did not receive in whole or in part. Pioneer

issued checks to the marketing agent for the amount of the invoice and the marketing agent returned cash (less the service fee and any amount owed for any material actually received) to Pioneer.

11. Pioneer maintained the cash generated through the use of marketing agents in a locked metal box. Pioneer documented each unlawful payment on a voucher which was maintained with the cash. Pioneer also kept track of the unlawful payments on a spreadsheet. The vouchers and the spreadsheet were maintained separately from Pioneer's other books and records and were not subject to review during annual audits.

12. Under Indian law, records generated in the normal course of business must be maintained for ten years. Wabtec requires its foreign subsidiaries to follow applicable local laws with respect to record retention. Despite these requirements, Pioneer destroyed all records relating to the Ordering Payments and the IRB Payments after one year, and records do not exist prior to 2005.

13. Pioneer failed to properly account for the unlawful payments in its books and records. Pioneer recorded the marketing agents' invoices as "consulting" expenses and supplies. In fact, Pioneer did not receive any services or supplies; the sole purpose of the invoice was to raise cash. Moreover, although Pioneer maintained records regarding the unlawful payments, Pioneer did not use those records to account for the unlawful payments. Wabtec's financial statements are prepared on a consolidated basis. Accordingly, Wabtec's books, records and accounts did not reflect the Ordering Payments or IRB Payments.

C. Wabtec's Lack of Internal Controls

14. From 2001 through July 2006, although Wabtec's Code of Conduct prohibited giving anything of value to improperly influence any person in a business relationship with Wabtec, it did not have a FCPA policy or provide training or education to any of its employees, agents or subsidiaries regarding the requirements of the FCPA. Wabtec also failed to establish a program to monitor its employees, agents and subsidiaries for compliance with the FCPA.

15. In January 2006, Wabtec conducted an internal investigation of Pioneer and, upon its completion, voluntarily disclosed the facts and documents relating to this matter to the Commission staff.

Legal Analysis

16. The FCPA, enacted in 1977, added Section 30A to the Exchange Act in order to prohibit public companies, or any officer, director, employee, or agent of a public company from, among other things, making improper payments to foreign officials for the purpose of influencing their decision in order to obtain or retain business.

17. In each of the transactions described above, Wabtec, through its subsidiary, intended to make, and did make, the Ordering Payments and IRB Payments to employees of the government of India in order to obtain or retain business for Wabtec. As a result, Wabtec violated Section 30A of the Exchange Act.

18. The FCPA also added Exchange Act Section 13(b)(2)(A) to require public companies to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer, and Exchange Act Section 13(b)(2)(B) to require such companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; and (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets.

19. As detailed above, Pioneer did not properly record the payments that it made to employees of the government of India in its books. As a result, Wabtec's books, records, and accounts did not, in reasonable detail, accurately reflect its transactions and dispositions of the assets. As a result, Wabtec violated Section 13(b)(2)(A) of the Exchange Act.

20. In addition, Wabtec failed to devise and maintain a system of internal accounting controls sufficient to ensure that its employees complied with the FCPA. As a result, Wabtec violated Section 13(b)(2)(B) of the Exchange Act.

Wabtec's Remedial Efforts

21. In determining to accept the Offer, the Commission considered remedial acts undertaken by Respondent and cooperation afforded the Commission staff.

IV.

Undertakings

Respondent undertakes to:

Independent Compliance Consultant

22. Retain within 60 days of the issuance of the Order, an independent compliance consultant ("ICC"), not unacceptable to the staff of the Commission, to review and evaluate Wabtec's internal controls, record-keeping, and financial reporting policies and procedures as they relate to Wabtec's compliance with the books and records, internal accounting controls, and anti-bribery provisions of the FCPA, codified at Sections 13(b)(2)(A), 13(b)(2)(B), and 30A of the Exchange Act and other applicable foreign bribery laws. The ICC's compensation and all related expenses shall be borne exclusively by Wabtec. Wabtec shall cooperate fully with the ICC and

shall provide the ICC with access to its files, books and records, and personnel as reasonably requested for the review;

23. Require that the ICC issue a report, within 60 days after being retained, summarizing the review and recommending policies and procedures reasonably designed to ensure compliance with the federal securities laws as they relate to the FCPA. Wabtec shall require that the ICC transmit a copy of the report to the Commission staff;

24. Adopt all recommendations in the report of the ICC; provided, however, that within 60 days after the ICC serves that report, Wabtec shall, in writing, advise the ICC and the Commission staff of any recommendation that it considers to be unduly burdensome, impractical, or costly. With respect to any recommendation that Wabtec considers unduly burdensome, impractical or costly, Wabtec need not adopt that recommendation at the time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation on which Wabtec and the ICC do not agree, such parties shall attempt in good faith to reach an agreement within 60 days after Wabtec serves the written advice. In the event Wabtec and the ICC are unable to agree on an alternative proposal, Wabtec will abide by the determinations of the ICC; and

25. Require the ICC to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the ICC shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Wabtec, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the ICC will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the ICC in performance of his/her duties under this Order shall not, without prior written consent of the Philadelphia Regional Office, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Wabtec, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

26. Wabtec: (i) shall not have the authority to terminate the ICC, without the prior written approval of the staff of the Commission; (ii) shall compensate the ICC, and persons engaged to assist the ICC, for services rendered pursuant to the Order at their reasonable and customary rates; and (iii) shall not be in and shall not have an attorney-client relationship with the ICC and shall not seek to invoke the attorney-client or any other doctrine or privilege to prevent the ICC from transmitting any information, reports, or documents to the Commission or the Commission's staff.

Certification

27. Wabtec agrees to certify in writing to the staff (at the address set forth herein), within twelve months of the issuance of the Order, that Wabtec has fully adopted and complied in all material respects with the undertakings set forth in paragraphs 22 through 26 above and

with the recommendations of the ICC, or in the event of material non-adoption or non-compliance shall describe such material non-adoption and non-compliance.

Recordkeeping

28. Wabtec shall preserve for a period of not less than six years from the end of the fiscal year last used, the first two years in an easily accessible place, any record of its compliance with the undertakings set forth in paragraphs 22 through 26 above.

Extension of Time

29. For good cause shown, the staff of the Commission may extend any of the procedural dates set forth above.

V.

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

Accordingly, it is hereby ORDERED that:

A. Respondent Wabtec cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A), 13(b)(2)(B), and 30A of the Exchange Act.

B. Respondent shall comply with the undertakings enumerated in Section IV. above.

C. IT IS FURTHERED ORDERED that Respondent shall, within ten days of the entry of this Order, pay disgorgement and prejudgment interest in the total amount of \$288,351, consisting of \$259,000 in disgorgement and \$29,351 in prejudgment interest, 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 Wabtec 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 Elaine C. Greenberg, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Philadelphia Regional Office, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

By the Commission.



Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57330 / February 14, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2784 / February 14, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12955

In the Matter of	:	ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934
AXM PHARMA, INC.	:	
Respondent.	:	
	:	
	:	
	:	
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I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against AXM Pharma, Inc. ("AXM" 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 it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

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SUMMARY

This case involves a financial reporting fraud at AXM during its second quarter of 2005 (the quarter ended June 30, 2005). Specifically, AXM, through its management, improperly recognized approximately \$2.8 million in revenues on a series of sales to a distributor in Asia. These sales, on their face, clearly failed to meet several of the fundamental criteria for revenue recognition under Generally Accepted Accounting Principles ("GAAP"). As a result of the inclusion of this improperly recognized revenue, AXM reported revenues of over \$3.2 million for the quarter, overstating its revenue by over 970 percent, and reported net income for the quarter of approximately \$179,000, instead of a net loss of approximately \$1.46 million.

RESPONDENT

1. AXM is a Nevada corporation with principal executive offices in City of Industry, California. Its main operations are in the People's Republic of China. AXM, through a wholly owned subsidiary in the People's Republic of China, is a manufacturer of pharmaceutical and nutraceutical products. At all relevant times, AXM's common stock was registered with the Commission pursuant to Sections 12(b) of the Exchange Act and was listed on the American Stock Exchange ("AMEX") under the symbol "AXJ." The AMEX delisted AXM in June 2006, and its common stock is currently quoted on the Pink Sheets.

BACKGROUND

2. Prior to the quarter ended June 30, 2005, AXM's primary business operations consisted of producing and selling pharmaceutical products in the People's Republic of China. In 2002, AXM shut down its existing factory and began construction on a new factory. Consequently, without a production facility, from 2002 through the quarter ended March 31, 2005, AXM's revenues had declined virtually to the point of nonexistence.

3. In January 2004, to generate revenue while its factory was out of operation, AXM obtained a license to sell certain Sunkist-branded vitamin products. These products were to be produced by third parties in the United States and sold in Asia via a distributor.

4. Between March and May 2005, AXM entered into distribution agreements with three subsidiaries of a Hong Kong-based company (the "Asian Distributor") to sell the Sunkist products in Hong Kong, Taiwan, and Shanghai. Each of the agreements provided for payment to AXM after the Asian Distributor sold the goods to its customers, and specified that the transfer of title occurred upon delivery to the Asian Distributor's warehouse. The agreements also gave the Asian Distributor a right of return for expired and other goods.

5. Pursuant to these agreements, from March through June 2005, AXM received purchase orders from the Asian Distributor for Sunkist products totaling \$2.8 million. AXM recognized revenue for the full amount of these purchase orders on its financial statements for the quarter ended June 30, 2005.

IMPROPER REVENUE RECOGNITION IN THE SECOND QUARTER OF 2005

6. None of the \$2.8 million from these product “sales” should have been recognized as revenue in the second quarter of 2005 because the Asian Distributor had the right to return the goods and did not have to pay AXM until after reselling the goods. Moreover, \$1.9 million of the goods also did not meet the criteria for revenue recognition because AXM had not even delivered the product by the close of the quarter.

Right of Return

7. Statement of Financial Accounting Standards No. 48 (“SFAS 48”) provides that where a seller grants a right of return, revenue may be recognized, only if the two following conditions, among others, are met: (1) the buyer has paid the seller and the obligation is not contingent on resale of the product; and (2) the amount of future returns can be reasonably estimated.

8. AXM did not meet either of the conditions under SFAS 48 because the Asian Distributor’s obligation to pay AXM was contingent on the resale of the products. AXM never obtained any evidence that the Asian Distributor sold any of the goods before the end of the second quarter and, in fact, no such sales took place.

9. AXM also failed to meet the requirement under SFAS 48 that returns be reasonably estimated. AXM and the Asian Distributor had no history selling the products or similar products. Moreover, AXM had no history working with the Asian Distributor. Thus, given AXM’s lack of historical experience with similar types of sales of similar products, it could not reasonably estimate future product returns. SFAS 48, therefore, precluded AXM from recognizing revenue during the second quarter of 2005.

10. GAAP provides “profit is deemed to be realized when a sale in the ordinary course of business is effected.” Accounting Research Bulletin No. 43, (“ARB 43”), Chapter 1A ¶ 1. Moreover, revenue should not be recognized until such time as the revenue is realized or realizable and earned. Statement of Financial Accounting Concepts No. 5 (“Concept No. 5”), ¶ 83. These conditions “are usually met by the time product or merchandise is delivered . . . to customers.” Concept No. 5, ¶ 84(a). Thus, AXM should not have recognized revenue of \$1.9 million on product that it had not delivered as of the close of its second quarter.

MATERIAL MISSTATEMENT OF REVENUE AND NET INCOME

11. On July 21, 2005, AXM issued a press release stating that it expected to “post a quarterly profit” and that it had “shipped and booked sales in excess of \$3.1 million in the second quarter.” AXM attached the press release as an exhibit to a Form 8-K filed with the Commission on July 21, 2005. On that day, the trading volume on AXM’s common stock increased more than ten-fold, and AXM’s stock price increased by 18% to \$1.58 from the previous day’s close of \$1.34.

12. On August 15, 2005, AXM filed the Form 10-Q for its second quarter of 2005. The financial statements contained in the Form 10-Q included revenues of \$3.2 million and net

income of \$179,000. In its Management Discussion and Analysis section (“MD&A”) of the Form 10-Q, AXM described its second quarter results as “the best sales quarter in its history.”

13. The same day that AXM filed its Form 10-Q, AXM touted the record-setting quarter through another press release, at a conference call discussing the results for the quarter, and in a Form 8-K containing a transcript of the conference call.

14. On October 31, 2005, AXM announced that it would restate its 2005 second quarter results. AXM’s restated second quarter results ultimately reported revenues of only \$329,000 and a loss of \$1.5 million.

15. AXM’s chief executive officer, who also served as acting chief financial officer, resigned in October 2005.

LEGAL ANALYSIS

Violations of Antifraud Provisions of the Exchange Act

16. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit the making of misstatements or omissions of material fact in connection with the purchase or sale of a security. A fact is material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Information concerning a company’s financial condition and profitability is material information. See, e.g., SEC v. Murphy, 626 F.2d 633, 653 (9th Cir. 1980). AXM’s material misstatements included overstating revenue for the second quarter of 2005 by over 970 percent and falsely reporting net income rather than a substantial loss for the quarter.

17. Scienter is required to establish a violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Aaron v. SEC, 446 U.S. 680, 701-02 (1980). Scienter is “a mental state embracing intent to deceive, manipulate, or defraud.” Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). Recklessness satisfies the scienter requirement. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc). In making the false statements contained in the Form 10-Q, and in press releases and conference calls, AXM’s management acted intentionally or recklessly. Specifically, AXM management knew or recklessly disregarded information showing that a significant portion of the product had not been delivered to the Asian Distributor’s subsidiaries by the end of the second quarter. Furthermore, management knew that the Asian Distributor’s subsidiaries had no obligation to pay AXM until they sold the products to their customers. Management’s scienter is imputed to AXM. See SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1089 n.3 (2d Cir. 1972). As a result, AXM violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Reporting Violations

18. Section 13(a) of the Exchange Act and Rules 13a-11 and 13a-13 require issuers of securities registered pursuant to Section 12 of the Exchange Act, such as AXM, to file with the Commission accurate current and quarterly reports, respectively. An issuer violates these provisions if it files a report that contains materially false or misleading information. See SEC v.

IMC International, Inc., 384 F. Supp. 889, 893 (N.D. Tex.), aff'd mem., 505 F.2d 733 (5th Cir. 1974). Rule 12b-20 under the Exchange Act similarly requires that these reports contain any additional material information necessary to make the required statements made in the reports not misleading. As described above, AXM filed a 2005 second quarter Form 10-Q with misstated financial statements and filed Forms 8-K that misstated AXM's second quarter revenues. Thus, AXM violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-11, and 13a-13 thereunder.

Record-Keeping Violations

19. Section 13(b)(2)(A) of the Exchange Act requires reporting companies registered pursuant to Section 12 of the Exchange Act to "make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions . . . of the issuer." As described above, AXM violated Section 13(b)(2)(A) of the Exchange Act by including entries in its books and records improperly recording revenue from the Sunkist sales.

Internal Control Violations

20. Section 13(b)(2)(B) of the Exchange Act requires reporting companies to devise and maintain a system of internal accounting controls sufficient to reasonably assure that transactions are recorded and financial statements are prepared in conformity with GAAP. AXM violated Section 13(b)(2)(B) of the Exchange Act by having no internal controls to assure that it accounted for its revenue correctly.

AXM'S REMEDIAL EFFORTS

21. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

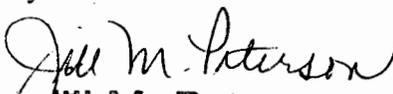
IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in AXM's Offer.

Accordingly, it is hereby ORDERED that Respondent AXM cease and desist from committing or causing any violations and any future violations of Sections 10(b), 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 10b-5, 12b-20, 13a-11, and 13a-13 thereunder.

By the Commission.

Nancy M. Morris
Secretary


By: **Jill M. Peterson**
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8894 / February 14, 2008

SECURITIES EXCHANGE ACT OF 1934
Release No. 57327 / February 14, 2008

INVESTMENT COMPANY ACT OF 1940
Release No. 28152 / February 14, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12559

In the Matter of

TRAUTMAN WASSERMAN &
COMPANY, INC.,
GREGORY O. TRAUTMAN,
SAMUEL M. WASSERMAN,
MARK BARBERA,
JAMES A. WILSON, JR.,
JEROME SNYDER, AND
FORDE H. PRIGOT,

Respondents.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 15(b) OF
THE SECURITIES EXCHANGE ACT
OF 1934 AND SECTION 9(b) OF THE
INVESTMENT COMPANY ACT OF
1940, AND INSTITUTING A CEASE-
AND-DESIST PROCEEDING
PURSUANT TO SECTION 8A OF THE
SECURITIES ACT OF 1933, SECTION
21C OF THE SECURITIES
EXCHANGE ACT OF 1934 AND
SECTION 9(f) OF THE INVESTMENT
COMPANY ACT OF 1940, MAKING
FINDINGS AND IMPOSING A
CEASE-AND-DESIST ORDER AS TO
MARK BARBERA**

I.

On February 5, 2007, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against respondents including Mark Barbera ("Respondent" or "Barbera"). On June 1, 2007, the Commission issued an Order Dismissing Cease-and-Desist Proceedings Against Barbera, which dismissed the cease-and-desist proceedings instituted by the

Document 18 of 30

Commission's order dated February 5, 2007. The Commission deems it appropriate and in the public interest that the cease-and-desist proceedings be, and hereby are, instituted as to Barbera.

II.

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, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940, and Instituting a Cease-and-Desist Proceeding Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934 and Section 9(f) of the Investment Company Act of 1940, Making Findings and Imposing a Cease-and-Desist Order as to Mark Barbera ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. This matter concerns a scheme to defraud mutual funds through, among other conduct, late trading of mutual funds through Trautman Wasserman & Company, Inc. ("TWCO"), a registered broker-dealer. Between January 2001 and September 2003, TWCO accepted thousands of orders from its hedge fund customers to trade mutual funds after 4:00 p.m. ET, but executed the trades as though they had been received prior to 4:00 p.m. ET. In addition, TWCO employed deceptive tactics to evade mutual funds' efforts to restrict TWCO's hedge fund customers' market timing of mutual funds. This illegal conduct generated significant revenues for TWCO and harmed mutual fund investors by diluting the value of their investment.

2. TWCO's mutual fund trading department consisted principally of two registered representatives ("RRs"), James A. Wilson, Jr. ("Wilson") and Scott A. Christian ("Christian"). Wilson directed the late trading and market timing schemes, and he personally accepted customers' late trading orders. Christian handled day-to-day communications with customers, and he regularly accepted and entered late trades. In carrying out the fraudulent late trading scheme, Wilson and Christian created records falsely indicating that customers had placed trades before 4 p.m.

3. Barbera, TWCO's chief financial officer ("CFO"), was present for parts of various discussions between other TWCO partners and officers, including TWCO's Chief Executive Officer ("CEO") and Chairman, and Wilson where the practice of submitting trades after 4:00 p.m. ET was

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

discussed. In addition, Barbera sought capacity that could be used for mutual fund trading. Further, Barbera approved using TWCO assets to trade mutual funds through a proprietary account, which subsequently traded on the basis of news and market conditions after the market close, but those trades were priced at that day's net asset value (NAV). The CEO of TWCO generally placed the trades in the proprietary account.

Respondent

4. **Barbera**, age 50, is a resident of Bronxville, NY. Barbera has been CFO of TWCO since 1993. At all relevant times, Barbera was associated with TWCO. Barbera holds or has held Series 3, 4, 7, 24, 27 and 63 licenses.

Related Entity

5. **TWCO**, based in New York, New York, was at all relevant times a broker-dealer registered with the Commission.

Late Trading

6. Rule 22c-1(a) under the Investment Company Act requires investment companies issuing redeemable securities, their principal underwriters and dealers, and any person designated in the fund's prospectus as authorized to consummate transactions in securities issued by the fund to sell and redeem fund shares at a price based on the current net asset value ("NAV") next computed after receipt of an order to buy or redeem. Mutual funds generally determine the daily price of their mutual fund shares as of 4:00 p.m. ET. In these circumstances, orders received before 4:00 p.m. ET must be executed at the price determined as of 4:00 p.m. ET that day. Orders received after 4:00 p.m. ET must be executed at the price determined as of 4:00 p.m. ET the next trading day.

7. "Late trading" refers to the practice of placing orders to buy or sell mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m. ET), but receiving the price based on the prior NAV already determined as of 4:00 p.m. ET. Late trading enables the trader to profit from market events that occur after 4:00 p.m. ET but that are not reflected in that day's price. In particular, the late trader obtains an advantage – at the expense of the other shareholders of the mutual fund – when he learns of market moving information and is able to purchase (or sell) mutual fund shares at prices set *before* the market moving information was released. Late trading violates Rule 22c-1(a) under the Investment Company Act. Late trading also harms shareholders, for instance, when late trading dilutes the value of their shares.

Late Trading At TWCO

8. In 2000, the Chairman of TWCO began attempting to set up a mutual fund trading operation at TWCO. The Chairman recruited Wilson and Christian, who were at that time working at another broker-dealer. While interviewing for their positions at TWCO, Wilson and Christian learned that TWCO's clearing broker, Banc of America Securities, LLC ("B of A"), offered a mutual fund trading system that allowed mutual fund trades to be entered until 8:30 p.m. ET and still be priced at the same NAV as orders submitted by 4:00 p.m. ET. The

Chairman, who managed TWCO's relationship with B of A, arranged meetings between Wilson, Christian, and B of A representatives so that they could discuss the mutual fund trading platform. After these meetings, Wilson and Christian realized that they could directly enter mutual fund trades into this system, thereby bypassing the B of A mutual fund desk.

9. Wilson and Christian began working at TWCO in December 2000.

10. Although the B of A system allowed orders to be entered and processed as late as 8:30 p.m. ET, Wilson and Christian were aware that they were supposed to receive orders from customers by 4:00 p.m. ET in order to execute them at that day's price. For example, B of A's "Mutual Funds Processing" manual that B of A provided to TWCO required that: "All orders should be received and time stamped by the close of the NYSE, 4 PM EST."

11. Wilson and Christian then contacted their former market timing customers as well as other prospective customers to pitch the advantages of the market timing and late trading system that they were developing at TWCO. In return, Wilson extracted extra compensation for providing late trading. For example, on April 11, 2001, the manager of a hedge fund, Hedge Fund A, that was interested in late trading sent an e-mail to Wilson complaining that TWCO was "earning double what everyone else takes home on this business," and that "[y]ou currently earn 2% p.a. [per annum]." Further, the manager of Hedge Fund A complained that "[y]our facility for late trading is not the only one we have," and that "[i]n all the other cases, we pay 1% p.a." On April 11, 2001, Wilson sent an e-mail to Hedge Fund A's manager indicating that "**we are the only place to trade late past 530**" (emphasis in original), and "thus you have to pay more." On May 1, 2001, the hedge fund manager notified Wilson by e-mail that Hedge Fund A was sending funds to begin trading. The hedge fund manager described how the late trading would work as follows:

In essence, most of it will be done by you within certain parameters that we will give you each day. In the majority of cases, your decision point will be 5:30pm NY time. In a few cases, your decision point will be 6:30pm – I know, slave labor...whatever will you do working that late!

12. Wilson directed the daily operations of his and Christian's late trading and market timing business. At Wilson's direction, Christian and another TWCO employee entered tens of thousands of late trades for Wilson's customers. Moreover, Wilson directed Christian and the other employee to create false records, "for compliance reasons," intended to show that TWCO had received the customer's trading orders prior to 4:00 p.m. ET.

13. On a daily basis, customers sent tentative instructions to purchase or redeem mutual fund shares to TWCO during the day, beginning at approximately 12 noon ET. TWCO treated these trading instructions as order tickets. As the trading instructions came in, Christian would collect them, but he would not enter the orders or time stamp the order tickets. Rather, Christian waited until shortly before 4:00 p.m. ET to time stamp the order tickets.

14. Christian sometimes forgot to time stamp the order tickets before 4:00 p.m. ET, resulting in some order tickets that were stamped after 4:00 p.m. ET. Wilson eventually gave Christian an alarm clock, which Christian set to go off shortly before 4:00 p.m. ET to remind him to stamp the order tickets. When the alarm went off, Christian and the other TWCO employee

would time stamp the trading instructions. This practice made it appear as if TWCO received the instructions shortly before 4:00 p.m. ET.

15. However, Christian and the other employee did not enter the orders into the B of A mutual fund trading system when they time stamped the orders. Instead, between 4:00 p.m. ET and 6:30 p.m. ET, Wilson, Christian, or the other employee spoke with customers to get their final trading decisions.

16. Sometimes customers gave final trading instructions that were “cancellations” or partial cancellations of the tentative orders placed earlier in the day. Often, customers submitted wholly new orders that were not part of the tentative instructions they had submitted earlier in the day. Only then did Christian or the other employee enter the trading orders, without creating a new or modified order ticket reflecting the actual order or with the correct time stamp on the ticket.

17. TWCO, through Wilson and Christian, routinely accepted mutual fund trading instructions for Hedge Fund A, as well as for two other hedge funds, Hedge Fund B and Hedge Fund C, well past 4:00 p.m. ET and often as late as between 5:00 and 6:45 p.m. ET. For these customers, virtually all the trading in mutual funds at TWCO consisted of late trading.

18. Wilson also personally took customers’ mutual fund orders to engage in late trading. For example, tape recordings made at Hedge Fund B of telephone calls indicate that Wilson accepted mutual fund orders at 4:41 p.m. ET on February 14, 2003, at 5:17 p.m. ET on September 27, 2001, and at 6:08 p.m. ET on December 18, 2001. After receiving these orders, Wilson then entered the trades so they could be executed at the same day’s NAV.

19. Further, Wilson was fully aware of the procedures that Christian and the other employee routinely used for executing late trades. For example, on February 14, 2003, at 4:41 p.m. ET, a trader at Hedge Fund B telephoned TWCO and said, “Hey, Jim, it’s [a representative of Hedge Fund B]. ... You got Scott or [the other employee] there to take some trades?” Wilson replied, “I can help you,” and proceeded to accept Hedge Fund B’s late trading decisions. Wilson then said, “Let me just read this back to you. I haven’t done this in a while so I don’t have any embarrassing situations.” On September 27, 2001 at 5:17 p.m. ET, the same representative of Hedge Fund B telephoned TWCO and asked for Christian. Wilson said that Christian had just stepped away, offered to take the order, and said he would “grab the sheets” off Christian’s desk, referring to the trading instructions sent by Hedge Fund B and time stamped by TWCO before 4:00 p.m. ET. Wilson proceeded to accept Hedge Fund B’s instructions as to which trades on the trading instructions it wished to confirm, cancel, or modify. Wilson concluded by telling Hedge Fund B’s representative that he could call with additional trading decisions until 5:30 p.m. ET.

20. Further, as evident from his April 11, 2001 email to Hedge Fund A quoted above (demanding higher fees because of the value of late trading), Wilson knew that TWCO’s hedge fund customers benefited from the ability to late trade. Wilson knew that customers factored into their trading decisions after-hours news announcements and market conditions. For example, he knew from e-mails with Hedge Fund A that the hedge fund based its trading instructions on parameters for after-hours index futures prices that Hedge Fund A provided to TWCO.

21. At Wilson's direction, Christian and the other TWCO employee regularly helped customers follow calendars of corporate earnings announcements and relayed to customers information regarding notable developments after the market close. Further, Christian frequently provided customers shortly after 4:00 p.m. ET with newly-calculated mutual fund NAVs reflecting the current day's pricing. This allowed customers to compare the NAVs of mutual funds against after hours trading in stocks in those funds, and thereby compute with some degree of precision the actual trading profit they would make on a given late trade.

22. Wilson also persuaded TWCO's partners to establish a proprietary account with the firm's money to serve as the basis for a TWCO managed hedge fund. In late 2001, TWCO opened a mutual fund trading account, and TWCO ultimately deposited approximately \$500,000 into the account.

TWCO Partners Approved and/or Participated in Late Trading

23. An executive committee consisting of the firm's principals, including TWCO's CEO, TWCO's Chairman, and Barbera, managed TWCO. The executive committee held regular weekly meetings and other ad hoc meetings to discuss the business of the firm and to engage in planning and decision-making. TWCO's CEO and TWCO's Chairman were aware of Wilson's and Christian's late trading.

24. Barbera was present for parts of various discussions between other TWCO partners and officers, including TWCO's CEO and Chairman, and Wilson where the practice of submitting trades after 4:00 p.m. ET was discussed.

25. TWCO's CEO offered late trading to at least one of his customers ("Customer 89001"). With Barbera present, TWCO's CEO explained to Customer 89001 that when deciding to purchase shares of mutual funds, for instance, TWCO would use a "trigger." The trigger was when the price of stock futures contracts rose by 1.5% in after-hours (post-4:00 p.m. ET) trading. TWCO's CEO told Customer 89001, and Barbera confirmed to Customer 89001, that TWCO's CEO had made money on 13 of 15 trades using this system. Customer 89001 then invested with TWCO. TWCO placed Customer 89001's funds in a TWCO brokerage account. Subsequently, TWCO's CEO placed late trades for Customer 89001's account.

26. The TWCO partners actively participated in the mutual fund business by seeking timing capacity from fund companies. In particular, TWCO's CEO used a personal friendship with a fund manager at one fund complex to obtain large amounts of capacity. Further, TWCO's Chairman used his long-standing contacts at another fund complex to increase TWCO's capacity in those funds. Neither TWCO's CEO nor TWCO's Chairman disclosed to the fund complexes that TWCO would use the capacity for late trading.

27. Barbera also engaged in efforts to obtain capacity. At various times in 2002 and 2003, Barbera sought timing capacity from other entities that could be used for mutual fund trading on behalf of TWCO's customers.

28. In September 2002, Barbera drafted a letter agreement setting forth the fee arrangement for a \$5 million discretionary account established by one customer, which TWCO's

CEO, TWCO's Chairman, Wilson, and Christian knew would be used for late trading. Barbera should have known that others intended to and did use this account to place trades after 4:00 p.m. ET.

29. Also in the spring of 2003, Barbera and Christian sought to develop a relationship with a data processing firm for the purpose of enabling TWCO to engage in mutual fund trading apart from the B of A system.

30. Wilson also persuaded TWCO's partners to establish a proprietary account with the firm's money to serve as the basis for a TWCO managed hedge fund. In late 2001, TWCO opened a mutual fund trading account, and TWCO ultimately deposited approximately \$500,000 into the account. Initially, the TWCO proprietary account copied the market timing trades of a TWCO customer. When the account started losing money, TWCO's CEO took charge of trading in the account. TWCO's CEO then began to make trading decisions in the account based on news developments that occurred after 4:00 p.m. ET.

31. Subsequently, TWCO's CEO often went to Wilson's and Christian's office at TWCO after the market close to decide whether to place mutual fund trades in the TWCO account based on news and market conditions after 4:00 p.m. ET. TWCO's CEO occasionally referred to the ability to trade late on news or post-4:00 p.m. ET futures market conditions as the firm's "elixir," "magic potion," or "special juice."

32. Barbera monitored the TWCO proprietary account for net capital purposes.

Violations

33. As a result of the conduct described above, Barbera willfully violated Section 17(a)(2) of the Securities Act, which makes it unlawful for any person in the offer or sale of securities, directly or indirectly, 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. Section 17(a)(2) of the Securities Act has no scienter requirement. *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980). Negligent conduct can violate Section 17(a)(2) of the Securities Act. *See, e.g., SEC v. Hughes Capital Corp.*, 124 F.2d 449, 453 (3d Cir. 1997); *In the Matter of Raymond James Financial Services, Inc.*, Exchange Act Release No. 49234 (Feb. 12, 2004).

34. As a result of the conduct described above, TWCO violated Section 15(c) of the Exchange Act, which prohibits fraudulent, deceptive or manipulative acts by brokers or dealers in connection with the purchase or sale of securities. Barbera caused TWCO's violations of Section 15(c) of the Exchange Act.

35. As a result of the conduct described above, TWCO's clearing firm, B of A, violated Rule 22c-1, as adopted under Section 22(c) of the Investment Company Act, and Barbera caused B of A's violations. Rule 22c-1 prohibits dealers in a mutual fund's shares, among others, from executing a trade in that mutual fund's shares at that day's NAV if the trade was received after the time as of which the mutual fund has calculated that day's NAV (e.g., 4:00 p.m. ET). B of A had dealer agreements with the primary underwriters of several mutual funds that were late traded by

TWCO's customers. B of A sold and redeemed fund shares at prices not based on the current NAV next computed after receipt of an order to buy or redeem to facilitate the late trading engaged in by these customers.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Barbera cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act;

B. Respondent Barbera cease and desist from causing any violations and any future violations of Section 15(c) of the Exchange Act, and from committing or causing any violations and any future violations of Rule 22c-1, as adopted under Section 22(c) of the Investment Company Act;

C. Respondent be, and hereby is, suspended from association with any broker or dealer for a period of six (6) months, effective on the second Monday following the entry of this Order; and

D. Respondent is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter for a period of six (6) months, effective on the second Monday following the entry of this Order.

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. 8895 / February 14, 2008

SECURITIES EXCHANGE ACT OF 1934
Release No. 57328 / February 14, 2008

INVESTMENT COMPANY ACT OF 1940
Release No. 28153 / February 14, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12559

In the Matter of

TRAUTMAN WASSERMAN &
COMPANY, INC.,
GREGORY O. TRAUTMAN,
SAMUEL M. WASSERMAN,
MARK BARBERA,
JAMES A. WILSON, JR.,
JEROME SNYDER, AND
FORDE H. PRIGOT,

Respondents.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
AND A CEASE-AND-DESIST ORDER
PURSUANT TO SECTION 8A OF THE
SECURITIES ACT OF 1933, SECTIONS
15(b) AND 21C OF THE SECURITIES
EXCHANGE ACT OF 1934 AND
SECTIONS 9(b) AND 9(f) OF THE
INVESTMENT COMPANY ACT OF 1940
AS TO JAMES A. WILSON, JR.

I.

On February 5, 2007, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against respondents including James A. Wilson, Jr. ("Wilson" or "Respondent").

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II.

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, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Sections 9(b) and 9(f) of the Investment Company Act of 1940 as to James A. Wilson, Jr. ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. This matter concerns a scheme to defraud mutual funds through late trading and deceptive market timing of mutual funds through Trautman Wasserman & Company, Inc. ("TWCO"), a registered broker-dealer. Between January 2001 and September 2003, TWCO accepted thousands of orders from its hedge fund customers to trade mutual funds after 4:00 p.m. ET, but executed the trades as though they had been received prior to 4:00 p.m. ET. In addition, TWCO employed deceptive tactics to evade mutual funds' efforts to restrict TWCO's hedge fund customers' market timing of mutual funds. This illegal conduct generated significant revenues for TWCO and harmed mutual fund investors by diluting the value of their investment.

2. TWCO's mutual fund trading department consisted principally of two registered representatives ("RRs"), Wilson and Scott A. Christian ("Christian"). Wilson directed the late trading and market timing schemes, and he personally accepted customers' late trading orders. Christian handled day-to-day communications with customers, and he regularly accepted and entered late trades. In carrying out the fraudulent late trading scheme, Wilson and Christian created records falsely indicating that customers had placed trades before 4 p.m. Further, numerous mutual funds notified Wilson, Christian, and others at TWCO that frequent trading by TWCO's customers exceeded restrictions in the mutual funds' prospectuses, and the mutual funds instructed TWCO to stop permitting its customers to trade those funds. Wilson, Christian and others, acting at Wilson's direction, then employed deceptive tactics to continue trading the mutual funds that had requested TWCO's customers to stop.

Respondent

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

3. **Wilson**, age 37, is a resident of New York, New York. At all relevant times, Wilson was a RR associated with TWCO. Wilson holds Series 7 and 63 licenses.

Related Entity

4. **TWCO**, based in New York, New York, was at all relevant times a broker-dealer registered with the Commission.

Market Timing and Late Trading

5. Market timing includes (a) frequent buying and selling of shares of the same mutual fund or (b) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal per se, can harm other mutual fund shareholders because it can dilute the value of their shares. Market timing can also disrupt the management of the mutual fund's investment portfolio and cause the targeted mutual fund to incur costs borne by other shareholders to accommodate frequent buying and selling of shares by the market timer.

6. Rule 22c-1(a) under the Investment Company Act requires investment companies issuing redeemable securities, their principal underwriters and dealers, and any person designated in the fund's prospectus as authorized to consummate transactions in securities issued by the fund to sell and redeem fund shares at a price based on the current net asset value ("NAV") next computed after receipt of an order to buy or redeem. Mutual funds generally determine the daily price of their mutual fund shares as of 4:00 p.m. ET. In these circumstances, orders received before 4:00 p.m. ET must be executed at the price determined as of 4:00 p.m. ET that day. Orders received after 4:00 p.m. ET must be executed at the price determined as of 4:00 p.m. ET the next trading day.

7. "Late trading" refers to the practice of placing orders to buy or sell mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m. ET), but receiving the price based on the prior NAV already determined as of 4:00 p.m. ET. Late trading enables the trader to profit from market events that occur after 4:00 p.m. ET but that are not reflected in that day's price. In particular, the late trader obtains an advantage – at the expense of the other shareholders of the mutual fund – when he learns of market moving information and is able to purchase (or sell) mutual fund shares at prices set before the market moving information was released. Late trading violates Rule 22c-1(a) under the Investment Company Act. Late trading also harms shareholders, for instance, when late trading dilutes the value of their shares.

Late Trading at TWCO

8. In 2000, principals at TWCO began attempting to set up a mutual fund trading operation at TWCO. TWCO recruited Wilson and Christian, who were at that time working at another broker-dealer. While interviewing for their positions at TWCO, Wilson and Christian learned that TWCO's clearing broker, Banc of America Securities, LLC ("B of A"), offered a mutual fund trading system that allowed mutual fund trades to be entered until 8:30 p.m. ET and

still be priced at the same NAV as orders submitted by 4:00 p.m. ET. A principal at TWCO, who managed TWCO's relationship with B of A, arranged meetings between Wilson, Christian, and B of A representatives so that they could discuss the mutual fund trading platform. After these meetings, Wilson and Christian realized that they could directly enter mutual fund trades into this system, thereby bypassing the B of A mutual fund desk.

9. TWCO then hired Wilson and Christian, and they began working at TWCO.

10. Soon after Wilson and Christian started working at TWCO in December 2000, TWCO retained a computer consultant to develop software for entering orders into the B of A trading system effectively on a large scale.

11. Although the B of A system allowed orders to be entered and processed as late as 8:30 p.m. ET, Wilson and Christian were aware that they were supposed to receive orders from customers by 4:00 p.m. ET in order to execute them at that day's price. For example, B of A's "Mutual Funds Processing" manual that B of A provided to TWCO required that: "All orders should be received and time stamped by the close of the NYSE, 4 PM EST."

12. Wilson and Christian then contacted their former market timing customers as well as other prospective customers to pitch the advantages of the market timing and late trading system that they were developing at TWCO. In return, Wilson extracted extra compensation for providing late trading. For example, on April 11, 2001, the manager of a hedge fund, Hedge Fund A, that was interested in late trading sent an e-mail to Wilson complaining that TWCO was "earning double what everyone else takes home on this business," and that "[y]ou currently earn 2% p.a. [per annum]." Further, the manager of Hedge Fund A complained that "[y]our facility for late trading is not the only one we have," and that "[i]n all the other cases, we pay 1% p.a." On April 11, 2001, Wilson sent an e-mail to Hedge Fund A's manager indicating that "**we are the only place to trade late past 530**" (emphasis in original), and "thus you have to pay more." On May 1, 2001, the hedge fund manager notified Wilson by e-mail that Hedge Fund A was sending funds to begin trading. The hedge fund manager described how the late trading would work as follows:

In essence, most of it will be done by you within certain parameters that we will give you each day. In the majority of cases, your decision point will be 5:30pm NY time. In a few cases, your decision point will be 6:30pm – I know, slave labor...whatever will you do working that late!

13. Wilson directed the daily operations of his and Christian's late trading and market timing business. At Wilson's direction, Christian and another TWCO employee entered tens of thousands of late trades for Wilson's customers. Moreover, Wilson directed Christian and the other employee to create false records, "for compliance reasons," intended to show that TWCO had received the customer's trading orders prior to 4:00 p.m. ET.

14. On a daily basis, customers sent tentative instructions to trade mutual fund shares to TWCO during the day, beginning at approximately 12 noon E.T. TWCO treated these trading instructions as order tickets. As the trading instructions came in, Christian would collect them, but

he would not enter the orders or time stamp the order tickets. Rather, Christian waited until shortly before 4:00 p.m. ET to time stamp the order tickets.

15. Christian sometimes forgot to time stamp the order tickets before 4:00 p.m. ET, resulting in some order tickets that were stamped after 4:00 p.m. ET. Wilson eventually gave Christian an alarm clock, which Christian set to go off shortly before 4:00 p.m. ET to remind him to stamp the order tickets. When the alarm went off, Christian and the other TWCO employee would time stamp the trading instructions. This practice made it appear as if TWCO received the instructions shortly before 4:00 p.m. ET.

16. However, Christian and the other employee did not enter the orders into the B of A mutual fund trading system when they time stamped the orders. Instead, between 4:00 p.m. ET and 6:30 p.m. ET, Wilson, Christian, or the other employee spoke with customers to get their final trading decisions.

17. Sometimes customers gave final trading instructions that were "cancellations" or partial cancellations of the tentative orders placed earlier in the day. Often, customers submitted wholly new orders that were not part of the tentative instructions they had submitted earlier in the day. Only then did Christian or the other employee enter the trading orders, without creating a new or modified order ticket reflecting the actual order or with the correct time stamp on the ticket.

18. TWCO routinely accepted mutual fund trading instructions for Hedge Fund A, as well as for two other hedge funds, Hedge Fund B and Hedge Fund C, well past 4:00 p.m. ET and often as late as between 5:00 and 6:45 p.m. ET. For these customers, virtually all the trading in mutual funds at TWCO consisted of late trading.

19. Wilson also personally took customers' mutual fund orders to engage in late trading. For example, tape recordings made at Hedge Fund B of telephone calls indicate that Wilson accepted mutual fund orders at 4:41 p.m. ET on February 14, 2003, at 5:17 p.m. ET on September 27, 2001, and at 6:08 p.m. ET on December 18, 2001. After receiving these orders, Wilson then entered the trades so they could be executed at the same day's NAV.

20. Further, Wilson was fully aware of the procedures that Christian and the other employee routinely used for executing late trades. For example, on February 14, 2003, at 4:41 p.m. ET, a trader at Hedge Fund B telephoned TWCO and said, "Hey, Jim, it's [a representative of Hedge Fund B]. ... You got Scott or [the other employee] there to take some trades?" Wilson replied, "I can help you," and proceeded to accept Hedge Fund B's late trading decisions. Wilson then said, "Let me just read this back to you. I haven't done this in a while so I don't have any embarrassing situations." On September 27, 2001 at 5:17 p.m. ET, the same representative of Hedge Fund B telephoned TWCO and asked for Christian. Wilson said that Christian had just stepped away, offered to take the order, and said he would "grab the sheets" off Christian's desk, referring to the trading instructions sent by Hedge Fund B and time stamped by TWCO before 4:00 p.m. ET. Wilson proceeded to accept Hedge Fund B's instructions as to which trades on the trading instructions it wished to confirm, cancel, or modify. Wilson concluded by telling Hedge Fund B's representative that he could call with additional trading decisions until 5:30 p.m. ET.

21. Further, as evident from his April 11, 2001 email to Hedge Fund A quoted above (demanding higher fees because of the value of late trading), Wilson knew that TWCO's hedge fund customers benefited from the ability to late trade. Wilson knew that customers factored into their trading decisions after-hours news announcements and market conditions. For example, he knew from e-mails with Hedge Fund A that the hedge fund based its trading instructions on parameters for after-hours index futures prices that Hedge Fund A provided to TWCO.

22. At Wilson's direction, Christian and the other TWCO employee regularly helped customers follow calendars of corporate earnings announcements and relayed to customers information regarding notable developments after the market close. Further, Christian frequently provided customers shortly after 4:00 p.m. ET with newly-calculated mutual fund NAVs reflecting the current day's pricing. This allowed customers to compare the NAVs of mutual funds against after hours trading in stocks in those funds, and thereby compute with some degree of precision the actual trading profit they would make on a given late trade.

23. Wilson also persuaded TWCO's partners to establish a proprietary account with the firm's money to serve as the basis for a TWCO managed hedge fund. In late 2001, TWCO opened a mutual fund trading account, and TWCO ultimately deposited approximately \$500,000 into the account.

Wilson Directed TWCO's Deception of Mutual Funds That Sought To Curtail Market Timing

24. In March 2001, as TWCO began large-scale market timing for its customers, mutual fund complexes began notifying TWCO that the funds restricted or prohibited such transactions. For example, on March 16, 2001, a fund complex wrote Christian to warn him about excessive trading by customer accounts in one of the complex's mutual funds. The letter explained that excessive trading could hurt the mutual fund's performance and that the fund's prospectus therefore reserved to the fund complex the right to refuse an exchange request if there were more than two exchanges from the same fund in any three-month period. The letter notified Christian that "exchange activities in your client's account have become excessive and we are writing you in an effort to have you and your clients adhere to the guidelines stated in our Prospectus," and warned that further excessive trading would result in a trading freeze in the accounts.

25. In total, during the period March 2001 through April 2003, TWCO, Wilson, and Christian received 307 "kick out" letters from 40 mutual fund families that addressed trading activity in 113 accounts.

26. In response, Wilson and Christian attempted to deceive mutual fund companies and evade their restrictions. Wilson had learned many of these techniques from his hedge fund customers while Wilson was working at other broker-dealers. Wilson explained these techniques to Christian, and directed him to employ them.

27. Based on Wilson's instructions, Christian opened multiple accounts for TWCO's market timing customers and entered transactions using one of numerous RR numbers. Christian did this because he understood that mutual fund companies would be less likely to detect market

timing by a customer if the customer's trades occurred in numerous accounts with different account numbers, account names, or RR identification numbers.

28. More specifically, TWCO "cloned" accounts to evade mutual funds' restrictions. For example, a fund complex sent a letter to TWCO on February 22, 2002 concerning account number 70087, an account that TWCO maintained for Hedge Fund A, warning that the account was approaching the limit on exchanges. On March 4, 2002, Christian opened two new accounts, each with a new account number (70089 and 70110), for the same entity, and two days later entered a market timing trade in one of the mutual fund complex's mutual funds. Similarly, on June 4, 2002, the same fund complex sent to TWCO a letter imposing restrictions on trading by account number 70104, an account that TWCO maintained for Hedge Fund B. On June 7, 2002, Christian opened a new account for the same entity with a new account number (70139), and less than three weeks later began trading the fund complex's mutual funds using the new account.

29. Consistent with this deceptive practice, TWCO opened a total of 140 accounts for eleven institutional customers. These included 68 accounts for its customer Hedge Fund A; 35 accounts for Hedge Fund B; nine accounts for Hedge Fund C; 15 accounts for Hedge Fund D; and five accounts for Hedge Fund E.

30. Christian and others also established 16 different RR identification numbers at TWCO for use in mutual fund trading, as a means of evading restrictions imposed by mutual funds that tracked excessive trading through RR numbers.

Violations

31. As a result of the conduct described above, Wilson willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities. Among other things, Wilson participated in a scheme with TWCO's customers to defraud mutual funds and their shareholders by engaging in late trading. The late trading scheme involved implicit, material false representations that TWCO received trades from customers prior to 4:00 p.m. ET. Further, Wilson defrauded mutual funds and their shareholders when he and Christian misrepresented and concealed the identities of TWCO's RRs and customers, as well as the nature of their customers' market timing activity, from the mutual funds. Wilson acted knowingly and/or recklessly in engaging in these activities.

32. As a result of the conduct described above, Wilson willfully aided and abetted and caused TWCO's violations of Section 15(c) of the Exchange Act and Rules 10b-3 thereunder, which prohibit fraudulent conduct by brokers or dealers in connection with the purchase or sale of securities. Among other things, TWCO participated in a scheme with its customers to defraud mutual funds and their shareholders by engaging in late trading. The late trading scheme involved implicit, material false representations that TWCO received trades from customers prior to 4:00 p.m. ET. Wilson was well aware of this late trading scheme and he accepted late trades, solicited customers to late trade, gave false assurances to customers concerning the legality of late trading, and/or took other steps such as setting up customer accounts to be used for late trading. Further, Wilson defrauded mutual funds and their shareholders when he and Christian misrepresented and

concealed the identities of TWCO's RRs and customers, as well as the nature of their customers' market timing activity, from the mutual funds. Wilson and Christian used multiple RR numbers and accounts to market time mutual funds. Wilson acted knowingly and/or recklessly in engaging in these activities, and was otherwise generally aware that his conduct was wrongful.

33. As a result of the conduct described above, Wilson willfully aided and abetted and caused violations of Rule 22c-1, as adopted under Section 22(c) of the Investment Company Act. Rule 22c-1 prohibits dealers in a mutual fund's shares, among others, from executing a trade in that mutual fund's shares at that day's NAV if the trade was received after the time as of which the mutual fund has calculated that day's NAV (e.g., 4:00 p.m. ET). TWCO's clearing firm, B of A, had dealer agreements with the primary underwriters of several mutual funds that were late traded by TWCO's customers. B of A sold and redeemed fund shares at prices not based on the current NAV next computed after receipt of an order to buy or redeem to facilitate the late trading engaged in by these customers. Thus, B of A willfully violated Rule 22c-1, as adopted under Section 22(c) of the Investment Company Act. Wilson substantially assisted this violation. Wilson and his subordinates received numerous orders for trades in those mutual funds after 4:00 p.m. ET, yet entered the trades in the B of A system such that they would receive the current day's NAV. Wilson acted knowingly and/or recklessly, and was otherwise generally aware that his conduct was wrongful. Thus, Wilson willfully aided and abetted and caused B of A's violations of Rule 22c-1.

34. As a result of the conduct described above, Wilson willfully aided and abetted and caused TWCO's violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, which require registered brokers and dealers to make and keep current certain specified books and records, including a memorandum of each brokerage order and other instruction given or received for the purchase or sale of a security. Rule 17a-3 was amended effective May 2, 2003 specifically to require brokers and dealers to note on the memorandum the time at which the order was received. Specifically, Wilson directed Christian and other TWCO employees to create falsified books and records by time stamping order tickets prior to 4:00 p.m. ET to create the appearance that customers made final trading decisions prior to 4:00 p.m. ET. Moreover, although customers routinely made their trading decisions after 4:00 p.m. ET, no TWCO employee created an order ticket reflecting this post-4:00 p.m. ET order. As a result of this conduct, from May 2, 2003 through September 2003, TWCO failed to maintain order tickets that accurately reflected the time that TWCO received customers' final trading decisions. Wilson substantially assisted this conduct. Specifically, Wilson directed Christian and other TWCO employees to time stamp order tickets prior to 4:00 p.m. ET to create the appearance that customers made final trading decisions prior to 4:00 p.m. ET. Wilson knew that the customers did not make their final trading decisions at the time reflected on the order tickets.

Undertakings

35. Respondent undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings brought by the Commission relating to or arising from the matters described in the Order and agrees:

- a. To comply with any and all reasonable requests by the Commission's staff for documents or other information;

b. To be interviewed at such times as the Commission's staff reasonably may direct;

c. To appear and testify in such investigations, depositions, hearings or trials as the Commission's staff reasonably may direct; and

d. That in connection with any (i) testimony of Respondent to be conducted by testimony session, deposition, hearing or trial, or (ii) requests for documents or other information, that any notice or subpoena for such may be addressed to Respondent's counsel, and be served by mail or facsimile.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Wilson cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

B. Respondent Wilson cease and desist from causing any violations and any future violations of Sections 15(c) and 17(a) of the Exchange Act and Rules 10b-3 and 17a-3 thereunder, and from committing or causing any violations and any future violations of Rule 22c-1, as adopted under Section 22(c) of the Investment Company Act;

C. Respondent Wilson be, and hereby is barred from association with any broker or dealer, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

D. 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;

E. IT IS FURTHER ORDERED that Respondent shall, within 10 days of the entry of this Order, pay disgorgement of \$534,160 and prejudgment interest of \$145,840 to the Securities and Exchange Commission. 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 James A. Wilson, Jr. 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 Kay L. Lackey, Associate Regional Director, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, New York, NY 10281; and

F. 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 \$120,000 to the Securities and Exchange Commission. 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 James A. Wilson, Jr. 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 Kay L. Lackey, Associate Regional Director, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, New York, NY 10281.

By the Commission.


Nancy M. Morris
Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57329 / February 14, 2008

INVESTMENT COMPANY ACT OF 1940
Release No. 28154 / February 14, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12559

In the Matter of

TRAUTMAN WASSERMAN &
COMPANY, INC.,
GREGORY O. TRAUTMAN,
SAMUEL M. WASSERMAN,
MARK BARBERA,
JAMES A. WILSON, JR.,
JEROME SNYDER, AND
FORDE H. PRIGOT,

Respondents.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
AND A CEASE-AND-DESIST ORDER
PURSUANT TO SECTIONS 15(b) AND
21C OF THE SECURITIES
EXCHANGE ACT OF 1934 AND
SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940 AS TO
FORDE H. PRIGOT

I.

On February 5, 2007, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against respondents including Forde H. Prigot ("Respondent" or "Prigot").

II.

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

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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, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940 as to Forde H. Prigot ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. This matter concerns a scheme to defraud mutual funds through, among other conduct, deceptive market timing of mutual funds through Trautman Wasserman & Company, Inc. ("TWCO"), a registered broker-dealer. TWCO employed deceptive tactics to evade mutual funds' efforts to restrict TWCO's hedge fund customers' market timing of mutual funds. This illegal conduct generated significant revenues for TWCO and harmed mutual fund investors by diluting the value of their investment.

2. TWCO's mutual fund trading department consisted principally of two registered representatives ("RRs"), James A. Wilson, Jr. ("Wilson") and Scott A. Christian ("Christian"). Numerous mutual funds notified Wilson, Christian, and others at TWCO that frequent trading by TWCO's customers violated prohibitions in the mutual funds' prospectuses, and the mutual funds instructed TWCO to stop permitting its customers to trade those funds. Christian and others, acting at Wilson's direction, then employed deceptive tactics to continue trading the mutual funds that had requested TWCO's customers to stop.

3. TWCO's former chief administrative officer, Jerome Snyder ("Snyder"), and its former chief compliance officer, Prigot, also participated in TWCO's deceptive market timing. Snyder and Prigot each took steps to deceive mutual fund companies about TWCO's customers' market timing to evade the mutual fund companies' efforts to curtail the practice.

Respondent

4. **Prigot**, age 64, is a resident of Park Ridge, NJ. Prigot was a compliance officer of TWCO beginning in January 2002. Prigot was the chief compliance officer of TWCO from February 2003 to October 2005. At all relevant times, Prigot was associated with TWCO. Prigot holds or has held Series 4, 7, 24, 27, 55, and 66 licenses.

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Related Entity

5. TWCO, based in New York, New York, was at all relevant times a broker-dealer registered with the Commission.

Market Timing

6. Market timing includes (a) frequent buying and selling of shares of the same mutual fund or (b) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal per se, can harm other mutual fund shareholders because it can dilute the value of their shares. Market timing can also disrupt the management of the mutual fund's investment portfolio and cause the targeted mutual fund to incur costs borne by other shareholders to accommodate frequent buying and selling of shares by the market timer.

Prigot Participated in TWCO's Deception of Mutual Funds That Sought To Curtail Market Timing

7. In March 2001, as TWCO began large-scale market timing for its customers, mutual fund complexes began notifying TWCO that the funds restricted or prohibited such transactions. For example, on March 16, 2001, a fund complex wrote Christian to warn him about excessive trading by customer accounts in one of the complex's mutual funds. The letter explained that excessive trading could hurt the mutual fund's performance and that the fund's prospectus therefore reserved to the fund complex the right to refuse an exchange request if there were more than two exchanges from the same fund in any three-month period. The letter notified Christian that "exchange activities in your client's account have become excessive and we are writing you in an effort to have you and your clients adhere to the guidelines stated in our Prospectus," and warned that further excessive trading would result in a trading freeze in the accounts.

8. In total, during the period March 2001 through April 2003, TWCO, Wilson, and Christian received 307 "kick out" letters from 40 mutual fund families that addressed trading activity in 113 accounts.

9. In response, Wilson and Christian attempted to deceive mutual fund companies and evade their restrictions. Wilson had learned many of these techniques from his hedge fund customers while Wilson was working at other broker-dealers. Wilson explained these techniques to Christian, and directed him to employ them.

10. Based on Wilson's instructions, Christian opened multiple accounts for TWCO's market timing customers and entered transactions using one of numerous RR numbers. Christian did this because he understood that mutual fund companies would be less likely to detect market timing by a customer if the customer's trades occurred in numerous accounts with different account numbers, account names, or RR identification numbers.

11. More specifically, TWCO "cloned" accounts to evade mutual funds' restrictions. For example, a fund complex sent a letter to TWCO on February 22, 2002 concerning account

number 70087, an account that TWCO maintained for Hedge Fund A, warning that the account was approaching the limit on exchanges. On March 4, 2002, Christian opened two new accounts, each with a new account number (70089 and 70110), for the same entity, and two days later entered a market timing trade in one of the mutual fund complex's mutual funds. Similarly, on June 4, 2002, the same fund complex sent to TWCO a letter imposing restrictions on trading by account number 70104, an account that TWCO maintained for Hedge Fund B. On June 7, 2002, Christian opened a new account for the same entity with a new account number (70139), and less than three weeks later began trading the fund complex's mutual funds using the new account.

12. Consistent with this deceptive practice, TWCO opened a total of 140 accounts for eleven institutional customers. These included 68 accounts for its customer Hedge Fund A; 35 accounts for Hedge Fund B; nine accounts for Hedge Fund C; 15 accounts for Hedge Fund D; and five accounts for Hedge Fund E. Christian prepared the new account forms, which he then submitted to Snyder or Prigot for approval and signature.

13. Christian, assisted by Snyder and/or Prigot, also established 16 different RR identification numbers at TWCO for use in mutual fund trading, as a means of evading restrictions imposed by mutual funds that tracked excessive trading through RR numbers.

14. Prigot was aware that mutual funds were trying to curtail Wilson's and Christian's trading. Prigot received numerous kick out letters from mutual funds. In addition, Prigot was responsible for dealing with mutual fund complexes that had questions about TWCO's mutual fund market timing customers.

15. Snyder explained to Prigot that, when mutual fund complexes asked who controlled accounts that the fund complexes suspected were engaged in market timing, Prigot should tell the fund complexes that the accounts were "house accounts." On at least two occasions, when mutual funds questioned whether certain trades were market timing trades, Prigot told mutual fund complexes' representatives that the RR numbers associated with the accounts in question were house RR numbers even though he knew that the trades were performed by Wilson and Christian and were engaged in market timing.

16. In addition, Prigot served as a principal at TWCO. In this capacity, Prigot signed numerous account opening forms for Wilson's and Christian's market timing customers. Prigot thus enabled TWCO to create duplicate accounts, which Wilson and Christian used to enable their customers to continue to market time mutual funds without the funds' knowledge.

Violations

17. By virtue of the conduct of its officers and employees as discussed above, TWCO violated, and Prigot willfully aided and abetted and caused violations of, Section 15(c) of the Exchange Act and Rule 10b-3 thereunder. Section 15(c) of the Exchange Act and Rule 10b-3 thereunder prohibit fraudulent conduct by brokers or dealers in connection with the purchase or sale of securities. TWCO violated Section 15(c) of the Exchange Act and Rule 10b-3 when TWCO and its RRs misrepresented and concealed the identities of TWCO's RRs and customers, as

well as the nature of their customers' market timing activity, from mutual funds. Prigot substantially assisted this violation. Prigot received numerous warning or kick out letters from mutual funds, but failed to stop the market timing as the funds requested. Prigot signed numerous account opening forms for TWCO. Wilson and Christian then used the multiple accounts to market time mutual funds. After mutual funds questioned whether certain trades were market timing trades, Prigot told mutual fund complexes' representatives that the RR numbers associated with the accounts in question were house RR numbers even though he knew that the trades were performed by Wilson and Christian and were engaged in market timing. Prigot was generally aware that his conduct was wrongful.

18. As a result of the conduct described above, TWCO, Wilson, Christian, and their customers violated, and Prigot willfully aided and abetted and caused violations of, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Section 10(b) of the Exchange Act and Rule 10b-5 prohibit fraudulent practices in connection with the purchase or sale of securities. Among other things, TWCO, Wilson, Christian, and their customers engaged in deceptive market timing when they misrepresented and concealed the identities of TWCO's RRs and customers, as well as the nature of their customers' market timing activity, from mutual funds. Prigot substantially assisted this conduct. For example, Prigot received numerous warning or kick out letters from mutual funds, but failed to stop the market timing as the funds requested. Prigot also signed numerous account opening forms for TWCO. Wilson and Christian then used the multiple accounts to deceive mutual funds about the identity of their customers in order to market time mutual funds. Additionally, after mutual funds contacted Prigot and questioned whether certain trades were market timing trades, Prigot told mutual fund complexes' representatives that the RR numbers associated with the accounts in question were house RR numbers even though he knew that the trades were performed by Wilson and Christian and were engaged in market timing. Prigot was generally aware that his conduct was wrongful.

Undertakings

19. Respondent undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings brought by the Commission relating to or arising from the matters described in the Order and agrees:

- a. To comply with any and all reasonable requests by the Commission's staff for documents or other information;
- b. To be interviewed at such times as the Commission's staff reasonably may direct;
- c. To appear and testify in such investigations, depositions, hearings or trials as the Commission's staff reasonably may direct; and
- d. That in connection with any (i) testimony of Respondent to be conducted by testimony session, deposition, hearing or trial, or (ii) requests for documents or

other information, that any notice or subpoena for such may be addressed to Respondent's counsel, and be served by mail or facsimile.

IV.

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

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

- A. Respondent Prigot cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;
- B. Respondent Prigot cease and desist from causing any violations and any future violations of Section 15(c) of the Exchange Act and Rule 10b-3 thereunder;
- C. Respondent be, and hereby is, suspended from association with any broker or dealer for a period of six (6) months, effective on the second Monday following the entry of this Order.
- D. Respondent is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter for a period of six (6) months, effective on the second Monday following the entry of this Order; and
- E. 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 Thirty Thousand Dollars (\$30,000) to the Securities and Exchange Commission. 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 Forde H. Prigot 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 Kay L. Lackey, Associate Regional Director, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, New York, NY 10281.

By the Commission.


Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57339 / February 15, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2787 / February 15, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-10354

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

On July 27, 2001, Jeffrey M. Yonkers, CPA ("Yonkers") 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 Yonkers consented to the entry of the order without admitting or denying the findings therein. This order is issued in response to Yonkers' 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 alleged that the financial statements of Detour Magazine, Inc. ("Detour") contained in their filings with the Commission during 1997 and 1998, as audited by Yonkers and others, materially misrepresented the company's financial condition and results of operation. Based upon his conduct during the audits of Detour's financial statement, the Commission determined that Yonkers had willfully violated Section 10A of the Securities Exchange Act of 1934 ("Exchange Act") and willfully aided and abetted Detour's violations of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder. The Commission also determined that Yonkers engaged in improper professional conduct under Rule 102(e) of the Commission's Rules of Practice.

¹ See Accounting and Auditing Enforcement Release No. 1428 dated July 27, 2001. Yonkers was permitted, pursuant to the order, to apply for reinstatement after one year upon making certain showings.

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, Yonkers 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. Yonkers 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, Yonkers' 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.

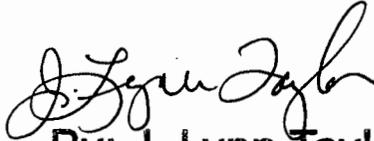
Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."² This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Yonkers, it appears that he has complied with the terms of the July 27, 2001 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 Yonkers, 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 Jeffrey M. Yonkers, 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


By: J. Lynn Taylor
Assistant 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).

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57338 / February 15, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12959

In the Matter of

STEPHEN ZIEGLER

Respondent.

**ORDER OF SUSPENSION PURSUANT
TO RULE 102(e)(2) OF THE
COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Stephen Ziegler pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. 200.102(e)(2)].¹

II.

The Commission finds that:

1. Ziegler is an attorney admitted to practice in Florida.
2. On September 24, 2007, a judgment of conviction was entered against Ziegler in *United States v. Ziegler*, No. 07-CR-20446-PCH, in the United States District Court for the Southern District of Florida, finding him guilty of one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371. Ziegler's conduct was in connection with his representation of Mutual Benefits Corporation, a viatical services provider sued by the Commission for securities fraud in *Securities and Exchange Commission v. Mutual Benefits Corp., et al.*, No. 04-60573-CIV-MORENO (S.D. Fla.) (May 4, 2004).

¹ Rule 102(e)(2) provides in pertinent part: Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

3. As a result of this conviction, Ziegler was sentenced to 60 months imprisonment in a federal penitentiary and ordered to pay restitution in the amount of \$826,839,642.

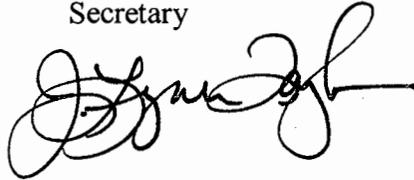
III.

In view of the foregoing, the Commission finds that Ziegler has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Stephen Ziegler is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris
Secretary

A handwritten signature in black ink, appearing to read "Nancy M. Morris", written in a cursive style.

By: J. Lynn Taylor
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57337 / February 15, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2786 / February 15, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12958

In the Matter of

RAQUEL KOHLER, CPA

Respondent.

**ORDER OF SUSPENSION PURSUANT
TO RULE 102(e)(2) OF THE
COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Raquel Kohler pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. 200.102(e)(2)].¹

II.

The Commission finds that:

1. Kohler is a certified public accountant in New York.

2. On September 24, 2007, a judgment of conviction was entered against Kohler in *United States v. Kohler*, No. 07-CR-20446-PCH, in the United States District Court for the Southern District of Florida, finding her guilty of one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371. Kohler served as Chief Financial Officer of Mutual Benefits Corporation, a viatical services provider sued by the Commission for securities fraud in *Securities and Exchange Commission v. Mutual Benefits Corp., et al.*, No. 04-60573-CIV-MORENO (S.D. Fla.) (May 4, 2004).

¹ Rule 102(e)(2) provides in pertinent part: Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

3. As a result of this conviction, Kohler was sentenced to 60 months imprisonment in a federal penitentiary and ordered to pay restitution in the amount of \$471,000,000.

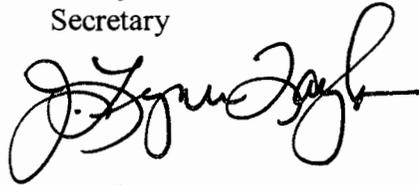
III.

In view of the foregoing, the Commission finds that Kohler has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Raquel Kohler is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57353 / February 19, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2789 / February 19, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12964

In the Matter of	:	ORDER INSTITUTING
	:	ADMINISTRATIVE PROCEEDINGS
Michael K. Openshaw, CPA	:	PURSUANT TO RULE 102(e) OF THE
	:	COMMISSION'S RULES OF
Respondent.	:	PRACTICE, 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 against Michael K. Openshaw, ("Respondent" or "Openshaw") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.¹

¹ Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

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.C. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant Rule 102(e) of the Commission's Rules of Practice, 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:

A. Openshaw, age 48, became a certified public accountant licensed to practice in the state of Utah in 1984. Openshaw's CPA license expired on September 30, 1996. Openshaw served as Chief Financial Officer of Q Comm International, Inc., from April 1, 2001, until May 31, 2005. Openshaw is a resident of Draper, Utah.

B. Q Comm International, Inc. was, at all relevant times, a Utah corporation based in Orem, Utah. Q Comm is in the business of purchasing and reselling prepaid telecommunication products and services, primarily prepaid wireless telephone talk time and prepaid long distance minutes. In general, these prepaid products are sold in the form of a personal identification number, or "PIN." Q Comm purchases PINs from telecommunications carriers and distributes them through a network of retail outlets. Q Comm stock was registered with the Commission under Section 12(b) of the Exchange Act since January 13, 2000 and at all times relevant to these proceedings. Q Comm stock traded on the American Stock Exchange under the symbol "QMM" at all times relevant to these proceedings.

C. On December 17, 2007, the Commission filed a complaint against Openshaw in SEC v. Michael K. Openshaw, (Civil Action No. 2:07-cv-0977 in the United States District Court for the District of Utah). On January 23, 2008, the court entered an order permanently enjoining Openshaw, by consent, from future violations of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13a-14, 13b2-1 and 13b2-2 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. Openshaw was not ordered to pay a civil money penalty based on his sworn representations in his Statement of Financial Condition dated July 31, 2007.

D. The Commission's complaint alleged, among other things, that from September through December of 2004, Openshaw, who was then CFO of Q Comm, completed five unauthorized bank wires, transferring a total of \$1,525,000 to a Q Comm vendor. Openshaw wired these funds without approval and without disclosing the transfers to other members of Q

Comm's management or its auditors. Openshaw concealed the transfers from Q Comm and its auditors for nearly nine months by mischaracterizing them through improper accounting entries and by altering documents. The complaint further alleges that Openshaw's acts caused Q Comm's financial statements for the year ended December 31, 2004 and quarter ended March 31, 2005 to materially deviate from Generally Accepted Accounting Principles. In addition, Openshaw falsely certified the annual report for the year ended December 31, 2004.

IV.

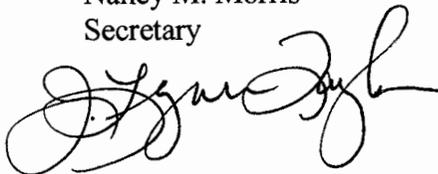
In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Openshaw's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

Openshaw is suspended from appearing or practicing before the Commission as an accountant.

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57344 / February 19, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12960

In the Matter of

Azur International, Inc.,

Respondent.

**ORDER INSTITUTING PROCEEDINGS,
MAKING FINDINGS, AND REVOKING
REGISTRATION OF SECURITIES 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 proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Azur International, Inc. ("Azur" or "Respondent").

II.

In anticipation of the institution of these proceedings, Azur 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 it and the subject matter of these proceedings, which are admitted, Azur consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), and to the findings as set forth below.

III.

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

1. Azur (CIK No. 1093673) is a revoked Nevada corporation located in Fort Lauderdale, Florida. At all times relevant to this proceeding, the securities of Azur have

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been registered with the Commission under Exchange Act Section 12(g). As of July 12, 2007, the company's common stock (symbol "AZRI") was quoted on the Pink Sheets.

2. Azur has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder while its securities were registered with the Commission in that it has not filed any periodic reports for any fiscal period subsequent to the period ended September 30, 2005.

IV.

Section 12(j) of the Exchange Act provides as follows:

The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

In view of the foregoing, the Commission deems it necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

Accordingly, it is hereby ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of Azur's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 57346 / February 19, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-12962

In the Matter of

Greater China Corp.,

Respondent.

**ORDER INSTITUTING PROCEEDINGS,
MAKING FINDINGS, AND REVOKING
REGISTRATION OF SECURITIES 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 proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Greater China Corp. ("Greater China" or "Respondent").

II.

In anticipation of the institution of these proceedings, Greater China 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 it and the subject matter of these proceedings, which are admitted, Greater China consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), and to the findings as set forth below.

III.

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

1. Greater China (CIK No. 773342) is a Delaware corporation located in New York, New York with a class of securities registered with the Commission under Exchange Act Section 12(g). As of October 12, 2007, the company's common stock

Document 26 of 30

(symbol "GCHC") was quoted on the Pink Sheets, had thirteen market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c-2-11(f)(3).

2. Greater China has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder while its securities were registered with the Commission in that it has not filed any periodic reports for any fiscal period subsequent to the period ended September 30, 1998.

IV.

Section 12(j) of the Exchange Act provides as follows:

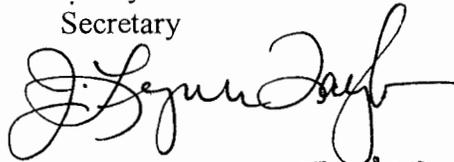
The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

In view of the foregoing, the Commission deems it necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

Accordingly, it is hereby ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of Greater China's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57345 / February 19, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12961

In the Matter of
Enova Holdings, Inc.,
Respondent.

ORDER INSTITUTING PROCEEDINGS,
MAKING FINDINGS, AND REVOKING
REGISTRATION OF SECURITIES 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 proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Enova Holdings, Inc. ("Enova" or "Respondent").

II.

In anticipation of the institution of these proceedings, Enova 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 it and the subject matter of these proceedings, which are admitted, Enova consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), and to the findings as set forth below.

III.

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

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1. Enova (CIK No. 1098929) is a Nevada corporation located in Hong Kong with a class of securities registered with the Commission under Exchange Act Section 12(g).

2. Enova has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder while its securities were registered with the Commission in that it has not filed any periodic reports for any fiscal period subsequent to the period ended September 30, 2000.

IV.

Section 12(j) of the Exchange Act provides as follows:

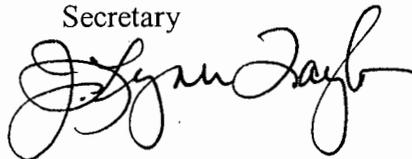
The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

In view of the foregoing, the Commission deems it necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

Accordingly, it is hereby ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of Enova's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2707 / February 22, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12967

In the Matter of

EDWARD SEWON EHEE,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO 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 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Edward Sewon Ehee ("Ehee" 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 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 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

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

1. Ehee was the sole member of Compass Fund Management, LLC ("Compass Management"), an investment adviser registered with the Commission from 2004 through March 2006. Ehee was also the sole member of Viper Capital Management, LLC ("Viper Management"), an investment adviser. From November 1989 through September 1992 and again from June 1994 to July 1994, Ehee was also a registered representative associated with a broker-dealer registered with the Commission. Ehee, 44 years old, is a resident of Oakland, California.

2. On January 30, 2008, a final judgment was entered by consent against Ehee, permanently enjoining him from future violations of Sections 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 207 of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Edward Sewon Ehee, et al., Civil Action Number C 06-6966 SI, in the United States District Court for the Northern District of California. Ehee was also ordered to pay the proceeds from the sale of his home as disgorgement.

3. The Commission's complaint alleged that, in connection with the offer and sale of interests in the Compass West and Viper Funds, Ehee misused and misappropriated investor funds, falsely stated to investors that their funds were invested, sent out false account statements indicating that investors funds were fully invested and earning returns, filed a false report with the Commission, and otherwise engaged in a variety of conduct which operated as a fraud and deceit on investors.

IV.

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

Accordingly, it is hereby ORDERED:

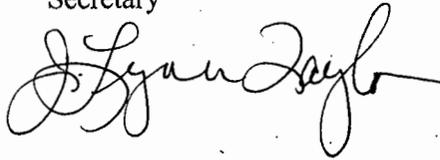
Pursuant to Section 203(f) of the Advisers Act, that Respondent Ehee be, and hereby is barred from association with any investment adviser;

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

A handwritten signature in cursive script, appearing to read "J. Lynn Taylor".

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 28171 / February 27, 2008

In the Matter of :
:
:
POWERSHARES CAPITAL MANAGEMENT LLC :
POWERSHARES ACTIVELY MANAGED :
EXCHANGE-TRADED FUND TRUST :
301 West Roosevelt Road :
Wheaton, Illinois 60187 :
:
AER ADVISORS, INC. :
30 Laurence Lane :
Rye Beach, New Hampshire 03871 :
:
AIM DISTRIBUTORS, INC. :
11 Greenway Plaza :
Houston, Texas 77046 :
:
(812-13386) :
:

ORDER UNDER SECTIONS 6(c), 12(d)(1)(J) AND 17(b) OF THE INVESTMENT
COMPANY ACT OF 1940

PowerShares Capital Management LLC, PowerShares Actively Managed Exchange-Traded Fund Trust, AIM Distributors, Inc., and AER Advisors, Inc. filed an application on May 18, 2007, and amendments to the application on November 9, 2007, November 16, 2007, November 30, 2007, December 20, 2007, and January 7, 2008, requesting an order under sections 6(c) and 17(b) of the Investment Company Act of 1940 ("Act") for an exemption from sections 2(a)(32), 5(a)(1), and 22(d) of the Act and rule 22c-1 under the Act, under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

The order permits: (a) series of certain open-end management investment companies to issue shares redeemable in large aggregations only ("Creation Units"); (b) secondary market transactions in the shares of the series to occur at negotiated prices; (c) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (d) certain registered management

investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire shares of the series.

On February 1, 2008, a notice of the filing of the application was issued (Investment Company Act Release No. 28140). The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found, on the basis of the information set forth in the application, as amended, that granting the requested exemptions is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

It is further found that the terms of the proposed transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transactions are consistent with the policy of each registered investment company concerned and with the general purposes of the Act.

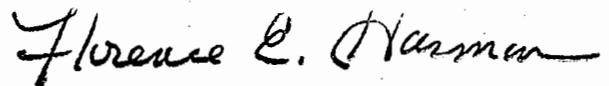
Accordingly, in the matter of PowerShares Capital Management LLC, et al. (File No. 812-13386),

IT IS ORDERED, under section 6(c) of the Act, that the requested exemption from sections 2(a)(32), 5(a)(1), and 22(d) of the Act and rule 22c-1 under the Act is granted, effective immediately, subject to the conditions contained in the application, as amended.

IT IS FURTHER ORDERED, under section 12(d)(1)(J) of the Act, that the requested exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act, is granted, effective immediately, subject to the conditions contained in the application, as amended.

IT IS FURTHER ORDERED, under sections 6(c) and 17(b) of the Act, that the requested exemption from sections 17(a)(1) and 17(a)(2) of the Act is granted, effective immediately, subject to the conditions contained in the application, as amended.

By the Commission:



Florence E. Harman
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57402 / February 29, 2008

INVESTMENT ADVISERS ACT OF 1940
Release No. 2708 / February 29, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12972

In the Matter of

PAUL N. GERMAIN,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTIONS 15(b) AND
17A(c)(4)(C) 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 Sections 15(b) and 17A(c)(4)(C) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Paul N. Germain ("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 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 Sections 15(b) and 17A(c)(4)(C) 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.

Document 30 of 30

III.

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

1. Between 1997 and 2005, Germain was associated with Principal Management Corporation, a transfer agent and an investment adviser registered with the Commission. At the same time, Germain was associated as a registered representative with Princor Financial Services Corporation, a broker-dealer registered with the Commission. Germain, 63 years old, is a resident of Ankeny, Iowa.

2. On March 8, 2007, Germain pled guilty to one count of theft in the first degree in violation of Iowa Code Sections 714.1(1) and 714.2(1) before the Iowa District Court for Polk County, Iowa, in State of Iowa v. Paul Germain, Case No. FE207223. On May 9, 2007, Germain was sentenced to ten years imprisonment, but the sentence was suspended, and Germain was placed on a two-year supervised probation. The Court also ordered Germain to make supplemental restitution in the amount of \$30,773. Germain had already made partial restitution.

3. The counts of the criminal information to which Germain pled guilty alleged, inter alia, that between 1997 and 2005, while serving as an officer of a transfer agent, Germain misappropriated a total of \$184,337 from nine mutual fund accounts in seventeen transactions without the account owners' authorization and spent the funds for his personal purposes.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Sections 15(b)(6) and 17A(c)(4)(C) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Germain be, and hereby is barred from association with any broker, dealer, transfer agent, 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

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 February 2008, 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 Nazareth was Commissioner from August 4, 2005 to January 31, 2008.

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

KATHLEEN L. CASEY, COMMISSIONER

16 Documents

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 249 and 274

[Release Nos. 34-57306; IC-28148; File No. S7-02-08]

RIN 3235-AK05

DISCLOSURE OF DIVESTMENT BY REGISTERED INVESTMENT COMPANIES IN ACCORDANCE WITH SUDAN ACCOUNTABILITY AND DIVESTMENT ACT OF 2007

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing amendments to its forms under the Securities Exchange Act of 1934 and the Investment Company Act of 1940 that would require disclosure by a registered investment company that divests, in accordance with the Sudan Accountability and Divestment Act of 2007, from securities of issuers that the investment company determines, using credible information that is available to the public, conduct or have direct investments in certain business operations in Sudan. The Sudan Accountability and Divestment Act limits civil, criminal, and administrative actions that may be brought against a registered investment company that divests itself from such securities, provided that the investment company makes disclosures in accordance with regulations prescribed by the Commission.

DATES: Comments should be submitted on or before [**Insert date that is 30 days after date of publication in Federal Register**].

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

Electronic Comments:

Document 1 of 16

- 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 S7-02-08 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 S7-02-08. 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 also are 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: Devin F. Sullivan, Attorney, 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 Form N-CSR¹ and Form N-SAR² under the Securities Exchange Act of 1934 (“Exchange Act”)³ and the Investment Company Act of 1940 (“Investment Company Act”).⁴

I. DISCUSSION

We are proposing amendments to Form N-CSR and Form N-SAR that would, if adopted, require disclosure by a registered investment company that divests, in accordance with the Sudan Accountability and Divestment Act of 2007 (“Sudan Divestment Act”),⁵ from securities of issuers that the investment company determines conduct or directly invest in certain business operations in Sudan.

The Sudan Divestment Act

On December 31, 2007, the President signed the Sudan Divestment Act into law. Among other things, the Sudan Divestment Act provides that no person may bring any civil, criminal, or administrative action against any registered investment company, or any employee, officer, director, or investment adviser of the investment company, based solely upon the investment company divesting from, or avoiding investing in, securities issued by persons that the investment company determines, using credible information that is available to the public, conduct or have direct investments in certain business

¹ 17 CFR 294.331 and 274.128.

² 17 CFR 294.330 and 274.101.

³ 15 U.S.C. 78a et seq.

⁴ 15 U.S.C. 80a-1 et seq.

⁵ Pub. L. 110-174, 121 Stat. 2516 (2007).

operations in Sudan.⁶ This limitation on actions does not apply to a registered investment company, or any of its employees, officers, directors, or investment advisers, unless the investment company makes disclosures about the divestments in accordance with regulations prescribed by the Commission.⁷ To that end, the Sudan Divestment Act requires us to prescribe regulations not later than 120 days after enactment that require disclosure by each registered investment company that divests itself of securities in accordance with the Act. The Sudan Divestment Act states that these rules shall require this disclosure to be included in the next periodic report filed under Section 30 of the Investment Company Act following the divestment.⁸

Proposed Amendments

To implement the Sudan Divestment Act, we are proposing to require each registered investment company that divests securities in accordance with the Sudan Divestment Act to disclose the divestment on the next Form N-CSR or Form N-SAR that it files following the divestment. Management investment companies would provide the disclosure on Form N-CSR, and unit investment trusts would provide the disclosure on Form N-SAR.⁹ We are proposing to require disclosure of information that would identify the securities divested and the magnitude of the divestment. This would include the issuer's name; exchange ticker symbol; Committee on Uniform Securities Identification Procedures ("CUSIP") number; total number of shares or, for debt securities, principal

⁶ Section 4(a) of the Sudan Divestment Act [to be codified at 15 U.S.C. 80a-13(c)(1)].

⁷ Section 4(a) of the Sudan Divestment Act [to be codified at 15 U.S.C. 80a-13(c)(2)(B)].

⁸ Section 4(b) of the Sudan Divestment Act.

⁹ Proposed Item 6(b) of Form N-CSR; proposed Item 133 of Form N-SAR.

amount divested; and dates that the securities were divested.¹⁰ In addition, if the registered investment company continues to hold any securities of the divested issuer, it would be required to disclose the exchange ticker symbol; CUSIP number; and total number of shares or, for debt securities, principal amount of such securities, held on the date of filing.¹¹ This requirement is intended to provide information about whether or not a registered investment company has a continuing position in the issuer whose securities were divested.

Proposed Instructions to Form N-CSR and Form N-SAR clarify that while a registered investment company is not required to disclose divestments of securities of an issuer that conducts or has direct investments in certain business operations in Sudan, the limitation on actions provided in the Sudan Divestment Act does not apply with respect to a divestment that is not disclosed.¹²

In addition, proposed Instructions to Form N-CSR and Form N-SAR state that a registered investment company that divests securities in accordance with the Sudan Divestment Act during the period that begins on the fifth business day before the date of filing a Form N-CSR or Form N-SAR and ends on the date of filing may disclose the divestment in either that filing or an amendment thereto. The amendment would be required to be filed not later than five business days after the date of filing the Form

¹⁰ Proposed Item 6(b)(1)-(5) of Form N-CSR; proposed Item 133.A.-E. of Form N-SAR. We are also proposing technical amendments to Form N-SAR to change cross-references to Item 132 to reflect the addition of Item 133.

¹¹ Proposed Item 6(b)(6) of Form N-CSR; proposed Item 133.F. of Form N-SAR.

¹² Proposed Instruction 1. to proposed Item 6(b) of Form N-CSR; proposed Instructions to Item 133 of Form N-SAR.

N-CSR or Form N-SAR.¹³ This flexibility is intended to lessen the compliance burdens associated with divestment transactions that occur shortly before a registered investment company files a Form N-CSR or Form N-SAR.

Finally, the proposed Instructions provide that, for purposes of determining when a divestment should be reported, if a registered investment company divests its holdings in a particular security in a related series of transactions, the company may deem the divestment to occur at the time of the final transaction in the series.¹⁴ As a result, a registrant could choose either to report each transaction in the next Form N-CSR or Form N-SAR filed following the individual transaction or to report the entire series of transactions in the next Form N-CSR or Form N-SAR filed following the final transaction in the series. This flexibility is intended to reduce opportunities for third parties to exploit information about ongoing divestments through predatory trading practices, such as trading ahead of, or “front-running,” a registered investment company’s divestment. The proposed Instructions require a registered investment company that chooses to report the entire series of transactions following the final transaction to separately state each date on which securities were divested and the total number of shares or, for debt securities, principal amount divested, on each such date. This is intended to ensure that that the same information will be disclosed whether the series of transactions is reported in multiple filings after each transaction or on a single filing after the entire related series of transactions that comprises the divestment is complete.

¹³ Proposed Instruction 2. to proposed Item 6(b) of Form N-CSR; proposed Instructions to Item 133 of Form N-SAR.

¹⁴ Proposed Instruction 3. to proposed Item 6(b) of Form N-CSR; proposed Instructions to Item 133 of Form N-SAR.

II. 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 have an effect on the proposals contained in this release, including the following:

- Are Form N-CSR and Form N-SAR the appropriate locations for disclosure?
Should registered investment companies include disclosure about divestments in accordance with the Sudan Divestment Act in reports that are provided directly to shareholders instead of, or in addition to, including it in Form N-CSR and Form N-SAR, which are filed with the Commission and publicly available but not provided directly to shareholders?
- What information should we require registered investment companies to disclose about divestments in accordance with the Sudan Divestment Act? Is any of the information that we propose to require unnecessary? Should we require disclosure of any other information?
- Should we require a registered investment company to make the proposed disclosures about securities of an issuer that it retains after divesting other securities of that issuer?
- The provisions of the Sudan Divestment Act concerning registered investment company divestments terminate 30 days after the President certifies to Congress that the Government of Sudan has undertaken certain actions.¹⁵
Should the proposed amendments to Form N-CSR and Form N-SAR include a

¹⁵ Section 12 of the Sudan Divestment Act.

similar sunset provision? Or is this unnecessary because, for example, following any such termination under the Sudan Divestment Act, there could no longer be divestments in accordance with the Sudan Divestment Act and therefore no disclosure would be called for under the proposed amendments?

- Should we, as proposed, permit a registered investment company that divests securities in accordance with the Sudan Divestment Act during the period that begins on the fifth business day before the date of filing a Form N-CSR or Form N-SAR and ends on the date of filing to disclose the divestment in either that filing or an amendment thereto that is filed not later than five business days after the date of filing the Form N-CSR or Form N-SAR? Should either the period prior to filing a Form N-CSR or Form N-SAR or the period for filing an amendment be shorter or longer, such as two business days or 10 business days?
- Should we, as proposed, permit a divestment that occurs in a related series of transactions to be reported after the final transaction? Should we define or limit this flexibility in any way, e.g., by defining “related series of transactions” or limiting the length of the period during which transactions may occur and be considered “related?”
- Should our amendments address divestments that occur after the enactment of the Sudan Divestment Act and before the effective date of our amendments? Should we, for example, permit a registered investment company that makes a divestment in accordance with the Sudan Divestment Act between December 31, 2007, and the effective date of the amendments, and that files a Form

N-CSR or Form N-SAR after the divestment but before the effective date of the amendments, to disclose the divestment on an amendment to that Form N-CSR or Form N-SAR filed no later than five business days after the effective date of the amendments? Should the period for filing the amendment be shorter or longer, such as two business days or 10 business days after the effective date of the amendments?

III. PAPERWORK REDUCTION ACT

The new form amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).¹⁶ We are submitting the proposal to the Office of Management and Budget (“OMB”) for emergency review in accordance with the PRA.¹⁷ Because the Sudan Divestment Act mandates that the Commission prescribe regulations not later than 120 days after the date of enactment, the Commission is requesting, pursuant to 44 U.S.C. 3507(j)(1), that OMB authorize the collections of information no later than April 29, 2008, which is 120 days after enactment. The titles for the collections of information are “Form N-CSR under the Investment Company Act of 1940 and Securities Exchange Act of 1934, Certified Shareholder Report,” and “Form N-SAR under the Investment Company Act of 1940, Semi-Annual Report for Registered Investment Companies.”

Form N-CSR (OMB Control No. 3235-0570) under the Exchange Act and the Investment Company Act¹⁸ is used by registered management investment companies filing certified shareholder reports. Form N-SAR (OMB Control No. 3235-0330) under

¹⁶ 44 U.S.C 3501 et seq.

¹⁷ 44 U.S.C. 3507(j); 5 CFR 1320.13.

¹⁸ 17 CFR 249.331 and 17 CFR 274.128.

the Exchange Act and the Investment Company Act¹⁹ is used by registered investment companies to file periodic reports with the Commission. 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.

A. Summary of Proposed Rules

The Sudan Divestment Act, enacted on December 31, 2007, requires the Commission to prescribe regulations not later than 120 days after enactment that require disclosure by each registered investment company that divests itself of securities in accordance with the Act.²⁰ The Sudan Divestment Act states that these rules shall require this disclosure to be included in the next periodic report filed under Section 30 of the Investment Company Act following the divestment.²¹

To implement the Sudan Divestment Act, we are proposing amendments that would, if adopted, require each registered investment company that divests securities in accordance with the Sudan Divestment Act to disclose the divestment on the next Form N-CSR or Form N-SAR that it files following the divestment. Management investment companies would provide the disclosure on Form N-CSR, and unit investment trusts would provide the disclosure on Form N-SAR.²² We are proposing to require disclosure of information that would identify the securities divested and the magnitude of the divestment. This would include the issuer's name; exchange ticker symbol; CUSIP number; total number of shares or, for debt securities, principal amount divested; and

¹⁹ 17 CFR 249.330 and 17 CFR 274.101.

²⁰ Section 4(b) of the Sudan Divestment Act.

²¹ Id.

²² Proposed Item 6(b) of Form N-CSR; proposed Item 133 of Form N-SAR.

dates that the securities were divested.²³ In addition, if the registered investment company continues to hold any securities of the divested issuer, it would be required to disclose the exchange ticker symbol; CUSIP number; and total number of shares or, for debt securities, principal amount of such securities, held on the date of filing.²⁴

Compliance with the proposed form amendments would be necessary to obtain the benefit of the limitation on civil, criminal, and administrative actions provided in the Sudan Divestment Act. The information provided will not be kept confidential.

B. Reporting and Cost Burden Estimates

The compliance burden estimates for the proposed collections of information are based on several assumptions. The compliance burden for the proposed amendments to Form N-CSR and Form N-SAR would be the reporting burden of collecting information necessary to make the disclosures under new Item 6(b) of Form N-CSR and new Item 133 of Form N-SAR. We estimate that the new collections of information would result in an increase of one-half burden hour per filing. Further, we believe that the number of registered investment companies that hold securities in companies conducting or directly investing in certain business operations in Sudan, and that will divest from these securities in accordance with the Sudan Divestment Act, will be relatively small. We estimate that approximately 15% of all registered investment company portfolios have an objective of investing internationally.²⁵ Based on a conservative assumption that each of these portfolios will make a divestment in accordance with the Sudan Divestment Act

²³ Proposed Item 6(b)(1)-(5) of Form N-CSR; proposed Item 133.A.-E. of Form N-SAR.

²⁴ Proposed Item 6(b)(6) of Form N-CSR; proposed Item 133.F. of Form N-SAR.

²⁵ This estimate is based on analysis done by the Division of Investment Management staff of publicly available data.

prior to each filing it makes on Form N-CSR or Form N-SAR, we estimate that approximately 15% of the filings on Form N-CSR and Form N-SAR will include disclosures of divestments in accordance with the Sudan Divestment Act. We request comment on these estimates.

Based on a burden hour estimate of one-half hour per filing for each respondent that makes disclosures under the proposed amendments, we estimate that registered management investment companies filing Form N-CSR will incur approximately 510 annual burden hours,²⁶ and unit investment trusts will incur approximately 10 annual burden hours,²⁷ to comply with the proposed form amendments.

The total annual burden hours for Form N-CSR, revised to include the burden hours expected from the proposed form amendments, are estimated to be 138,662.5 burden hours, an increase of 510 burden hours from the current annual burden of 138,152.5 hours. The total annual burden hours for Form N-SAR, revised to include the burden hours expected from the proposed form amendments, are estimated to be 107,213 burden hours, an increase of 10 burden hours from the current annual burden of 107,203 hours.

C. Request for Comment

We request comments to: (a) evaluate whether the proposed amendments to our existing information collections are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;

(b) evaluate the accuracy of our estimates of the burden of the proposed form

²⁶ 6,743 annual and semi-annual filings on Form N-CSR x 15% of filings on Form N-CSR x ½ burden hour = approximately 510 total burden hours (rounded to the nearest 10).

²⁷ 90 filings on Form N-SAR x 15% of filings on Form N-SAR x ½ burden hour = approximately 10 total burden hours (rounded to the nearest 10).

amendments; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the proposals on those who 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. S7-02-08. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-02-08, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE, Washington, DC 20549-1520. We have requested, pursuant to 44 U.S.C. 3507(j), that OMB authorize the collections of information not later than April 29, 2008.

IV. COST/BENEFIT ANALYSIS

The Commission is sensitive to the costs and benefits imposed by its rules. Our proposed amendments to Form N-CSR and Form N-SAR would, if adopted, require each registered investment company that divests securities in accordance with the Sudan Divestment Act to disclose the divestment on the next Form N-CSR or Form N-SAR that it files following the divestment.

A. Benefits

In proposing these form amendments, we intend to implement the Sudan Divestment Act's mandate for rulemaking by the Commission. The proposed amendments meet the Sudan Divestment Act's directive that the Commission "prescribe regulations, in the public interest and for the protection of investors, to require disclosure by each registered investment company that divests itself of securities in accordance with section 13(c) of the Investment Company Act of 1940."²⁸ Disclosure under the proposed form amendments would make applicable to a registered investment company, and its employees, officers, directors, and investment advisers, the limitation on actions provided by the Sudan Divestment Act. The proposed amendments also would make important information about divestments in accordance with the Sudan Divestment Act available to investors, including information identifying the securities divested, the dates of divestment, and any securities of the issuer that the registered investment company continues to hold.

We request comment on these and any other potential benefits.

B. Costs

While the proposed form amendments may lead to some additional costs for registered investment companies, we believe that these costs should be minimal. Our proposed amendments to Form N-CSR and Form N-SAR would, if adopted, require each registered investment company that divests securities in accordance with the Sudan Divestment Act to disclose the divestment on the next Form N-CSR or Form N-SAR that it files following the divestment. Registered investment companies retain records of

²⁸ Section 4(b) of the Sudan Divestment Act.

securities transactions that, we believe, would permit them to readily identify and disclose, for divestments made in accordance with the Sudan Divestment Act, the securities divested, the dates of divestment, and any securities of the issuer retained by the investment company. Further, to ease the burden of information collection and disclosure, we have included a proposed instruction in Form N-CSR and Form N-SAR stating that a registered investment company that divests securities in accordance with the Sudan Divestment Act during the period that begins on the fifth business day before the date of filing a Form N-CSR or Form N-SAR and ends on the date of filing may disclose the divestment in either that filing or an amendment thereto that is filed not later than five business days after the date of filing the Form N-CSR or Form N-SAR.²⁹ We believe that this flexibility may lessen the compliance burdens associated with reporting divestments that occur shortly before a registered investment company files a Form N-CSR or Form N-SAR.

For purposes of the PRA, we estimate that it would take approximately 510 annual burden hours³⁰ to comply with the proposed amendments to Form N-CSR and approximately 10 annual burden hours³¹ to comply with the proposed amendments to Form N-SAR, for an aggregate of approximately 520 total annual burden hours to comply with the proposed form amendments. We estimate that this additional burden would

²⁹ Proposed Instruction 2. to proposed Item 6(b) of Form N-CSR; proposed Instructions to Item 133 of Form N-SAR.

³⁰ See supra note 26.

³¹ See supra note 27.

equal total costs of approximately \$145,000 annually.³² We believe that the potential, incremental costs of disclosing divestments in accordance with the Sudan Divestment Act on Form N-CSR and Form N-SAR are justified by the fact that such disclosures would make applicable to a registered investment company, and its employees, officers, directors, and investment advisers, the limitation on actions provided by the Sudan Divestment Act. These disclosures also would make important information about divestments in accordance with the Sudan Divestment Act available to investors, including information identifying the securities divested, the dates of divestment, and any securities of the issuer that the registered investment company continues to hold.

We request comment on the magnitude of these potential costs, including our estimates, and whether there are any other additional potential costs.

C. Request for Comments

We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed form amendments. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

³²

This cost increase is estimated by multiplying the total annual hour burden (520 hours) by the estimated hourly wage rate of \$279.50 and rounding to the nearest 1,000. 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 \$270 and \$289, respectively. See Securities Industry Association, Report on Management & Professional Earnings in the Securities Industry 2007 (Sept. 2007). 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 \$279.50 (($\$270 \times .50$) + ($\$289 \times .50$)).

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

Section 23(a)(2) of the Exchange Act³³ requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition.

Section 23(a)(2) also prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(c) of the Investment Company Act,³⁴ Section 2(b) of the Securities Act of 1933,³⁵ and Section 3(f) of the Exchange Act³⁶ 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.

The proposed form amendments are intended to implement the Sudan Divestment Act's requirement that we prescribe regulations not later than 120 days after enactment that require disclosure by each registered investment company that divests itself of securities in accordance with the Act. Disclosure provided in response to the proposed amendments would make applicable to a registered investment company, and its employees, officers, directors, and investment advisers, the limitation on actions provided by the Sudan Divestment Act. These disclosures also would make important information about divestments in accordance with the Sudan Divestment Act available to investors,

³³ 15 U.S.C. 78w(a)(2).

³⁴ 15 U.S.C. 80a-2(c).

³⁵ 15 U.S.C. 77b(b).

³⁶ 15 U.S.C. 78c(f).

including information identifying the securities divested, the dates of divestment, and any securities of the issuer that the registered investment company continues to hold.

These proposed amendments may improve efficiency. Disclosure provided in response to the proposed amendments, if adopted, could increase efficiency at registered investment companies by making applicable to a registered investment company, and its employees, officers, directors, and investment advisers, the limitation on actions provided by the Sudan Divestment Act. These disclosures also could promote efficiency because they make important information about divestments in accordance with the Sudan Divestment Act available to investors, including information identifying the securities divested, the dates of divestment, and any securities of the issuer that the registered investment company continues to hold. Making such information available to investors may enable them to make more informed investment decisions.

The proposed amendments may promote competition. We anticipate that our proposed form amendments may promote competition because they may make it easier for registered investment companies to choose whether or not to offer portfolios that include holdings in companies that conduct or directly invest in certain business operations in Sudan. Thus, the proposed form amendments may facilitate competition by making it easier for registered investment companies to offer different types of portfolios that appeal to different investors. We do not anticipate that the proposed amendments will impose a measurable burden on competition. We also do not anticipate that the proposed form amendments will have a significant impact on capital formation.

We request comment on whether the proposed form amendments, if adopted, would promote efficiency, competition, and capital formation. We also request comment

on whether the proposed amendments would impose a burden on competition.

Commenters are requested to provide empirical data and other factual support for their views if possible.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

This Initial Regulatory Flexibility Analysis (“Analysis”) has been prepared in accordance with the Regulatory Flexibility Act.³⁷ It relates to the Commission’s proposed form amendments under the Exchange Act and the Investment Company Act that would require each registered investment company that divests securities in accordance with the Sudan Divestment Act to disclose the divestment on the next Form N-CSR or Form N-SAR that it files following the divestment.

A. Reasons for, and Objectives of, Proposed Amendments

The purpose of the proposed form amendments is to implement the Sudan Divestment Act’s requirement that the Commission adopt rules requiring disclosure of divestments made in accordance with the Act. Disclosure provided in response to the proposed amendments would make applicable to a registered investment company, and its employees, officers, directors, and investment advisers, the limitation on actions provided by the Sudan Divestment Act. These disclosures also would make important information about divestments in accordance with the Sudan Divestment Act available to investors, including information identifying the securities divested, the dates of divestment, and any securities of the issuer that the registered investment company continues to hold.

³⁷ 5 U.S.C. 601 et seq.

B. Legal Basis

The Commission is proposing amendments to Forms N-CSR and N-SAR pursuant to authority set forth in Sections 10(b), 13, 15(d), 23(a), and 36 of the Exchange Act [15 U.S.C. 78j(b), 78m, 78o(d), 78w(a), and 78mm] and Sections 8, 13(c), 24(a), 30, and 38 of the Investment Company Act [15 U.S.C. 80a-8, 80a-13(c), 80a-24(a), 80a-29, and 80a-37].

C. Small Entities Subject to the Rule

The proposed form amendments would affect registered investment companies that are small entities. 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.³⁸ Approximately 160 registered investment companies currently meet this definition.³⁹

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments to Form N-CSR and Form N-SAR would, if adopted, require each registered investment company that divests securities in accordance with the Sudan Divestment Act to disclose the divestment on the next Form N-CSR or Form N-SAR that it files following the divestment.

For purposes of the PRA, we estimate that it would take approximately 510 annual burden hours to comply with the proposed amendments to Form N-CSR and approximately 10 annual burden hours to comply with the proposed amendments to Form

³⁸ 17 CFR 270.0-10.

³⁹ This estimate is based on analysis by the Division of Investment Management staff of publicly available data.

N-SAR, for an aggregate of approximately 520 total annual burden hours to comply with the proposed form amendments. We estimate that this additional burden would equal total costs of approximately \$145,000 annually.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that there are no rules that duplicate, overlap, or conflict with the proposed amendments.

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 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 or the requirements of the Sudan Divestment Act. Disclosure provided in response to the proposed amendments would make applicable to a registered investment company, and its employees, officers, directors, and investment advisers, the limitation on actions provided by the Sudan Divestment Act. These disclosures also would make important information about divestments in accordance with

the Sudan Divestment Act available to investors, including information identifying the securities divested, the dates of divestment, and any securities of the issuer that the registered investment company continues to hold. Different disclosure requirements or different timetables for registered investment companies that are small entities do not appear to be consistent with the requirements of the Sudan Divestment Act. Finally, in this proposed rulemaking, we do not consider using performance rather than design standards to be consistent with the statutory requirement that we adopt rules for the protection of investors.

We have endeavored through the proposed amendments to minimize the regulatory burden on all registered investment companies, including small entities, while meeting the requirements of the Sudan Divestment Act. Small entities should benefit from the Commission's reasoned approach to the proposed amendments to the same degree as other registered investment companies.

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.

VII. CONSIDERATION OF IMPACT ON THE ECONOMY

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),⁴⁰ 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.

VIII. STATUTORY AUTHORITY

The Commission is proposing amendments to Form N-SAR and Form N-CSR pursuant to authority set forth in Sections 10(b), 13, 15(d), 23(a), and 36 of the Exchange Act [15 U.S.C. 78j(b), 78m, 78o(d), 78w(a), and 78mm], and Sections 8, 13(c), 24(a), 30, and 38 of the Investment Company Act [15 U.S.C. 80a-8, 80a-13(c), 80a-24(a), 80a-29, and 80a-37].

List of Subjects

17 CFR Part 249

Reporting and recordkeeping requirements, Securities.

⁴⁰ Pub. L. No. 104-21, Title II, 110 Stat. 857 (1996).

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

TEXT OF PROPOSED 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 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq., 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

2. 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.

* * * * *

3. Form N-SAR (referenced in §§ 249.330 and 274.101) is amended by:

- a. Revising the reference “132” in Item 6 to read “133”;
- b. Adding new Item 133;
- c. Revising the reference “132” in the fifth paragraph of General

Instruction A to read “133”; and

- d. Adding an instruction to new Item 133.

The additions read as follows:

Note: The text of Form N-SAR does not, and these amendments will not, appear in the Code of Federal Regulations.

FORM N-SAR

* * * * *

133. If the Registrant has divested itself of securities in accordance with Section 13(c) of the Investment Company Act of 1940 following the filing of its last report on Form N-SAR and before filing of the current report, disclose the following information for each such divested security:

- A. Name of the issuer;
- B. Exchange ticker symbol;
- C. CUSIP number;
- D. Total number of shares or, for debt securities, principal amount divested;
- E. Date(s) that the securities were divested; and
- F. If the Registrant holds any securities of the issuer on the date of filing, the exchange ticker symbol; CUSIP number; and the total number of shares or, for debt securities, principal amount held on the date of filing.

* * * * *

Instructions to Specific Items

* * * * *

ITEM 133: Divestment of Securities in Accordance with the Sudan Accountability and Divestment Act of 2007.

This item may be used by a Registrant that divested itself of securities in accordance with Section 13(c) of the Investment Company Act, which was added by the Sudan Accountability and Divestment Act of 2007. A Registrant is not required to include

disclosure under this item; however, the limitation on civil, criminal, and administrative actions under Section 13(c) of the Investment Company Act does not apply with respect to a divestment that is not disclosed under this item.

If a Registrant divests itself of securities in accordance with Section 13(c) of the Act during the period that begins on the fifth business day before the date of filing a Form N-SAR and ends on the date of filing, it may disclose the divestment in either the Form N-SAR or an amendment thereto that is filed not later than five business days after the date of filing the Form N-SAR.

For purposes of determining when a divestment should be reported under this item, if a Registrant divests its holdings in a particular security in a related series of transactions, the Registrant may deem the divestment to occur at the time of the final transaction in the series. In that case, the Registrant should report each transaction in the series on a single Form N-SAR, but should separately state each date on which securities were divested and the total number of shares or, for debt securities, principal amount divested, on each such date.

* * * * *

4. Form N-CSR (referenced in §§ 249.331 and 274.128) is amended by:
 - a. Revising the reference “Schedule of Investments.” in the caption to Item 6 to read “Investments.”;
 - b. Designating the undesignated paragraph in Item 6 as paragraph (a);

c. Revising the reference “Instruction.” in Item 6 to read “Instruction to paragraph (a).”; and

d. Adding new paragraph (b) and new Instructions 1, 2, and 3 to paragraph (b) to Item 6.

The additions read as follows:

Note: The text of Form N-CSR does not, and these amendments will not, appear in the Code of Federal Regulations.

FORM N-CSR

* * * * *

Item 6. Investments.

(a) * * *

(b) If the registrant has divested itself of securities in accordance with Section 13(c) of the Investment Company Act of 1940 following the filing of its last report on Form N-CSR and before filing of the current report, disclose the following information for each such divested security:

- (1) Name of the issuer;
- (2) Exchange ticker symbol;
- (3) Committee on Uniform Securities Identification Procedures (“CUSIP”)

number;

- (4) Total number of shares or, for debt securities, principal amount divested;
- (5) Date(s) that the securities were divested; and

(6) If the registrant holds any securities of the issuer on the date of filing, the exchange ticker symbol; CUSIP number; and the total number of shares or, for debt securities, principal amount held on the date of filing.

Instructions to paragraph (b).

1. This Item may be used by a registrant that divested itself of securities in accordance with Section 13(c) of the Investment Company Act, which was added by the Sudan Accountability and Divestment Act of 2007. A registrant is not required to include disclosure under this Item; however, the limitation on civil, criminal, and administrative actions under Section 13(c) of the Investment Company Act does not apply with respect to a divestment that is not disclosed under this Item.

2. If a registrant divests itself of securities in accordance with Section 13(c) of the Act during the period that begins on the fifth business day before the date of filing a Form N-CSR and ends on the date of filing, it may disclose the divestment in either the Form N-CSR or an amendment thereto that is filed not later than five business days after the date of filing the Form N-CSR.

3. For purposes of determining when a divestment should be reported under this Item, if a registrant divests its holdings in a particular security in a related series of transactions, the registrant may deem the divestment to occur at the time of the final transaction in the series. In that case, the registrant should report each transaction in the

series on a single Form N-CSR, but should separately state each date on which securities were divested and the total number of shares or, for debt securities, principal amount divested, on each such date.

By the Commission.

A handwritten signature in cursive script that reads "Nancy M. Morris". The signature is written in black ink and is positioned to the right of the typed name.

Nancy M. Morris
Secretary

February 11, 2008

SECURITIES AND EXCHANGE COMMISSION
Release No. 34-57301 / February 11, 2008

Order Granting Temporary Exemption of LACE Financial Corp. from the Conflict of Interest Prohibition in Rule 17a-5(c)(1) of the Securities Exchange Act of 1934

I. Introduction

The Credit Rating Agency Reform Act of 2006 (“Rating Agency Act”),¹ enacted on September 29, 2006, defined the term “nationally recognized statistical rating organization” (“NRSRO”), added Section 15E to the Securities Exchange Act of 1934 (“Exchange Act”), and provided authority for the Securities and Exchange Commission (“Commission”) to implement registration, recordkeeping, financial reporting, and oversight rules with respect to registered credit rating agencies. Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300), prescribe the process for a credit rating agency to apply for registration. Rule 17g-1 and Form NRSRO were effective on June 18, 2007, and the other rules, Rules 17g-2 through 17g-6 (17 CFR 240.17g-2 through 17g-6), became effective on June 26, 2007.²

In particular, Rule 17g-5(c)(1) prohibits an NRSRO from issuing or maintaining a credit rating solicited by a person that, in the most recently ended fiscal year, provided the NRSRO with net revenue equaling or exceeding 10% of the total net revenue of the NRSRO for the fiscal year. In adopting this rule, the Commission stated that such a person would be in a position to exercise substantial influence on the NRSRO, which in turn would make it difficult for the NRSRO to remain impartial.³

¹ Pub. L. No. 109-291 (2006).

² Release No. 34-55857 (June 5, 2007), 72 FR 33564, 33564-65 (June 18, 2007).

³ Id. at 33598.

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II. Application and Exemption Request of LACE Financial Corp.

LACE Financial Corp. ("LACE"), a credit rating agency, furnished to the Commission an application for registration as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. Based on the information provided in the application, LACE has a conflict of interest relating to the fourth class⁴ that would cause the firm to be in violation of Rule 17g-5(c)(1) if LACE became registered. Specifically, for the fiscal year ending December 31, 2007, LACE maintained credit ratings on asset-backed securities solicited by a person that provided LACE with 10% or more of its total revenues for that year.

LACE has requested that the Commission exempt it from Rule 17g-5(c)(1) on the grounds that the prohibition hinders its ability as a small entity to grow its business issuing credit ratings on asset-backed securities. LACE indicated in its application that it expects the percentage of revenue attributable to the relevant client to decrease based on LACE's revenue trend, continued growth, and the problems in the asset-backed securities market.

III. Discussion

The Commission, when adopting Rule 17g-5(c)(1), noted that it intended to monitor how the prohibition operates in practice, particularly with respect to asset-backed securities, and whether exemptions may be appropriate.⁵ The Commission notes that the revenue in question was earned by LACE before it submitted its application for

⁴ The fourth class of credit ratings is for "issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations...) ("asset-backed securities"). Section 3(a)(62)(B)(iv) of the Exchange Act.

⁵ Release No. 34-55857 (June 5, 2007), 72 FR 33564, 33598 (June 18, 2007).

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57300 / February 11, 2008

ORDER GRANTING REGISTRATION OF LACE FINANCIAL CORP. AS A
NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

LACE Financial Corp. ("LACE"), a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act.

Based on the information provided in the application, LACE has a conflict of interest relating to the fourth class that would cause the firm to be in violation of Exchange Act Rule 17g-5(c)(1) (17 CFR 240.17g-5(c)(1)) if it became registered. LACE requested that the Commission grant LACE an exemption from the conflict of interest prohibition in Exchange Act Rule 17g-5(c)(1). Simultaneously with this Order, the Commission is issuing an Order ("Exemptive Order") granting LACE an exemption from Exchange Act Rule 17g-5(c)(1) until January 1, 2009.¹

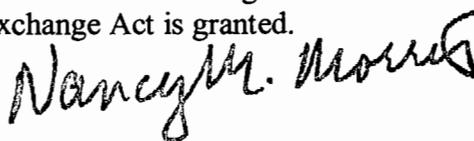
The Commission finds that the application furnished by LACE is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application and Exemptive Order, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of LACE Financial Corp. with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.



Nancy M. Morris
Secretary

¹ Release No. 34-57301 (February 11, 2008).

Notice of Solicitation of Public Views Regarding Practices Being Developed to Deal with the Increasing Number of Senior Investors

Securities and Exchange Commission

[Release No. 34-57308; File No. S7-03-08]

On February 8, 2008, the Commission issued Press Release No. 2008-16 announcing that the Commission staff, in coordination with FINRA and NASAA, would be seeking information from all interested parties (including investors, broker-dealers and investment advisers) concerning the particular practices that have been developed and are being developed to responsibly deal with the increasing number of senior investors. The goal of the project is to identify industry practices in dealing with senior investors that appear to be effective in ensuring that the firms deal fairly with senior investors, and to provide information about these practices publicly. It is anticipated that the staff will prepare a report summarizing the project and practices identified.

The Commission asks all parties to share effective practices in the following areas:

- Marketing and advertising to seniors (including information such as procedures to review this material);
- Account opening; (including information such as any additional disclosures provided to seniors, any review conducted on account opening documents; and information obtained about the customer);

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Product and account review (including information such as whether the firm has any specific guidelines for selling particular products to senior investors, additional or enhanced reviews of purchases);

Ongoing review of the relationship and appropriateness of products (including information such as who conducts review, frequency of review, any guidelines for appropriateness of products and procedures);

Discerning and meeting the changing needs of customers as they age (including information such as procedures for handling customer accounts if the customer becomes unable to make their own investment decisions, required documentation, and any review of customer accounts as the customer ages to ensure customers investment objectives are being met);

Surveillance and compliance reviews (including information such as exception reports; description of the types of reviews conducted, and procedures or guidance given to the reviewer); and

Training for firm employees (including information such as who is required to attend the training, when was training implemented, and any written procedures).

If you wish to send us your views, please submit them by hard copy or e-mail, but not by both methods on or before April 1, 2008. We strongly encourage electronic submissions. You may submit your written views electronically at the following electronic mail address: *rule-comments@sec.gov*. We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions so you should submit only information that you wish to make available publicly.

Views communicated in hard copy should be submitted in triplicate to Nancy Morris, Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549-1090. All submissions should refer to File No. S7-03-08. This file number should be included in the subject line if electronic mail is used. Hard copy submissions will be available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, N.E., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m.. Electronic submissions will be posted on the Commission's Internet Web site (<http://www.sec.gov/rules/other.shtml>).

For additional information, please contact Suzanne McGovern, Assistant Director, or Laura Magyar, Branch Chief at (202) 551-6452, in the Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.



Nancy M. Morris

Secretary

February 11, 2008

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

**Securities Act of 1933
Release No. 8893/February 13, 2008**

**Securities Exchange Act of 1934
Release No. 57319/February 13, 2008**

**ORDER REGARDING REVIEW OF FASB ACCOUNTING SUPPORT FEE FOR
2008 UNDER SECTION 109 OF THE SARBANES-OXLEY ACT OF 2002**

The Sarbanes-Oxley Act of 2002 (the "Act") provides that the Securities and Exchange Commission (the "Commission") may recognize, as generally accepted for purposes of the securities laws, any accounting principles established by a standard setting body that meets certain criteria. Consequently, Section 109 of the Act provides that all of the budget of such a standard setting body shall be payable from an annual accounting support fee assessed and collected against each issuer, as may be necessary or appropriate to pay for the budget and provide for the expenses of the standard setting body, and to provide for an independent, stable source of funding, subject to review by the Commission. Under Section 109(f) of the Act, the amount of fees collected for a fiscal year shall not exceed the "recoverable budget expenses" of the standard setting body. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act.

On April 25, 2003, the Commission issued a policy statement concluding that the Financial Accounting Standards Board ("FASB") and its parent organization, the Financial Accounting Foundation ("FAF"), satisfied the criteria for an accounting

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standard-setting body under the Act, and recognizing the FASB's financial accounting and reporting standards as "generally accepted" under Section 108 of the Act.¹ As a consequence of that recognition, the Commission undertook a review of the FASB's accounting support fee for calendar year 2008. In connection with its review, the Commission also reviewed the budget for the FAF and the FASB for calendar year 2008.

Section 109 of the Act also provides that the standard setting body can have additional sources of revenue for its activities, such as earnings from sales of publications, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual or perceived independence of the standard setter. In this regard, the Commission also considered the interrelation of the operating budgets of the FAF, the FASB and the Governmental Accounting Standards Board ("GASB"), the FASB's sister organization, which sets accounting standards used by state and local government entities. The Commission has been advised by the FAF that neither the FAF, the FASB nor the GASB accept contributions from the accounting profession.

After its review, the Commission determined that the 2008 annual accounting support fee for the FASB is consistent with Section 109 of the Act. Accordingly,

IT IS ORDERED, pursuant to Section 109 of the Act, that the FASB may act in accordance with this determination of the Commission.

By the Commission.



Nancy M. Morris
Secretary

¹ Financial Reporting Release No. 70.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57351 / February 19, 2008

Admin. Proc. File No. 3-12901

In the Matter of

ROANOKE TECHNOLOGY CORP.

ORDER REMANDING FOR
RECONSIDERATION OF
DEFAULT ORDER

On December 6, 2007, pursuant to Securities Exchange Act Section 12(k), 1/ we issued an order 2/ suspending for ten days trading in the securities of Roanoke Technology Corporation ("Roanoke") because Roanoke was delinquent in its periodic filing obligations under Exchange Act Section 13(a) and related rules. 3/ The same day, we also issued an order instituting an administrative proceeding ("OIP") against Roanoke pursuant to Exchange Act Section 12(j), 4/ ordering a hearing to determine whether to further suspend or revoke the registration of Roanoke's securities. 5/ The OIP was served on Roanoke in accordance with Rule of Practice 141(a)(2)(ii) by sending a copy of the OIP via express mail to the address shown on Roanoke's most recent filing with the Commission, *i.e.*, an address in Rocky Mount, North Carolina given on a Form 8-K Roanoke filed on February 12, 2007. 6/

1/ 15 U.S.C. § 78l(k).

2/ Roanoke Technology Corp., Order of Suspension of Trading, File No. 500-1 (Dec. 6, 2007).

3/ 15 U.S.C. § 78m; 17 C.F.R. §§ 240.13a-1, 13a-13.

4/ 15 U.S.C. § 78l(j).

5/ Roanoke Technology Corp., Order Instituting Administrative Proceedings and Notice of Hearing Pursuant to Section 12(j) of the Securities Exchange Act of 1934, Admin. Proc. File No. 3-12901 (Dec. 6, 2007).

6/ 17 C.F.R. § 201.141(a)(2)(ii).

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On January 15, 2008, an administrative law judge issued an order finding that Roanoke failed to file an answer to the allegations in the OIP or otherwise defend the proceeding. ^{7/} She found Roanoke in default pursuant to Rule of Practice 155(a)(2), ^{8/} accepted the allegations contained in the OIP as true, and revoked the registration of Roanoke's securities.

It has come to our attention that, on January 2, 2008, Roanoke sent a letter to the Secretary of the Commission, signed by Joseph Meuse, who identified himself as "Director" of the company. In that letter Meuse requested a ten-day extension in order to "respond to the [Commission's] suspension of trading in Roanoke securities" and made a motion under Rule of Practice 155(b) "to set aside the default." ^{9/} The letterhead bears a Washington, Virginia return address and explains that Roanoke "was not able to appear or defend their filing delinquency due to the recent change of Roanoke's counsel."

Two Forms 8-K recently filed with the Commission by Roanoke on January 3, 2008 and January 22, 2008 state that Meuse assumed leadership of Roanoke as the company's sole officer and director on December 7, 2007. Those filings also indicate that, as of January 3, 2008, the company's mailing address had changed from Rocky Mount, North Carolina to Washington, Virginia.

We have reviewed Meuse's January 2 letter. ^{10/} We cannot determine from the face of the letter whether Meuse seeks to challenge the December suspension order, which expired weeks before Meuse sent his letter, or the more recent revocation proceeding in which the law judge found Roanoke in default. Nevertheless, in light of the information contained in Roanoke's most recent Forms 8-K, Meuse's asserted status as "sole officer and director" of

^{7/} Roanoke Technology Corp., Order Making Findings and Revoking Registration by Default, Securities Exchange Act Rel. No. 57151 (Jan. 15, 2008), __ SEC Docket __.

^{8/} 17 C.F.R. § 201.155(a)(2). Rule 155(a)(2) authorizes the law judge to find a party in default if that party fails to file an answer, respond to a dispositive motion, or otherwise defend the proceeding.

^{9/} Rule of Practice 155(b), 17 C.F.R. § 201.155(b), provides:

A motion to set aside default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Commission, at any time, may for good cause shown set aside a default.

^{10/} 17 C.F.R. § 201.400(a) ("The Commission may, at any time, on its own motion, direct that any matter be submitted to it for review").

Roanoke appears to permit him to represent Roanoke in the proceeding. 11/ Moreover, the information in Roanoke's recent 8-K filings regarding the company's change of address and Meuse's assumption of the sole leadership of Roanoke, as well as Meuse's representation that the company recently changed counsel, suggest that Roanoke may be able to show cause for its failure to appear and defend the proceeding against it. Therefore, we believe it is appropriate to remand this matter to the law judge so that she may reconsider her decision to find Roanoke in default in light of Meuse's January 2 letter.

Accordingly, IT IS ORDERED that this proceeding be, and it hereby is, REMANDED to the administrative law judge for reconsideration of her January 15, 2008 order finding Roanoke in default.

By the Commission.


Nancy M. Morris
Secretary

11/ Rule of Practice 102(b), 17 C.F.R. § 201.102(b), permits a "bona fide officer of a corporation, trust or association" to represent that entity before the Commission in an administrative proceeding.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239, 240 and 249

[RELEASE NO. 34-57350; INTERNATIONAL SERIES RELEASE NO. 1307;

FILE NO. S7-04-08]

RIN 3235-AK04

**EXEMPTION FROM REGISTRATION UNDER SECTION 12(g) OF THE
SECURITIES EXCHANGE ACT OF 1934 FOR FOREIGN PRIVATE ISSUERS**

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to the rule that exempts a foreign private issuer from having to register a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") based on the submission to the Commission of certain information published outside the United States. The exemption allows a foreign private issuer to exceed the registration thresholds of Section 12(g) and effectively have its equity securities traded on a limited basis in the over-the-counter market in the United States. Currently, in order to obtain the exemption under Exchange Act Rule 12g3-2(b), a non-reporting foreign private issuer must submit to the Commission written materials in paper, including a list of information that the issuer must disclose publicly pursuant to its home jurisdiction laws or stock exchange requirements, or that is sent to its security holders, along with paper copies of documents containing the required information that the issuer has published for its last fiscal year. A successful applicant may maintain the exemption by submitting to the Commission paper copies of these documents on an ongoing basis. The proposed amendments would

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eliminate paper submission requirements by automatically granting the Rule 12g3-2(b) exemption to a foreign private issuer that meets specified conditions, which do not depend on a count of an issuer's United States security holders, and which would require an issuer to publish electronically in English specified non-United States disclosure documents. As a result, the proposed amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-United States disclosure documents and make better informed decisions regarding whether to invest in that issuer's equity securities through the over-the-counter market in the United States or otherwise.

DATES: Comments must 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/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-04-08 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 S7-04-08. 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 also are 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 a.m. and 3:00 p.m. 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: Elliot Staffin, Special Counsel, at (202) 551-3450, in the Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We propose to amend Commission Rules 12g3-2¹ and 15c2-11² under the Exchange Act,³ Forms 15,⁴ 15F,⁵ 40-F,⁶ and 6-K⁷

¹ 17 CFR 240.12g3-2.

² 17 CFR 240.15c2-11.

³ 15 U.S.C. 78a *et seq.*

⁴ 17 CFR 249.323.

⁵ 17 CFR 249.324.

⁶ 17 CFR 249.240f

⁷ 17 CFR 249.306.

under the Exchange Act, and Form F-6⁸ under the Securities Act of 1933 (“Securities Act”).⁹

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⁸ 17 CFR 239.36.

⁹ 15 U.S.C. 77a *et seq.*

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I. EXECUTIVE SUMMARY AND BACKGROUND

A. Introduction

Congress adopted Section 12(g) of the Exchange Act¹⁰ in order to provide investors trading in over-the-counter securities, in which there was significant public interest, with the same fundamental disclosure protections afforded to investors trading in securities listed on a national securities exchange.¹¹ When read in conjunction with the subsequently adopted Exchange Act Rule 12g-1,¹² Section 12(g) requires an issuer¹³ to file an Exchange Act registration statement regarding a class of equity securities within 120 days of the last day of its fiscal year if, on that date, the number of its record holders is 500 or greater, and the issuer's total assets exceed \$10 million.¹⁴

¹⁰ 15 U.S.C. 78l(g).

¹¹ Congress adopted Exchange Act Section 12(g) as part of the Securities Act Amendments of 1964 [Public Law 88-467 (August 20, 1964)]. See the 88th Congress, 2d Session, U.S. House of Representatives Report No. 1418 (May 19, 1964).

¹² 17 CFR 240.12g-1.

¹³ Application of Section 12(g) requires that the issuer have the necessary jurisdictional nexus with interstate commerce in the United States. 15 U.S.C. 78l(g)(1).

¹⁴ Through successive amendments of Rule 12g-1, the Commission raised the statutory asset threshold from an amount exceeding \$1,000,000 to an amount exceeding \$10,000,000.

When adopting Section 12(g), Congress expressly granted the Commission the power to exempt any security of a foreign issuer from that section if it found that "such exemption is in the public interest and is consistent with the protection of investors."¹⁵ The Commission initially adopted a provisional exemption from Section 12(g) for the securities issued by any foreign government, foreign national or foreign corporation so that it could study more fully the extent to which Section 12(g) should apply to foreign securities.¹⁶ This initiative involved a review of the disclosure requirements and practices of many of the foreign countries with issuers whose securities were traded in the United States over-the-counter market.¹⁷

Following completion of its work, in 1967 the Commission adopted Exchange Act Rule 12g3-2,¹⁸ which established two exemptions from Section 12(g) for foreign private issuers.¹⁹ Exchange Act Rule 12g3-2(a) exempts a foreign private issuer whose

¹⁵ Exchange Act Section 12(g)(3) [15 U.S.C. 78j(g)(3)]. In an earlier draft of the 1964 amendments, the U.S. Senate justified an exemptive provision for the securities of foreign issuers based on the serious difficulties that would result from the enforcement of Exchange Act Section 12(g)'s registration and reporting requirements "against foreign issuers outside the jurisdiction of the United States who do not voluntarily seek funds in the American capital markets or listing on an exchange. . . ." 88th Congress, 1st Session, U.S. Senate Report No. 379 1, 29 (July 24, 1963).

¹⁶ Release No. 34-7427 (September 15, 1964). At that time, while expressing its belief that, to the extent practicable, U.S. investors in foreign securities should be afforded the same investor protections to which U.S. investors in domestic securities are entitled, the Commission also recognized the practical problems "of enforcement and compliance and of differing foreign laws" raised by the application of Section 12(g) to foreign companies.

¹⁷ See Release No. 34-7746 (November 16, 1965).

¹⁸ Release No. 34-8066 (April 28, 1967).

¹⁹ As defined in Rule 3b-4(c) (17 CFR 240.3b-4(c)), a foreign private issuer is a corporation or other organization incorporated or organized in a foreign country that either has 50 percent or less of its outstanding voting securities held of record by United States residents or, if more than 50 percent of its voting securities are held by U.S. residents, about which none of the following are true:

equity securities are held of record by less than 300 residents in the United States, although it has 500 or more record holders on a worldwide basis as of the end of its most recently completed fiscal year.²⁰ An issuer that relies on this exemption must reassess the number of its U.S. shareholders at the end of each fiscal year in order to determine whether the exemption remains valid.

Although, for this first exemption, the Commission used a traditional shareholder test to determine whether there was sufficient U.S. investor interest to warrant requiring Section 12(g) registration,²¹ it adopted a different approach for the second exemption. Exchange Act Rule 12g3-2(b)²² exempts a foreign private issuer from Section 12(g) registration if, among other requirements, the issuer furnishes to the Commission on an ongoing basis information it has made public or is required to make public under the laws of its jurisdiction of incorporation, organization or domicile, pursuant to its non-U.S. stock exchange filing requirements, or that it has distributed or is required to distribute to its security holders (collectively, its “non-U.S. disclosure documents”).²³ The Commission adopted this exemption because there was improvement in the reporting of

-
- (1) a majority of its executive officers or directors are U.S. citizens or residents;
 - (2) more than 50 percent of its assets are located in the United States; and
 - (3) the issuer's business is administered principally in the United States.

²⁰ 17 CFR 240.12g3-2(a).

²¹ The Commission reasoned that having fewer than 300 U.S. shareholders evidenced such an insufficient public interest that it could not justify applying Section 12(g) although a foreign private issuer may have breached the statutory threshold. The Commission further relied on Exchange Act Section 12(g)(4) [15 U.S.C. 78j(g)(4)], which provides that an issuer may file a certification with the Commission to terminate its registration when its record holders have fallen below 300. Release No. 34-7746.

²² 17 CFR 240.12g3-2(b).

²³ Exchange Act Rule 12g3-2(b)(1)(iii) (17 CFR 240.12g3-2(b)(iii)).

financial information by foreign issuers, due to changes in foreign corporate laws, stock exchange requirements, and voluntary disclosure by the foreign companies themselves.²⁴ Because of the continued and expected improvement in the quality of information being made public by foreign issuers, the Commission determined that Section 12(g) exemptive relief was appropriate for a foreign private issuer that has not sought a public market in the United States for its equity securities, and that furnishes to the Commission its non-U.S. disclosure documents.²⁵ These documents would then be available for review by U.S. investors through the Commission's public reference facilities.

B. Current Rule 12g3-2(b) Requirements

As a condition to obtaining the Exchange Act Rule 12g3-2(b) exemption, an issuer must initially submit to the Commission a list of its non-U.S. disclosure requirements as well as copies of its non-U.S. disclosure documents published since the beginning of its last fiscal year.²⁶ The Rule clarifies that an issuer need only submit copies of information that is material to an investment decision for the purpose of obtaining or maintaining the exemption.²⁷ As examples of material information, the Rule lists an issuer's financial condition or results of operations, changes in its business, the acquisition or disposition of assets, the issuance, redemption or acquisition of securities, changes in management or control, the granting of options or other payment to directors

²⁴ Release No. 34-8066.

²⁵ Id.

²⁶ Exchange Act Rule 12g3-2(b)(1)(i) (17 CFR 240.12g3-2(b)(1)(i)). Historically, an issuer has submitted its home jurisdiction materials as part of a letter application to the Commission, which has been processed through the Office of International Corporate Finance in the Division of Corporation Finance.

²⁷ Exchange Act Rule 12g3-2(b)(3) (17 CFR 240.12g3-2(b)(3)).

or officers, and transactions with directors, officers or principal security holders. At the time of the initial submission, an issuer must also provide the Commission with the number of U.S. holders of its equity securities and the percentage held by them, as well as a brief description of how its U.S. holders acquired those shares.²⁸

Rule 12g3-2(b) currently requires that an applicant submit all of the necessary non-U.S. disclosure documents and other information before the date that a registration statement would otherwise become due under Section 12(g).²⁹ Once an issuer has timely submitted its application and obtained the exemption, the issuer may surpass the record holder thresholds as long as it maintains the exemption by submitting the required non-U.S. documents.

From its inception, the Rule 12g3-2(b) disclosure regime has mandated paper submissions. Even after the adoption of EDGAR filing rules for foreign private issuers, the Commission has required a foreign private issuer to submit its initial Rule 12g3-2(b) supporting materials in paper.³⁰ The Commission has based this treatment of Rule 12g3-2(b) materials on the analogous treatment of applications for an exemption from Exchange Act reporting obligations filed pursuant to Exchange Act Section 12(h).³¹

²⁸ Exchange Act Rule 12g3-2(b)(1)(v) (17 CFR 240.12g3-2(b)(1)(v)). An issuer must also disclose the dates and circumstances of the most recent public distribution of securities by the issuer or an affiliate.

²⁹ Exchange Act Rule 12g3-2(b)(2) (17 CFR 240.12g3-2(b)(2)).

³⁰ See Release No. 33-8099 (May 14, 2002), 67 FR 36678 (May 24, 2002).

³¹ 15 U.S.C. 781(h). We require the filing of Section 12(h) exemptive applications in paper pursuant to Regulation S-T Rule 101(c)(16) (17 CFR 232.101(c)(16)).

Once a foreign private issuer has obtained the Rule 12g3-2(b) exemption, it may have its equity securities traded on a limited basis in the over-the-counter market in the United States. Typically a foreign private issuer obtains the Rule 12g3-2(b) exemption in order to have established an unlisted, sponsored or unsponsored depository facility for its American Depositary Receipts (“ADRs”).³² Establishing the Rule 12g3-2(b) exemption also facilitates resales of an issuer's securities to qualified institutional buyers (“QIBs”) under Rule 144A.³³ It further permits registered broker-dealers to fulfill their current information delivery obligations concerning foreign private issuers’ securities for which they seek to publish quotations.³⁴

The Rule 12g3-2(b) exemption has generally not been available to a foreign private issuer that had a class of securities registered under Exchange Act Section 12 or had a Section 15(d) reporting obligation, active or suspended, during the previous 18 months.³⁵ The exemption has similarly been unavailable to an issuer that succeeded to

³² An ADR is a negotiable instrument that represents an ownership interest in a specified number of securities, which the securities holder has deposited with a designated bank depository. The filing of Securities Act Form F-6 (17 CFR 239.36) is required in order to establish an ADR facility. The eligibility criteria for the use of Form F-6 include the requirement that the issuer of the deposited securities have a reporting obligation under Exchange Act section 13(a) or have established the exemption under Rule 12g3-2(b). See General Instruction I.A.3 of Form F-6. While required to be registered on Form F-6 under the Securities Act, ADRs are exempt from registration under Exchange Act Section 12(g) pursuant to Exchange Act Rule 12g3-2(c) (17 CFR 240.12g3-2(c)).

³³ See Securities Act Rule 144A(d)(4) (17 CFR 230.144A(d)(4)).

³⁴ Brokers currently can comply with their obligations under Exchange Act Rule 15c2-11 (17 CFR 240.15c2-11) when a foreign company has established and maintains the Rule 12g3-2(b) exemption by, in part, reviewing the information furnished to the Commission under the exemption. See Rule 15c2-11(a)(4) (17 CFR 240.15c2-11(a)(4)).

³⁵ Exchange Act Rule 12g3-2(d)(1) (17 CFR 240.12g3-2(d)(1)). The 18 month prohibition does not apply to a Canadian issuer that incurred Section 15(d) reporting obligations solely from the filing of a registration statement under the Commission’s Multijurisdictional Disclosure System

the Exchange Act reporting obligations of another company following a merger, consolidation, acquisition or exchange of shares.³⁶

However, in March 2007, the Commission adopted amendments to Rule 12g3-2, which enable a foreign private issuer to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of its termination of Exchange Act registration and reporting pursuant to newly adopted Exchange Act Rule 12h-6.³⁷ While these amendments eliminated the 18-month and successor issuer prohibitions for issuers terminating their Exchange Act registration and reporting under Rule 12h-6, the prohibitions still apply to foreign private issuers that have exited the Exchange Act reporting regime under Exchange Act Rule 12g-4 or 12h-3.³⁸

In order to maintain the Rule 12g3-2(b) exemption, an issuer must furnish to the Commission on an ongoing basis its non-U.S. disclosure documents. Until the March 2007 amendments, the Commission required an issuer to submit those documents in paper to the Commission. The March amendments require an issuer that has obtained the Rule 12g3-2(b) exemption, upon the effectiveness of its termination of registration and reporting pursuant to newly adopted Rule 12h-6, to publish its non-U.S. disclosure documents on an ongoing basis on its Internet Web site or through an electronic

("MJDS").

³⁶ Exchange Act Rule 12g3-2(d)(2) (17 CFR 240.12g3-2(d)(2)). Similarly, MJDS filers are not subject to this restriction.

³⁷ 17 CFR 240.12h-6. The Commission adopted these Rule 12g3-2 amendments and Rule 12h-6 in Release No. 34-55540 (March 27, 2007), 72 FR 16934 (April 5, 2007).

³⁸ 17 CFR 240.12g-4 and 240.12h-3. Both Rules 12g-4 and 12h-3 permit an issuer to exit the Exchange Act reporting regime following the filing of a Form 15 (17 CFR 249.323), which certifies that it has fewer than 300 record holders or less than 500 record holders and total assets not exceeding \$10 million on the last day of each of its most recent 3 fiscal years.

information delivery system generally available to the public in its primary trading market, rather than submit that information in paper to the Commission.³⁹ The amendments further permit a foreign private issuer that has obtained or will obtain the Rule 12g3-2(b) exemption, upon application to the Commission and not pursuant to Rule 12h-6, to publish electronically in the same manner its non-U.S. documents required to maintain the exemption.⁴⁰

The March 2007 amendments further clarified the English translation requirements under Rule 12g3-2(b).⁴¹ The amendments provide that, when electronically publishing its non-U.S. documents required to maintain the Rule 12g3-2(b) exemption, at a minimum, a foreign private issuer must electronically publish English translations of the following documents if in a foreign language:

- its annual report, including or accompanied by annual financial statements;
- interim reports that include financial statements;
- press releases; and
- all other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.⁴²

³⁹ Exchange Act Rule 12g3-2(e) (17 CFR 240.12g3-2(e)).

⁴⁰ Exchange Act Rule 12g3-2(f) (17 CFR 240.12g3-2(f)).

⁴¹ Rule 12g3-2(b)(4) (17 CFR 240.12g3-2(b)(4)) provides that copies furnished to the Commission of press releases and any materials distributed directly to security holders must be in English, and states that English summaries and versions may be used instead of English translations. However, the rule does not specify what other documents must be translated fully into English, and when summaries or versions may be used.

⁴² Note 1 to Exchange Act Rule 12g3-2(e).

The March 2007 amendments also provide that, for a foreign private issuer that electronically publishes its non-U.S. disclosure documents, the Rule 12g3-2(b) exemption remains in effect for as long as the issuer fulfills the ongoing non-U.S. disclosure requirement, or until the issuer registers a class of securities under Section 12 of the Exchange Act or incurs reporting obligations under Section 15(d) of the Exchange Act.⁴³ This is consistent with the Commission's treatment of issuers making paper submissions under Rule 12g3-2(b).

C. Proposed Rule 12g3-2 Amendments

Since the initial adoption of Rule 12g3-2(b) four decades ago, the globalization of securities markets, advances in information technology, the increased use of ADR facilities by foreign companies to trade their securities in the United States, and other factors have increased significantly the number of foreign companies that have engaged in cross-border activities, as well as increased the amount of U.S. investor interest in the securities of foreign companies. These developments led us recently to re-evaluate and revise the Commission rules governing when a foreign private issuer may terminate its Exchange Act registration and reporting obligations.⁴⁴ We believe these same factors warrant reconsidering the Commission rules that determine when a foreign private issuer must enter the Section 12(g) regime as well.

⁴³ 15 U.S.C. 78o(d).

⁴⁴ Several commenters on Rule 12h-6 encouraged the Commission to address the registration requirements under Section 12(g) for foreign private issuers as well as the rules relating to termination of Exchange Act registration and reporting.

We propose to amend Exchange Act Rule 12g3-2 to permit a foreign private issuer to claim the Rule 12g3-2(b) exemption, without having to submit an application to the Commission, as long as:

- the issuer is not required to file or furnish reports under Exchange Act Section 13(a)⁴⁵ or 15(d) of the Act;
- the issuer currently maintains a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities;
- either:
 - the average daily trading volume of the subject class of securities in the United States for the issuer's most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or
 - the issuer has terminated its registration of a class of securities under Section 12(g) of the Act, or terminated its obligation to file or furnish reports under Section 15(d) of the Act, pursuant to Exchange Act Rule 12h-6; and
- unless claiming the exemption in connection with or following its recent Exchange Act deregistration, the issuer has published specified non-U.S. disclosure documents, required to be made public from the first day of its most recently completed fiscal year, in English on its Internet Web site or through an

⁴⁵ 15 U.S.C. 78m(a).

electronic information delivery system generally available to the public in its primary trading market.

All foreign private issuers that met the above requirements would be immediately exempt from Exchange Act registration under Rule 12g3-2(b) without having to apply to, or otherwise notify, the Commission, concerning the exemption. Thus, a foreign private issuer that exceeds the 300 U.S. holder threshold could automatically claim the exemption as long as it is not otherwise subject to Exchange Act reporting, meets the foreign listing condition, has 20 percent or less of its worldwide trading market in the United States, and electronically publishes the specified non-U.S. disclosure documents, as required under the proposed amendments.⁴⁶

An issuer could also immediately claim the Rule 12g3-2(b) exemption upon the effectiveness of, or following its recent Exchange Act deregistration, whether pursuant to Rule 12g-4, 12h-3, or 12h-6, or the suspension of its reporting obligations under Section 15(d),⁴⁷ if it met the above requirements absent the electronic publication condition for its most recently completed fiscal year. Since a recently deregistered company will already have filed its Exchange Act reports on EDGAR for its most recently completed fiscal year, such a prior year publication requirement is not necessary to protect investors.

⁴⁶ An issuer that has fewer than 300 U.S. resident shareholders would continue to be exempt from Exchange Act registration without any other conditions unless it also sought to establish the Rule 12g3-2(b) exemption.

⁴⁷ An issuer may suspend its Section 15(d) reporting obligations under Rule 12h-3 or Section 15(d) itself. The statutory section provides that suspension occurs if, on the first day of the fiscal year, other than the year in which the issuer's registration statement went effective, the issuer's record holders number less than 300.

Like the March 2007 amendments, the proposed rules would require any issuer, whether a prior registrant or not, to maintain the Rule 12g3-2(b) exemption by publishing, on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, the information specified for its last fiscal year. The proposed rules would require the electronic publication in English of the same types of information required under the March 2007 amendments.

The proposed rules provide that the Rule 12g3-2(b) exemption will remain in effect for as long as a foreign private issuer satisfies the electronic publication condition, or until:

- the issuer no longer maintains a listing for the subject class of securities on one or more exchanges in its primary trading market;
- the average daily trading volume of the subject class of securities in the United States exceeds 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the issuer's most recently completed fiscal year, other than the year in which the issuer first claims the exemption; or
- the issuer registers a class of securities under section 12 of the Act or incurs reporting obligations under section 15(d) of the Act.

By requiring the electronic publication in English of specified non-U.S. disclosure documents for an issuer claiming the Rule 12g3-2(b) exemption, the proposed amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents, and make better informed decisions regarding whether to invest in that issuer's equity securities through the over-the-counter

market in the United States or otherwise. Thus, the proposed amendments should foster increased efficiency in the trading of the issuer's securities for U.S. investors.

By enabling a qualified foreign private issuer to claim the Rule 12g3-2(b) exemption automatically, and without regard to the number of its U.S. shareholders, the proposed rule amendments should encourage more foreign private issuers to claim the Rule 12g3-2(b) exemption. That would enable the establishment of additional ADR facilities, make it easier for broker-dealers to fulfill their obligations under Exchange Act Rule 15c2-11 to investors with respect to the equity securities of a non-reporting foreign company, and facilitate the resale of a foreign company's securities to QIBs in the United States under Securities Act Rule 144A. Consequently, the proposed rule amendments should foster the increased trading of a foreign company's securities in the U.S. over-the-counter market, which could benefit investors.

II. DISCUSSION

A. Proposed Non-Reporting Condition

Proposed Exchange Act Rule 12g3-2(b) would require a foreign private issuer to have no reporting obligations under Exchange Act Section 13(a) or 15(d) as a condition to the exemption under the Rule.⁴⁸ Like the current non-Exchange Act reporting condition of Rule 12g3-2(b),⁴⁹ the purpose of this provision is to prevent an issuer from claiming the Rule 12g3-2(b) exemption when it already has incurred active Exchange Act reporting obligations.

⁴⁸ Proposed Exchange Act Rule 12g3-2(b)(1).

⁴⁹ Rule 12g3-2(d)(1) (17 CFR 240.12g3-2(d)(1)).

1. Non-Reporting Issuers

A foreign private issuer would satisfy the proposed non-reporting condition if it did not already have reporting obligations under either Exchange Act Section 13(a) or 15(d). Since Section 13(a) imposes reporting obligations on an issuer that has registered a class of securities under Section 12, a foreign private issuer that has an effective registration statement filed with the Commission under Section 12(b), for example, covering a class of debt securities, or Section 12(g), covering a particular class of equity securities, would be ineligible to claim the exemption. This treatment is consistent with the current Exchange Act reporting prohibition under Rule 12g3-2(b).⁵⁰

Currently an issuer may apply for the Rule 12g3-2(b) exemption, although it may have exceeded the Section 12(g) shareholder thresholds on the last day of its most recently completed fiscal year, as long as the statutory 120-day period for filing a Section 12(g) registration statement has not lapsed.⁵¹ We propose to eliminate this 120-day submission requirement because, under the proposed revised Rule 12g3-2(b) exemptive scheme, we do not believe that this requirement is necessary to protect investors.

The proposed revised exemptive scheme does not depend on an issuer's determination of the number of its worldwide or U.S. shareholders, and does not require that it submit a written application disclosing that information. Instead, it requires a foreign private issuer to satisfy a U.S. trading volume standard measured for its most recently completed fiscal year, meet a foreign listing requirement, and electronically

⁵⁰ Exchange Act Rule 12g3-2(d)(1).

⁵¹ Exchange Act Rule 12g3-2(b)(2).

publish specified material non-U.S. disclosure documents in English. If we also required an issuer to claim the exemption within the 120-day period, we believe some issuers, particularly smaller ones, would be unable to meet that deadline.⁵² Assuming that those issuers continued to satisfy the other conditions to Rule 12g3-2(b), they would have to wait until the end of their current fiscal year and the start of a new 120-day period before they could claim the exemption. We see little benefit in making investors wait several months before being able to gain electronic access to the issuer's material non-U.S. disclosure documents in English.

As is currently the case, an issuer that, on the last day of its most recently completed fiscal year, has not exceeded the 500 worldwide holder threshold under Exchange Act Section 12(g), the 300 U.S. holder threshold under Rule 12g3-2(a), or the \$10 million annual asset threshold under Rule 12g-1, could claim an exemption from Section 12(g) registration for a class of equity securities based upon one or more of those provisions, and would not have to comply with Rule 12g3-2(b)'s conditions, if it chose not to rely on that rule for its exemption from Section 12(g) registration. However, such an issuer would have to claim the Rule 12g3-2(b) exemption, and satisfy all of its conditions, if it sought to have established an ADR facility for its equity securities. ADRs must be registered on a Form F-6, which requires an issuer of the deposited securities to be either an Exchange Act reporting company or have the Rule 12g3-2(b) exemption.

⁵² Under current Rule 12g3-2(b), several issuers have requested Commission staff to accept their applications although the 120-day period has lapsed.

2. Deregistered Issuers

A foreign private issuer that has suspended its Exchange Act reporting obligations upon the filing of Form 15, pursuant to Rule 12g-4 or 12h-3, or Form 15F, pursuant to Rule 12h-6, would satisfy the non-reporting requirement upon the effectiveness of its deregistration, assuming that it had not otherwise incurred additional Exchange Act reporting obligations. Similarly, a foreign private issuer that suspended its reporting obligations pursuant to the statutory terms of Section 15(d) would satisfy the non-reporting condition immediately upon its determination that it had less than 300 shareholders as of the beginning of its most recent fiscal year.

Thus, unlike the current rule, the proposed provision would not require an issuer to look back over the previous eighteen months and determine whether it had Exchange Act reporting obligations during that period.⁵³ We eliminated the eighteen month requirement when adopting the March 2007 rule amendments that granted the Rule 12g3-2(b) exemption automatically to a foreign private issuer upon the effectiveness of its termination of Exchange Act registration and reporting pursuant to Rule 12h-6. We see no reason to treat differently foreign private issuers that have terminated their Section 12(g) registration under the older Rule 12g-4 following the filing of a Form 15.⁵⁴ Elimination of a lengthy waiting period would help hasten the publishing of a foreign private issuer's non-U.S. disclosure documents required under the exemption and, thus,

⁵³ Exchange Act Rule 12g3-2(d)(1) provides that the Rule 12g3-2(b) exemption is generally not available to a foreign private issuer that, during the preceding 18 months, has registered a class of securities under Exchange Act Section 12 or had an active or suspended Section 15(d) reporting obligation.

⁵⁴ Although a qualifying prior Form 15 filer may terminate its Exchange Act registration and reporting under Rule 12h-6, only a small number have done so.

help improve the ability of U.S. investors to make informed decisions regarding that issuer's securities.

For the same reason, proposed Rule 12g3-2(b) would eliminate the current rule's general prohibition against making the exemption available to an issuer that has had active or suspended reporting obligations under Section 15(d) during a prescribed period.⁵⁵ The current rule precludes any issuer that suspended its reporting obligations under Section 15(d) from ever being able to obtain the Rule 12g3-2(b) exemption, no matter how much time has elapsed from the effectiveness of its suspension. We permitted an issuer to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of its deregistration under Rule 12h-6, although its reporting obligations derived from Section 15(d). Similarly, we propose that an otherwise eligible issuer could claim the Rule 12g3-2(b) exemption upon the effectiveness of the suspension of its reporting obligations under Section 15(d) or pursuant to Rule 12h-3 and following the filing of a Form 15. As long as it has not once again incurred active Section 15(d) reporting obligations,⁵⁶ an issuer would be able to claim the Rule 12g3-2(b) exemption and publish its non-U.S. disclosure documents accordingly.

Comment Solicited

We solicit comment on the proposed non-Exchange Act reporting condition.

- Should we require an issuer not to have Exchange Act reporting obligations as a condition to claiming the Rule 12g3-2(b) exemption, as proposed?

⁵⁵ Rule 12g3-2(d)(1). Unlike under Section 12(g) and Rule 12g-4, an issuer can only suspend, and cannot terminate, its reporting obligations under Section 15(d) and Rule 12h-3.

⁵⁶ Following deregistration, an issuer would once again incur Section 15(d) reporting obligations upon the effectiveness of a new Securities Act registration statement.

- Should we permit an issuer that has Exchange Act reporting obligations regarding a class of debt securities to claim the Rule 12g3-2(b) exemption for a class of equity securities without having first to deregister the class of debt securities? Should we permit an issuer that has Exchange Act reporting obligations regarding a particular class of equity securities to claim the Rule 12g3-2(b) exemption regarding a different class of equity securities?
- Should we permit an issuer to claim the Rule 12g3-2(b) exemption if it meets the trading volume condition and the other proposed conditions although the statutory 120-day period has lapsed, as proposed? If not, why should we retain the 120-day statutory requirement for Rule 12g3-2(b) when that provision pertains to a shareholder-based requirement? What are the benefits to investors of eliminating or retaining the 120-day requirement?
- Should we require an issuer not to have Exchange Act reporting obligations over a specified period before claiming the exemption? Should the specified period be 3, 6, 12, 18, or 24 months, or some other specified period?
- Should we permit an otherwise eligible issuer to claim the Rule 12g3-2(b) exemption immediately upon the termination of its Section 12(g) registration or the suspension of its Section 15(d) reporting obligations, as proposed?

B. Proposed Foreign Listing Condition

As a second condition to the use of the Rule 12g3-2(b) exemption, the proposed amendments would require an issuer currently to maintain a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign

jurisdiction, constitutes the primary trading market for those securities. These proposed rule amendments are substantially similar to the foreign listing condition and definition of primary trading market adopted as part of the March 2007 amendments.⁵⁷

The purpose of the foreign listing condition is to help assure that there is a non-U.S. jurisdiction that principally regulates and oversees the issuance and trading of the issuer's securities and the issuer's disclosure obligations to investors. This foreign listing condition makes more likely the availability of a set of non-U.S. securities disclosure documents to which a U.S. investor may turn for material information when making investment decisions about the issuer's securities in the U.S. over-the-counter market. This foreign listing condition is also consistent with the Commission staff's past and current practice of administering the Rule 12g3-2(b) exemption.

The proposed rule amendments define primary trading market to mean that at least 55 percent of the trading in the issuer's subject class of securities took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. The proposed amendments further instruct that, if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of this paragraph, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities.

⁵⁷ Exchange Act Rule 12h-6(a)(3) (17 CFR 240.12h-6(a)(3)) and Exchange Act Rule 12h-6(f)(5) (17 CFR 240.12h-6(f)(5)).

Like the 2007 amendments, the proposed amendments would permit an issuer to aggregate its securities over multiple markets in one or two foreign jurisdictions in recognition that many foreign private issuers have listings on more than one exchange in one or more non-U.S. markets. Unlike the earlier amendments, however, the proposed rule amendments would not require an issuer establishing the exemption, but not deregistering, to have maintained a foreign listing for the previous twelve months, or for some other specified period of time, since we see no reason to exclude newly listed foreign companies from eligibility. We note that many foreign exchanges require substantial initial disclosure before a listing is accepted. In addition, there is currently no similar requirement for a non-reporting company applying for the Rule 12g3-2(b) exemption.

Under Rule 12h-6, an issuer must certify that, at the time it files its Form 15F,⁵⁸ it meets that rule's foreign listing requirement. That issuer would also have to meet the proposed foreign listing requirement upon the effectiveness of its Exchange Act termination of registration and reporting under Rule 12h-6 in order to be able to claim the Rule 12g3-2(b) exemption. Since typically that effectiveness occurs 90 days from the date of filing of the Form 15F, we expect most Form 15F filers will satisfy the proposed foreign listing requirement under Rule 12g3-2(b).⁵⁹

⁵⁸ 17 CFR 249.324. Similar to a Form 15, Form 15F is the form that a foreign private issuer must file to certify that it meets the conditions for terminating its Exchange Act registration and reporting obligations under Rule 12h-6.

⁵⁹ Unless the Commission objects, termination of an issuer's reporting and registration under Rule 12h-6 is effective 90 days after the filing of its Form 15F. Exchange Act Rule 12h-6(g)(1) (17 CFR 240.12h-6(g)(1)).

Comment Solicited

We solicit comment on the proposed foreign listing condition.

- Should we require an issuer to maintain a listing on one or more exchanges in one or two foreign jurisdictions comprising its primary trading market as a condition to the Rule 12g3-2(b) exemption, as proposed? Should we require that the foreign exchange be part of a recognized national market system or possess certain characteristics? If so, what characteristics would be appropriate?
- Should we define primary trading market to mean that at least 55 percent of the trading in the issuer's subject class of securities took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year, as proposed? If not, is there another percentage, such as 50, 51, 60, or some other percent, that is more appropriate?
- Should we permit the trading volume in an issuer's primary trading market to be less than 50 percent of its worldwide trading volume as long as the primary trading market's trading volume is greater than its U.S. trading volume?
- Should we also require that, if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of the foreign listing condition, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities, as proposed? Should we instead permit an issuer to count the trading of its securities only in one foreign

jurisdiction or only on one exchange in each of two foreign jurisdictions for the purpose of the foreign listing condition?

- Are there a significant number of issuers that may be listed on a foreign exchange but that would not meet the 55 percent threshold under the primary trading market definition, for example, due to being traded on more than two foreign exchanges, and which would otherwise satisfy the current or proposed conditions of Rule 12g3-2(b)? If so, what are specific examples of those issuers? Should we require those issuers to meet a lower U.S. relative trading volume threshold to be eligible for the Rule 12g3-2(b) exemption? If so, should the threshold be 3, 5, 7, 10 or some other percent of worldwide trading volume? What would be the advantages or disadvantages of such an approach?
- Should we require an issuer to maintain a listing in its jurisdiction of incorporation, organization or domicile instead of, or in addition to, a listing in its primary trading market? Would such a requirement increase the likelihood that a non-U.S. jurisdiction is principally regulating the trading in an issuer's securities?
- Should we permit an unlisted issuer to claim the Rule 12g3-2(b) exemption as long as it publishes voluntarily the same documents that a listed company is required to publish in its home jurisdiction?

C. Proposed Quantitative Standard

1. Trading Volume Benchmark

Proposed Rule 12g3-2(b) would permit an otherwise eligible issuer to claim an exemption from Section 12(g) registration by meeting a quantitative standard that does

not depend on a count of the issuer's U.S. holders. Under the proposed rule amendments, regardless of the number of its U.S. holders, an issuer would be eligible to claim the Rule 12g3-2(b) exemption if the average daily trading volume of the subject class of securities in the United States for the issuer's most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period.⁶⁰

We adopted a trading volume benchmark as part of the 2007 amendments concerning foreign deregistration because we believed it to be a more direct and less costly measure of the relative U.S. market interest in a foreign private issuer's securities than one based on a count of the issuer's shareholders.⁶¹ We believe the same considerations apply to the proposed amendments of the rules that determine when a foreign private issuer must register a class of equity securities under Section 12(g). If only 20 percent or less of an issuer's worldwide trading volume occurs in the United States, we believe the relative U.S. market interest in those securities does not warrant subjecting the issuer to Exchange Act reporting requirements.

The 2007 amendments established a trading volume standard that permits a qualified foreign private issuer to terminate its Exchange Act registration and reporting obligations if its U.S. average daily trading volume is no greater than 5 percent of its worldwide average daily trading volume. We believe it is appropriate to have a stricter trading volume standard for determining when an issuer may exit the Exchange Act

⁶⁰ Proposed Exchange Act Rule 12g3-2(b)(3)(i).

⁶¹ See Release No. 34-55540, Parts I.A and II.A.1.a.ii. We also adopted a 20 percent trading volume benchmark in the definition of "substantial U.S. market interest" under Regulation S. See 17 CFR 230.902(j).

registration and reporting regime compared to when it must enter that regime. In the former instance, an issuer has availed itself of U.S. market facilities and filed Exchange Act reports upon which U.S. investors have relied. A similar relationship exists between the current shareholder-based standards governing entrance into and exit from the Exchange Act reporting regime.⁶²

The proposed rule amendments would require an issuer to calculate U.S. and worldwide trading volume in the same fashion as under Rule 12h-6.⁶³ Under that rule, when determining its U.S. average daily trading volume, an issuer must include all transactions, whether on-exchange or off-exchange. When determining its worldwide average daily trading volume, an issuer must include on-exchange transactions, and may include off-exchange transactions. The sources of trading volume information may include publicly available sources, market data vendors or other commercial information service providers upon which an issuer has reasonably relied in good faith, and as long as the information does not duplicate any other trading volume information obtained from exchanges or other sources.

The proposed amendments would require an issuer to measure its trading volume for its most recently completed fiscal year. In contrast, Rule 12h-6 enables an issuer to make its trading volume determinations for a recent 12-month period, which is defined as

⁶² Compare Exchange Act Section 12(g)'s 500 or greater shareholder standard compelling registration with the less than 300 U.S. or worldwide shareholder standard permitting deregistration under Exchange Act Rules 12h-6, 12g-4 and 12h-3.

⁶³ The instructions for calculating trading volume are set forth in Instruction 3 to Item 4 of Form 15F and in Release No. 34-55540, Part II.A.1.a.ii.

a 12-calendar-month period that ended no more than 60 days before the filing date of an issuer's Form 15F.⁶⁴ A rolling 12-month period is appropriate in the context of deregistration since the relevant rules do not require an eligible issuer to deregister within a particular time frame. However, we are not proposing a similar rolling 60-day window for the Rule 12g3-2 amendments since Section 12(g) posits the last day of an issuer's fiscal year as the measuring date for determining whether an issuer must register a class of securities under that statutory section.

2. Rule 12h-6 Issuers

An issuer that terminates its Exchange Act registration and reporting regarding a class of equity securities under Rule 12h-6 must meet either that rule's trading volume benchmark or its record holder standard.⁶⁵ Rule 12h-6's trading volume standard requires an issuer's U.S. trading volume to be no greater than 5 percent of its worldwide trading volume, and to be measured over a recent 12-month period.⁶⁶ Rule 12h-6's alternative record holder standard requires an issuer's worldwide or U.S. holders to be less than 300.⁶⁷ An issuer that has proceeded under either of Rule 12h-6's quantitative provisions obtains the Rule 12g3-2(b) exemption upon the termination of its registration and reporting under Rule 12h-6.

⁶⁴ Exchange Act Rule 12h-6(f)(6) (17 CFR 240.12h-6(f)(6)).

⁶⁵ Exchange Act Rule 12h-6(a)(4) (17 CFR 240.12h-6(a)(4)). Thus far, most issuers that have terminated their registration and reporting requirements under Rule 12h-6 have relied on the trading volume standard.

⁶⁶ Exchange Act Rule 12h-6(a)(4)(i) (17 CFR 240.12h-6(a)(4)(i)). Rule 12h-6(f)(6) (17 CFR 240.12h-6(f)(6)) defines a recent 12-month period to mean a 12-calendar-month period that ended no more than 60 days before the filing date of Form 15F.

⁶⁷ Exchange Act Rule 12h-6(a)(4)(ii) (17 CFR 240.12h-6(a)(4)(ii)).

Because a Rule 12h-6 issuer will have met a more stringent trading volume test, although most likely for a different 12 month period, we do not believe it is necessary to require that issuer to recalculate its relative U.S. trading volume for the previous 12 months upon the effectiveness of its deregistration under Rule 12h-6 for the purpose of determining whether it may claim the Rule 12g3-2(b) exemption. Similarly, we believe that an issuer that has satisfied Rule 12h-6's strict record holder standard should continue to be able to claim the Rule 12g3-2(b) exemption upon the termination of its registration and reporting under Rule 12h-6 as long as it meets the proposed Rule 12g3-2(b) foreign listing requirement.

Comment Solicited

We solicit comment on the proposed Rule 12g3-2(b) quantitative provision.

- Should an issuer be able to claim the Rule 12g3-2(b) exemption if the U.S. trading volume of its subject class of securities is no greater than a specified percentage of its worldwide trading volume for the previous 12 months, even if the number of its U.S. shareholders is 300 or greater, as proposed?
- If so, should the U.S. trading volume standard be no greater than 20 percent of worldwide trading volume, as proposed? Should the U.S. trading volume standard instead be no greater than 5, 10, 15, 25, 30 or some other percent of worldwide trading volume?
- Is there another quantitative measure that is a more appropriate measure of relative U.S. investor interest in a foreign private issuer's securities than the proposed trading volume standard?

- Should we not impose any quantitative measure relating to U.S. market interest when determining whether a foreign private issuer should be subject to Exchange Act registration?
- Should we require an issuer to determine its relative U.S. trading volume for its most recently completed fiscal year, as proposed? If not, should the measuring period be a shorter period, such as 3 or 6 months? Should it be a longer period, such as 18 or 24 months? Should the measuring period be the same as a recent 12-month period, as under Rule 12h-6?
- Should we require an issuer to calculate its U.S. and worldwide trading volumes as under Rule 12h-6, as proposed? Should we require additional, or different, requirements or guidance regarding off-exchange transactions?
- Should we permit an issuer's sources of trading volume information to include publicly available sources, market data vendors or other commercial information service providers upon which the issuer has reasonably relied in good faith? Are there other parties or services that we should specify as permissible sources of trading volume information?
- Should we permit an issuer that has satisfied Rule 12h-6's trading volume benchmark to claim the Rule 12g3-2(b) exemption upon the effectiveness of its Rule 12h-6 deregistration, assuming it meets the proposed Rule 12g3-2(b) foreign listing requirement, as proposed?
- Similarly should we permit an issuer that has satisfied Rule 12h-6's alternative record holder condition to claim the Rule 12g3-2(b) exemption upon the

effectiveness of its Rule 12h-6 deregistration as long as it meets the proposed Rule 12g3-2(b) foreign listing requirement, as proposed?

- Are there some currently Rule 12g3-2(b)-exempt companies that would lose the exemption upon the effectiveness of the proposed rule amendments because their U.S. trading volume exceeds the proposed threshold and the number of their U.S. holders is 300 or greater? If so, are there a significant number of such companies and how should we treat them? Should we provide a transition period for those companies that would grant them a longer period of time before they would have to register their securities under Exchange Act Section 12(g)?⁶⁸ Should we provide a “grandfather” provision or issue an order that would permit issuers that have currently claimed the exemption under Rule 12g3-2(b), but would exceed the proposed trading volume threshold, to continue to be exempt from Section 12(g) provided that they comply with all other conditions? Provide specific examples of such companies.
- Should we establish a different U.S. trading volume threshold for companies from certain countries or regions, for example, Canada, which may have a greater relative U.S. market presence than other foreign companies? If so, should that threshold be 25, 30, 35 or some higher percent of worldwide trading volume?

⁶⁸ See Part II.L. of this release for discussion of a proposed three-year transition period.

D. Proposed Electronic Publishing of Non-U.S. Disclosure Documents

1. Electronic Publishing Requirement to Claim Exemption

Unless in connection with or following a recent Exchange Act deregistration, in order to claim the Rule 12g3-2(b) exemption, the proposed amendments would require an issuer to have published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, from the first day of its most recently completed fiscal year, it:

- has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;
- has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and
- has distributed or been required to distribute to its security holders.⁶⁹

These are the same categories of information that the Commission has historically required a non-reporting company to submit in paper when applying for the exemption under Rule 12g3-2(b).⁷⁰ They also are the same non-U.S. disclosure documents that, more recently, the Commission has required an issuer to publish electronically in order to maintain its Rule 12g3-2(b) exemption claimed upon the effectiveness of its deregistration under Rule 12h-6.⁷¹

⁶⁹ Proposed Exchange Act Rule 12g3-2(b)(4)(i).

⁷⁰ Exchange Act Rules 12g3-2(b)(1)(i).

⁷¹ Exchange Act Rule 12g3-2(e)(2) (17 CFR 240.12g3-2(e)(2)).

The purpose of this non-U.S. publication condition is to provide U.S. investors with ready access to material information when trading in the issuer's equity securities in the over-the-counter market.⁷² This condition also would assist U.S. investors who are interested in trading the issuer's securities in its primary securities market. Moreover, having a foreign private issuer's key non-U.S. disclosure documents electronically published in English would assist broker-dealers in meeting their Rule 15c2-11 obligations to investors and facilitate resales of that issuer's securities to qualified institutional buyers under Rule 144A.

As under the current rule, the proposed amendments would require an issuer only to publish electronically information that is material to an investment decision regarding the subject securities,⁷³ such as:

- results of operations or financial condition;
- changes in business;
- acquisitions or dispositions of assets;
- the issuance, redemption or acquisition of securities;
- changes in management or control;

⁷² Any trading of a foreign private issuer's Rule 12g3-2(b) exempt securities in the United States would have to occur through an over-the-counter market such as that maintained by the Pink Sheets, LLC since, as of April, 1998, the NASD has required a foreign private issuer to register a class of securities under Exchange Act Section 12 before its securities could be traded through the electronic over-the-counter bulletin board administered by Nasdaq. See, for example, NASD Notice to Members (January 1998).

⁷³ Proposed Exchange Act Rule 12g3-2(b)(4)(ii). Although the substantive requirements are the same, we have proposed conforming changes to General Instruction E and Part II, Item 9 of Form 15F to reflect the proposed renumbering of the non-U.S. publication requirements of Rule 12g3-2(b).

- the granting of options or the payment of other remuneration to directors or officers; and
- transactions with directors, officers or principal security holders.⁷⁴

As is currently required of an issuer that has terminated its Exchange Act registration and reporting obligations under Rule 12h-6,⁷⁵ the proposed rule amendments would require any issuer claiming the Rule 12g3-2(b) exemption to publish electronically, at a minimum, English translations of the following documents if in a foreign language:

- its annual report, including or accompanied by annual financial statements;
- interim reports that include financial statements;
- press releases; and
- all other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.⁷⁶

These are the same documents for which the Commission staff has historically required English translations because of their importance to investors.⁷⁷

As proposed, an issuer that claimed the Rule 12g3-2(b) exemption, in connection with or following the recent effectiveness of its Exchange Act deregistration, would not

⁷⁴ These are the same types of information specified in current Exchange Act Rule 12g3-2(b)(3) (17 CFR 240.12g3-2(b)(3)).

⁷⁵ Note 1 to Exchange Act Rule 12g3-2(e) (17 CFR 240.12g3-2(e)).

⁷⁶ Proposed Exchange Act Rule 12g3-2(b)(4)(iii).

⁷⁷ Current Rule 12g3-2(b)(4) (17 CFR 240.12g3-2(b)(4)) specifies only that press releases and shareholder communications must be in English. It also states that an issuer may provide an English summary or version instead of an English translation. However, Commission staff has consistently administered the current rule to require English translations of financial statements and the other specified documents because of their importance to investors.

have to comply with the electronic publication requirement for its last fiscal year.⁷⁸ Since a recently deregistered company will already have filed its Exchange Act reports on EDGAR for its most recently completed fiscal year, such a prior year publication requirement is not necessary to protect investors.

2. Electronic Publishing Requirement to Maintain Exemption

In order to maintain the Rule 12g3-2(b) exemption, the proposed amendments would require an issuer to publish the same information specified in the prior fiscal year provision, on an ongoing basis and for subsequent fiscal years, on its Internet Web site or through an electronic information delivery system in its primary trading market.⁷⁹ This requirement would apply to any issuer claiming the exemption, whether or not a former Exchange Act registrant. Like the prior fiscal year publication condition, this ongoing publication condition would help assure that investors and other market participants have access to an issuer's specified non-U.S. disclosure documents, in English, which are material to an investment decision.

Similar to the current rule,⁸⁰ the proposed rule amendments would require an issuer to publish electronically its non-U.S. disclosure documents promptly after the information has been made public, pursuant to its home jurisdiction laws, non-U.S. stock exchange rules, or shareholder rules and practices.⁸¹ As under current Commission staff practice, what constitutes "promptly" would depend on the type of document and the

⁷⁸ Proposed Note 3 to proposed Exchange Act Rule 12(g)3-2(b).

⁷⁹ Proposed Exchange Act Rule 12g3-2(c)(1).

⁸⁰ Exchange Act Rule 12g3-2(b)(1)(iii).

⁸¹ Proposed Exchange Act Rule 12g3-2(c)(2). Form 6-K imposes a similar requirement.

amount of time required to prepare an English translation. Currently an issuer typically must electronically publish or submit in paper a copy of a material press release on the same business day of its original publication.

The proposed amendments would permit an issuer to meet Rule 12g3-2(b)'s electronic publication requirement concurrently with the publishing in English of a non-U.S. disclosure document through an electronic information delivery system generally available to the public in its primary trading market. Thus, if an issuer's non-U.S. stock exchange or securities regulatory authority permits the issuer to publish electronically a required report on its electronic delivery system, and the public has ready access to the report and other documents maintained on the system,⁸² that electronic publication solely would satisfy the proposed Rule 12g3-2(b)'s electronic publishing requirements.

Comment Solicited

We solicit comment on the proposed condition requiring an issuer to publish electronically its non-U.S. disclosure documents.

- Should we require an issuer to publish its non-U.S. disclosure documents, made public since the beginning of its most recently completed fiscal year, on its Internet Web site or through an electronic information delivery system in its primary trading market, as a condition to claiming the Rule 12g3-2(b) exemption, other than in connection with or following the issuer's recent deregistration, as proposed? Should we also require an issuer that has recently

⁸² An example of such a system is the System for Electronic Document Analysis and Retrieval ("SEDAR") maintained by the Canadian Securities Administrators.

deregistered to publish those non-U.S. disclosure documents on its Internet Web site or through an electronic information delivery system if it has not already done so as a condition to claiming the exemption?

- Should we require an issuer to publish electronically its non-U.S. disclosure documents on an ongoing basis and for subsequent fiscal years as a condition to maintaining the Rule 12g3-2(b) exemption, as proposed?
- Since one purpose of the proposed foreign listing condition is to increase the likelihood that another jurisdiction has regulatory oversight of an issuer, should we expand the jurisdictional scope of the required non-U.S. disclosure documents such that it includes all documents that the issuer has made or is required to make public under the law of any jurisdiction in its primary trading market? Should all documents, provided they are material, required to be published by an issuer pursuant to any governmental authority or stock exchange be included in the scope of non-U.S. disclosure documents?
- Where an issuer is organized in one jurisdiction and domiciled in another, should the issuer have to comply voluntarily with the obligations of both jurisdictions, or only one? If only one, should the issuer be permitted to elect which one or should the manner of choosing be specified by rule? If so, what standards should govern the decision?
- For both the conditions to claim and maintain the Rule 12g3-2(b) exemption, should we require an issuer to publish electronically the types of information deemed to be material as specified in the proposed rule? Are there other types of information that should be expressly stated in the non-exclusive list of

deemed material information? Are there types of information that should be excluded from the list of required material documents?

- For both the conditions to claim and maintain the Rule 12g3-2(b) exemption, should we permit an issuer to publish its non-U.S. disclosure documents through an electronic information delivery system that is generally available to the public, even if that system is located outside of the issuer's primary trading market?
- Should we permit an issuer to satisfy the rule's electronic publication requirements concurrently with the publishing of its non-U.S. disclosure document through an electronic information delivery system that is generally publicly available in the issuer's primary trading market, as proposed? Should we also require the issuer to publish its non-U.S. document on its Internet Web site?
- Is it reasonable to expect that all electronic information delivery systems that are generally available to the public will be accessible and useable by U.S. investors? Should we require an issuer to publish its non-U.S. disclosure documents on its Internet Web site if the electronic delivery system is not navigable in English or requires users to register or pay a fee for access? Should we require an issuer to note on its Internet Web site that documents supplied to maintain the Rule 12g3-2(b) exemption are available on an electronic delivery system, and provide a link to that system?
- Should we require an issuer to publish electronically an English translation of the specified non-U.S. documents, as proposed? Are there other documents

that should be subject to an English translation requirement? Should we exclude any of the specified documents from the English translation requirement? Will a translation requirement into English inadvertently encourage issuers to provide the minimal level of disclosure in their primary trading market in order to limit the burden of translating such documents into English?

- Should we provide specific guidance regarding when an issuer may provide an English summary instead of a line-by-line English translation of a required non-U.S. disclosure document? For example, should we permit an issuer to provide English summaries of certain non-U.S. documents, for example, interim reports, or sections of such reports, that do not contain financial statements, and other foreign language documents for which English summaries are permitted under cover of Form 6-K, as long as the English summaries are permitted by, and meet the requirements of Exchange Act Rule 12b-12(d)?⁸³
- Should we require an issuer to publish electronically a non-U.S. document required to be filed with its non-U.S. regulator or non-U.S. exchange, but which is not made public by that non-U.S. regulator or non-U.S. exchange, if it is material to investors?
- Should we require an issuer to maintain the publishing of specified documents on its Internet Web site for a particular length of time? If so, which documents and for what length? For example, should we require an issuer to post its

⁸³ 17 CFR 240.12b-12(d).

annual report on its Internet Web site for 1, 2 or 3 years, interim or current reports for 1 or 2 years, and press releases for 6 months or 1 year?

- Should we require an issuer to commence publishing electronically the required non-U.S. disclosure documents before the date that its Section 12(g) registration statement would be due, as a condition to the Rule 12g3-2(b) exemption?
- For the condition to maintain the Rule 12g3-2(b) exemption, should we require an issuer to publish electronically a required non-U.S. disclosure document promptly after the document has been published pursuant to its home jurisdiction laws, stock exchange rules, or shareholder rules and practices, as proposed? Should we instead provide a particular due date for the electronic publication of a specified document?
- Should the Commission permit or require an issuer to publish its non-U.S. disclosure documents on EDGAR or through another specified central electronic repository for documents instead of requiring the publishing of those documents on an issuer's Internet Web site or through an electronic information delivery system in its primary trading market?

E. Proposed Elimination of the Written Application Requirement

Currently in order to obtain the Rule 12g3-2(b) exemption, if not proceeding under Rule 12h-6, a foreign private issuer must submit written materials, typically in the form of a letter application, to the Commission. These materials must include a list of the issuer's non-U.S. disclosure requirements, the number of U.S. holders of its subject securities and the percentage of outstanding shares held by them, the circumstances in

which its U.S. holders acquired those securities, and the date and circumstances of the most recent public distribution of the securities of the issuer or its affiliate.⁸⁴ As part of the written application, an issuer must also submit copies of its non-U.S. disclosure documents published since the first day of its most recently completed fiscal year.⁸⁵ An issuer must submit this information, together with all of the supporting documents, in paper only.

We are proposing to eliminate Rule 12g3-2(b)'s written application process for all foreign private issuers. As proposed, an issuer may claim the Rule 12g3-2(b) exemption as long as it satisfies the rule's conditions. This proposal is consistent with our adoption of an automatic grant of the Rule 12g3-2(b) exemption upon the effectiveness of an issuer's deregistration under Rule 12h-6. Moreover, since we are proposing to permit an issuer to claim the Rule 12g3-2(b) exemption based on a trading volume measure, regardless of the number of its U.S. shareholders, the current shareholder information requirement would be of marginal use. Further, since, as proposed, as a condition to claiming and maintaining the Rule 12g3-2(b) exemption, an issuer would have to publish electronically its non-U.S. disclosure documents, investors would be able to ascertain many of the issuer's non-U.S. disclosure requirements from a review of those publicly available documents.⁸⁶

⁸⁴ Exchange Act Rules 12g3-2(b)(1), (2) and (5). An issuer is also required to furnish a revised list of its non-U.S. disclosure requirements at the end of any fiscal year in which those requirements changed. Rule 12g3-2(b)(1)(iv) (17 CFR 240.12g3-2(b)(1)(iv)).

⁸⁵ Exchange Act Rule 12g3-2(b)(1)(i).

⁸⁶ From time to time, the Commission has published a list of issuers claiming the Rule 12g3-2(b) exemption that have submitted relatively current information pursuant to that rule. See, for example, Release No. 34-51893 (June 21, 2005), 70 FR 37128 (June 28, 2005). Commission staff has compiled this list based on a review of submitted paper documents. As part of the

Comment Solicited

We solicit comment on the proposed elimination of the written application process for the Rule 12g3-2(b) exemption.

- Should we permit an issuer, which has not terminated its registration and reporting obligations under Rule 12h-6, to claim the Rule 12g3-2(b) exemption as long as it meets the proposed rule's conditions, without submitting a written application to the Commission, as proposed?
- Should we continue to permit an issuer to claim the Rule 12g3-2(b) exemption automatically upon the effectiveness of its deregistration under Rule 12h-6, as proposed?
- As a condition of claiming or maintaining the Rule 12g3-2(b) exemption, should we require an issuer to publish, and to update as necessary, a list of its non-U.S. disclosure requirements on its Internet Web site or its primary trading market's electronic information delivery system?
- As a condition of claiming or maintaining the Rule 12g3-2(b) exemption, should we require an issuer to publish electronically other information with respect to its eligibility for the Rule 12g3-2(b) exemption, for example, identification of its non-U.S. primary market, and its U.S. trading volume as a percentage of its worldwide trading volume for its most recently completed fiscal year?

streamlining of the Rule 12g3-2(b) process that the proposed rule amendments are intended to effect, the Commission anticipates it would no longer publish these lists subsequent to the effective date of the new rules.

- What use do investors currently make of the information contained in an initial application under Rule 12g3-2(b)? Does it assist them in making informed investment decisions?
- If it is appropriate to eliminate the application process for the Rule 12g3-2(b) exemption, as proposed, should we at least require an issuer to notify the Commission that it is claiming the Rule 12g3-2(b) exemption? If so, what form should the notification take? Would the filing of an amended Form F-6, as proposed, serve as sufficient notice for most issuers claiming the Rule 12g3-2(b) exemption?
- What effects, if any, would the proposed elimination of the written application requirement and the lack of a formal notice requirement have on other market participants, for example, broker-dealers and their ability to fulfill their Rule 15c2-11 obligations to investors or facilitate the resale of a foreign company's securities to QIBs in the United States under Securities Act Rule 144A?

F. Proposed Duration of the Amended Rule 12g3-2(b) Exemption

The proposed Rule 12g3-2(b) exemption would remain in effect for as long as a foreign private issuer satisfies the electronic publication condition, or until:

- the issuer no longer maintains a listing for the subject class of securities on one or more exchanges in its primary trading market;
- the average daily trading volume of the subject class of securities in the United States exceeds 20 percent of the average daily trading volume of that class of

- securities on a worldwide basis for the issuer's most recently completed fiscal year, other than the year in which the issuer first claims the exemption; or
- the issuer registers a class of securities under Section 12 of the Act or incurs reporting obligations under Section 15(d) of the Act.⁸⁷

This proposed duration would apply to both non-reporting issuers as well as issuers claiming the Rule 12g3-2(b) exemption following their deregistration pursuant to Rule 12h-6, 12g-4, or 12h-3 or the statutory terms of Section 15(d).

The proposed duration of the amended Rule 12g3-2(b) exemption is similar to the duration of the current exemption. Both depend on an issuer's continued compliance with the non-U.S. publication requirements. Under both provisions, Section 12 registration or the incurrence of Section 15(d) reporting obligations terminates the exemption.⁸⁸ Moreover, currently, if an issuer can no longer claim the Rule 12g3-2(b) exemption because it has not complied with the rule's non-U.S. publication requirements, it must determine on the last day of the fiscal year whether, because of its record holder count, it must register a class of securities under Section 12(g). The same would hold true under the proposed rule amendments for a non-compliant issuer.

As proposed, an issuer would lose the Rule 12g3-2(b) exemption if it no longer was listed on an exchange in its primary trading market. We believe this provision is necessary in order to help ensure the continued availability of a set of non-U.S. disclosure documents to which investors may turn when making decisions regarding an issuer's securities. We imposed a similar foreign listing condition when we adopted

⁸⁷ Proposed Rule 12g3-2(d).

⁸⁸ See, for example, Exchange Act Rule 12g3-2(e)(3) (17 CFR 240.12g3-2(e)(3)).

Rule 12h-6, although we did not explicitly provide that an issuer that ceased to meet the foreign listing condition would not be eligible to claim or maintain the Rule 12g3-2(b) exemption following its deregistration under Rule 12h-6. The proposed amendments would clarify that, because of the importance of the foreign listing requirement, any issuer that ceases to comply with that requirement would lose the Rule 12g3-2(b) exemption.

Under the proposed rule amendments, if relying on Rule 12g3-2(b)'s 20 percent trading volume standard, an issuer would have to determine at the end of each fiscal year, other than the year in which it first claims the exemption, whether it still met that standard, even if the issuer was in compliance with the non-U.S. publication requirements. We believe this treatment is warranted in order to protect investors. Moreover, trading volume information is more easily obtainable than information regarding a foreign private issuer's U.S. and worldwide shareholders, and the trading volume standard provides a more direct measure of relative U.S. market interest in an issuer's securities. An issuer would not have to make the trading volume determination for the fiscal year in which the issuer first claimed the exemption, however, in order to provide a reasonably long enough period to assess relative U.S. market interest for the issuer's securities.

Comment Solicited

We solicit comment on the proposed duration of the Rule 12g3-2(b) exemption.

- Should an issuer be able to claim the Rule 12g3-2(b) exemption only for as long as it complies with the rule's non-U.S. publication requirement, as proposed?

- Should an issuer lose the Rule 12g3-2(b) exemption if its U.S. trading volume exceeds 20 percent of its worldwide trading volume for its most recently completed fiscal year, other than the year in which the issuer first claimed the exemption, even if the issuer has fully complied with Rule 12g3-2(b)'s non-U.S. jurisdiction publication requirement, as proposed? Should an issuer have to make the trading volume determination for the fiscal year in which the issuer first claims the exemption as well? Or should compliance with the rule's non-U.S. publication and foreign listing requirements suffice as a basis for continuing the exemption, regardless of the relative U.S. trading volume of its securities?
- Should an issuer be able to claim the Rule 12g3-2(b) exemption only for as long as it maintains a listing in its primary trading market, as proposed? Should it instead be able to continue to claim the exemption if, despite being delisted in its primary trading market, it voluntarily continues to publish electronically the documents required by its former foreign exchange and its U.S. trading volume remains at 20 percent or less of its worldwide trading volume?
- Should an issuer no longer be able to claim the Rule 12g3-2(b) exemption if it registers the same or a different class of securities under Exchange Act Section 12(g) or incurs reporting obligations as to such a class under Section 15(d), as proposed? Should an issuer instead be able to maintain the Rule 12g3-2(b) exemption for a class of equity securities if it incurs Section 15(d) reporting obligations regarding debt securities?

- Should other factors or conditions cause an issuer to lose the Rule 12g3-2(b) exemption? For example, if an issuer sells a significant percentage of its equity securities to U.S. investors in one or more exempt transactions during a specified period of time, such as six months or a year, should it be able to continue to claim the Rule 12g3-2(b) exemption as long as its U.S. trading volume does not exceed 20 percent of its worldwide trading volume at the end of that year? Is there a point when the percentage of outstanding shares owned by U.S. investors becomes as or more important than relative U.S. trading volume as a measure of U.S. market interest for determining the duration of the Rule 12g3-2(b) exemption? If so, what is that point?

G. Proposed Elimination of the Successor Issuer Prohibition

Currently an issuer may not obtain the Rule 12g3-2(b) exemption if, following the issuance of shares to acquire by merger, consolidation, exchange of securities or acquisition of assets, it has succeeded to the Exchange Act reporting obligations of another issuer.⁸⁹ The sole exception has been for Canadian companies that registered the securities to be issued in the transaction on specified MJDS registration statements under the Securities Act.⁹⁰

As part of the 2007 rule amendments, we adopted a provision that permits a successor issuer to terminate its newly acquired Exchange Act reporting obligations as long as it meets Rule 12h-6's substantive requirements for equity or debt securities

⁸⁹ Exchange Act Rule 12g3-2(d)(2). An issuer succeeds to the Exchange Act reporting obligations of another either under Exchange Act Rule 12g-3 (17 CFR 240.12g-3) or 15d-5 (17 CFR 240.15d-5).

⁹⁰ The specified MJDS registration statements are Forms F-8, F-9, F-10 and F-80 (17 CFR 239.38, 239.39, 239.40, and 239.41).

issuers.⁹¹ That provision permits a successor issuer to take into account the reporting history of its predecessor when determining whether it meets Rule 12h-6's prior reporting condition.⁹² Under that rule, a non-Exchange Act reporting foreign private issuer that has acquired a reporting foreign private issuer in a transaction exempt under the Securities Act, for example, under Rule 802⁹³ or Securities Act Section 3(a)(10),⁹⁴ may qualify immediately for termination of its Exchange Act reporting obligations under Rule 12h-6, without having to file an Exchange Act annual report, as long as the acquired company's reporting history fulfills Rule 12h-6's prior reporting condition and the successor issuer meets the rule's other conditions.

When adopting Rule 12h-6's successor issuer provision, we amended Exchange Act Rule 12g3-2(d) to permit a successor issuer to claim the Rule 12g3-2(b) exemption upon the effectiveness of its termination of Exchange Act registration and reporting under Rule 12h-6. We see no reason to treat differently a successor issuer that qualifies for deregistration under one of the older exit rules or under Section 15(d). Accordingly, we propose to eliminate the successor issuer provision in its entirety, which would permit a successor issuer to claim the Rule 12g3-2(b) exemption upon the effectiveness of its exit from the Exchange Act reporting regime whether under Rule 12h-6, 12g-4 or 12h-3 or Section 15(d).

⁹¹ 17 CFR 240.12h-6(d).

⁹² Exchange Act Rule 12h-6(d)(2) (17 CFR 240.12h-6(d)(2)).

⁹³ Securities Act Rule 802 (17 CFR 230.802)).

⁹⁴ 15 U.S.C. 77c(a)(10).

Comment Solicited

We solicit comment on the proposed elimination of the successor issuer prohibition.

- Should we permit a successor issuer to claim the Rule 12g3-2(b) exemption upon the effectiveness of its exit from the Exchange Act reporting regime under Rule 12g-4, Rule 12h-3 or Section 15(d), as proposed?

H. Proposed Elimination of the Rule 12g3-2(b) Exception for MJDS Filers

When the Commission adopted its Multijurisdictional Disclosure System (MJDS) for Canadian issuers, it amended Rule 12g3-2 to make the Rule 12g3-2(b) exemption available to Canadian issuers that have only filed with the Commission specified MJDS registration statements,⁹⁵ although they may have filed those registration statements within the previous 18 months or to effect transactions in which they would succeed to Exchange Act reporting obligations.⁹⁶ The reason for these exemptions was to encourage Canadian issuers to use the MJDS.⁹⁷ Because the proposed amendments would eliminate the 18 month and successor issuer prohibitions under Rule 12g3-2(b), they would remove as unnecessary the MJDS filer exceptions to those prohibitions.

When adopting the MJDS, the Commission also permitted a Canadian issuer that already had the Rule 12g3-2(b) exemption, but that subsequently acquired Exchange Act

⁹⁵ Release No. 33-6902 (June 21, 1991), 56 FR 30036 (July 1, 1991). The MJDS generally permits a qualified Canadian issuer to file with the Commission its Canadian registration statements and reports under cover of the MJDS forms.

⁹⁶ Exchange Act Rules 12g3-2(d)(1) and (2).

⁹⁷ Release No. 33-6879 (October 22, 1990), 55 FR 462881 (November 2, 1990), as adopted in Release No. 33-6902.

reporting obligations as a MJDS filer, for example, with regard to a class of debt securities, to retain the Rule 12g3-2(b) exemption for its equity securities. The Commission permitted that issuer to submit its non-U.S. disclosure documents simultaneously to fulfill its Exchange Act reporting obligations under the MJDS and its non-U.S. publication obligations under Rule 12g3-2(b). The Commission then amended Form 40-F⁹⁸ and Form 6-K⁹⁹ to require an issuer to disclose on the cover page that it was filing the form for that dual purpose.¹⁰⁰ Under the current rules, a Canadian issuer that checks the appropriate box on the cover of each filed Form 40-F and submitted Form 6-K is able to use those Exchange Act reports to maintain its Rule 12g3-2(b) exemption as well.

This dual use of MJDS Exchange Act reports was reasonable at the time that the Commission adopted the MJDS since a Canadian issuer had to file or submit substantially the same Canadian disclosure documents for Exchange Act purposes as it did to maintain the Rule 12g3-2(b) exemption. However, this is no longer the case. Since the enactment of the Sarbanes-Oxley Act,¹⁰¹ and Commission rules adopted under that Act, Canadian issuers must respond to several U.S. disclosure requirements when preparing their Form 40-F annual reports.¹⁰²

⁹⁸ 17 CFR 249.240f. Form 40-F is the MJDS form used for the filing of an Exchange Act registration statement or annual report.

⁹⁹ Like non-MJDS foreign registrants, a MJDS filer uses Form 6-K to submit its interim home jurisdiction documents.

¹⁰⁰ Release Nos. 33-6902 and 33-6879.

¹⁰¹ Pub. L. 107-204, 116 Stat. 745 (2002).

¹⁰² See, for example, Form 40-F's certifications required concerning an issuer's disclosure controls and procedures and its internal controls over financial reporting, and the disclosure required concerning its audit committee financial expert, its code of ethics, and its off-balance

Accordingly, we are proposing to eliminate the current, but rarely used, ability of a Canadian company, which has Exchange Act reporting obligations solely from having filed an effective MJDS registration statement under the Securities Act, to claim simultaneously the Rule 12g3-2(b) exemption. Under the proposed rule amendments, a MJDS registrant would be eligible to claim the Rule 12g3-2(b) exemption on the same grounds as other foreign registrants. If it has recently exited the Exchange Act reporting regime under Rule 12h-6, 12g-4 or 12h-3 or Section 15(d), it could claim the exemption, assuming it satisfied the proposed rule amendments' other conditions. Otherwise, the filing of a MJDS registration statement under the Securities Act or Exchange Act would trigger Exchange Act reporting obligations and preclude that issuer from claiming the exemption.¹⁰³

Comment Solicited

We solicit comment on the proposed elimination of the Rule 12g3-2(b) exception for MJDS filers.

- Should we eliminate the ability of a MJDS issuer to claim the Rule 12g3-2(b) exemption while having Exchange Act reporting obligations, as proposed?

I. Proposed Elimination of the “Automated Inter-Dealer Quotation System” Prohibition and Related Grandfathering Provision

Under the existing rules, a foreign private issuer generally may not claim the Rule 12g3-2(b) exemption if it has securities or ADRs quoted in the United States on an

sheet arrangements.

¹⁰³ The proposed amendments would remove the instruction on the cover page of Form 40-F and Form 6-K requiring a registrant to indicate whether it also was furnishing the materials pursuant to Rule 12g3-2(b).

automated inter-dealer quotation system,¹⁰⁴ which, until recently, referred to the inter-dealer quotation system administered by the National Association of Securities Dealers Inc., and known as Nasdaq. The Commission adopted this prohibition in 1983 because of its belief that, since its establishment in 1971, Nasdaq had so matured into a trading system with substantial similarities to a national securities exchange that Nasdaq-traded companies should be required to meet the same disclosure standards as exchange-traded companies.¹⁰⁵ We are proposing to eliminate this prohibition because Nasdaq has since become a national securities exchange.¹⁰⁶

When the Commission adopted the automatic inter-dealer quotation system prohibition, it recognized that the general prohibition could cause some Nasdaq-quoted foreign companies that already had obtained the Rule 12g3-2(b) exemption to withdraw from Nasdaq. Therefore, the Commission excepted from that prohibition securities that:

- were quoted on Nasdaq on October 5, 1983 and have been continuously traded since;
- were exempt under Rule 12g3-2(b) on October 5, 1983 and have remained so since; and
- after January 2, 1986, were issued by a non-Canadian company.¹⁰⁷

¹⁰⁴ Exchange Act Rule 12g3-2(d)(3) (17 CFR 240.12g3-2(d)(3)).

¹⁰⁵ Release No. 34-20264 (October 6, 1983), 48 FR 46736 (October 14, 1983).

¹⁰⁶ Nasdaq ceased operations as an automated inter-dealer quotation system and became a national securities exchange effective August 1, 2006. See Release No. 34-53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

¹⁰⁷ Exchange Act Rule 12g3-2(d)(3). The Commission based the more limited grandfathering of Canadian securities on the more active U.S. market for those securities, which had led to abuses under Rule 12g3-2(b). Release No. 34-20264.

Since the adoption of this grandfathering provision, only nine of the grandfathered issuers remain listed on Nasdaq.¹⁰⁸ Pursuant to Commission order, Nasdaq is now a national securities exchange, and these issuers must register their securities under Exchange Act Section 12(b)¹⁰⁹ by August 1, 2009 if they wish to remain listed on Nasdaq.¹¹⁰ Given these developments, we no longer believe it is necessary to maintain the grandfathering provision for those Nasdaq-listed companies. Pursuant to the terms of the Commission order, as long as the nine grandfathered issuers continue to comply with the conditions of Rule 12g3-2(b), brokers and dealers may trade their securities in reliance on the Rule 12g3-2(b) exemption until the above deadline for Exchange Act registration.

Comment Solicited

We solicit comment on the proposed elimination of Rule 12g3-2(b)'s automatic inter-dealer quotation system prohibition and related grandfathering provision.

- Should we eliminate the automatic inter-dealer quotation system prohibition, as proposed?
- Are there alternative trading systems or other non-exchange trading platforms that raise similar concerns as those that caused the Commission to adopt the Nasdaq-focused automatic inter-dealer quotation system prohibition? If so,

¹⁰⁸ Letter from Edward S. Knight to Nancy M. Morris (July 31, 2006), attached to Release No. 34-54240 (July 31, 2006), 71 FR 45246 (August 8, 2006).

¹⁰⁹ 15 U.S.C. 781(b).

¹¹⁰ Release No. 34-54241 (July 31, 2006), 71 FR 45359 (August 8, 2006). The Commission granted the grandfathered issuers an additional three years to register their securities under Section 12(b) in order to avoid disruptions in the trading of their securities caused by their delisting from Nasdaq and to provide them with time to meet U.S. disclosure requirements.

should we prohibit an issuer whose securities are traded on those non-exchange systems from relying on the Rule 12g3-2(b) exemption?

- Should we eliminate the grandfathering provision to Rule 12g3-2(b)'s automatic inter-dealer quotation system prohibition, as proposed?

J. Proposed Revisions to Form F-6

We propose to make one revision to Form F-6, the registration statement used to register ADRs under the Securities Act. Currently a registrant of ADRs must state on Form F-6 that the issuer of the deposited securities against which the ADRs will be issued is either an Exchange Act reporting company or furnishes public reports and other documents to the Commission pursuant to Rule 12g3-2(b). The proposed revision would require a Form F-6 registrant to state that, if the issuer of deposited securities is not an Exchange Act reporting company, such issuer publishes information in English required to maintain the Rule 12g3-2(b) exemption on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. The registrant would also have to disclose the issuer's address of its Internet Web site or the electronic information delivery system in its primary trading market.¹¹¹

Currently an ADR facility may be either sponsored or unsponsored.¹¹² Under our current regulations, in order for a depositary bank to establish an ADR facility with respect to the shares of a specific foreign private issuer, the issuer must either be an

¹¹¹ Proposed amended Part I, Item 2 of Form F-6.

¹¹² With a sponsored facility, the issuer of the deposited securities is a party to the deposit agreement along with the depositary and is able to exercise some control regarding the terms and operations of the facility. With an unsponsored facility, the depositary solely controls the terms and operations of the facility.

Exchange Act reporting company or furnish public reports and other documents to the Commission pursuant to Rule 12g3-2(b). As a result, a foreign private issuer that does not seek to have its securities traded in the United States in the form of ADRs is able, by not formally claiming the Rule 12g3-2(b) exemption and submitting documents to the Commission, to restrict the ability of ADR depositary banks to establish an unsponsored ADR facility.

We are not proposing to revise our requirement under Form F-6 that the issuer of the deposited securities be either an Exchange Act reporting company or be exempt from registration under Rule 12g3-2(b). Because we are proposing to expand the availability of the Rule 12g3-2(b) exemption so that it will be available to all otherwise eligible foreign private issuers that post materials to their Web sites or make them available through an electronic information delivery system in their primary trading market, ADR depositaries will be able to establish unsponsored ADRs on this expanded group of foreign private issuers. ADR depositaries will also be able to establish sponsored ADR facilities with foreign private issuers that choose to have their shares represented by ADRs in the United States.

Comment Solicited

- Should we require a Form F-6 registrant to disclose on Form F-6 that, if the issuer of deposited securities is not an Exchange Act reporting company, such issuer electronically publishes the documents required to maintain the Rule 12g3-2(b) exemption, and to provide the address of the issuer's Internet Web site or electronic information delivery system in its primary trading market, as proposed?

- Should we clarify the proposed requirement that a registrant that already has an effective Form F-6 for either a sponsored or unsponsored facility has to disclose the address where the issuer of the underlying securities has electronically published its non-U.S. disclosure documents under Rule 12g3-2(b) when the registrant files its first post-effective amendment to the Form F-6 following the effective date of the proposed rule amendments, as intended?
- Should we delete the requirement under Form F-6 that the foreign private issuer whose securities are to be represented by an ADR be an Exchange Act reporting company or be exempt from registration under Rule 12g3-2(b)?
- As a condition to the registration of ADRs on Form F-6 relating to the shares of a foreign private issuer, should we require that the issuer give its consent to the depository? Should we require that the depository have notified the foreign private issuer of its intention to register ADRs and have either received an affirmative statement of no objection from the issuer or not received an affirmative statement of objection from the issuer?

K. Proposed Amendment of Exchange Act Rule 15c2-11

Exchange Act Rule 15c2-11¹¹³ contains requirements that are intended to deter broker-dealers from initiating or resuming quotations for covered over-the-counter securities that may facilitate a fraudulent or manipulative scheme. The Rule currently prohibits a broker-dealer from publishing (or submitting for publication) a quotation for a covered over-the-counter security in a quotation medium unless it has obtained and

¹¹³ 17 CFR 240.15c2-11.

reviewed current information about the issuer.¹¹⁴ One of the specified types of information required by Rule 15c2-11 is information furnished to the Commission pursuant to Rule 12g3-2(b). A broker-dealer must make this information reasonably available upon request to any person expressing an interest in a proposed transaction involving the security with the broker-dealer.¹¹⁵

We propose to amend Rule 15c2-11 to conform to the proposed rule amendments so that a broker-dealer must have available the information that, since the beginning of its last fiscal year, the issuer has published in order to maintain the Rule 12g3-2(b) exemption. Because some issuers currently still make paper submissions to maintain their Rule 12g3-2(b) exemption, we expect that, during the first year of the amended rules' effectiveness, a broker-dealer may have to resort to both paper submissions and electronically published materials in order to fulfill its Rule 15c2-11 obligations regarding a particular issuer. Eventually, however, a broker-dealer will only have to look to an issuer's electronically published materials for the purpose of Rule 15c2-11.

The proposed amended Rule 15c2-11 would still require a broker-dealer to make reasonably available upon request the information published pursuant to Rule 12g3-2(b). However, a broker-dealer would be able to satisfy this requirement by providing the requesting person with appropriate instructions regarding how to obtain the information electronically. This reflects our view that most investors will have ready access to the electronically published documents of Rule 12g3-2(b)-exempt issuers.

¹¹⁴ Rule 15c2-11(a) (17 CFR 240.15c2-11(a)). The broker-dealer must also have a reasonable basis for believing that the issuer information, when considered along with any supplemental information, is accurate and is from a reliable source.

¹¹⁵ Rule 15c2-11(a)(4).

Comment Solicited

We solicit comment on the proposed amendments to Rule 15c2-11.

- Should we require a broker-dealer to have available the information published by an issuer to maintain the Rule 12g3-2(b) exemption, as proposed?
- Should we continue to require a broker-dealer to make this information reasonably available upon request, as proposed? Should a broker-dealer be able to satisfy this requirement by providing appropriate instructions regarding how to obtain the information electronically, as intended?

L. Proposed Transition Periods**1. Regarding Section 12 Registration**

While we believe most issuers that currently have the Rule 12g3-2(b) exemption will continue to be able to claim the exemption upon the effectiveness of the proposed rule amendments, some may not be able to do so because their U.S. trading volume exceeded 20 percent of their worldwide trading volume on the last day of their most recently completed fiscal year. Those issuers would have to file a Section 12 registration statement if they are unable to meet all of the amended rule's conditions. In order to provide those issuers with sufficient time to prepare for and complete the Section 12 registration process, including obtaining required audited financial statements, we are proposing to require that those issuers become Exchange Act registrants no later than three years from the effective date of the proposed rule amendments.¹¹⁶

¹¹⁶ We adopted a similar three-year transition period to enable those grandfathered Nasdaq-traded foreign companies that were Rule 12g3-2(b)-exempt to register under Section 12(b) after Nasdaq became an exchange. See Release No. 34-54241 (July 31, 2006), 71 FR 45359 (August 8, 2006).

We believe this proposed three-year transition period is necessary for the benefit not just of issuers, but of broker-dealers and investors as well. If a currently exempt issuer is unable to claim the Rule 12g3-2(b) exemption upon the effectiveness of the proposed amendments because it cannot satisfy the trading volume threshold, but meets the amended rule's other conditions, it may continue to rely on the exemption during the transition period as long as it complies with the electronic publishing and other conditions, except for the trading volume condition, required to maintain the exemption. Accordingly, during this transition period, a broker-dealer would be able to rely on that issuer's electronic postings to meet its Rule 15c2-11 obligations to investors and to facilitate resales of that issuer's securities in Rule 144A transactions.

Comment Solicited

We solicit comment on the proposed three-year transition period.

- Should we adopt a three-year transition period for currently-exempt issuers that cannot claim the Rule 12g3-2(b) exemption on the effective date of the rule amendments, as proposed?
- Should we instead adopt a shorter transition period, such as a one or two-year transition period? Should we adopt a longer transition period, such as a four or five-year period? Should we not adopt any transition period?

2. Regarding Processing of Paper Submissions

Although the 2007 amendments permitted an issuer that received the Rule 12g3-2(b) exemption upon application to the Commission to publish electronically its non-U.S. disclosure documents required to maintain the exemption, many issuers still submit those documents in paper. The Commission continues to process those paper

documents and make them publicly available in the Public Reference Room at its Washington, D.C. headquarters.

We expect that, following the effectiveness of the proposed rule amendments, some Rule 12g3-2(b)-exempt companies will continue to submit their non-U.S. disclosure documents in paper to the Commission either because they are unaware of the amendments or lack electronic publishing capabilities. Because there may be some investors who currently do not have ready access to the Internet, we are proposing to continue to process paper Rule 12g3-2(b) submissions and make them publicly available in the Public Reference Room for three months following the effectiveness of the rule amendments. Thereafter, the Commission will no longer process paper Rule 12g3-2(b) submissions. An issuer that continues to make Rule 12g3-2(b) submissions in paper after this three-month period, and does not publish the submitted documents electronically as required, would no longer be able to claim the Rule 12g3-2(b) exemption.

We anticipate that three months would be sufficient time for all Rule 12g3-2(b)-exempt issuers to develop the capabilities to publish electronically their non-U.S. disclosure documents. We further anticipate that the proposed three-month transition period would be sufficient to permit investors and other interested persons to determine how and where to access those electronically published documents.

Comment Solicited

We solicit comment on the proposed three-month transition period for the processing of paper Rule 12g3-2(b) submissions.

- Is a transition period necessary to provide issuers with sufficient time to publish electronically their non-U.S. disclosure documents required under

Rule 12g3-2(b) or to enable investors to learn how to access those electronically published documents?

- If so, would the three-month transition period be sufficient? Should it be less than three months, such as one month, or two months? Should it be longer than three months, such as six months or one year?

M. Revisions to Form 15

As part of the 2007 amendments, we revised Exchange Act Rules 12g-4 and 12h-3, the older exit rules, by eliminating foreign private issuer provisions that were no longer needed because of the adoption of Rule 12h-6, and by renumbering the remaining provisions accordingly.¹¹⁷ However, we did not correspondingly revise the cover page of Form 15, which requires an issuer to indicate under which provision of Rule 12g-4 or 12h-3 it is terminating its Section 12(g) registration or suspending its Section 15(d) reporting obligations. Because Form 15 refers to the pre-March 2007 version of Rules 12g-4 and 12h-3, it has understandably engendered some confusion among issuers seeking to file the form. We are today adopting revisions to the cover page of Form 15 to reflect the current version of Rules 12g-4 and 12h-3.¹¹⁸

¹¹⁷ The March 2007 amendments eliminated Exchange Act Rules 12g-4(a)(2)(i) and (ii) (17 CFR 240.12g-4(a)(2)(i) and (ii)) and Rules 12h-3(b)(2)(i) and (ii) (17 CFR 240.12h-3(b)(2)(i) and (ii)), and renumbered Rule 12g-4(a)(1)(i) and (ii) as Rule 12g-4(a)(1) and (2) (17 CFR 240.12g-4(a)(1) and (2)).

¹¹⁸ As amended, Form 15's cover page refers to Exchange Act Rule 12g-4(a)(1) or (2) and Rule 12h-3 (b)(1)(i) or (ii), in addition to Rule 15d-6 (17 CFR 240.15d-6), which remains unchanged. We are adopting these revisions today without soliciting comment because they involve solely a technical matter that does not give rise to any substantive change in the Commission's rules.

General Request for Comments

We solicit comment on the proposed amendments to Rule 12g3-2(b), (c), (d), (e), and (f), Rule 15c-2(11), and Forms F-6, 40-F, 6-K, and 15F, as well as to all other aspects of the proposed rule amendments. Here and throughout the release, when we solicit comment, we are interested in hearing from all interested parties, including members and representatives of the investing public, representatives of foreign companies and foreign industry groups, representatives of broker-dealers, domestic issuers, and other participants in U.S. securities markets. We are further interested in learning from all parties what aspects of the proposed rule amendments they deem essential, what aspects they believe are preferred but not essential, and what aspects they believe should be modified.

III. PAPERWORK REDUCTION ACT ANALYSIS

This rule proposal contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").¹¹⁹ We are submitting our proposal to the Office of Management and Budget ("OMB") for review in accordance with the PRA.¹²⁰ The title of the affected collections of information are submissions under Exchange Act Rule 12g3-2 (OMB Control No. 3235-0119) and Securities Act Form F-6 (OMB Control No. 3235-0292). 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. Compliance with the proposed amendments to Rule 12g3-2 and Form F-6 will be mandatory.

¹¹⁹ 44 U.S.C. 3501 *et seq.*

¹²⁰ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Exchange Act Rule 12g3-2 is an exemptive rule that, under paragraph (b) of that rule, provides an exemption from Exchange Act section 12(g) registration for a foreign private issuer that, on an ongoing basis, either submits copies of its material non-U.S. disclosure documents to the Commission in paper or publishes those documents on its Internet Web site or through an electronic information delivery system in its primary trading market. We adopted paragraph (b) of Rule 12g3-2 in order to provide information for U.S. investors concerning foreign private issuers with limited securities trading in U.S. capital markets.

Securities Act Form F-6 is the form used to register American Depositary Receipts (“ADRs”), which are a special type of security issued by a U.S. bank, representing a specified amount of securities issued by a foreign company that are deposited with the bank. We adopted Form F-6 in order to provide investors with information concerning a foreign company’s ADRs, as disclosed in the deposit agreement, which must be attached as an exhibit to the Form F-6.

The hours and costs associated with making submissions under Exchange Act Rule 12g3-2(b) and preparing, filing and sending Form F-6 constitute reporting and cost burdens imposed by those collections of information. We based our estimates of the effects that the proposed rule amendments would have on those collections of information primarily on our review of the most recently completed PRA submissions for Rule 12g3-2(b) documents and Form F-6, on the particular requirements for those submissions and form, and on other information, for example, concerning relative U.S. trading volume for foreign private issuers whose equity securities trade in the U.S.

over-the-counter market.

The proposed amendments to Exchange Act Rule 12g3-2 would permit a foreign private issuer to claim the Rule 12g3-2(b) exemption, without having to submit paper copies of written materials to the Commission, if, among other requirements, its U.S. average daily trading volume has been no greater than 20 percent of its worldwide average trading volume for its most recently completed fiscal year. The proposed amendments would require a qualifying issuer to publish on an ongoing basis copies of its non-U.S. disclosure documents required by Rule 12g3-2(b) on its Internet Web site, or through an electronic information delivery system in its primary trading market, instead of permitting their submission in paper to the Commission.

The proposed amendments of Form F-6 would require a registrant to state that the issuer of the deposited securities, which is not an Exchange Act reporting company, publishes information in English required to maintain the Rule 12g3-2(b) exemption on the issuer's Internet Web site or through its primary trading market's electronic information delivery system. The proposed amendments would also require the registrant to disclose the address of the issuer's Internet Web site or electronic information delivery system. A registrant that already has an effective Form F-6 would have to disclose the address of where the issuer electronically publishes its non-U.S. disclosure documents under Rule 12g3-2(b) when the registrant first amends its Form F-6 following the effective date of the proposed rule amendments.

We have prepared the annual burden and cost estimates of the proposed rule amendments on Rule 12g3-2(b) submissions or publications and Form F-6 based on the following current estimates and assumptions:

- a foreign private issuer incurs 75% of the burden required to produce each Rule 12g3-2(b) submission or publication, excluding the initial application for the Rule 12g3-2(b) exemption and English translation work, and 25% of the burden required to perform work for the initial application and English translation for the Rule 12g3-2(b) submissions or publications;
- outside firms, including legal counsel, accountants and other advisors satisfy 25% of the burden required to produce each Rule 12g3-2(b) submission or publication, not including the initial application for the Rule 12g3-2(b) exemption and English translation work, at an average cost of \$400 per hour, 75% of the burden required to produce the initial application at an average cost of \$400 per hour, and 75% of the burden resulting from English translation work at an average cost of \$125 per hour;
- English translation work constitutes on average 25% of the total work required for the Rule 12g3-2(b) submissions;
- a registrant satisfies 25% of the burden required to produce each Form F-6; and
- outside firms, including legal counsel, accountants and other advisors, satisfy 75% of the burden required to produce each Form F-6 at an average cost of \$400 per hour.

A. Rule 12g3-2(b) Submissions or Publications

We estimate that, under current Rule 12g3-2(b), on an annual basis:

- 1,036 foreign private issuers claim the Rule 12g3-2(b) exemption;
- each issuer makes on average 12 submissions or publications, for a total of 12,432 submissions or publications under Rule 12g3-2(b);

- production of those Rule 12g3-2(b) submissions or publications requires a total of 49,728 burden hours, or an average of 4 burden hours per submission or publication (for all work performed by foreign private issuers and outside firms);
- of those total burden hours, 13,700 hours result from work incurred by 685 issuers to produce their initial Rule 12g3-2(b) applications;¹²¹
- foreign private issuers incur a total of 25,943 burden hours¹²² to produce the Rule 12g3-2(b) submissions or publications, or an average of 2.1 burden hours per submission or publication;¹²³ and
- outside firms perform service at a total cost of \$7,656,375¹²⁴ to produce the

¹²¹ We previously estimated that 685 issuers obtained the Rule 12g3-2(b) exemption before the adoption of Rule 12h-6, which eliminated the application process for issuers that deregister pursuant to that new rule. See Release No. 34-55540. All of the 685 issuers obtained the Rule 12g3-2(b) exemption after having submitted a letter application to the Commission. Based on a review of several Rule 12g3-2(b) applications, and an assessment of Rule 12g3-2(b)'s requirements and current practice, we estimate that it takes approximately 20 hours on average to complete a Rule 12g3-2(b) letter application. $685 \times 20 \text{ hrs.} = 13,700 \text{ hrs.}$

¹²² $49,728 \text{ hrs.} - 13,700 \text{ hrs.} = 36,028 \text{ hrs.}$ for work excluding application work. $36,028 \text{ hrs.} \times .25 = 9,007 \text{ hrs.}$ for English translation work. $36,028 \text{ hrs.} - 9,007 \text{ hrs.} = 27,021 \text{ hrs.} \times .75 = 20,266 \text{ hrs.}$ for non-English translation work. $9,007 \text{ hrs.} \times .25 = 2,252 \text{ hrs.}$ for English translation work. $13,700 \text{ hrs.} \times .25 = 3,425 \text{ hrs.}$ for application work. $20,266 \text{ hrs.} + 2,252 \text{ hrs.} + 3,425 \text{ hrs.} = 25,943 \text{ hrs.}$ for total work performed by foreign private issuers. $25,943 \text{ hrs.} / 12,432 = 2.1 \text{ hrs}$ per submission or publication.

¹²³ The last OMB submission for Rule 12g3-2(b) reported 31,080 burden hours for foreign private issuers. Our current estimate of 25,943 burden hours is due to our assessment of the average annual burden hours required to produce written applications under Rule 12g3-2(b), most of which are incurred by outside firms. We are treating the decrease in hours as an adjustment to the previous PRA burden estimate for Rule 12g3-2(b).

¹²⁴ $27,021 \text{ hrs.} \times .25 = 6,755 \text{ hrs.} \times \$400/\text{hr.} = \$2,702,000$ for non-English translation work. $9,007 \text{ hrs.} \times .75 = 6,755 \text{ hrs.} \times \$125/\text{hr.} = \$844,375$ for English translation work. $13,700 \text{ hrs.} \times .75 = 10,275 \text{ hrs.} \times \$400/\text{hr.} = \$4,110,000$ for application work. $\$2,702,000 + \$844,375 + \$4,110,000 = \$7,656,375$ for total work performed by outside firms.

Rule 12g3-2(b) submissions or publications.¹²⁵

We estimate that, on an annual basis, approximately 150 additional foreign private issuers could claim the Rule 12g3-2(b) exemption as a result of the proposed amendments to Rule 12g3-2. This increase in the number of Rule 12g3-2(b) exempt issuers would cause:

- the number of issuers claiming the Rule 12g3-2(b) exemption to total 1,186;
- the number of Rule 12g3-2(b) publications to total 14,232;¹²⁶
- the number of burden hours required to produce these Rule 12g3-2(b) publications to total 53,928;¹²⁷
- the number of burden hours incurred by foreign private issuers to produce the Rule 12g3-2(b) publications to total 33,706 hours, or 2.4 burden hours per publication;¹²⁸ and
- outside firms perform services at a total cost of \$5,308,800 to produce the

¹²⁵ The last OMB submission for Rule 12g3-2(b) reported \$4,895,100 in total costs for outside firms. Our current estimate of \$7,656,375 is due to the previously noted assessment of the average annual burden hours required to produce written applications under Rule 12g3-2(b). We are treating the increase in costs as an adjustment to the previous PRA cost estimate for Rule 12g3-2(b).

¹²⁶ $1,186 \times 12 \text{ hrs.} = 14,232.$

¹²⁷ $14,232 \text{ hrs.} \times 4 = 56,928 \text{ hrs.}$ $150 \times 20 \text{ hrs.} = 3,000 \text{ hrs.}$ saved by the elimination of the written application requirement. $56,928 \text{ hrs.} - 3,000 \text{ hrs.} = 53,928 \text{ hrs.}$

¹²⁸ $53,928 \text{ hrs.} \times .25 = 13,482 \text{ hrs.}$ for English translation work. $53,928 \text{ hrs.} - 13,482 \text{ hrs.} = 40,446 \text{ hrs.}$; $40,446 \text{ hrs.} \times .75 = 30,335 \text{ hrs.}$ for non-English translation work; $13,482 \text{ hrs.} \times .25 = 3,371 \text{ hrs.}$ for English translation work; $30,335 \text{ hrs.} + 3,371 \text{ hrs.} = 33,706 \text{ total hrs.}$ incurred by foreign private issuers. $33,706 \text{ hrs.} / 14,232 = 2.4 \text{ hrs. per publication.}$ Of the 33,706 hrs., + 7,763 hrs. result from the proposed rule change and -5,137 hrs. result from the previously noted program adjustment. $7,763 \text{ hrs.} - 5,137 \text{ hrs.} = \text{a net increase of } 2,626 \text{ hrs.}$ from the previous PRA estimate for Rule 12g3-2(b).

Rule 12g3- 2(b) publications.¹²⁹

B. Form F-6

We currently estimate that, on an annual basis:

- 150 registrants file Form F-6;
- each registrant files one Form F-6, for a total of 150 Form F-6s;
- production of these Form F-6s requires 150 burden hours, or one burden hour per Form F-6 (for all work performed by registrants and outside firms);
- of those total hours, registrants incur 38 hours to produce the Form F-6s, or an average of .25 hours per Form F-6;¹³⁰ and
- outside firms perform services at a total cost of \$45,000 to produce the Form F-6s.¹³¹

We estimate that, on an annual basis, approximately 150 additional registrants could file Form F-6 as a result of the proposed rule amendments. We further estimate that, as a result of the proposed rule amendments, the burden required to produce each Form F-6 would increase by .5 hours. This increase in the number of Form F-6s and burden hours would cause:

- the number of Form F-6s filed to increase by 150 for a total of 300;

¹²⁹ 40,446 hrs. x .25 = 10,112 hrs. x \$400/hr. = \$4,044,800 for non-English translation work; 13,482 hrs. x .75 = 10,112 hrs. x \$125/hr. = \$1,264,000 for English translation work; \$4,044,800 + \$1,264,000 = \$5,308,800 for total costs incurred by outside firms. Of the total costs, - \$2,347,575 result from the proposed rule change and + \$2,761,275 result from the previously noted program adjustment. \$2,761,275 - \$2,347,575 = a net increase of \$413,700 from the previous PRA estimate for Rule 12g3-2(b).

¹³⁰ 150 hrs. x .25 = 38 hrs.

¹³¹ 150 hrs. x .75 x \$400/hr. = \$45,000.

- the total hours required to produce the Form F-6s to increase by 225 hours for a total of 375 hours, or 1.25 hours per Form F-6;¹³²
- the number of burden hours incurred by registrants to produce the Form F-6s to increase by 56 hours to 94 hours, or .33 hours per Form F-6;¹³³ and
- outside firms to perform services at a total cost of \$112,400 (an increase of \$67,400) to produce the Form F-6s.¹³⁴

IV. COST-BENEFIT ANALYSIS

A. Expected Benefits

The proposed rule amendments are designed to encourage more foreign companies with relatively limited U.S. market interest to claim the Rule 12g3-2(b) exemption, and thereby publish on the Internet material documents in English, enhancing the ability of U.S. investors to trade equity securities of such companies in the U.S. over-the-counter market. The Rule 12g3-2(b) exemption permits a foreign company to have established an ADR facility under which its equity securities are traded as ADRs in the U.S. over-the-counter market for the convenience of U.S. investors, even if its U.S. investors exceed the Section 12(g) shareholder thresholds.¹³⁵ The Rule 12g3-2(b) exemption also permits a foreign company to trade its equity securities in the form of

¹³² For the additional 150 filers: $150 \times 1.5 \text{ hrs.} = 225 \text{ hrs.}$, $225 \text{ hrs.} + 150 \text{ hrs.} = 375 \text{ hrs.}$, $375 \text{ hrs.}/300 = 1.25 \text{ hrs. per Form F-6.}$

¹³³ $375 \text{ hrs.} \times .25 = 94 \text{ hrs.}$, $94 \text{ hrs.} - 38 \text{ hrs.} = 56 \text{ hrs.}$, $94 \text{ hrs.}/300 = .31 \text{ hr. per Form F-6.}$

¹³⁴ $375 \text{ hrs.} \times .75 = 281 \text{ hrs.} \times \$400/\text{hr.} = \$112,400.$ $\$112,400 - \$45,000 = \$67,400.$

¹³⁵ Use of an ADR facility makes it easier for a U.S. investor to collect dividends in U.S. dollars. Moreover, because the clearance and settlement process for ADRs generally is the same for securities of domestic companies that are traded in U.S. markets, a U.S. holder of an ADR is able to hold securities of a foreign company that trades, clears and settles within automated U.S. systems and within U.S. time periods.

ordinary shares through the U.S. over-the-counter market, makes it easier for broker-dealers to fulfill their obligations under Exchange Act Rule 15c2-11 to investors, and facilitates the resale of a foreign company's securities to qualified institutional buyers in the United States under Securities Act Rule 144A. By encouraging more foreign companies to claim the Rule 12g3-2(b) exemption, the proposed rule amendments should benefit investors by enhancing their ability to invest in foreign securities in the United States over-the-counter market.

The proposed rule amendments would encourage more foreign companies to claim the Rule 12g3-2(b) exemption by reducing the costs of obtaining that exemption for foreign private issuers in two ways. First, the proposed amendments would enable an otherwise eligible issuer to claim the Rule 12g3-2(b) exemption, regardless of the number of its U.S. security holders, as long as the U.S. trading volume for its subject class of equity securities was no greater than ten percent of its worldwide trading volume for its most recently completed fiscal year. Currently Rule 12g3-2(b) requires an issuer to disclose the number of its U.S. security holders and the percentage of its outstanding securities held by them when applying for the Rule's exemption from Exchange Act registration.¹³⁶ Since it is typically more difficult for a foreign company to calculate the number of its U.S. holders than to determine its relative U.S. trading volume, the proposed rule amendments should make it easier for more foreign companies to determine whether they qualify for the exemption.

¹³⁶ An issuer must also currently recalculate the number of its U.S. security holders when applying for reinstatement of the Rule 12g3-2(b) exemption should it lose that exemption due to non-compliance with the Rule's ongoing home jurisdiction disclosure requirements.

Second, the proposed rule amendments would eliminate the current written application process that requires an issuer to submit in paper specified information concerning, for example, its non-U.S. disclosure requirements, along with paper copies of its non-U.S. disclosure documents published since the beginning of its last fiscal year. Since outside law firms typically perform most of the work required for the application, the proposed rule amendments should reduce Rule 12g3-2(b) costs for foreign companies and encourage more of them to claim the Rule 12g3-2(b) exemption.

The proposed rule amendments would further benefit investors by requiring any foreign company that claims the Rule 12g3-2(b) exemption to publish in English specified non-U.S. disclosure documents on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market. Currently an issuer that has obtained the Rule 12g3-2(b) exemption upon application may submit its non-U.S. documents on an ongoing basis in paper to the Commission. By requiring the electronic publication in English of specified non-U.S. documents for any issuer claiming the Rule 12g3-2(b) exemption, the proposed amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents and make better informed decisions regarding whether to invest in that issuer's equity securities.

B. Expected Costs

Investors could incur costs from the proposed rule amendments to the extent that the proposed amendments encourage more foreign companies, which otherwise would be required to register their equity securities under the Exchange Act, to claim the Rule 12g3-2(b) exemption, where the information, enforcement remedies, and other

effects of registration are valuable to investors. We estimate that, on an annual basis, approximately 150 additional foreign private issuers could claim the Rule 12g3-2(b) exemption as a result of the proposed amendments to Rule 12g3-2. Some less technologically capable investors may also incur costs resulting from the search and retrieval of a foreign company's electronically published documents.

A foreign company would incur costs resulting from the amended rule's requirement to publish electronically specified non-U.S. disclosure documents in English to the extent that it is not already required to, or does not already, do so pursuant to any applicable law or rule. A foreign private issuer would also incur costs resulting from its required annual determination regarding whether it is still in compliance with the Rule 12g3-2(b) conditions.

If, because of those costs, the foreign company does not claim or maintain the Rule 12g3-2(b) exemption, U.S. investors interested in trading in the securities of that company would have to resort to trading in the company's non-U.S. primary trading market. Those U.S. investors could incur costs associated with finding and contracting with a broker-dealer who is able to trade in the foreign reporting company's primary trading market. U.S. investors could also face additional costs resulting from currency conversion and higher transaction costs trading the securities in a foreign market.

Comment Solicited

We solicit comment on the costs and benefits to U.S. and other investors, foreign private issuers, and others who may be affected by the proposed amendments to Exchange Act Rule 12g3-2 and the associated proposed rule 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 the proposed rule amendments. We also request data to quantify the costs and value of the benefits identified. We are particularly interested on receiving information concerning an issuer's expected costs of determining its relative U.S. trading volume under the proposed rule compared to its costs of having to determine the number of its U.S. holders and the percentage of shares held by them as required under the current rule.

V. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION ANALYSIS

A. Small Business Regulatory Enforcement Fairness Act of 1996 Considerations

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),¹³⁷ we solicit data to determine whether the rule proposals constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- an annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- 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 the potential impact of the proposed rule amendments on these factors. Commenters are requested to provide empirical data and other factual support for their views if possible.

¹³⁷ Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

B. Securities Act Section 2(b) and Exchange Act Section 3(f) and Section 23(a)(2) Considerations

When engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, Securities Act Section 2(b)¹³⁸ and Exchange Act Section 3(f)¹³⁹ require the Commission to consider whether the action will promote efficiency, competition and capital formation. Further, when adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act¹⁴⁰ requires us to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The rule proposals would amend the rules that determine when a foreign private issuer may claim the exemption from Exchange Act Section 12(g) registration under Exchange Act Rule 12g3-2(b). That exemption permits limited trading of an issuer's exempted equity securities in the over-the-counter market in the United States as long as the issuer submits its non-U.S. disclosure documents to the Commission, notwithstanding that the issuer exceeds the Section 12(g) registration thresholds. Many foreign private issuers rely on the Rule 12g3-2(b) exemption to have established ADR facilities, which make it easier for U.S. investors to trade in those issuers' equity securities. The Rule 12g3-2(b) exemption also makes it easier for broker-dealers to meet their Exchange

¹³⁸ 15 U.S.C. 77b(b).

¹³⁹ 15 U.S.C. 78c(f).

¹⁴⁰ 15 U.S.C. 78w(a)(2).

Act Rule 15c2-11 obligations to investors, and effect the resale of a foreign private issuer's securities to QIBs under Securities Act Rule 144A.

The proposed rule amendments would permit a foreign private issuer to claim the Rule 12g3-2(b) exemption without having to submit a paper application to the Commission, as is currently required, if, among other conditions, the U.S. average daily trading volume of its equity securities was no greater than 20 percent of its worldwide average daily trading volume for its most recently completed fiscal year. The proposed rule amendments would also require an issuer to publish in English specified non-U.S. disclosure documents on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market. Currently an issuer that has obtained the Rule 12g3-2(b) exemption by application may submit its non-U.S. disclosure documents in paper to the Commission.

By enabling a qualified foreign private issuer to claim the Rule 12g3-2(b) exemption automatically, and without regard to the number of its U.S. shareholders, as is currently the case, the proposed rule amendments should encourage more foreign private issuers to claim the Rule 12g3-2(b) exemption by lowering the costs of obtaining that exemption. Consequently, the proposed rule amendments should foster the trading of foreign companies' equity securities in the U.S. over-the-counter market, for example, by enabling the establishment of additional ADR facilities and making it easier for broker-dealers to meet their Rule 15c2-11 obligations to investors with respect to foreign securities. The enhanced ability of investors to trade foreign securities in the United States should help encourage competition between domestic and foreign firms for investors in the U.S. over-the-counter-market.

Moreover, by requiring the electronic publication in English of specified non-U.S. disclosure documents for any issuer claiming the Rule 12g3-2(b) exemption, the proposed amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents and make better informed decisions regarding whether to invest in that issuer's equity securities. Thus, the proposed amendments should foster increased efficiency in the trading of the issuer's securities.

We solicit comment on whether the proposed rules would impose a burden on competition or whether they would promote efficiency, competition and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

VI. REGULATORY FLEXIBILITY ACT CERTIFICATION

The Securities and Exchange Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed amendments to Exchange Act Rules 12g3-2 and 15c2-11, Exchange Act Forms 40-F, 6-K, 15, and 15F, and Securities Act Form F-6, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act. The reason for this certification is as follows.

The proposed rule amendments would permit a foreign private issuer to claim the exemption from registration under Exchange Act Rule 12g3-2(b) if, among other conditions, the U.S. average daily trading volume of its equity securities was no greater than 20 percent of its worldwide average daily trading volume for its most recently completed fiscal year. The proposed rule amendments would also require an issuer to

publish electronically its non-U.S. disclosure documents rather than submit them in paper to the Commission, as under the current rule.

Because the proposed amendments would only apply to foreign private issuers, they would directly affect only foreign companies and not domestic companies. Based on an analysis of the language and legislative history of the Regulatory Flexibility Act, Congress did not intend that the Act apply to foreign issuers. Accordingly, the entities directly affected by the proposed rule and form amendments will fall outside the scope of the Act. For this reason, proposed amended Exchange Act Rule 12g3-2 and the other proposed rule and form amendments should not have a significant economic impact on a substantial number of small entities.

We encourage written comments regarding this certification. We request in particular that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

VII. STATUTORY BASIS AND TEXT OF PROPOSED AMENDMENTS

We propose to amend Securities Act Form F-6, Exchange Act Rules 12g3-2 and 15c2-11, and Exchange Act Forms 40-F, 6-K, 15, and 15F under the authority in Sections 6, 7, 10 and 19 of the Securities Act¹⁴¹ and Sections 3(b), 12, 13, 23 and 36 of the Exchange Act.¹⁴²

TEXT OF PROPOSED RULE AMENDMENTS

List of Subjects

17 CFR Parts 239, 240 and 249

¹⁴¹ 15 U.S.C. 77f, 77g, 77h, 77j, and 77s.

¹⁴² 15 U.S.C. 78c, 78l, 78m, 78w, and 78mm.

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we propose to amend Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 239 - FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. The authority citation for Part 239 continues to read in part 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, 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.

* * * * *

2. Amend Form F-6 (referenced in §239.36) by revising Item 2 of Part I to read as follows:

Note: The text of Form F-6 does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

FORM F-6

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933
FOR DEPOSITARY SHARES EVIDENCED BY AMERICAN DEPOSITARY
RECEIPTS**

* * * * *

PART I - INFORMATION REQUIRED IN PROSPECTUS

* * * * *

Item 2. Available Information

Provide the information in either (a) or (b) below, whichever is applicable.

(a) State that the foreign issuer publishes information in English required to maintain the exemption from registration under Rule 12g3-2(b) of the Securities Exchange of 1934 on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. Then disclose the address of the foreign issuer's Internet Web site or the electronic information delivery system in its primary trading market.

(b) State that the foreign issuer is subject to the periodic reporting requirements of the Securities Exchange Act of 1934 and accordingly files reports with the Commission. Then disclose that these reports are available for inspection and copying through the Commission's EDGAR system or at public reference facilities maintained by the Commission in Washington, D.C.

* * * * *

**PART 240 - GENERAL RULES AND REGULATIONS, SECURITIES
EXCHANGE ACT OF 1934**

3. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

4. Amend §240.12g3-2 by revising paragraphs (b), (c), (d), and (e), and removing paragraph (f), to read as follows:

§240.12g3-2 Exemptions for American depositary receipts and certain foreign securities.

* * * * *

(b) A foreign private issuer shall be exempt from the requirement to register a class of equity securities under section 12(g) of the Act (15 U.S.C. 78l(g)) if:

(1) The issuer is not required to file or furnish reports under section 13(a) of the Act (15 U.S.C. 78m(a)) or section 15(d) of the Act (15 U.S.C. 78o(d));

(2) The issuer currently maintains a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities;

(3)(i) The average daily trading volume of the subject class of securities in the United States for the issuer's most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

(ii) The issuer has terminated its registration of a class of securities under section 12(g) of the Act, or terminated its obligation to file or furnish reports under section 15(d) of the Act, pursuant to §240.12h-6; and

(4)(i) The issuer has published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, since the first day of its most recently completed fiscal year, it:

(A) Has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;

(B) Has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and

(C) Has distributed or been required to distribute to its security holders.

(ii) The information required to be published electronically under paragraph (b)(4)(i) of this section is information that is material to an investment decision regarding the subject securities, such as information concerning:

(A) Results of operations or financial condition;

(B) Changes in business;

(C) Acquisitions or dispositions of assets;

(D) The issuance, redemption or acquisition of securities;

(E) Changes in management or control;

(F) The granting of options or the payment of other remuneration to directors or officers; and

(G) Transactions with directors, officers or principal security holders.

(iii) At a minimum, a foreign private issuer shall electronically publish English translations of the following documents required to be published under paragraph (b)(4)(i) of this section if in a foreign language:

(A) Its annual report, including or accompanied by annual financial statements;

(B) Interim reports that include financial statements;

(C) Press releases; and

(D) All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

Note 1 to Paragraph (b): For the purpose of paragraph (b)(2) of this section, primary trading market means that at least 55 percent of the trading in the subject class of securities took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. If a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of this paragraph, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities.

Note 2 to Paragraph (b): For the purpose of paragraph (b)(3) of this section, calculate United States trading volume and worldwide trading volume as under §240.12h-6.

Note 3 to Paragraph (b): Paragraph (b)(4)(i) of this section does not apply to an issuer when claiming the exemption under paragraph (b) in connection with or following the recent effectiveness of the termination of its registration of a class of securities under section 12(g) of the Act, or the termination of its obligation to file or furnish reports under section 15(d) of the Act.

(c)(1) In order to maintain the exemption under paragraph (b) of this section, a foreign private issuer shall publish, on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery

system generally available to the public in its primary trading market, the information specified in paragraph (b)(4) of this section.

(2) An issuer must electronically publish the information required by paragraph (c)(1) of this section promptly after the information has been made public.

(d) The exemption under paragraph (b) of this section shall remain in effect until:

(1) The issuer no longer satisfies the electronic publication condition of paragraph (c) of this section;

(2) The issuer no longer maintains a listing for the subject class of securities on one or more exchanges in its primary trading market;

(3) The average daily trading volume of the subject class of securities in the United States exceeds 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the issuer's most recently completed fiscal year, other than the year in which the issuer first claimed the exemption under paragraph (b) of this section; or

(4) The issuer registers a class of securities under section 12 of the Act or incurs reporting obligations under section 15(d) of the Act.

(e) Depositary shares registered on Form F-6 (§239.36 of this chapter), but not the underlying deposited securities, are exempt from section 12(g) of the Act under this paragraph.

5. Amend §240.15c2-11 by revising paragraph (a)(4) to read as follows:

§240.15c2-11 Initiation or resumption of quotations without specific information.

* * * * *

(a) * * *

(4) The information that, since the beginning of its last fiscal year, the issuer has published pursuant to §240.12g3-2(b) to maintain the exemption from registration under section 12(g) of the Act, and which the broker or dealer shall make reasonably available upon the request of a person expressing an interest in a proposed transaction in the issuer's security with such broker or dealer; or

* * * * *

PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934

6. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq., and 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

7. Amend Form 40-F (referenced in §249.240f), the cover page, by removing the second to last paragraph, which pertains to information furnished pursuant to Rule 12g3-2(b), including the check boxes.

Note: The text of Form 40-F does not and this amendment will not appear in the Code of Federal Regulations.

8. Amend Form 6-K (referenced in §249.306), the cover page, by removing the two paragraphs, which pertain to information furnished pursuant to Rule 12g3-2(b), following the second Note, including the check boxes.

Note: The text of Form 6-K does not and this amendment will not appear in the Code of Federal Regulations.

9. Amend Form 15 (referenced in §249.323) by revising the check boxes on the cover page to read as follows:

Note: The text of Form 15 does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

FORM 15

**CERTIFICATION AND NOTICE OF TERMINATION OF REGISTRATION
UNDER SECTION 12(g) OF THE SECURITIES EXCHANGE ACT OF 1934 OR
SUSPENSION OF DUTY TO FILE REPORTS UNDER SECTIONS 13 AND 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934.**

* * * * *

- | | |
|----------------------|--------------------------|
| Rule 12g-4(a)(1) | <input type="checkbox"/> |
| Rule 12g-4(a)(2) | <input type="checkbox"/> |
| Rule 12h-3(b)(1)(i) | <input type="checkbox"/> |
| Rule 12h-3(b)(1)(ii) | <input type="checkbox"/> |
| Rule 15d-6 | <input type="checkbox"/> |

* * * * *

10. Amend Form 15F (referenced in §249.324) by revising General Instruction E and Item 9 of Part II to read as follows:

Note: The text of Form 15F does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549
FORM 15F**

**CERTIFICATION OF A FOREIGN PRIVATE ISSUER'S TERMINATION OF
REGISTRATION OF A CLASS OF SECURITIES UNDER SECTION 12(g) OF
THE SECURITIES EXCHANGE ACT OF 1934 OR ITS TERMINATION OF
THE DUTY TO FILE REPORTS UNDER SECTION 13(a) OR SECTION 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934**

* * * * *

GENERAL INSTRUCTIONS

* * * * *

E. Rule 12g3-2(b) Exemption

Regardless of the particular Rule 12h-6 provision under which it is proceeding, a foreign private issuer that has filed a Form 15F regarding a class of equity securities shall receive the exemption under Rule 12g3-2(b) (17 CFR 240.12g3-2(b)) for the subject class of equity securities immediately upon the effective date of its termination of registration and reporting under Rule 12h-6. Refer to Rule 12g3-2(c) and (d) (17 CFR 240.12g3-2(c) and (d)) for the conditions that a foreign private issuer must meet in order to maintain the Rule 12g3-2(b) exemption following its termination of Exchange Act registration and reporting.

* * * * *

PART II

Item 9. Rule 12g3-2(b) Exemption

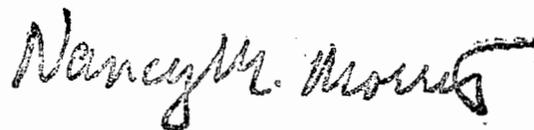
Disclose the address of your Internet Web site or of the electronic information delivery system in your primary trading market on which you have published and will publish the information required under Rule 12g3-2(b)(4) (17 CFR 240.12g3-2(b)(4)) and Rule 12g3-2(c) to maintain the exemption under Rule 12g3-2(b).

Instruction to Item 9.

Refer to Rule 12g3-2(b)(4)(iii) (17 CFR 240.12g3-2(b)(4)(iii)) for instructions regarding providing English translations of documents required to maintain the Rule 12g3-2(b) exemption.

* * * * *

By the Commission.



Nancy M. Morris
Secretary

Dated: February 19, 2008

TAIN

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 22, 2008

In the Matter of

TelcoBlue, Inc.,

File No. 500-1

ORDER OF SUSPENSION
OF TRADING

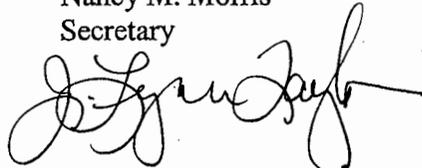
It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of **TelcoBlue, Inc.** ("TelcoBlue") because TelcoBlue has failed to file its last six required periodic reports.

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 above-listed company is suspended for the period from 9:30 a.m. EST on February 22, 2008 through 11:59 p.m. EST on March 6, 2008.

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 22, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12965

In the Matter of

TelcoBlue, Inc.,

Respondent.

ORDER INSTITUTING PROCEEDINGS
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND NOTICE OF HEARING

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:

Respondent

1. **TelcoBlue, Inc.** was incorporated in Delaware in 1997. Its headquarters are in Lexington, Kentucky. TelcoBlue's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is quoted in the Pink Sheets.

Delinquent Filings

2. TelcoBlue has failed to file its last six required periodic reports and is up to 18 months delinquent in its filings. Specifically, the company has failed to file its Form 10-KSB for the fiscal year ended December 31, 2006 (due April 2, 2007), and its Forms 10-QSB for the quarters ended September 30, 2007 (due November 14, 2007), June 30, 2007 (due August 14, 2007), March 31, 2007 (due May 15, 2007), September 30, 2006 (due November 14, 2006), and June 30, 2006 (due August 14, 2006). Further, five of TelcoBlue's prior ten periodic reports were filed late. Finally, in June 2004, TelcoBlue changed the end of its fiscal year from September 30 to December 31, but failed in its Form 10-KSB for the fiscal year ended December 31, 2004 to include audited financial statements for the transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year. A chart detailing TelcoBlue's recent filing history is attached as an Appendix.

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Violations

3. As a result of the foregoing, TelcoBlue has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1, 13a-10, and 13a-13 thereunder while its common stock was registered with the Commission, which require issuers with classes of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), Rule 13a-10 requires issuers who have changed their fiscal year to file audited financial statements for the transition period, and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

III.

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

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford 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 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 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].

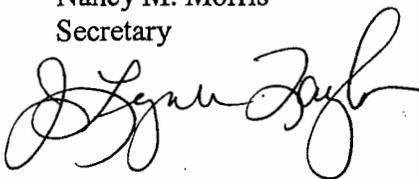
This Order shall be served forthwith upon Respondent personally, or by certified, registered, or express mail, or any other means of verifiable delivery.

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

A handwritten signature in cursive script, appearing to read "J. Lynn Taylor".

Attachment

By: J. Lynn Taylor
Assistant Secretary

Appendix

Chart of Delinquent Filings *TelcoBlue, Inc.*

Form	Period Ended	Due Date	Date Received	Months Delinquent (Rounded Up)
10-QSB	9/30/2007	11/14/2007	Not Received	3
10-QSB	6/30/2007	8/14/2007	Not Received	6
10-QSB	3/31/2007	5/15/2007	Not Received	9
10-KSB	12/31/2006	4/2/2007	Not Received	10
10-QSB	9/30/2006	11/14/2006	Not Received	15
10-QSB	6/30/2006	8/14/2006	Not Received	18
10-QSB	3/31/2006	5/15/2006	5/16/2006	0
10-KSB	12/31/2005	3/31/2006	1/17/2007	10
10-QSB	9/30/2005	11/14/2005	12/20/2005	1
10-QSB	6/30/2005	8/15/2005	8/15/2005	0
10-QSB	3/31/2005	5/16/2005	6/10/2005	1
10-KSB	12/31/2004	3/31/2005	6/9/2005	2
10-QSB ¹	9/30/2004	11/15/2004	11/22/2004	0
10-QSB	6/30/2004	8/16/2004	8/23/2004	0
10-QSB	3/31/2004	5/17/2004	6/25/2004	1
10-QSB	12/31/2003	2/17/2004	2/23/2004	0

¹ In June 2004, TelcoBlue changed the end of its fiscal year from September 30 to December 31.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 22, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12966

In the Matter of

EXECUTIVE REGISTRAR &
TRANSFER, INC. and JOHN
J. DONNELLY,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 17A(c)(3),
17A(c)(4), AND 21C OF THE SECURITIES
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 17A(c)(3) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Respondent Executive Registrar & Transfer, Inc. ("Executive") and that public administrative proceedings be, and hereby are, instituted pursuant to Section 17A(c)(4) of the Exchange Act against Respondent John J. Donnelly ("Donnelly") (collectively with Executive, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. **RESPONDENTS**

1. **Executive Registrar & Transfer, Inc.** is a Colorado corporation with its principal place of business in Englewood, Colorado. Executive has been registered with the Commission as a transfer agent since March 22, 1982, pursuant to Section 17A(c)(2) of the Exchange Act. Executive is wholly-owned by Donnelly.

2. **John J. (a/k/a Jack) Donnelly**, a 73 year-old resident of Highlands Ranch, Colorado, has been president of Executive and United Stock Transfer, Inc. ("United") at all times relevant to these proceedings. In 2001 the Commission, by consent, authorized the issuance of an administrative and cease-and-desist order against Donnelly based on his aiding and abetting and

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causing of violations of Exchange Act provisions pertaining to transfer agents by United. See In the Matter of United Stock Transfer, Inc. and John J. Donnelly, File No. 3-10378 (Securities Exchange Act Rel. No. 44380, June 1, 2001) (the "June 2001 C&D Order").

B. RELATED PARTY

United Stock Transfer, Inc. was a registered transfer agent owned by Donnelly that was merged into Executive in the Fall of 2003. United subsequently withdrew its registration as a transfer agent and dissolved. United was a subject of the June 2001 C&D Order.

C. UNITED'S, EXECUTIVE'S, AND DONNELLY'S FAILURE TO COMPLY WITH EXCHANGE ACT PROVISIONS CONCERNING TRANSFER AGENTS AND VIOLATIONS OF PRIOR COMMISSION ORDER

1. At all times relevant to these proceedings, Donnelly was president of United and Executive and the individual responsible for United's and Executive's compliance with the Exchange Act provisions applicable to them.

2. Following the issuance of the June 2001 C&D Order, United and Executive accumulated numerous separate violations of the transfer agent rules and repeatedly violated several of these rules. Many of these violations also constitute violations of the June 2001 C&D Order.

3. Specifically, the violations are as follows:

a. Exchange Act Section 17A(d)(1) and Rule 17Ad-2(e)(1) thereunder require registered transfer agents to give continuous and diligent attention to all non-routine items presented for transfer and to turnaround such items as soon as possible. In May 2006, an issuer for which Executive was engaged as the transfer agent ("Issuer A") consummated a merger with another issuer ("Issuer B") whereby the shareholders of Issuer B were to receive restricted stock of Issuer A in exchange for their Issuer B shares (the "merger shares"). Six months later, in December 2006, Issuer A terminated Executive as its transfer agent. During Executive's engagement for Issuer A and up to the date of its termination, Executive, through Donnelly, failed to transfer a substantial number of the merger shares owed to Issuer B's shareholders, which did not satisfy the requirements of the Rule.

b. Exchange Act Section 17A(d)(1) and Exchange Act Rule 17Ad-13(a) require every registered transfer agent to file annually with the Commission a report prepared by an independent accountant concerning the transfer agent's system of internal accounting control and related procedures for the transfer of record ownership and the safeguarding of related securities and funds. Donnelly has failed to make this filing for Executive for the years 2004, 2005, and 2006.

c. If any of the information reported by a transfer agent on transfer agent registration Form TA-1 becomes inaccurate, misleading or complete, Exchange Act Section 17A(d)(1) and Exchange Act Rule 17Ac2-1(c) require the transfer agent to correct the information by filing an

amendment within sixty days following the date on which the information became inaccurate, misleading, or complete. Donnelly failed to timely file amendments to United's Form TA-1 to reflect the June 2001 C&D Order sanctioning United and Donnelly and a cease-and-desist order entered against United in 1999 by the Commission. Donnelly also failed to timely file amendments to Executive's Form TA-1 to reflect the June 2001 C&D Order. Donnelly further failed to timely file an amended Form TA-1 to reflect the affiliation between United and Executive after Executive was acquired by Donnelly in the Fall of 2003. Finally, Donnelly did not timely file an amended Form TA-1 to reflect the resignation of a director in February 2006.

d. Exchange Act Section 17A(d)(1) and Exchange Act Rule 17Ac2-2(a) require every transfer agent registered on December 31 to file a report covering the reporting period on Form TA-2 by March 31 following the end of the reporting period. Donnelly has failed to make this filing for Executive for the year ended December 31, 2006, as required. Donnelly also did not timely file Executive's Form TA-2 for the year ended December 31, 2005.

e. Exchange Act Section 17A(d)(1) and Exchange Act Rule 17Ad-10(a), (b), and (e) require every registered recordkeeping transfer agent to maintain and keep current an accurate master securityholder file, subsidiary files, and control book for each issue of securities. On or before November 2003, control books for three issuers maintained by Executive, through Donnelly, were out of balance with the master securityholder files and subsidiary files for such issuers.

f. Exchange Act Section 17A(d)(1) and Exchange Act Rule 17Ad-15(c) require every registered transfer agent to establish written standards and procedures for the acceptance of signature guarantees. On or before November 2003, Executive, through Donnelly, did not have a set of written standards and procedures for signature guarantees.

g. Exchange Act Section 17A(d)(1) and Exchange Act Rule 17Ad-16(a) require a registered transfer agent that ceases to perform transfer agent services to send written notice of such termination to the appropriate qualified registered securities depository on or before the later of ten calendar days prior to the effective date of termination or the date the transfer agent is notified of the effective date of such termination. On or before November 2003, Donnelly did not inform the appropriate registered securities depository that United had been terminated as the transfer agent for two issuers. In addition, Donnelly did not timely send written notice to the appropriate registered securities depository that Executive had been terminated as the transfer agent for an issuer in December 2006.

h. Exchange Act Section 17A(d)(1) and Exchange Act Rule 17Ad-17(c) require registered recordkeeping transfer agents to maintain written procedures which describe the transfer agent's methodology for complying with Rule 17Ad-17. On or before July 2002, United, through Donnelly, failed to establish an adequate procedure for searching for lost securities holders because there was no documentation of a procedure to conduct two database searches as required by Rule 17Ad-17(a)(1). On or before November 2003, Executive, through Donnelly, did not maintain the required written procedures under Rule 17Ad-17(c).

i. Exchange Act Sections 17(a)(3) and 17A(d)(1) and Exchange Act Rule 17Ad-6 require registered transfer agents to make and keep the business records specified in the Rule. On or before November 2003, United, through Donnelly, failed to maintain complete records of written requests sent to United regarding items and did not maintain complete records regarding terminations letters sent to United as required by Rule 17Ad-6(a)(6) and (8). Also, on or before November 2003, Executive, through Donnelly, failed to maintain complete records of written requests sent to Executive regarding items and did not maintain letters of appointment for several issues it handled as required by Rule 17Ad-6(a)(6) and (8).

j. Exchange Act Sections 17(a)(3) and 17A(d)(1) and Exchange Act Rule 17Ad-7 require registered transfer agents to follow specified record retention requirements. On or before July 2002, United, through Donnelly, failed to retain documentation of searches for lost securities holders under Exchange Act Rule 17Ad-17(c) or the results of the searches as required by Rule 17Ad-7(i). On or before November 2003, United, through Donnelly, failed to retain certain correspondence from issuers as required by Exchange Act Rule 17Ad-6(a)(6) and (8) in violation of Rule 17Ad-7(a) and (c). Similarly, on or before November 2003, Executive, through Donnelly, failed to retain certain correspondence from issuers as required by Exchange Act Rule 17Ad-6(a)(6) and (8) in violation of Rule 17Ad-7(a) and (c).

k. Exchange Act Section 17A(d)(1) and Exchange Act Rule 17Ad-19(b) require registered transfer agents involved in the handling, processing, or storage of securities certificates to establish and implement written procedures for the cancellation, storage, transportation, destruction, or other disposition of securities certificates. On or before May 2006, Executive, through Donnelly, failed to establish such written procedures insofar as the procedures did not provide that the physical transportation of cancelled certificates be made in a secure manner and that Executive maintain separately a record of the CUSIP number and certificate number of each certificate in transit.

l. Exchange Act Section 17(f)(2) and Exchange Act Rule 17f-2(a) require registered transfer agents to fingerprint employees and maintain those fingerprints. On or before November 2006, Donnelly failed to fingerprint three Executive employees as required.

D. VIOLATIONS

1. As a result of the conduct described above, United willfully violated Sections 17(a)(3) and 17A(d)(1) of the Exchange Act and Rules 17Ac2-1, 17Ad-6, 17Ad-7, 17Ad-16, and 17Ad-17 thereunder.

2. As a result of the conduct described above, Executive willfully violated Sections 17(a)(3), 17(f)(2), and 17A(d)(1) of the Exchange Act and Rules 17Ac2-1, 17Ac2-2, 17Ad-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15, 17Ad-16, 17Ad-17, 17Ad-19, and 17f-2 thereunder.

3. As a result of the conduct described above, Donnelly willfully aided and abetted United's and Executive's violations of Sections 17(a)(3), 17(f)(2), and 17A(d)(1) of the Exchange Act and Rules 17Ac2-1, 17Ac2-2, 17Ad-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15, 17Ad-16, 17Ad-17, 17Ad-19, and 17f-2 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

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

B. What, if any, remedial action is appropriate in the public interest against Executive pursuant to Section 17A(c)(3) of the Exchange Act including, but not limited to, civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Donnelly pursuant to Section 17A(c)(4) of the Exchange Act including, but not limited to, civil penalties pursuant to Section 21B of the Exchange Act;

D. Whether, pursuant to Section 21C of the Exchange Act, Executive should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 17(a)(3), 17(f)(2), and 17A(d)(1) of the Exchange Act and Rules 17Ac2-1, 17Ac2-2, 17Ad-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15, 17Ad-17, 17Ad-19, and 17f-2 thereunder.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order 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 FURTHER ORDERED that Respondents 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 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, 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 them 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.

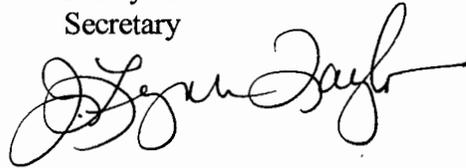
This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

A handwritten signature in black ink, appearing to read "J. Lynn Taylor", written in a cursive style.

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8899 / February 25, 2008

SECURITIES EXCHANGE ACT OF 1934
Release No. 57379 / February 25, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12969

In the Matter of

PAMELA J. THOMPSON,

Respondent

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 17A(c) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 17A(c) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Pamela J. Thompson ("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 her and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 17A(c) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

These proceedings arise out of Respondent's role in usurping the "corporate identity" of Bancorp International Group, Inc. ("BCIT"), a public shell company, and which resulted in the issuance and trading of fraudulently issued shares of BCIT.

Respondent

1. Respondent, 42 years old, is a resident of Phoenix, Arizona and a certified public accountant in good standing in Arizona. In 2005, Respondent was engaged as an outside chief financial officer and consultant for Carter Care, Inc., a privately-held nursing care company.

Other Relevant Entity

2. BCIT is a Nevada shell corporation based in London, England. The company was incorporated in 1995 as N.E.C. Properties, Inc. In November 1999, the company changed its name to March Indy International, Inc., and on August 17, 2001, again changed its name, to Bancorp International Group, Inc. BCIT's common stock is registered with the Commission under Section 12(g) of the Exchange Act and quoted on the Pink Sheets.

Background

3. Between February and April 2005, Thompson assisted in the attempt to use the BCIT shell in a reverse merger to take Carter Care public.

4. In April 2005, Thompson prepared and faxed false documents to the Nevada Secretary of State that purported to change BCIT's registered agent and corporate officers. This filing with Nevada designated a nominee as the sole officer and director of the corporation, thereby purporting to cause a change of control.

5. At the end of April 2005, Thompson's assistance culminated in the issuance of 41 certificates. The certificates represented over 249 million shares, including 20 million to Thompson. No registration statements were filed in connection with the issuance of these shares of BCIT stock. Throughout this period, Thompson was aware of information demonstrating that another individual was BCIT's actual president.

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

6. On May 24, 2005, Thompson sent a letter to the Depository Trust Corp. informing them that she was BCIT's new transfer agent. Thompson never registered as a transfer agent with the Commission.

7. On May 25, 2005, Thompson assisted in ordering the printing of additional new BCIT stock certificates. Thompson faxed the printer a legitimate BCIT stock certificate issued in 2001 and instructed the printer to use those signatures on the new BCIT certificates. The signatures on the certificate were those of its president and its then-secretary who left in early 2002. At the time of their ordering, Thompson had not received permission or direction from BCIT's president, the only person with relevant authority, to print new stock certificates.

8. During June and July 2005, Thompson received and sold two million shares of fraudulent BCIT stock, earning profits of \$7,632. No registration statements were filed with respect to these stock issuances.

9. Thompson acted as the transfer agent of BCIT between April and August 2005.

10. As a result of the conduct described above, Thompson committed violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act. In the offer or sale of securities, Section 17(a)(2) makes it unlawful "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;" and Section 17(a)(3) proscribes "any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." Violations of Section 17(a)(2) and 17(a)(3) may be established by a showing of negligence. Aaron v. SEC, 446 U.S. 680, 697 (1980); SEC v. Glt. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001).

11. Further, as a result of the conduct described above, Thompson committed violations of Sections 5(a) and 5(c) of the Securities Act, which require that issuances of securities be either validly registered or exempt from registration.

12. Finally, as a result of the conduct described above, Thompson willfully² violated Section 17A of the Exchange Act and Rule 17Ac2-1 thereunder, which require registration as a transfer agent.

² "Willfully" as used in this Order means intentionally committing the act which constitutes the violation. Cf. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8(2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

Civil Penalties

13. Respondent has submitted a sworn Statement of Financial Condition dated May 30, 2007, updated December 19, 2007, and other evidence, and has asserted her inability to pay a civil penalty.

Undertakings

14. Respondent has undertaken to, in connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, (i) appear and to be interviewed by the Commission staff at such times and places as the staff requests upon reasonable notice; (ii) will accept service by mail or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) appoints Respondent's undersigned attorney as agent to receive service of such notices and subpoenas; (iv) with respect to such notices and subpoenas, to waive the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Respondent's travel, lodging, and subsistence expenses at the then-prevailing United States Government per diem rates; and consents to personal jurisdiction over Respondent in any United States District Court for purposes of enforcing any such subpoena.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act and Sections 17A(c) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent Thompson cease and desist from committing or causing any violations and any future violations of Sections 5(a), 5(c), 17(a)(2), and 17(a)(3) of the Securities Act and Section 17A of the Exchange Act and Rule 17Ac2-1 thereunder.

B. Respondent Thompson be, and hereby is barred from association with any transfer agent, with the right to reapply for association after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Respondent Thompson shall, within ten days of the entry of this Order, pay disgorgement of \$7,632 and prejudgment interest of \$830.82 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. 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 Pamela J. Thompson 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 Mary S. Brady, Division of Enforcement, Securities and Exchange Commission, Denver Regional Office, 1801 California Street, Suite 1500, Denver, CO 80202.

D. Based upon Respondent's sworn representations in her Statement of Financial Condition dated May 30, 2007, updated December 19, 2007, and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent.

E. The Division of Enforcement may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

F. Respondent shall comply with the undertakings enumerated in Section 14 above.

By the Commission.


Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57380 / February 26, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2791 / February 26, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12970

In the Matter of

DUANE HIGGINS, CPA,

Respondent.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted against Duane Higgins, CPA ("Respondent" or "Higgins") pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.¹

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, which are admitted, Respondent consents to the entry of this Order Instituting Public

¹ Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

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Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds² that:

A. SUMMARY

This Order concerns the conduct of Duane Higgins, an audit partner at Deloitte & Touche LLP ("D&T"), in connection with fiscal year 2000 and 2001 audits of the financial statements of Delphi Corporation ("Delphi"). On October 30, 2006, the Commission brought actions against Delphi and 13 individuals in connection with their role in widespread accounting violations at Delphi. Higgins, then an audit partner on the Delphi audits, engaged in improper professional conduct as detailed below.

B. RESPONDENT

Duane Higgins, 41, a resident of Clarkston, Michigan, has been an audit partner at D&T since 1999 and served as the second engagement partner for the fiscal year 1999-2002 audits of Delphi's financial statements. Higgins has been licensed as a CPA in the State of Ohio since 1992 and in the State of Michigan since 2000.

C. FACTS

1. Higgins' Review and Audit of the Sale and Repurchase of Precious Metals

In November of 2000, Delphi learned that Delphi's former parent company would not be acquiring Delphi's inventory of precious metals before year-end 2000, despite Delphi's understanding that it had a commitment to do so. Thereafter, on December 28, 2000, Delphi agreed to sell substantially all its precious metals inventory to a bank ("the Bank"). On the same day, Delphi entered into a forward purchase agreement to acquire metals of the same specifications in the same quantities from the Bank for delivery on January 29, 2001. The delivery in January was intended to coincide with Delphi's postponed transfer to its former parent company of Delphi's precious metals inventory. The price specified for Delphi's purchase of the metals in the forward agreement exceeded the sales price for the same quantities in the sales agreement by \$3.26 million. Under Generally Accepted Accounting Principles ("GAAP"), the transactions should have been accounted for together as a financing, but Delphi accounted for the sale and purchase separately. Delphi recognized the disposition of the metals inventory and a \$6 million gain on the sale in December 2000, as well as a "LIFO liquidation gain" of \$54 million included in fiscal year 2000 earnings. On January 29, 2001, Delphi repurchased the metals from the Bank as agreed. Delphi disclosed the last in, first out ("LIFO") gain as part of Delphi's yearly total LIFO gain of \$96 million. The transactions caused the financial statements to falsely portray more income,

² The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

greater operating cash flows and reduced inventories and contributed to results that Delphi, in its Form 10-K for 2000, attributed in part to "aggressive inventory management."

In November 2000, Delphi consulted Higgins about transactions that would allow Delphi to move the precious metals off Delphi's balance sheet before year end and then repurchase the same quantity of metals in early 2001 in time to sell them to Delphi's former parent company pursuant to a prior agreement. Higgins sought the advice of a D&T partner serving as a regional professional practice director, regarding three alternative forms of a hypothetical precious metals transaction, one of which contemplated executing an agreement to sell metals at current market prices, and make delivery of them, contemporaneous with an agreement to repurchase the metals at futures market prices. The other D&T partner concurred that this hypothetical structure could be accounted for as a sale followed by a separate purchase. Because the consultation was hypothetical, however, it did not include all of the facts of the transactions, as discussed below. Delphi arranged the sale of the metals to the Bank shortly before year-end along with a contemporaneous agreement according to which the Bank would sell the same quantities of the metals back to Delphi a month later. In the week before the agreements were executed, one or more drafts were shared with Higgins, and he furnished comments on the effects of one or more provisions on Delphi's accounting for the transactions.

The arrangement nominally transferred title to the metals to the Bank, but did not transfer the risks of ownership. Because Delphi was committed to purchase like metals 32 days after the sale to the Bank at a fixed, but slightly higher price, the Bank had no market risk and was assured a profit. Delphi was bailee and custodian of the metals, and, as such, agreed to indemnify the Bank for all risks of storing the metals. As a result, the Bank incurred risks no different than if it had only loaned Delphi an amount equal to the proceeds from the purported sale. In addition, the sale agreement included no fixed date for physical delivery of the metals. Although Higgins noted that the sale agreement gave the Bank the right to direct transfer of metals delivered by Delphi, Delphi had the right under the bailment agreement not to deliver the amount specified in the agreement, and, instead, pay cash equal to a fixed rate per troy ounce for the undelivered metals. Conversely, the Bank could satisfy its delivery obligation by furnishing a bill of sale for "quantities constitut[ing] all of such metals remaining in the custody of [Delphi] pursuant to the bailment provisions" in the sale agreement. The quantities of metals also well exceeded amounts that could be quickly traded at quoted prices. Some of the metals purported to be sold pursuant to the agreement were in the custody of Delphi's suppliers for their use in coating catalytic converters on Delphi's behalf. These suspect facts were not addressed sufficiently in the audit memo written by Higgins to document his concurrence with Delphi's accounting for the transactions.

In assessing these transactions, Higgins considered SFAS No. 49, "Accounting for Product Financing Arrangements," which addresses agreements where an entity sells a product to another entity and, in a related transaction, agrees to repurchase that product or a substantially identical product. SFAS No. 49 indicates that a sale and repurchase should not be accounted for as a financing unless, among other things, the amounts to be paid on the repurchase "will be adjusted, as necessary to cover substantially all fluctuations in costs incurred by the other entity in purchasing and holding the product (including interest)." Higgins believed separate treatment of the sale and repurchase by Delphi could be appropriate because the agreed forward purchase price

was a fixed amount per troy ounce, and therefore would not fluctuate to cover the Bank's costs. He did not take due note of an example in SFAS No. 49 that applies financing treatment to a sale and repurchase with fixed repurchase prices that were "adequate to cover all financing and holding costs of the other entity." Higgins did not recognize that no adjustment of the repurchase price would be necessary over the 32-day period that the Bank had title to the metals. The Bank had no holding costs, other than interest cost and the fixed bailment fee it paid Delphi to retain custody of the metals. The Bank's assured margin on the transaction of \$3.26 million equated to interest earned at an annualized rate of almost 20%, well in excess of any interest cost the Bank would reasonably incur to purchase and hold the metals.

In addition, Higgins' review of a pricing analysis prepared by Delphi, which falsely justified the prices as being appropriately discounted from market, was deficient. Higgins believed that he was sufficiently competent to evaluate the overall reasonableness of the pricing model developed by Delphi without consulting with capital markets experts at D&T. Delphi's formula predicted that each metal would trade at a different discount, but the sale and repurchase agreements indicated an identical discount for each metal. Higgins accepted Delphi's contrived calculations as evidence that the transactions occurred at fair value. Higgins also did not question why the sale and repurchase prices for at least one of the metals fell outside the range that Delphi's investment bank advisers considered reasonably likely.

Moreover, Higgins failed to revise D&T's assessment of risk of material misstatement due to fraud in light of the above-described problematic aspects of the precious metals transaction. In May 2000, he had assessed the risk as "normal," but, by January 2001, Higgins should have realized that the risk of material misstatement was higher and conducted his audit work thereafter with more careful scrutiny in light of that risk.

For the above reasons, Higgins' review and testing of the precious metals transaction did not conform to Generally Accepted Auditing Standards ("GAAS").

2. Higgins' Response to New Information Concerning the Repurchase of Generator Cores and Batteries from the Consulting Company

In a December 27, 2000, transaction, Delphi purported to sell \$70 million of bulk inventories consisting of substantially all of Delphi's inventories of generator cores and finished automotive batteries to a company that was primarily engaged in providing consulting assistance to troubled automotive industry suppliers and automotive companies engaged in turnaround efforts (the "Consulting Company"). The written agreement between Delphi and the Consulting Company expressly stated that it constituted the entire agreement, and that any oral discussions in connection with the agreement were not enforceable. The written agreement contained no commitment to repurchase the cores or batteries. Nevertheless, pursuant to an oral side agreement made at the time of the original sale and not revealed to D&T or Higgins, Delphi purchased the identical inventory of cores and batteries back from the Consulting Company on January 5, 2001, at its original price, plus a transaction fee. Because Delphi committed to repurchase the cores and batteries at a price that covered the Consulting Company's costs and paid it a fee, GAAP required the arrangement to be accounted for as a product financing under SFAS No. 49, but Delphi

improperly accounted for the transactions as a separate sale and purchase. Delphi did not recognize any revenue or direct profit on the sale, but nevertheless recognized \$27 million in LIFO inventory liquidation gains, which were included by Delphi as part of its year-end disclosure of \$96 million in LIFO gains.

In connection with D&T's annual audit of Delphi's financial statements, Higgins reviewed the Consulting Company sales agreement and concluded that its terms were not abnormal and that Delphi had no obligation to repurchase the inventory, either written or oral (per Delphi representations).

Later, however, likely in the course of D&T's review of Delphi's first quarter 2001 financial statements, in April or May 2001, Higgins became aware that at least a significant portion of the generator cores sold in the final days of 2000 had been repurchased during the first quarter. As part of his quarterly review, the lead D&T engagement partner asked senior members of Delphi's management why a repurchase had occurred, and was told that Delphi had changed its view as to its need for possession of the cores in light of its plans regarding the sale of the generator business. Delphi management also orally reaffirmed to the lead D&T engagement partner that there had been no prior repurchase commitment to the Consulting Company. The lead D&T engagement partner did not document his consideration of this issue, and performed no additional procedures. Higgins relied on the lead D&T engagement partner's inquiry of Delphi management concerning the matter.

The response of Higgins to the discovery of inventory repurchased in the first quarter so soon after the year-end bulk sale, particularly in the face of a prior management representation that there was no obligation to repurchase the inventory, was inadequate. It indicated insufficient concern about facts that could have contradicted important management representations or otherwise indicated the possible presence of fraud. Higgins recalls knowing that "some" inventory was repurchased at some time in the first quarter, but had no recollection that the sale or repurchase also involved batteries. Higgins had a duty in those circumstances to learn more about the unexpected repurchase so that the inquiries of management could be sufficiently probative, but he did not seek out additional facts. D&T's work papers showed that the repurchase comprised all, or substantially all, of the original bulk sale of both generator cores and batteries. The invoice for the repurchase, which D&T neither requested nor received, showed that it occurred nine days after the sale. The invoice price, compared to the original sale price, showed that the purported value of the inventory increased over those nine days (representing the fee to the Consulting Company). In addition, Delphi's records reveal that Delphi itself had provided the cash with which the Consulting Company purchased the inventories. In light of facts which were known to him, GAAS required Higgins to make additional inquiries or conduct additional procedures.

D. VIOLATIONS

Rule 102(e)(1)(ii) provides that the Commission may temporarily or permanently deny an accountant the privilege of appearing or practicing before it, if it finds, after notice and opportunity for hearing, that the accountant engaged in "improper professional conduct." Such improper professional conduct includes, as applicable here, negligent conduct, defined as "repeated instances

of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.” Rule 102(e)(1)(iv)(A)-(B). Higgins failed (i) to obtain sufficient competent evidential matter to afford a reasonable basis for the opinion rendered, Auditing Standards §AU 326, (ii) to exercise due professional care in the planning and performance of the audit, Auditing Standards § AU 320, and (iii) in performing the audit to identify material departures from GAAP in the financial statements, Auditing Standards § AU 410. As a result of the actions detailed above, for Delphi’s fiscal year 2000 and 2001, Higgins engaged in improper professional conduct on the precious metals and batteries and cores transactions.

E. FINDINGS

Based on the foregoing, the Commission finds that Higgins engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission’s Rules of Practice.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Higgins’ Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Higgins is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After two years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company’s financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent’s work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board (“Board”) in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms

of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

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
Release No. 57381 / February 26, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2792 / February 26, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12971

In the Matter of

NICHOLAS DIFAZIO, CPA,

Respondent.

ORDER INSTITUTING PUBLIC
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted against Nicholas Difazio, CPA ("Respondent" or "Difazio") pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.¹

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, which are admitted, Respondent consents to the entry of this Order Instituting Public

¹ Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

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Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds² that:

A. SUMMARY

This Order concerns the conduct of Nicholas Difazio, an audit partner at Deloitte & Touche LLP ("D&T"), in connection with fiscal year 2000 and 2001 audits of the financial statements of Delphi Corporation ("Delphi"). On October 30, 2006, the Commission brought actions against Delphi and 13 individuals in connection with their role in widespread accounting violations at Delphi. Difazio, then the lead engagement partner on the Delphi audits, engaged in improper professional conduct, as detailed below.

B. RESPONDENT

Nicholas Difazio, 44, a resident of Bloomfield, Michigan, has been an audit partner at D&T since 1995 and served as lead client service partner on the Delphi engagement for the fiscal year 1999 through 2002 audits of Delphi's financial statements. In that role, Difazio was directly responsible for providing audit services, and oversaw the provision of tax, mergers and acquisitions and consulting services, to Delphi. He currently serves in D&T's New York office. Difazio has been licensed as a CPA in the State of Michigan since 1987 and in the State of New York since 2003.

C. FACTS

1. Difazio's Review and Audit of Delphi Warranty Costs Charged to Equity

In the second quarter of 2000, Delphi misclassified a \$112 million increase in its warranty reserves as a charge to stockholders' equity, rather than to current-period warranty expenses, as required by Generally Accepted Accounting Principles ("GAAP"). The misclassification was reflected in Delphi's second quarter 2000 Form 10-Q and in its fiscal year 2000 Form 10-K. Delphi's improper treatment of the warranty reserve allowed it to increase the reserve and avoid a material increase in expenses. Later, Delphi restated the accounting for this transaction and D&T signed off on the restatement.

Delphi was spun-off from its former parent effective January 1, 1999. By May 2000, Delphi's former parent company had asserted as much as \$800 million in warranty claims under Delphi's supply agreement with the former parent company. Many claims related to parts that Delphi had manufactured and the former parent company had incorporated into its products prior to Delphi's spin-off from the former parent company in 1999. Delphi disputed the former parent company's right to recover these warranty costs, but ultimately determined during the second

² The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

quarter of 2000 that it would likely offer the former parent company \$100 million to settle the claims. Delphi incorrectly accounted for the warranty claims using an accounting method afforded to certain post-employment benefit liabilities that received special treatment under the agreement governing the spin-off of Delphi from the former parent company. Payments from Delphi to the former parent company made within one year of the spin-off to offset the "true up" of those post-employment benefit liabilities were accounted for as a direct charge to Delphi's shareholders' equity, rather than as a charge to income, and certain other adjustments were similarly charged directly to equity because they were considered to be the resolution of open items in accordance with the original intent of the agreement between Delphi and its former parent. Delphi treated the warranty claims by the former parent company the same way: Delphi recorded an increase to its warranty reserve of approximately \$112 million, and improperly accounted for the accrual as a charge to stockholders' equity of \$69 million, which was \$112 million net of taxes.

Difazio should not have accepted Delphi's view that it could use these special accounting rules and not the accounting rules that apply broadly to contingencies and changes in estimates on this warranty matter. Although Difazio provided a memorandum regarding the transaction to the Concurring Review Partner with regard to this warranty matter, he did not consult with D&T's national office concerning Delphi's application of the special spin-off accounting treatment to the former parent company's warranty claims. Delphi's warranty liability did not qualify for such special treatment. Although the warranty claims related to parts produced by Delphi prior to the spin-off, and were referred to as such by the parties, they arose in the normal course of the customer-supplier relationship between Delphi and the former parent company. The spin-off agreement expressly provided that Delphi was liable for warranty defects, regardless of a part's date of manufacture, and did not include provisions comparable to the true-up mechanism for post-employment benefits. Under these circumstances, changes in the estimated warranty liability should have been accounted for through the income statement of the current period, in accord with Statement of Financial Accounting Standards ("SFAS") No. 5, "Accounting for Contingencies." Difazio did not correctly identify the appropriate accounting guidance for the warranty accrual and unreasonably accepted Delphi's method which avoided recognition of the warranty expense. For these reasons, Difazio's audit did not conform to Generally Accepted Auditing Standards ("GAAS").

2. Difazio's Review and Audit of the September 2000 Settlement Agreement

In the third quarter of 2000, Delphi paid the former parent company \$237 million to resolve its warranty claims. Delphi misclassified \$202 million of the \$237 million payment to the former parent company as relating to pension and other post-employment benefits rather than warranty expense. This enabled Delphi to avoid recognizing the warranty expense in the third quarter and instead to defer that charge over many years. By accounting for only \$35 million of the payment as settlement of warranty issues and the remaining \$202 million as a pension "actuarial loss" that would be amortized as a charge to earnings over the next decade or more, Delphi did not comply with GAAP.

By September 2000, Delphi determined to pay the former parent company to settle 27 identified warranty claims, and it drafted a settlement agreement according to which Delphi would

pay the former parent company \$237 million, which, unknown to Difazio, was the parties' estimate of the present value of Delphi's share of the former parent company's anticipated warranty outlays. Although the agreement negotiated orally between the parties covered only warranty claims, Delphi's management drafted and the former parent company signed a written settlement agreement, dated September 22, 2000, that mischaracterized the \$237 million settlement as resolving two issues – warranty claims and increased pension and other post-employment benefit costs due to changes in healthcare assumptions – instead of just warranty claims. Three weeks before the agreement was executed, Delphi management discussed with Difazio a request by its former parent for adjustments to offset certain healthcare and other cost trends. Prior to the consultation, a Delphi manager had mentioned to Difazio that the former parent was expected to raise such an issue. Difazio did not know, however, that the former parent company had never asserted a claim involving changes in healthcare assumptions. In fact, the former parent company believed the separation agreements governing Delphi's spin-off from the former parent company would not allow such a claim. Delphi management told Difazio that it intended to attribute \$202 million of the \$237 million to the release of true-up assumption claims.³ As support for its valuation of the other post-employment benefit claims, Delphi furnished Difazio with the deceptive written agreement and a September 6, 2000, letter from an actuarial consultant stating that \$202 million was a "rough estimate of the impact" of using certain updated and forecasted assumptions for healthcare claims and health care trend rates in the calculation of the true-up between Delphi and the former parent company.

When Delphi presented the executed agreement as simultaneously settling two issues, Difazio should have made greater inquiry into Delphi's representations supporting the allocation which was now necessary. Difazio should have known that the separation agreements provided that the 1998 assumptions should be used for the true-up calculations. Difazio did not request or receive any documentation of the former parent company's purported claim or any legal assessment of its merits, and instead relied on the representations of members of Delphi management whom he believed were knowledgeable about the negotiations. Difazio should have known that updating the assumptions would result in Delphi's paying that incremental cost for employees assigned to the former parent company, even though the spin-off agreement limited Delphi's responsibility to benefits earned by its own employees who were active at the spin-off date and had not retired during a brief period following the spin-off.

Difazio also placed undue reliance on Delphi's actuarial consultant in support of the reasonableness of the other post-employment benefit claim. Although he had oral discussions with the actuary in which the actuary explained the calculation and his understanding of the agreement, Difazio should have known that the actuary did not participate in any negotiations with the former parent company and therefore could only be relaying information received from Delphi, and that the actuary was not interpreting Delphi's agreements with the former parent company, but merely performing a requested calculation using inputs provided by Delphi. Moreover, D&T requested a separate letter from the actuary during its year-end audit to confirm the valuation in the settlement agreement and the approach used in determining the amount. In response, the actuary faxed a copy

³ True-up calculations were designed to restore Delphi to its initially agreed-upon capitalization as of January 1, 1999, after adjustments for the post-employment liabilities recorded for employees that returned to Delphi's former parent company or retired as former parent company employees during a window period.

of its original September 6 letter with a cover sheet noting: "Attached is a note we prepared in September regarding the impact of alternative actuarial assumptions on certain true-up amounts. Please see [Delphi] for further information regarding the September agreement." In accordance with Delphi's instruction, the actuary included the amount Delphi attributed to resolution of the post-employment assumptions within the deferred pension balances in his year-end valuation. Difazio unreasonably concluded that the actuary's sending a copy of the original September 6 letter and the year-end valuation was sufficient confirmation.

Additionally, in connection with the \$237 million payment, Difazio unreasonably did not object to Delphi's method of allocating the settlement, and Difazio did not gather evidence as to whether the \$202 million allocation reflected the fair value of the release in the settlement agreement. Further, Difazio unreasonably relied on Delphi's warranty cost experience as a wholly owned subsidiary as evidence supporting the residual attribution of \$35 million to the 27 settled warranty claims, despite his awareness that the parent company's claims against Delphi as an independent company could be different.

In addition, Difazio failed to apply adequate professional skepticism in light of indications that the former parent company could be accounting for a much greater portion of the \$237 million as payment for the former parent company's warranty claims against Delphi. First, Difazio did not sufficiently scrutinize a "clawback" provision in the settlement agreement under which, if the former parent company's warranty expense turned out to be less than anticipated, Delphi might be able to recover from the former parent company amounts in excess of the \$35 million it supposedly paid for warranty. Difazio also failed to recognize the implications of a side letter to the agreement which was necessary only because the former parent company and Delphi both understood that the former parent company would be treating the \$237 million as a warranty payment and that this would have certain tax implications relating to the spin-off.⁴ Finally, Difazio did not perform any additional procedures in response to a call from the lead D&T engagement partner on the audit of the former parent company that he received after the opinion on Delphi's fiscal year 2000 financial statements had been issued. The engagement partner told Difazio to make sure he had documentation for the accounting position taken by Delphi. In light of this call, Difazio should have made further inquiries prior to the subsequent reissuance of D&T's audit report for fiscal year 2000 in Delphi's May 2001 prospectus offering debt securities.

In sum, Difazio's performance on the Delphi audit was deficient because he did not challenge sufficiently Delphi's unreasonable approach to the allocation of the settlement amount or gather sufficient evidence supporting the allocation. Difazio mistakenly assured the Delphi audit committee regarding the completeness of D&T's review of the settlement agreement and that D&T

⁴ For liquidity reasons, Delphi could not pay \$237 million in addition to a previously agreed \$800 million for true-up. The former parent company was willing to defer part of the amount due from Delphi, but the tax-free status of the spin-off would have been jeopardized if the amount deferred related to warranty reimbursement rather than the true-up agreement. Therefore, the former parent company and Delphi executed a separate agreement in conjunction with the settlement agreement specifying that \$237 million of the \$800 million true-up payment would be deferred, and that Delphi would immediately pay the \$237 million due under the settlement agreement. Difazio should have recognized that this side agreement would not have been necessary had the former parent company also intended to account for the bulk of the settlement payment as relating to true-up.

believed it had obtained sufficient evidence to conclude that “the accounting is reasonable.” In reality, for the reasons given above, Difazio’s audit did not conform to GAAS.

3. Difazio’s Response to New Information Concerning the Repurchase of Generator Cores and Batteries from the Consulting Company

In a December 27, 2000 transaction, Delphi purported to sell \$70 million of bulk inventories consisting of substantially all of Delphi’s inventories of generator cores and finished automotive batteries to a company that was primarily engaged in providing consulting assistance to troubled automotive industry suppliers and automotive companies engaged in turnaround efforts (the “Consulting Company”). The written agreement between Delphi and the Consulting Company expressly stated that it constituted the entire agreement, and that any oral discussions in connection with the agreement were not enforceable. The written agreement contained no commitment to repurchase the cores or batteries. Nevertheless, pursuant to an oral side agreement made at the time of the original sale and not revealed to D&T or Difazio, Delphi purchased the identical inventory of cores and batteries back from the Consulting Company on January 5, 2001, at its original price, plus a transaction fee. Because Delphi committed to repurchase the cores and batteries at a price that covered the Consulting Company’s costs and paid it a fee, GAAP required the arrangement to be accounted for as a product financing under SFAS No. 49, but Delphi improperly accounted for the transactions as a separate sale and purchase. Delphi did not recognize any revenue or direct profit on the sale, but nevertheless recognized \$27 million in last in, first out (“LIFO”) inventory liquidation gains, which were included by Delphi as part of its year-end disclosure of \$96 million in LIFO gains that Delphi attributed in part to “aggressive inventory management.”

A D&T partner other than Difazio performed and documented the year-end audit procedures in connection with this transaction. However, Difazio was aware of the transaction and his notes prepared for January and February 2001 audit committee meetings describe his understanding that the sale of the generator cores was in anticipation of a sale of the generator business with which the inventory was associated.

Later, however, in the course of D&T’s review of Delphi’s first quarter 2001 financial statements, in April or May 2001, Difazio became aware that at least a significant portion of the generator cores sold in the final days of 2000 had been repurchased during the first quarter. As part of his quarterly review, Difazio asked senior members of Delphi’s management why a repurchase had occurred, and was told that Delphi had changed its view as to its need for possession of the cores in light of its plans regarding the sale of the generator business. Delphi management also orally reaffirmed to Difazio that there had been no prior repurchase commitment to the Consulting Company. Difazio accepted this explanation, based on the facts known to him, but did not document his consideration of this issue, and performed no additional procedures.

The response of Difazio to the discovery of inventory repurchased in the first quarter so soon after the year-end bulk sale, particularly in the face of a prior management representation that there was no obligation to repurchase the inventory, was inadequate. It indicated insufficient concern about facts that could have contradicted important management representations or otherwise indicated the possible presence of fraud. Difazio recalls knowing that “some” inventory

was repurchased at some time in the first quarter, but had no recollection that the sale or repurchase also involved batteries. Difazio had a duty in those circumstances to learn more about the unexpected repurchase so that the inquiries of management could be sufficiently probative, but he did not seek out additional facts. D&T's work papers showed that the repurchase comprised all, or substantially all, of the original bulk sale of both generator cores and batteries. The invoice for the repurchase, which D&T neither requested nor received, showed that it occurred nine days after the sale. The invoice price, compared to the original sale price, showed that the purported value of the inventory increased over those nine days (representing the fee to the Consulting Company). In addition, Delphi's records reveal that Delphi itself had provided the cash with which the Consulting Company purchased the inventories. In light of facts which were known to him, GAAS required Difazio to make additional inquiries or conduct additional procedures.

D. VIOLATIONS

Rule 102(e)(1)(ii) provides that the Commission may temporarily or permanently deny an accountant the privilege of appearing or practicing before it, if it finds, after notice and opportunity for hearing, that the accountant engaged in "improper professional conduct." Such improper professional conduct includes, as applicable here, negligent conduct, defined as "repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission." Rule 102(e)(1)(iv)(A)-(B). Difazio failed (i) to obtain sufficient competent evidential matter to afford a reasonable basis for the opinion rendered, Auditing Standards §AU 326, (ii) to exercise due professional care in the planning and performance of the audit, Auditing Standards § AU 230, and (iii) in performing the audit to identify material departures from GAAP in the financial statements, Auditing Standards § AU 410. In addition, he wrongly stated that the audit conformed to GAAS, Auditing Standards § AU 508. As a result of the actions detailed above, for Delphi's fiscal year 2000 and 2001, Difazio engaged in improper professional conduct on the second and third quarter 2000 warranty and batteries/cores transactions.

E. FINDINGS

Based on the foregoing, the Commission finds that Difazio engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Difazio is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After three (3) years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However,

if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-57407/February 29, 2008]

Order Making Fiscal 2008 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934

I. Background

Section 31 of the Securities Exchange Act of 1934 (“Exchange Act”) requires each national securities exchange and national securities association to pay transaction fees to the Commission.¹ Specifically, Section 31(b) requires each national securities exchange to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted on the exchange.² Section 31(c) requires each national securities association to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted by or through any member of the association other than on an exchange.³

Sections 31(j)(1) and (3) require the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates for fiscal year 2012 and beyond.⁴ Section 31(j)(2) requires the Commission, in certain circumstances, to make a mid-year adjustment to the fee rates in fiscal 2002 through fiscal 2011.⁵ The annual and mid-year adjustments are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section

¹ 15 U.S.C. 78ee.

² 15 U.S.C. 78ee(b).

³ 15 U.S.C. 78ee(c).

⁴ 15 U.S.C. 78ee(j)(1) and (j)(3).

⁵ 15 U.S.C. 78ee(j)(2).

31 equal to the “target offsetting collection amount” specified in Section 31(l)(1) for that fiscal year.⁶ For fiscal 2008, the target offsetting collection amount is \$892,000,000.⁷

II. Determination of the Need for a Mid-Year Adjustment in Fiscal 2008

Under Section 31(j)(2) of the Exchange Act, the Commission must make a mid-year adjustment to the fee rates under Sections 31(b) and (c) in fiscal year 2008 if it determines, based on the actual aggregate dollar volume of sales during the first five months of the fiscal year, that the baseline estimate (\$78,732,152,559,457) is reasonably likely to be 10% (or more) greater or less than the actual aggregate dollar volume of sales for fiscal 2008.⁸ To make this determination, the Commission must estimate the actual aggregate dollar volume of sales for fiscal 2008.

Based on data provided by the national securities exchanges and the national securities association that are subject to Section 31,⁹ the actual aggregate dollar volume of sales during the first four months of fiscal 2008 was \$27,185,458,106,162.¹⁰ Using these data and a methodology for estimating the aggregate dollar amount of sales for the remainder of fiscal 2008 (developed

⁶ 15 U.S.C. 78ee(l)(1).

⁷ Id.

⁸ The amount \$78,732,152,559,457 is the baseline estimate of the aggregate dollar amount of sales for fiscal year 2008 calculated by the Commission in its Order Making Fiscal 2008 Annual Adjustments to the Fee Rates Applicable Under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b) and 31(c) of the Securities Exchange Act of 1934, Rel. No. 33-8794 (April 30, 2007), 72 FR 25809 (May 7, 2007).

⁹ The Financial Industry Regulatory Authority (“FINRA”) and each exchange is required to file a monthly report on Form R31 containing dollar volume data on sales of securities subject to Section 31. The report is due on the 10th business day following the month for which the exchange or association provides dollar volume data.

¹⁰ Although Section 31(j)(2) indicates that the Commission should determine the actual aggregate dollar volume of sales for fiscal 2008 “based on the actual aggregate dollar volume of sales during the first 5 months of such fiscal year,” data are only available for the first four months of the fiscal year as of the date the Commission is required to issue this order, *i.e.*, March 1, 2008. Dollar volume data on sales of securities subject to Section 31 for February 2008 will not be available from the exchanges and FINRA for several weeks.

after consultation with the Congressional Budget Office and the OMB),¹¹ the Commission estimates that the aggregate dollar amount of sales for the remainder of fiscal 2008 to be \$71,539,094,586,685. Thus, the Commission estimates that the actual aggregate dollar volume of sales for all of fiscal 2008 will be \$98,724,552,692,847.

Because the baseline estimate of \$78,732,152,559,457 is more than 10% less than the \$98,724,552,692,847 estimated actual aggregate dollar volume of sales for fiscal 2008, Section 31(j)(2) of the Exchange Act requires the Commission to issue an order adjusting the fee rates under Sections 31(b) and (c).

III. Calculation of the Uniform Adjusted Rate

Section 31(j)(2) specifies the method for determining the mid-year adjustment for fiscal 2008. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a “uniform adjusted rate that, when applied to the revised estimate of the aggregate dollar amount of sales for the remainder of [fiscal 2008], is reasonably likely to produce aggregate fee collections under Section 31 (including fees collected during such 5-month period and assessments collected under [Section 31(d)]) that are equal to [\$892,000,000].”¹² In other words, the uniform adjusted rate is determined by subtracting fees collected prior to the effective date of the new rate and assessments collected under Section 31(d) during all of fiscal 2008 from \$892,000,000, which is the target offsetting collection amount for fiscal 2008. That difference is

¹¹ See Appendix A.

¹² 15 U.S.C. 78ee(j)(2). The term “fees collected” is not defined in Section 31. Because national securities exchanges and national securities associations are not required to pay the first installment of Section 31 fees for fiscal 2008 until March 15, the Commission will not “collect” any fees in the first five months of fiscal 2008. See 15 U.S.C. 78ee(e). However, the Commission believes that, for purposes of calculating the mid-year adjustment, Congress, by stating in Section 31(j)(2) that the “uniform adjusted rate . . . is reasonably likely to produce aggregate fee collections under Section 31 . . . that are equal to [\$892,000,000],” intended the Commission to include the fees that the Commission will collect based on transactions in the six months before the effective date of the mid-year adjustment.

then divided by the revised estimate of the aggregate dollar volume of sales for the remainder of the fiscal year following the effective date of the new rate.

The Commission estimates that it will collect \$581,546,346 in fees for the period prior to the effective date of the mid-year adjustment¹³ and \$32,475 in assessments on round turn transactions in security futures products during all of fiscal 2008. Using the methodology referenced in Part II above, the Commission estimates that the aggregate dollar volume of sales for the remainder of fiscal 2008 following the effective date of the new rate will be \$55,740,439,070,059. Based on these estimates, the uniform adjusted rate is \$5.60 per million of the aggregate dollar amount of sales of securities.¹⁴

The Commission recognizes that this fee rate is lower than the current fee rate of \$11.00 per million. The new fee rate is established by the statutory mid-year adjustment mechanism and is a direct consequence of more recent information on the dollar amount of sales of securities. The aggregate dollar amount of sales of securities subject to Section 31 fees is illustrated in Appendix A.

¹³ This calculation is based on applying a fee rate of \$15.30 per million to the aggregate dollar volume of sales of securities subject to Section 31 through January 24, 2008, and a rate of \$11.00 for the period from January 25, 2008 to March 31, 2008. Because the Commission's regular appropriation for fiscal year 2008 was not enacted prior to the end of fiscal year 2007, Exchange Act Section 31(k), the "Lapse of Appropriation" provision, required that the fee rate in use at the end of fiscal year 2007, \$15.30 per million, remain in effect until 30 days after the appropriation was enacted. See also Order Making Fiscal 2008 Annual Adjustments to the Fee Rates Applicable Under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b) and 31(c) of the Securities Exchange Act of 1934, Rel. No. 33-8794 (April 30, 2007), 72 FR 25809 (May 7, 2007). The Commission's regular appropriation for fiscal year 2008 was enacted on December 26, 2007, and the \$11.00 per million rate went into effect 30 days later, by operation of the statute. See Exchange Act Section 31(j)(4)(A)(ii).

¹⁴ The calculation is as follows: $(\$892,000,000 - \$581,546,346 - \$32,475) / \$55,740,439,070,059 = \$0.0000055690$. Round this result to the seventh decimal point, yielding a rate of \$5.60 per million.

IV. Effective Date of the Uniform Adjusted Rate

Section 31(j)(4)(B) of the Exchange Act provides that a mid-year adjustment shall take effect on April 1 of the fiscal year in which such rate applies. Therefore, the exchanges and the national securities association that are subject to Section 31 fees must pay fees under Sections 31(b) and (c) at the uniform adjusted rate of \$5.60 per million for sales of securities transacted on April 1, 2008, and thereafter until the annual adjustment for fiscal 2009 is effective.¹⁵

¹⁵ Section 31(j)(1) and Section 31(g) of the Exchange Act require the Commission to issue an order no later than April 30, 2008, adjusting the fee rates applicable under Sections 31(b) and (c) for fiscal 2009. These fee rates for fiscal 2009 will be effective on the later of October 1, 2008 or thirty days after the enactment of the Commission's regular appropriation for fiscal 2009.

V. Conclusion

Accordingly, pursuant to Section 31 of the Exchange Act,¹⁶

IT IS HEREBY ORDERED that each of the fee rates under Sections 31(b) and (c) of the Exchange Act shall be \$5.60 per \$1,000,000 of the aggregate dollar amount of sales of securities subject to these sections effective April 1, 2008.

By the Commission.

A handwritten signature in black ink, appearing to read "Nancy M. Morris", with a long, sweeping flourish extending to the right.

Nancy M. Morris
Secretary

¹⁶ 15 U.S.C. 78ee.

APPENDIX A

A. Baseline estimate of the aggregate dollar amount of sales.

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (January 1998 - January 2008). The data obtained from the exchanges and FINRA are presented in Table A. The monthly aggregate dollar amount of sales from all exchanges and FINRA is contained in column C.

Next, calculate the change in the natural logarithm of ADS from month-to-month. The average monthly change in the logarithm of ADS over the entire sample is 0.017 and the standard deviation 0.124. Assume the monthly percentage change in ADS follows a random walk. The expected monthly percentage growth rate of ADS is 2.5 percent.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for January 2008 (\$380,797,961,013) to forecast ADS for February 2008 (\$390,166,745,447 = \$380,797,961,013 x 1.025).¹⁷ Multiply by the number of trading days in February 2008 (20) to obtain a forecast of the total dollar volume for the month (\$7,803,334,908,936). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column G of Table A. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).
2. For each month t , calculate the change in ADS from the previous month as $\Delta_t = \log(\text{ADS}_t / \text{ADS}_{t-1})$, where $\log(x)$ denotes the natural logarithm of x .
3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, \dots, \Delta_{120}\}$. These are given by $\mu = 0.017$ and $\sigma = 0.124$, respectively.
4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t .
5. Under the assumption that Δ_t is normally distributed, the expected value of $\text{ADS}_t / \text{ADS}_{t-1}$ is given by $\exp(\mu + \sigma^2/2)$, or on average $\text{ADS}_t = 1.025 \times \text{ADS}_{t-1}$.
6. For February 2008, this gives a forecast ADS of $1.025 \times \$380,797,961,013 = \$390,166,745,447$. Multiply this figure by the 20 trading days in February 2008 to obtain a total dollar volume forecast of \$7,803,334,908,936.
7. For March 2008, multiply the February 2008 ADS forecast by 1.025 to obtain a forecast ADS of \$399,766,030,385. Multiply this figure by the 20 trading days in March 2008 to obtain a total dollar volume forecast of \$7,995,320,607,691.

¹⁷ The value 1.025 has been rounded. All computations are done with the unrounded value.

8. Repeat this procedure for subsequent months.

B. Using the forecasts from A to calculate the new fee rate.

1. Determine the aggregate dollar volume of sales between 10/1/07 and 1/24/08 to be \$25,283,975,749,096. Multiply this amount by the fee rate of \$15.3 per million dollars in sales during this period and get \$386,844,829 in actual fees collected during 10/1/07 and 1/24/08. Determine the actual and projected aggregate dollar volume of sales between 1/25/08 and 3/31/08 to be \$17,700,137,873,692. Multiply this amount by the fee rate of \$11.00 per million dollars in sales during this period and get an estimate of \$194,701,517 in actual and projected fees collected during 1/25/08 and 3/31/08.
2. Estimate the amount of assessments on security futures products collected during 10/1/07 and 9/30/08 to be \$32,475 by summing the amounts collected through January of \$8,747 with projections of a 2.5% monthly increase in subsequent months.
3. Determine the projected aggregate dollar volume of sales between 4/1/08 and 9/30/08 to be \$55,740,439,070,059.
4. The rate necessary to collect the target \$892,000,000 in fee revenues is then calculated as:
$$(\$892,000,000 - \$386,844,829 - \$194,701,517 - \$32,475) \div \$55,740,439,070,059 = 0.0000055690.$$
5. Round the result to the seventh decimal point, yielding a rate of 0.0000056 (or \$5.60 per million).

Table A. Estimation of baseline of the aggregate dollar amount of sales.
(Methodology developed in consultation with the Office of Management and Budget and the Congressional Budget Office.)

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/07 to 1/24/08 (\$Millions)	25,283,976
b. Baseline estimate of the aggregate dollar amount of sales, 1/25/08 to 3/31/08 (\$Millions)	17,700,138
c. Baseline estimate of the aggregate dollar amount of sales, 4/1/08 to 9/30/08 (\$Millions)	55,740,439
d. Estimated collections in assessments on security futures products in FY 2005 (\$Millions)	0.032
e. Implied fee rate ($(\$892,000,000 - 0.0000153*a - 0.0000110*b - d) / c$)	\$5.56905

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Jan-98	20	1,037,925,292,902	51,896,264,645	-		
Feb-98	19	1,081,705,333,396	56,931,859,652	0.093		
Mar-98	22	1,259,994,685,467	57,272,485,703	0.006		
Apr-98	21	1,298,494,359,253	61,833,064,726	0.077		
May-98	20	1,110,221,658,995	55,511,082,950	-0.108		
Jun-98	22	1,243,779,791,913	56,535,445,087	0.018		
Jul-98	22	1,399,011,433,748	63,591,428,807	0.118		
Aug-98	21	1,307,501,463,442	62,261,974,450	-0.021		
Sep-98	21	1,352,428,235,083	64,401,344,528	0.034		
Oct-98	22	1,460,835,397,598	66,401,608,982	0.031		
Nov-98	20	1,298,403,768,065	64,920,188,403	-0.023		
Dec-98	22	1,442,697,787,306	65,577,172,150	0.010		
Jan-99	19	1,884,555,055,910	99,187,108,206	0.414		
Feb-99	19	1,656,058,202,765	87,160,958,040	-0.129		
Mar-99	23	1,908,967,664,074	82,998,594,090	-0.049		
Apr-99	21	2,177,601,770,622	103,695,322,411	0.223		
May-99	20	1,784,400,906,987	89,220,045,349	-0.150		
Jun-99	22	1,697,339,227,503	77,151,783,068	-0.145		
Jul-99	21	1,767,035,098,986	84,144,528,523	0.087		
Aug-99	22	1,692,907,150,726	76,950,325,033	-0.089		
Sep-99	21	1,730,505,881,178	82,405,041,961	0.068		
Oct-99	21	2,017,474,765,542	96,070,226,931	0.153		
Nov-99	21	2,348,374,009,334	111,827,333,778	0.152		
Dec-99	22	2,686,788,531,991	122,126,751,454	0.088		
Jan-00	20	3,057,831,397,113	152,891,569,856	0.225		
Feb-00	20	2,973,119,888,063	148,655,994,403	-0.028		
Mar-00	23	4,135,152,366,234	179,789,233,315	0.190		
Apr-00	19	3,174,694,525,687	167,089,185,562	-0.073		
May-00	22	2,649,273,207,318	120,421,509,424	-0.328		
Jun-00	22	2,883,513,997,781	131,068,818,081	0.085		
Jul-00	20	2,804,753,395,361	140,237,669,768	0.068		
Aug-00	23	2,720,788,395,832	118,295,147,645	-0.170		
Sep-00	20	2,930,188,809,012	146,509,440,451	0.214		
Oct-00	22	3,485,926,307,727	158,451,195,806	0.078		
Nov-00	21	2,795,778,876,887	133,132,327,471	-0.174		
Dec-00	20	2,809,917,349,851	140,495,867,493	0.054		
Jan-01	21	3,143,501,125,244	149,690,529,774	0.063		
Feb-01	19	2,372,420,523,286	124,864,238,068	-0.181		
Mar-01	22	2,554,419,085,113	116,109,958,414	-0.073		
Apr-01	20	2,324,349,507,745	116,217,475,387	0.001		
May-01	22	2,353,179,388,303	106,962,699,468	-0.083		
Jun-01	21	2,111,922,113,236	100,567,719,678	-0.062		
Jul-01	21	2,004,384,034,554	95,446,858,788	-0.052		
Aug-01	23	1,803,565,337,795	78,415,884,252	-0.197		
Sep-01	15	1,573,484,946,383	104,898,996,426	0.291		
Oct-01	23	2,147,238,873,044	93,358,211,871	-0.117		
Nov-01	21	1,939,427,217,518	92,353,677,025	-0.011		
Dec-01	20	1,921,098,738,113	96,054,936,906	0.039		

Jan-02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb-02	19	1,928,830,595,585	101,517,399,768	-0.008		
Mar-02	20	2,002,216,374,514	100,110,818,726	-0.014		
Apr-02	22	2,062,101,866,506	93,731,903,023	-0.066		
May-02	22	1,985,859,756,557	90,266,352,571	-0.038		
Jun-02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul-02	22	2,349,564,490,189	106,798,385,918	0.126		
Aug-02	22	1,793,429,904,079	81,519,541,095	-0.270		
Sep-02	20	1,518,944,367,204	75,947,218,360	-0.071		
Oct-02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov-02	20	1,780,816,458,122	89,040,822,906	-0.038		
Dec-02	21	1,561,092,215,646	74,337,724,555	-0.180		
Jan-03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb-03	19	1,411,722,405,357	74,301,179,229	-0.100		
Mar-03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr-03	21	1,759,751,025,279	83,797,667,870	0.035		
May-03	21	1,871,390,985,678	89,113,856,461	0.062		
Jun-03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul-03	22	2,100,812,973,956	95,491,498,816	-0.057		
Aug-03	21	1,766,527,686,224	84,120,366,011	-0.127		
Sep-03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov-03	19	1,903,726,129,859	100,196,112,098	-0.012		
Dec-03	22	2,066,530,151,383	93,933,188,699	-0.065		
Jan-04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb-04	19	2,177,765,594,701	114,619,241,826	-0.042		
Mar-04	23	2,613,808,754,550	113,643,858,893	-0.009		
Apr-04	21	2,418,663,760,191	115,174,464,771	0.013		
May-04	20	2,259,243,404,459	112,962,170,223	-0.019		
Jun-04	21	2,112,826,072,876	100,610,765,375	-0.116		
Jul-04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug-04	22	2,033,343,354,640	92,424,697,938	-0.130		
Sep-04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct-04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov-04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,839,174,160	129,091,958,708	0.060		
Feb-05	19	2,532,202,396,053	133,273,810,319	0.032		
Mar-05	22	3,030,474,095,010	137,748,822,500	0.033		
Apr-05	21	2,906,386,858,222	138,399,374,201	0.005		
May-05	21	2,697,406,551,792	128,447,931,038	-0.075		
Jun-05	22	2,825,792,932,509	128,445,133,296	0.000		
Jul-05	20	2,603,995,025,602	130,199,751,280	0.014		
Aug-05	23	2,846,109,434,770	123,743,888,468	-0.051		
Sep-05	21	3,009,608,583,531	143,314,694,454	0.147		
Oct-05	21	3,279,930,784,463	156,187,180,213	0.086		
Nov-05	21	3,163,288,362,669	150,632,779,175	-0.036		
Dec-05	21	3,090,218,506,716	147,153,262,225	-0.023		
Jan-06	20	3,573,306,111,973	178,665,305,599	0.194		
Feb-06	19	3,313,973,129,190	174,419,638,378	-0.024		
Mar-06	23	3,807,374,752,084	165,538,032,699	-0.052		
Apr-06	19	3,257,448,631,999	171,444,664,842	0.035		
May-06	22	4,206,452,683,345	191,202,394,697	0.109		
Jun-06	22	3,993,966,132,543	181,543,915,116	-0.052		
Jul-06	20	3,339,657,248,277	166,982,862,414	-0.084		
Aug-06	23	3,410,343,285,403	148,275,795,018	-0.119		
Sep-06	20	3,407,481,301,776	170,374,065,089	0.139		
Oct-06	22	3,980,061,341,623	180,911,879,165	0.060		
Nov-06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec-06	20	3,715,146,848,695	185,757,342,435	-0.008		
Jan-07	20	4,264,337,570,190	213,216,878,510	0.138		
Feb-07	19	3,947,307,855,865	207,753,045,046	-0.026		
Mar-07	22	5,245,976,330,691	238,453,469,577	0.138		
Apr-07	20	4,274,660,745,896	213,733,037,295	-0.109		

May-07	22	5,173,409,122,483	235,154,960,113	0.096		
Jun-07	21	5,589,955,070,604	266,188,336,695	0.124		
Jul-07	21	5,941,510,339,617	282,929,063,791	0.061		
Aug-07	23	7,715,893,065,459	335,473,611,542	0.170		
Sep-07	19	4,806,887,798,516	252,994,094,659	-0.282		
Oct-07	23	6,501,037,858,934	282,653,819,954	0.111		
Nov-07	21	7,175,404,886,442	341,685,946,973	0.190		
Dec-07	20	5,512,258,179,521	275,612,908,976	-0.215		
Jan-08	21	7,996,757,181,265	380,797,961,013	0.323		
Feb-08	20				390,166,745,447	7,803,334,908,936
Mar-08	20				399,766,030,385	7,995,320,607,691
Apr-08	22				409,601,486,837	9,011,232,710,417
May-08	21				419,678,925,340	8,813,257,432,139
Jun-08	21				430,004,299,385	9,030,090,287,086
Jul-08	22				440,583,708,939	9,692,841,596,650
Aug-08	21				451,423,404,044	9,479,891,484,931
Sep-08	21				462,529,788,516	9,713,125,558,836

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2709 / February 29, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12973

In the Matter of

VINCENT A. LENARCIC,
JR.,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO 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 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Vincent A. Lenarcic, Jr. ("Lenarcic" 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 proceedings, and the findings contained in Section III.2 and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

Document 15 of 16

III.

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

1. Lenarcic served as an unregistered investment adviser to Fundamental Growth Investors, LP ("Fundamental"), a hedge fund whose general partner was New Vision Investment Funds, LLC ("New Vision"), which was controlled and managed by Lenarcic. Lenarcic also served as the managing partner for QMA Investment Management, LLC ("QMA"), an investment adviser registered with the Commission. Lenarcic, 60 years old, resides in Charlotte, North Carolina.

2. On February 20, 2008, a final judgment was entered by consent against Lenarcic, permanently enjoining him from future violations of 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Vincent A. Lenarcic, Jr., et al., Civil Action Number 3:05-CV-487, in the United States District Court, Western District of North Carolina, Charlotte Division.

3. The Commission's complaint alleged that, from June 2000 to December 2003, Lenarcic and New Vision defrauded Fundamental's limited partners by selling securities in Fundamental's account and funneling at least \$807,000 of the proceeds to QMA and New Vision. Lenarcic and New Vision used the misappropriated funds to pay the debts, wages and operating expenses of QMA and New Vision. To conceal the fraud, Lenarcic and New Vision made misleading statements to Fundamental's investors concerning the use of the fund's assets and its performance.

4. On June 8, 2006, Lenarcic pled guilty to one felony count, involving prohibited transactions by an investment adviser, in violation of Title 15 United States Code, Sections 80b-6 and 80b-17 before the United States District Court for the Western District of North Carolina, Charlotte Division, in United States v. Vincent A. Lenarcic, Jr., Case No. 3:06CR155-01. On July 26, 2007, a judgment in the criminal case was entered against Lenarcic. He was sentenced to a prison term of 37 months and ordered to make restitution in the amount of \$1,090,000.

5. The count of the criminal information to which Lenarcic pled guilty alleged, inter alia, that Lenarcic defrauded investors and obtained money and property by means of materially false and misleading account statements, that he used the United States mails to send the false account statements, and that he caused commercial interstate carriers to take possession of the investors' money.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Lenarcic be, and hereby is barred from association with any investment adviser; and

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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 239, 240 and 249

[RELEASE NOS. 33-8900; 34-57409; INTERNATIONAL SERIES RELEASE NO. 1308; File No. S7-05-08]

RIN 3235-AK03

FOREIGN ISSUER REPORTING ENHANCEMENTS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed amendments to forms and rules.

SUMMARY: We are proposing a number of changes to our rules relating to foreign private issuers that are intended to improve the accessibility of the U.S. public capital markets to these issuers, as well as to enhance the information that is available to investors. These amendments are part of a series of initiatives that seek to address changes in our disclosure and other requirements applicable to foreign private issuers in light of market developments, new technologies and other matters in a manner that promotes investor protection, cross-border capital flows and the elimination of unnecessary barriers to our capital markets. We are proposing amendments that would enable foreign issuers to test their qualification to use the forms and rules available to foreign private issuers once a year, rather than continuously. We are also proposing amendments to change the deadline for annual reports filed by foreign private issuers and to eliminate an option under which foreign private issuers are permitted to omit segment data from their U.S. GAAP financial statements, and an amendment to the rule pertaining to going private transactions to reflect the new termination of reporting and deregistration rules for foreign private issuers. In addition, we are soliciting comment on proposals that

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would revise the annual report and registration statement forms used by foreign private issuers to improve certain disclosures provided in these forms.

DATES: Comments should be received on or before [insert date 60 days following 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>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-05-08 on the subject line; or
- Use the Federal Rulemaking ePortal (<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 S7-05-08. The 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 a.m. and 3:00 p.m. 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: Felicia H. Kung, Senior Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, at (202) 551-3450, or Craig Olinger, Deputy Chief Accountant, Division of Corporation Finance, at (202) 551-3400, or Katrina A. Kimpel, Professional Accounting Fellow, Office of the Chief Accountant, at (202) 551-5300, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Rule 405¹ of Regulation C,² Form F-1,³ Form F-3⁴ and Form F-4⁵ under the Securities Act of 1933 (“Securities Act”),⁶ Form 20-F⁷ under the Securities Exchange Act of 1934 (“Exchange

¹ 17 CFR 230.405.

² 17 CFR 230.400 et seq.

³ 17 CFR 239.31.

⁴ 17 CFR 239.33.

⁵ 17 CFR 239.34.

⁶ 15 U.S.C. 77a et seq.

⁷ 17 CFR 249.220f.

Act”),⁸ and Exchange Act Rules 3b-4,⁹ 13a-10,¹⁰ 13e-3,¹¹ and 15d-10.¹² Our proposed amendments would: (1) Permit foreign issuers to test their qualification to use the forms and rules available to foreign private issuers on an annual basis, rather than on the continuous basis that is currently required; (2) Accelerate the filing deadline for annual reports filed on Form 20-F by foreign private issuers under the Exchange Act by shortening the filing deadline from 6 months to within 90 days after the foreign private issuer’s fiscal year-end in the case of large accelerated and accelerated filers, and to within 120 days after a foreign private issuer’s fiscal year-end for all other issuers, after a two-year transition period; (3) Eliminate an instruction to Item 17 of Form 20-F that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; and (4) Amend Rule 13e-3 under the Securities Exchange Act by adding cross-references to the new termination of reporting and deregistration rules for foreign private issuers.

In addition, we are soliciting comments on proposals to: (5) Require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F; (6) Amend Form 20-F to require foreign private issuers to disclose information about changes in the issuer’s certifying accountant, the fees and charges paid by holders of American Depositary Receipts, the payments made by the

⁸ 15 U.S.C. 78a *et seq.*

⁹ 17 CFR 240.3b-4.

¹⁰ 17 CFR 240.13a-10.

¹¹ 17 CFR 240.13e-3.

¹² 17 CFR 240.15d-10.

depository to the foreign issuer whose securities underlie the American Depositary Receipts, and, for listed issuers, the differences in the foreign private issuer's corporate governance practices and those applicable to domestic companies under the relevant exchange's listing rules; and (7) Require foreign private issuers to provide certain financial information in annual reports on Form 20-F about a significant, completed acquisition that is significant at the 50% or greater level.

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I. Overview of the Proposed Amendments

When the Commission adopted Form 20-F in 1979,¹³ the form used by foreign private issuers¹⁴ to register a class of securities under the Exchange Act and to file annual reports,¹⁵ we indicated our basic philosophy that U.S. investors should be provided with information that is equal “as nearly as possible and practicable” to that provided by domestic issuers in our markets.¹⁶ Our objective in adopting Form 20-F was to place the disclosures required of foreign private issuers on a more equal footing to that required of domestic issuers. At the same time, we acknowledged that differences in the national laws and accounting regulations applicable to foreign private issuers should be considered when establishing disclosure requirements for foreign private issuers.¹⁷ As a result, we provided certain disclosure accommodations in Form 20-F, although we

¹³ Release No. 34-16371 (Nov. 29, 1979) [44 FR 70132] (hereinafter “Form 20-F Adopting Release”).

¹⁴ The definition for “foreign private issuer” is contained in Exchange Act Rule 3b-4(c). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States, (ii) more than 50 percent of its assets are located in the United States, or (iii) its business is principally administered in the United States.

¹⁵ Form 20-F is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act.

¹⁶ Form 20-F Adopting Release, supra note 13.

¹⁷ See id.

indicated that our assessment of the appropriate disclosure requirements for foreign private issuers was part of an ongoing evolutionary process.¹⁸

In the nearly thirty years since the adoption of Form 20-F, there has been a movement toward greater international agreement on the accounting and other non-financial statement disclosures that should be provided by issuers. Last December, we published rules to permit foreign private issuers to file financial statements with the Commission that comply with International Financial Reporting Standards (IFRS), as issued by the International Accounting Standards Board (IASB), without reconciliation to generally accepted accounting principles (GAAP) used in the United States.¹⁹ These rules support the efforts of the IASB and the Financial Accounting Standards Board (FASB) to converge their accounting standards. In addition, through the efforts of the International Organization of Securities Commissions (IOSCO),²⁰ securities regulators around the world are increasingly requiring the same types of disclosures in prospectuses used for public offerings and listings in their securities markets. In 1998, the IOSCO Technical Committee published the International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers²¹ (“International Equity

¹⁸ Form 20-F Adopting Release, *supra* note 13.

¹⁹ Release No. 33-8879 (Dec. 21, 2007) [73 FR 986].

²⁰ IOSCO consists of securities regulators from 188 countries (including ordinary, associate, and affiliate members) who are committed to working together “to promote high standards of regulation to maintain just, efficient and sound markets.” IOSCO, General Information About IOSCO, at <http://www.iosco.org/about/>.

²¹ Available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf>. The IOSCO Technical Committee recently published the International Disclosure Principles for Cross-Border Offerings and Listings of Debt Securities (2007), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD242.pdf>, which applies to

Disclosure Standards”), which pertains to prospectuses prepared by foreign issuers for public offerings and listings of equity securities. The Commission explicitly incorporated all of the International Equity Disclosure Standards into Form 20-F, effective in 2000.²² Other members of IOSCO have also based their prospectus requirements on the International Equity Disclosure Standards.

At the same time, we remain fully committed to facilitating cross-border capital flows and eliminating inadvertent barriers to our capital markets. In March 2007, we adopted rules that made it easier for foreign private issuers to terminate their reporting obligations and deregister their securities.²³ We adopted these rules out of concern that the burdens and uncertainties associated with terminating their registration and reporting obligations under the Exchange Act could serve as a disincentive to foreign private issuers accessing the U.S. public capital markets.²⁴ As noted previously, we adopted rules last December to permit foreign private issuers to file financial statements with the Commission that are prepared in accordance with IFRS, as issued by the IASB, without reconciliation to U.S. GAAP. In our implementation of the provisions of the Sarbanes-

prospectuses used by foreign issuers for offerings and listings of debt securities. The Commission’s prospectus disclosure requirements for debt securities offered by foreign private issuers, contained in Form 20-F, are consistent with these IOSCO Principles, as well.

²² Release No. 33-7745 (Sept. 28, 1999) [64 FR 53900].

²³ Release No. 34-55540 (Mar. 27, 2007) [72 FR 16934].

²⁴ Id.

Oxley Act of 2002,²⁵ we also provided several accommodations to foreign private issuers. For example, we permitted foreign private issuers to comply with the requirement to include in their annual reports management's report on the company's internal control over financial reporting and the auditor's attestation on a delayed basis compared to some domestic issuers.²⁶ Foreign private issuers are also permitted to report changes in their internal controls over financial reporting on an annual basis, rather than on a quarterly basis as is required of domestic issuers.²⁷ In addition, with respect to the audit committee independence requirements under Section 301 of the Sarbanes-Oxley Act, foreign private issuers listed on U.S. exchanges were accorded certain accommodations that recognized non-U.S. practices and requirements.²⁸ More recently, in a companion release,²⁹ we are proposing amendments to Exchange Act Rule 12g3-2(b)³⁰ to modify the availability of

²⁵ 15 U.S.C. 7201 *et seq.*

²⁶ See Release No. 33- 8392 (Feb. 24, 2004) [69 FR 9722] (extending the original compliance dates for accelerated filers to fiscal years ending on or after November 15, 2004, and for companies that are not accelerated filers and for foreign private issuers, to fiscal years ending on or after July 15, 2005); Release No. 33-8545 (Mar. 2, 2005) [70 FR 11528] (adopting an additional one-year extension of the compliance dates for companies that are non-accelerated filers and for foreign private issuers filing annual reports on Forms 20-F or 40-F); Release No. 33-8730A (Aug. 9, 2006) [71 FR 47056] (extending for one year the date by which a foreign private issuer that is an accelerated filer and that files annual reports on Forms 20-F or 40-F must begin to comply with the requirement to provide the auditor's attestation report on internal control over financial reporting).

²⁷ Release No. 33-8238 (June 5, 2003) [68 FR 36636].

²⁸ Release No. 33-8220 (Apr. 9, 2003) [68 FR 18788].

²⁹ Release No. 34-57350 (Feb. 19, 2008).

³⁰ 17 CFR.240.12g3-2(b).

this exemption from registration under Section 12(g)³¹ of the Exchange Act for foreign private issuers, so that a qualified foreign private issuer that meets specified conditions can claim the exemption automatically without regard to the number of its U.S. shareholders.

As the nature of the global capital markets have evolved, and because of marked advancements in technology with respect to the gathering and processing of information, some of the disclosure accommodations that we provided to foreign private issuers almost 30 years ago may no longer be appropriate. As a result, we are proposing today amendments to rules and forms that should enhance the reporting of information by foreign private issuers, as well as the timeframe within which investors can have access to this information.

The amendments that we are proposing today balance our dual objectives of enhancing the disclosures that foreign private issuers provide to investors in the U.S. public markets, and improving the accessibility of our public markets to these issuers.

Our principal proposals are as follows:

- Permit reporting foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year on the last business day of their second fiscal quarter, rather than on a continuous basis, which is currently required;
- Accelerate the reporting deadline for annual reports filed on Form 20-F by foreign private issuers from six months to 90 days after the issuer's fiscal year-end in the case of large accelerated filers and accelerated filers, and to

³¹ 15 U.S.C. 78l(g).

120 days after the issuer's fiscal year-end for all other issuers, after a two-year transition period;

- Amend Form 20-F by eliminating an instruction to Item 17 of that Form that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; and
- Amend Exchange Act Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliates, to reference the recently adopted deregistration and termination of reporting rules applicable to foreign private issuers.

In addition, we are also seriously considering other possible amendments that would affect foreign private issuers, and are seeking public comment on these proposals.

These matters include the following:

- Eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of Form 20-F for foreign private issuers that are only listing a class of securities on a U.S. national securities exchange, or only registering a class of equity securities under Section 12(g) of the Exchange Act, and not conducting a public offering. We are also proposing to eliminate this limited reconciliation option for annual reports filed on Form 20-F, and for certain non-capital raising offerings, such as offerings pursuant to reinvestment plans, offerings upon the conversion of securities, or offerings of investment grade securities. Thus, all foreign private issuers that are required to provide a U.S. GAAP reconciliation must do so pursuant to Item 18 of

Form 20-F, although required third party financial statements could continue to be prepared pursuant to Item 17 of Form 20-F;

- Amend Form 20-F to require disclosure in annual reports filed on that Form about any changes in the registrant's certifying accountant;
- Amend Form 20-F to require annual disclosure of the fees and other charges paid by holders of American Depositary Receipts (ADRs) to depositaries, as well as any payments made by depositaries to the foreign private issuers whose securities underlie the ADRs;
- Amend Form 20-F to require annual disclosure of the significant differences in the corporate governance practices of listed foreign private issuers compared to the corporate governance practices applicable to domestic companies under the relevant exchange's listing standards; and
- Amend Form 20-F to require foreign private issuers to present information about highly significant, completed acquisitions that are significant at the 50% or greater level.

II. Proposed Changes

A. Annual Test for Foreign Private Issuer Status

The Commission has a longstanding policy of facilitating the access of foreign companies to the U.S. capital markets, as evidenced by the accommodations to foreign practices and policies that are accorded to foreign companies that qualify as "foreign private issuers."³² For example, foreign private issuers are exempt from the

³² See *supra* note 14 for the definition of "foreign private issuer."

Commission's proxy rules,³³ and from the insider stock trading reports and short-swing profit recovery provisions under Section 16³⁴ of the Exchange Act.³⁵ They also provide any interim reports on the basis of home country regulatory and stock exchange practices, rather than the quarterly reports that are required of U.S. issuers,³⁶ and executive compensation disclosure on an aggregate basis if the information is reported on such a basis in the issuer's home country.³⁷

For many companies, the determination of whether they qualify as a foreign private issuer is important because of these various accommodations and exemptions. However, to make sure that it qualifies for these accommodations, a foreign private issuer that has close to 50% of its outstanding voting securities held of record by U.S. residents may find that it must monitor on a continuous basis the different factors used to assess

³³ 17 CFR 240.14a-1 et seq.

³⁴ 15 U.S.C. 78p.

³⁵ These exemptions are contained in Exchange Act Rule 3a12-3(b) [17 CFR 240.3a12-3(b)].

³⁶ Foreign private issuers submit current reports to the Commission on Form 6-K [17 CFR 249.306]. Unlike Form 8-K [17 CFR 249.308], which is the current report form used by domestic issuers, there are no specific substantive disclosures that are required by Form 6-K. Instead, foreign private issuers furnish under cover of Form 6-K whatever information that they (i) make or are required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized, or (ii) file or are required to file with a stock exchange on which their securities are traded and which was made public by that exchange, or (iii) distribute or are required to distribute to their securityholders. These reports are required to be furnished promptly after the material contained in the report is made public.

³⁷ Item 6.B. of Form 20-F.

foreign private issuer status.³⁸ This can result in some uncertainty for foreign private issuers as to which reporting and regulatory requirements will apply to them within a given period of time, as well as result in confusion for investors if an issuer needs to move between foreign and domestic reporting forms in the same fiscal year. For example, if a foreign issuer concludes that it does not qualify as a foreign private issuer in the middle of its fiscal year, it may find it difficult to change its basis of accounting to U.S. GAAP in order to comply on a timely basis with the reporting requirements applicable to domestic issuers under the Exchange Act. These issuers also face the challenge of modifying their information and processing systems to comply with the domestic reporting and registration regime, as well as the executive compensation disclosure requirements, proxy rules and Section 16 reporting requirements that are applicable to domestic issuers. To provide greater certainty to both issuers and investors as to the status of these foreign issuers within a given period of time, we are proposing to permit foreign private issuers to assess their status once a year. Aside from facilitating a smoother transition when foreign private issuers change status in the middle of a fiscal year, we believe that this approach would benefit investors by eliminating confusion in

³⁸ See note 14 above for a description of the factors that foreign issuers must monitor. The Commission's staff has taken the position that, for the purpose of the exemptions contained in Exchange Act Rule 3a12-3(b), foreign private issuers need to assess their status at the end of each fiscal quarter. In addition, they must assess their status at the completion of any purchase or sale by the issuer of its equity securities (other than in connection with an employee benefit plan or compensation arrangement, conversion of outstanding convertible securities, or exercise of outstanding options, warrants or rights), any purchase or sale of assets by the issuer other than in the ordinary course of business, and any purchase of equity securities of the issuer in a public tender offer or exchange offer by a non-affiliate. Foreign Private Issuers Relying on Rule 3a12-3(b) under the Exchange Act, SEC No-Action Letter, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶76,667 (Mar. 30, 1993).

the markets as to an issuer's status. This approach would also be more consistent with our approach to determining accelerated filer and smaller reporting company status, and should simplify compliance with the Commission's regulations.

We are proposing to permit reporting foreign issuers to assess their status on the last business day of their second fiscal quarter,³⁹ which is the same date used to determine accelerated filer status under Exchange Act Rule 12b-2⁴⁰ and smaller reporting company status in Item 10(f)(2)(i)⁴¹ of Regulation S-K.⁴² We believe that selecting this date would provide regulatory consistency and ease of issuer application, as opposed to different dates for determining filing status. In addition, if a foreign issuer determines that it no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter, it would be required to comply with the reporting requirements and use the forms prescribed for domestic companies beginning on the first day of the fiscal year following the determination date. For example, a foreign issuer that did not qualify as a foreign

³⁹ The proposed determination date for foreign private issuer status differs from the determination date for well-known seasoned issuer (WKSI) status. Under Rule 405 under the Securities Act, the determination date as to whether an issuer is a WKSI is the latest of: (i) the time of filing its most recent shelf registration statement, (ii) the time of filing its most recent amendment to a shelf registration statement for purposes of complying with Section 10(a)(3) of the Securities Act, 15 U.S.C. 77j(a)(3), or (iii) in the event that the issuer has not filed a shelf registration statement or amended a shelf registration statement for purposes of complying with section 10(a)(3) of that Act for 16 months, the time of filing of the issuer's most recent annual report on Form 10-K [17 CFR 249.310] or Form 20-F.

⁴⁰ 17 CFR 240.12b-2.

⁴¹ 17 CFR 229.10(f)(2)(i).

⁴² 17 CFR 229.10 et seq. See also Release No. 33-8876 (Dec. 19, 2007) [73 FR 934] (adopting amendments to the disclosure and reporting requirements under the Securities Act and the Exchange Act to expand the number of companies that qualify for the scaled disclosure requirements for smaller reporting companies).

private issuer as of the end of its second fiscal quarter in 2009 would file a Form 10-K in 2010 for its 2009 fiscal year. The issuer would also begin complying with the proxy rules and Section 16, and become subject to reporting on Forms 8-K and 10-Q on the first day of its 2010 fiscal year. This would give such issuers six months' advance notice that they will need to transition to the domestic forms and applicable reporting requirements.

On the other hand, we are proposing to permit a reporting company that qualifies as a foreign private issuer to avail itself of the foreign private issuer accommodations, including use of the foreign private issuer forms and reporting requirements, beginning on the determination date on which it establishes its eligibility as a foreign private issuer. We are proposing this distinction because we believe the new foreign private issuer, who would be eligible to file its annual report for that fiscal year on Form 20-F, need not continue to provide reports on Form 8-K and 10-Q for the remainder of that fiscal year. Instead, the issuer would be required to provide reports on Form 6-K.

Under the proposed amendment, a Canadian issuer that files registration statements and Exchange Act reports using the multijurisdictional disclosure system ("MJDS")⁴³ would also be required to test its status as a foreign private issuer only as of the last business day of its second fiscal quarter. Currently, a Canadian issuer that is eligible to file a Form 40-F⁴⁴ annual report at the end of a fiscal year is presumed to be eligible to use that Form, as well as Form 6-K, from the date of filing until the end of its

⁴³ 17 CFR 239.37 to 17 CFR 239.41 and 17 CFR 249.240f.

⁴⁴ 17 CFR 249.240f. MJDS filers file annual reports on Form 40-F and current reports on Form 6-K.

next fiscal year.⁴⁵ If adopted, the proposed amendment would require a Canadian issuer that plans to use the MJDS to test its foreign private issuer status earlier in the year. However, as noted in the adopting release to the MJDS, it would have to test its eligibility to file annual reports on Form 40-F based on all of the other requirements of that Form, such as public float, at the end of the fiscal year.⁴⁶ The proposed amendment would not change the responsibility of the Canadian issuer to check its eligibility to use Forms 40-F and 6-K at the end of its fiscal year, or the requirement that a Canadian issuer test its ability to use the MJDS Securities Act registration statement forms at the time of filing.

Comments solicited

1. Is it appropriate for foreign issuers to have six months' notice that they no longer qualify as foreign private issuers, and therefore must use the domestic registration and reporting forms as of the beginning of the next fiscal year? Should issuers who have been foreign private issuers, but who fail to qualify as foreign private issuers, be required to use the domestic forms immediately, as is currently required?

2. Is it likely that foreign issuers will attempt to manipulate the amount of their voting securities that are held by U.S. residents at the end of the second fiscal quarter as a result of the proposed test? Are there other factors under the definition of foreign private issuer that may be susceptible to manipulation on the test date, such as the resignation and reappointment of officers and directors, or the transfer of non-physical assets such as cash, receivables or securities out of the United States?

⁴⁵ See Release No. 33-6902 (June 21, 1991) [56 FR 30036] (adopting the MJDS system).

⁴⁶ See *id.*

3. If a foreign issuer that has been filing on domestic issuer forms qualifies as a foreign private issuer on the last business day of its second fiscal quarter, should it be allowed to switch over immediately to the foreign private issuer forms, such as Forms 20-F and 6-K? In some cases, an event may trigger the filing of a Form 8-K, but a Form 6-K might not be required because the foreign issuer's home jurisdiction or stock exchange does not require the publication of information about the event.⁴⁷ If a foreign issuer would have been required to file a Form 8-K shortly after the end of its second fiscal quarter, but qualifies as a foreign private issuer on the last business day of the second quarter, should it be allowed to forgo the filing of the Form 8-K even if a Form 6-K would not be required? Should the foreign issuer be required to file the Form 8-K and make all the filings it would otherwise be required to make on the domestic forms until it files a Form 20-F or furnishes its first Form 6-K? Even if a foreign issuer is permitted to switch to the foreign private issuer forms immediately, should the foreign issuer be required to file a Form 8-K in the scenario described above because the event that triggered the filing occurred during its second fiscal quarter?

4. Because of the many accommodations provided to foreign private issuers, should foreign issuers be required to test their status twice a year, rather than just once a year? For example, should foreign issuers be required to test their status as of the last business day of their second fiscal quarter, as well as at the end of the fiscal year?

5. If we adopt the proposed amendment, to avoid confusion by investors, should a foreign issuer be required to notify the market when it has determined that it has

⁴⁷ See note 36 above for a discussion for the Form 6-K requirements.

switched its status from domestic issuer to foreign private issuer, or vice versa? If so, how should this notification be made, e.g., press release, notice on its website?

6. How should we address the potential flowback of securities into the United States if a reporting foreign issuer concludes that it does not qualify as a foreign private issuer in its third fiscal quarter and, under the proposed rule, is able to qualify as a Category 2⁴⁸ issuer under Regulation S⁴⁹ and also avoid the restrictions of Category 3⁵⁰ and Rule 905⁵¹ of Regulation S for unregistered offshore offerings of its equity securities for almost a year and half after it has made this determination?

7. Should MJDS filers be required to test their foreign private issuer status on the last business day of their most recent second fiscal quarter, as well as at the end of the fiscal year? Would it be reasonable to require MJDS filers to assess their status twice a year because they must test their qualification to use the Form 40-F at the end of the fiscal year in any case? Would such a testing requirement be reasonable in light of the accommodations made for MJDS filers, e.g., they comply with the disclosure requirements of their home jurisdiction?

8. As proposed, a Canadian MJDS filer that did not qualify as a foreign private issuer on the last day of its second fiscal quarter would immediately not be able to use the MJDS forms for Securities Act offerings, since the eligibility to use the MJDS Securities Act forms is tested at the time that the registration statement is filed. In that case, the

⁴⁸ 17 CFR 230.903(b)(2).

⁴⁹ 17 CFR 230.901 – 230.905 and Preliminary Notes.

⁵⁰ 17 CFR 230.903(b)(3).

⁵¹ 17 CFR 230.905.

issuer would still be able to use the other foreign private issuer registration statement forms, such as Form F-3, until the end of its fiscal year. Should these issuers be permitted to file on the foreign private issuer registration statement forms in this circumstance? Alternatively, should these issuers be permitted to use the MJDS Securities Act registration statement forms until the end of their fiscal year?

B. Accelerating the Reporting Deadline for Form 20-F Annual Reports

As the Commission noted when it proposed to accelerate the filing dates for periodic reports filed by domestic issuers,⁵² technological advances have made it easier for companies to process and disseminate information quickly. At the same time, investors evaluate and react to information in a shorter timeframe, and many now expect to receive information on a faster basis. Although some information about foreign private issuers is available through their earnings releases and other announcements, investors may not have access to the more complete disclosure contained in an issuer's Form 20-F annual reports until six months after the end of the issuer's fiscal year. The longer filing due date for these reports was initially established as an accommodation to the different disclosure requirements in the foreign private issuers' home jurisdictions.⁵³ However, many companies that operate in the international markets gather and evaluate information on a vastly expedited basis compared to 29 years ago, when Form 20-F was

⁵² See Release No. 33-8089 (Apr. 12, 2002) [67 FR 19896].

⁵³ Form 20-F Adopting Release, *supra* note 13 (noting that the Commission decided not to adopt a filing due date for Form 20-F annual reports of four months after the registrant's fiscal year-end in deference to commenters' concerns about the need for more time to comply with applicable foreign regulations, which at that time often permitted annual reports to be furnished to shareholders more than four months after the issuer's fiscal year-end).

adopted, so that such a delayed filing date for these reports may no longer be necessary.

Today, foreign private issuers in many jurisdictions are expected to file annual reports with their home securities regulator on a faster timetable,⁵⁴ so that a significant portion of the information required in a Form 20-F is readily available.

Consistent with our efforts to modernize the periodic reporting system for domestic issuers, we are now proposing to shorten the filing due date for annual reports filed by foreign private issuers on Form 20-F.⁵⁵ Currently, a foreign private issuer must

⁵⁴ For example, the European Union's (EU) Transparency Directive requires companies listed on an EU regulated market to file their annual financial reports four months after the end of each financial year at the latest. Directive 2004/109/EC of the European Parliament and of the Council (Dec. 15, 2004). All EU member states were required to implement the Transparency Directive by January 20, 2007. Canadian issuers are also required to file their annual financial statements within a similar timeframe. Under National Instrument 51-102 Continuous Disclosure Obligations, a reporting Canadian issuer must file its annual financial statements within 90 to 120 days after its most recently completed financial year-end, depending on its status as a "venture issuer." Israeli companies are required to file their annual reports within three months of the end of their reporting year, provided that the report is submitted 14 days or more before the date fixed for convening the general meeting at which the company's financial statements will be presented, or within three days of the date when the company's accountant signed his audit opinion, whichever is earlier. Regulation 7, Israeli Securities Regulations (Periodic and Immediate Reports).

⁵⁵ We are not proposing a similar acceleration in the filing deadline for annual reports filed on Form 40-F, which is used by eligible Canadian issuers under the MJDS. Under the MJDS, issuers who file annual reports on Form 40-F must comply with the substantive disclosure requirements and filing deadlines established by the relevant Canadian securities regulator. In keeping with the purpose of MJDS, which is to facilitate cross-border capital flows between the United States and Canada by streamlining the registration and periodic reporting process for cross-border issuers, the Form 40-F must continue to be filed with the Commission on the same day that the information is due to be filed with the relevant Canadian securities regulatory authority, as set forth in General Instruction D.(3) of Form 40-F. However, we note that a reporting Canadian issuer that is not a "venture issuer" must file its annual financial statements on or before 90 days after its most recently completed financial year-end, while all other Canadian issuers must file their annual financial statements on or before 120 days after their most recently completed financial year-end. See supra note 54.

file its annual report on Form 20-F within six months after its fiscal year-end. We are proposing to accelerate the due date for annual reports filed on Form 20-F to within 90 days after the foreign private issuer's fiscal year-end in the case of large accelerated and accelerated filers, and to within 120 days after the issuer's fiscal year-end for all other issuers, after a two-year transition period. We note that the proposed due dates for Form 20-F would still provide an accommodation to many foreign private issuers, since large accelerated and accelerated domestic filers are required to file annual reports on Form 10-K⁵⁶ within 60 days and 75 days, respectively, of their fiscal year-ends.⁵⁷ All other domestic issuers are required to file annual reports on Form 10-K within 90 days after their fiscal year-end.⁵⁸

When we proposed to accelerate the periodic report filing dates for domestic issuers, we solicited comments on whether the deadline for annual reports filed on Form 20-F should be shortened to four or five months after the end of the issuer's fiscal year.⁵⁹ Several commenters indicated that they supported accelerating the deadline for filing annual reports on Form 20-F, citing considerations such as recent technological and information processing improvements, as well as concerns about the potential

⁵⁶ 17 CFR 249.310

⁵⁷ See General Instructions A.(2)(a) and (b) of Form 10-K. At the time that we first adopted rule and form amendments to accelerate the filing of the quarterly and annual reports of reporting U.S. issuers, we noted that those amendments would increase the discrepancy in the due dates for filing annual reports between foreign private issuers and larger seasoned U.S. issuers, and indicated that we would continue to consider this issue. Release No. 33-8128 (Sept. 5, 2002)[67 FR 58480]

⁵⁸ See General Instruction A.(2)(c) of Form 10-K.

⁵⁹ Release No. 33-8089, supra note 52.

competitive disadvantage faced by domestic companies as a result of the large discrepancy in reporting deadlines applicable to domestic versus foreign companies.⁶⁰ However, others noted the additional challenges faced by foreign registrants, such as requirements to reconcile their financial statements to U.S. GAAP, to prepare English translations, and to comply with home country reporting requirements.⁶¹ These commenters expressed concern that accelerating the Form 20-F deadlines for foreign private issuers would result in additional costs and burdens that would discourage foreign issuers from accessing the U.S. capital markets.

Since the adoption of the accelerated reporting deadlines for domestic companies, the Commission has adopted rule amendments that addressed some of the specific concerns highlighted by commenters. For example, as noted previously, we adopted rule amendments that free foreign private issuers that prepare financial statements in accordance with IFRS as issued by the IASB from the obligation to reconcile their financial statements to U.S. GAAP.⁶² When we proposed that rule, we noted that some investor representatives at a March 2007 roundtable on IFRS organized by the

⁶⁰ See, e.g., comment letters from Association for Investment Management and Research; Brown-Forman Corporation; Chevron Phillips Chemical Company LLP; Comcast Corporation; Deloitte & Touche LLP; The Dow Chemical Company; Eastman Kodak Company, Robert Krakauer, Markel Corporation; Maverick Capital Ltd.; SBC Communications Inc.

⁶¹ See, e.g., comment letters from Cleary, Gottlieb, Steen & Hamilton (“Cleary Gottlieb”); The Association of the Bar of the City of New York (NYCBA). For a summary of the comments received relating to the question of whether the deadline for filing Form 20-F should be accelerated, see U.S. Securities & Exchange Commission, Summary of Comments Relating to Proposed Amendments to Accelerate Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports, Section III.C.6., July 1, 2002, at <http://www.sec.gov/rules/extra/33-8089summary.htm>.

⁶² Release No. 33-8879, supra note 19.

Commission's staff ("March 2007 IFRS Roundtable") commented that IFRS financial statements would be more useful if issuers filed their Form 20-F annual reports on an accelerated basis.⁶³ As a result, we solicited comment again on whether the deadline for annual reports filed on Form 20-F should be accelerated.⁶⁴

Many of the commenters supported accelerating the deadline for Form 20-F filers, although several expressed concern that any deadline should not impede the ability of foreign private issuers to fulfill their obligations to file annual reports with their home regulators on a timely basis. To that end, some commenters urged a deadline that was later than the foreign private issuer's home filing requirements to permit sufficient time for translation of the annual report into English and compliance with the additional disclosure requirements imposed by the Commission.⁶⁵ In contrast, other commenters supported a deadline that was consistent with the deadline faced by the foreign private issuers in its home jurisdiction.⁶⁶ Others noted that dropping the requirement to reconcile financial statements prepared in accordance with IFRS, as issued by the IASB, to U.S.

⁶³ See Unedited Transcript, SEC Staff's International Financial Reporting Standards Roadmap Roundtable (Mar. 6, 2007), available at <http://www.sec.gov/spotlight/ifrsroadmap/ifrsroadmap-transcript.txt>.

⁶⁴ Release No. 33-8818 (July 2, 2007) [72 FR 37962] (hereinafter "IFRS Proposing Release").

⁶⁵ See, e.g., comment letter from Sullivan & Cromwell (supporting the acceleration of the Form 20-F deadline). See also comment letter from Cleary Gottlieb (not supporting an accelerated Form 20-F deadline, but nonetheless suggesting a deadline after the issuer's home country annual report is due if the Commission plans to accelerate the deadline).

⁶⁶ See, e.g., comment letter from HSBC.

GAAP would expedite the preparation of Form 20-F, so that an accelerated deadline would be feasible.⁶⁷

After carefully considering the concerns expressed by all of the commenters, we believe that it is appropriate to propose accelerating the deadline for filing annual reports on Form 20-F. Annual reports that are filed on an expedited basis would provide investors with more timely access to these filings, and would improve the delivery and flow of reliable information to investors and the capital markets, thereby helping to improve the efficiency of the markets. The current six-month deadline was adopted at a time when many of the current technologies to gather information and to process it were not available. A number of foreign private issuers already file their annual reports on Form 20-F well before the current six-month deadline. In addition, the recent rule amendments that would exempt foreign private issuers from the reconciliation requirement if they prepare their financial statements according to IFRS as issued by the IASB should make it easier for many foreign private issuers to prepare their annual reports on Form 20-F. We estimate that in the next several years a majority of the foreign private issuers who file annual reports with the Commission will have incentives to use either U.S. GAAP, or IFRS as issued by the IASB as more countries adopt IFRS as their basis of accounting, or permit companies to use IFRS as issued by the IASB as their basis of accounting. We are not proposing to change the age of financial statement requirements for registration statements under the Securities Act or Exchange Act.⁶⁸

⁶⁷ See, e.g., comment letters from the NYCBA and Swedish Export Credit Corporation.

⁶⁸ Under Item 8.A.4. of Form 20-F, the last year of audited financial statements may not be older than 15 months at the time of the offering or listing.

Accelerating the deadline for filing annual reports on Form 20-F should enable investors in the U.S. markets to get annual reports on the more current basis in which they are provided in other jurisdictions.

If the Commission decides to adopt amendments to accelerate the deadline for filing annual reports on Form 20-F, several commenters who responded to our IFRS Proposing Release⁶⁹ urged the Commission to provide a transition period for any accelerated deadline that was adopted.⁷⁰ We expect that the proposal, if adopted, would provide a two-year transition period. For example, if the proposal is adopted this year, the Form 20-F filing deadline would change for the fiscal years ending on or after December 15, 2010. For foreign private issuers that are large accelerated or accelerated filers, the Form 20-F due date would be 90 days after the fiscal year-end, and for all other foreign private issuers, annual reports filed on Form 20-F would be due 120 days after the fiscal year end, for fiscal years ending on or after December 15, 2010. In addition to these proposed amendments, we are proposing a conforming deadline for transition reports filed on Form 20-F, so that the deadline is the same as the deadline for annual reports filed on Form 20-F.⁷¹

⁶⁹ IFRS Proposing Release, supra note 64.

⁷⁰ See, e.g., comment letters from Merrill Lynch; Nippon Keidanren.

⁷¹ We also took this approach when we adopted amendments to accelerate the periodic report filing dates for domestic companies. See Release No. 33-8128, supra note 57; Release No. 33-8644 (Dec. 21, 2005) [70 FR 76626] (adopting further refinements to the acceleration rules). See also Release No. 33-6823 (Mar. 13, 1989) [54 FR 10306] (conforming the transition report rules to the periodic report rules).

Comments solicited

9. Would accelerating the due date for Form 20-F annual reports be beneficial for investors? Given the differences in the reporting requirements that exist among the various foreign reporting regimes, would accelerating the due date for Form 20-F annual reports have different impacts on foreign private issuers or investors depending on the particular country or the nature of the issuer's business? Would any of these differences affect the usefulness of the information to investors? If you believe that the due date should be accelerated, are the proposed due dates appropriate? Should different due dates be applied to foreign private issuers depending on the worldwide market value of their common equity held by non-affiliates, similar to the different annual report filing deadlines that are applied to domestic issuers? Should foreign private issuers with a larger worldwide market value be required to provide reports on a faster basis than other foreign private issuers because they presumably have additional resources and a better developed infrastructure that would enable them to comply with an accelerated due date?

10. Would accelerating the due date for filing annual reports on Form 20-F impose any unreasonable burdens on foreign private issuers, who may have to collect and provide more information in that Form than may be required in their home jurisdictions, and may also have to translate the information into English? Would the proposed accelerated due dates impose any burdens on foreign private issuers that may be required to file annual reports on Form 20-F with the Commission before they are required to provide annual reports in their home jurisdictions? Should the due date be accelerated to within 120 days of the foreign private issuer's fiscal year-end for all foreign private issuers, including large accelerated and accelerated filers?

11. Should different due dates be imposed on foreign private issuers depending on whether they file financial statements using U.S. GAAP, IFRS as issued by the IASB, or another GAAP with a reconciliation to U.S. GAAP? Should different due dates be imposed on foreign private issuers depending on whether their disclosure was originally prepared in a foreign language and needs to be translated into English?

12. Should the deadline for filing Form 20-F annual reports be linked to the issuer's home country requirements for filing annual reports? If so, should the deadline be the same as the one in the issuer's home country, or should it be on a delayed basis, such as one or two months later? If you believe that the deadline for filing Form 20-F should be linked to the issuer's home country requirements, should the foreign private issuer be responsible for submitting supporting materials that indicate when annual reports are due in its home jurisdiction, such as the applicable legislation or regulation, to the Commission at the time of its Form 20-F submission? Would varying deadlines according to home country requirements cause confusion for investors?

13. Would a different transition period be more appropriate for implementation of the accelerated deadline? For example, should foreign private issuers be subject to the accelerated deadline after a longer or shorter transition period instead?

14. Do foreign private issuers face unique challenges in preparing transition reports that would render a reduced filing period for those reports unduly burdensome?

C. Segment Data Disclosure

Under Item 17 of Form 20-F, foreign private issuers that present financial statements otherwise fully in compliance with U.S. GAAP may omit segment data from their financial statements, and also are permitted to have a qualified U.S. GAAP audit

report as a result of this omission. We estimate that fewer than 10 foreign private issuers currently use this accommodation. We are proposing to amend Form 20-F by eliminating this narrow accommodation.

The reporting permitted by this accommodation is inconsistent with recent international developments in financial reporting. For example, in order to file financial statements without reconciliation to U.S. GAAP, foreign private issuers must comply fully with IFRS as issued by the IASB, including presentation of segment data. An accommodation that permits a foreign private issuer to present incomplete and non-compliant U.S. GAAP financial statements may no longer be necessary or appropriate. Accordingly, we are proposing to amend Item 17 of Form 20-F by removing Instruction 3 to that Form, which currently permits the omission of segment data from U.S. GAAP financial statements.

Comments solicited

15. In Part III.A. of this release, we propose an amendment to eliminate the option to prepare financial statements according to Item 17 of Form 20-F. Under that proposed amendment, foreign private issuers would be required to prepare their financial statements according to the requirements of Item 18 of Form 20-F, which requires all of the information required by U.S. GAAP and Regulation S-X. If that proposal is adopted, would it still be useful to eliminate the exemption from providing segment data?

16. Should we provide an exemption for foreign private issuers that are currently preparing financial statements under U.S. GAAP that omit segment data pursuant to Instruction 3 of Item 17? If we adopt the proposed amendment, should we provide a

“grandfather” provision or an exemptive order to permit the small number of foreign private issuers to continue to not report segment data?

D. Exchange Act Rule 13e-3

We are proposing to amend Exchange Act Rule 13e-3,⁷² which pertains to going private transactions by reporting issuers or their affiliates, to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations.⁷³ Currently, Rule 13e-3 is triggered when an issuer and/or any of its affiliates are engaged in a specified transaction or series of transactions⁷⁴ that have either a reasonable likelihood or a purpose of causing (i) any class of equity securities of the issuer that is subject to Section 12(g) or Section 15(d)⁷⁵ of the Exchange Act to be held of record by less than 300 persons, or (ii) the securities to be neither listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system of any registered national securities association.

Rule 13e-3 requires any issuer or affiliate that engages in a Rule 13e-3 transaction to file a Schedule 13E-3⁷⁶ disclosing its plan to take the company private, and to make prompt amendments to reflect certain information about the proposed transaction. In the

⁷² 17 CFR 240.13e-3.

⁷³ Release No. 34-55540, supra note 23.

⁷⁴ A “Rule 13e-3 transaction” is defined as (i) a purchase of any equity security by the issuer of such security or by an affiliate, (ii) a tender offer, (iii) a proxy solicitation or information statement distribution in connection with a merger or similar transaction, (iv) the sale of substantially all the assets of an issuer to its affiliate, or (v) a reverse stock split. 17 CFR 240.13e-3.

⁷⁵ 15 U.S.C. 78o(d).

⁷⁶ 17 CFR 240.13e-100.

Schedule 13E-3, the filing party must disclose the purposes for the transaction, whether any alternative means for accomplishing the stated purposes were considered, the reasons for the structure of the transaction and why it was being undertaken at the time, the effects that the transaction would have on the issuer and its unaffiliated security holders, whether or not the filing party believes the transaction is fair to unaffiliated security holders, and the factors considered in determining fairness. Rule 13e-3(f)⁷⁷ also requires dissemination of the information required by Schedule 13E-3 to security holders within specified time periods.

When the Commission adopted Rule 13e-3, we indicated that the Rule would be triggered if a specified transaction has either the reasonable likelihood or purpose of causing the termination of reporting obligations under the Exchange Act because the class of securities would be held of record by less than 300 persons as a result of the transaction.⁷⁸ Recently, we adopted amendments to the deregistration provisions applicable to foreign private issuers that would permit them to terminate their reporting obligations under the Exchange Act by meeting a quantitative benchmark designed to measure relative U.S. market interest for their equity securities that does not depend on a head count of the issuers' U.S. security holders.⁷⁹ Although Rule 13e-3 does not reflect the termination of registration and reporting provisions that were previously applicable to foreign private issuers, we propose to amend the Rule to better reflect the current deregistration provisions. As a result, we are proposing to amend Rule 13e-

⁷⁷ 17 CFR 240.13e-3(f).

⁷⁸ Release No. 33-6100 (Aug. 2, 1979) [44 FR 46736].

⁷⁹ Release No. 34-55540, supra note 23.

3(a)(3)(ii)(A)⁸⁰ to specify that the cited effect is deemed to have occurred when a domestic or foreign issuer becomes eligible to deregister under Exchange Act Rules 12g-4⁸¹ and 12h-6,⁸² respectively.

When a foreign private issuer engages in a Rule 13e-3 transaction that would cause the termination of its registration or reporting obligations under the Exchange Act, Rule 13e-3 is intended to provide the issuer's security holders with one last opportunity to obtain information about the company and consider their alternatives. This is equally true in the context of a foreign private issuer that is deregistering as it is for a domestic or foreign company that is ceasing to file reports because the number of its shareholders falls below 300.

Comments Solicited

17. Is it appropriate to amend Rule 13e-3 by using the quantitative benchmark set forth in the new termination of reporting and deregistration provisions?

18. Instead of referencing the applicable termination of reporting and deregistration provisions, is there another threshold that should be applied in Rule 13e-3(a)(3)(ii)(A) to foreign private issuers?

19. If the proposed amendment is adopted, would more registrants be required to comply with Rule 13e-3 than intended because they may be engaged in one of the transactions described in Rule 13e-3(a)(3)(i) as a step toward terminating their

⁸⁰ 17 CFR 240.13e-3(a)(3)(ii)(A).

⁸¹ 17 CFR 240.12g-4.

⁸² 17 CFR 240.12h-6.

registration or reporting obligations with respect to a class of securities, transactions that previously might not have resulted in the application of Rule 13e-3?

20. To what extent may foreign private issuers engage in ordinary course securities transactions (such as buybacks or repurchases) that may trigger Rule 13e-3, and is it necessary to provide exceptions so that these transactions do not trigger Rule 13e-3?

III. Other Matters Under Consideration

The Commission is considering whether it is appropriate to amend Form 20-F in order to revise the disclosure elicited from foreign private issuers in annual reports and registration statements. The proposals discussed in this section touch on a number of different areas. Unlike our proposal relating to the annual report filing deadline, we have not discussed these matters in previous releases and we are especially interested in comments from investors, foreign issuers and others as to whether we should impose these new disclosure requirements.

In addition to the specific proposals discussed below, we would also welcome commenters' views regarding other areas as to which we should consider revising our disclosure requirements applicable to foreign private issuers, either with respect to requiring new areas of disclosure or eliminating current disclosure requirements.

A. Requiring Item 18 Reconciliation in Annual Reports and Registration Statements Filed on Form 20-F

Currently, a foreign private issuer that is only listing a class of securities on a national securities exchange, or only registering a class of securities under Exchange Act Section 12(g), without conducting a public offering of those securities may provide financial statements according to Item 17 of Form 20-F. Foreign private issuers may also

provide financial statements according to Item 17 for their annual reports on Form 20-F. Under Item 17, a foreign private issuer must prepare its financial statements and schedules in accordance with U.S. GAAP, or IFRS as issued by the IASB. If its financial statements and schedules are prepared in accordance with another basis of accounting, the issuer must include a reconciliation to U.S. GAAP. This reconciliation must include a narrative discussion of reconciling differences, a reconciliation of net income for each year and any interim periods presented, a reconciliation of major balance sheet captions for each year and any interim periods, and a reconciliation of cash flows for each year and any interim periods.⁸³ In contrast, if a foreign private issuer that presents its financial statements on a basis other than U.S. GAAP, or IFRS as issued by the IASB provides financial statements under Item 18 of Form 20-F, it must provide all the information required by U.S. GAAP and Regulation S-X, in addition to the reconciling information for the line items specified in Item 17.

We are proposing to eliminate this distinction between the disclosure provided to the primary and secondary markets by requiring Item 18 information for foreign private issuers that are only listing a class of securities on an exchange, or only registering a class of securities under Exchange Act Section 12(g), without conducting a public offering. We are also proposing to require Item 18 information for foreign private issuers that file annual reports on Form 20-F. In addition, foreign private issuers that are making certain non-capital raising offerings, such as an offerings pursuant to reinvestment plans, offerings upon the conversion of securities or offerings of investment grade securities, currently are permitted to provide Item 17 financial statements in their registration

⁸³ See Item 17(c)(2) of Form 20-F.

statements under the Securities Act. To ensure that the same type of financial information is provided regardless of the type of offering that is being made, we are also proposing to require foreign private issuers to file financial statements that comply with Item 18 when registering these types of offerings under the Securities Act.

The majority of foreign private issuers who do not prepare financial statements in accordance with U.S. GAAP elect to provide financial information pursuant to Item 18, rather than Item 17, of Form 20-F.⁸⁴ In our view, a reconciliation that includes the footnote disclosures required by U.S. GAAP and Regulation S-X⁸⁵ can provide important additional information.⁸⁶ As a result, we are proposing to amend Form 20-F and the registration statement forms available to foreign private issuers under the Securities Act (Forms F-1, F-3 and F-4) to require the disclosure of financial information according to Item 18 of Form 20-F for registration statements filed under both the Exchange Act and the Securities Act, as well as for annual reports. However, we are not proposing to eliminate the availability of Item 17 disclosures for Canadian MJDS filers in light of the special recognition accorded to MJDS filings. In addition, more countries are expected to

⁸⁴ A foreign private issuer's latest annual report filed on Form 20-F and all subsequent Form 20-F annual reports are incorporated by reference into its Form F-3 shelf registration statement. See Item 6 (Incorporation of Certain Information by Reference) in Form F-3. General Instruction I.B.1. of Form F-3 requires foreign private issuers to provide financial statements that comply with Item 18 for primary offerings.

⁸⁵ 17 CFR Part 210.1-01 et seq.

⁸⁶ Under Item 17, an issuer is not required to provide the extensive footnote disclosures required by U.S. GAAP and Regulation S-X, unless these disclosures are otherwise required under its home country GAAP. For example, the footnote disclosures related to pension assets, obligations and assumptions, lease commitments, business segments, tax attributes, stock compensation awards, financial instruments and derivatives, among many others, are not required under Item 17 unless they are otherwise required by the issuer's home country GAAP.

adopt IFRS as their basis of accounting, or to permit companies to use IFRS as issued by the IASB as their basis of accounting in the next few years. We therefore believe that eliminating the availability of Item 17 in MJDS registration statements would not be necessary. Item 17 would also continue to be available for financial statements of non-registrants that are required to be included in a foreign or domestic issuer's registration statement, annual report or other Exchange Act report. These include significant acquired businesses under Rule 3-05⁸⁷ of Regulation S-X, significant equity method investees under Rule 3-09⁸⁸ of Regulation S-X, entities whose securities are pledged as collateral under Rule 3-16⁸⁹ of Regulation S-X, and exempt guarantors under Rule 3-10(i)⁹⁰ of Regulation S-X.

If this amendment is adopted, we propose to establish a compliance date that would provide foreign private issuers with sufficient time to transition to the Item 18 requirements when preparing their financial statements. We anticipate that if this amendment is adopted in 2008, a foreign private issuer that currently prepares its financial statements according to Item 17 of Form 20-F would not be required to prepare financial statements pursuant to Item 18 until it files an annual report for its first fiscal year ending on or after December 15, 2009.

⁸⁷ 17 CFR 210.3-05.

⁸⁸ 17 CFR 210.3-09.

⁸⁹ 17 CFR 210.3-16.

⁹⁰ 17 CFR 210.3-10(i).

Comments solicited

21. Would the proposed amendment to eliminate the availability of the Item 17 option benefit investors?

22. Is it appropriate to provide a transition period for foreign private issuers that are currently preparing financial statements in accordance with Item 17 of Form 20-F? Is a compliance date that provides a transition period in the best interests of investors? If so, is the suggested transition period appropriate in length, or should it be shorter or longer than proposed?

23. As proposed, Item 17 will now only be available for the presentation of financial information for non-issuer entities required to be included in a foreign or domestic issuer's registration statement or Exchange Act report. Is there any reason for retaining the Item 17 financial information option for non-capital raising offerings made by foreign private issuers or annual reports?

24. Would the elimination of the Item 17 option increase costs for companies? If so, what types of compliance costs would be affected? Are there ways to mitigate the costs?

25. To what extent are the benefits to investors from the additional Item 18 financial disclosure linked to more timely filing of Form 20-F? If we decide not to accelerate the deadline for filing Form 20-F as proposed, should we still require the additional Item 18 financial disclosure?

26. Should we provide an exemption for foreign private issuers that are currently preparing financial statements pursuant to Item 17? If we adopt the proposed amendment, should we provide a "grandfather" provision or an exemptive order to permit

these foreign private issuers to continue to provide financial information pursuant to Item 17?

B. Disclosure About Changes in a Registrant's Certifying Accountant

Domestic companies currently report any changes in and disagreements with their certifying accountant in a current report on Form 8-K and in a registration statement on Form 10⁹¹ under the Exchange Act,⁹² as well as in their registration statements filed on Forms S-1⁹³ and S-4⁹⁴ under the Securities Act. Among other things, this disclosure provides information about potential opinion shopping situations by issuers. "Opinion shopping" generally refers to the search for an auditor that is willing to support a proposed accounting treatment that is designed to help a company achieve its reporting objectives, even though that treatment could frustrate reliable reporting.⁹⁵

Foreign private issuers have not been required to provide this disclosure. When we proposed the adoption of Form 20-F, we proposed a disclosure requirement soliciting

⁹¹ 17 CFR 249.210.

⁹² In their annual reports on Form 10-K, domestic issuers do not provide the same type of change of accountant disclosure, since they should have reported this information on a more current basis on Form 8-K. However, they do provide the disclosures required by Item 304(b) of Regulation S-K [17 CFR 229.304(b)]. See text *infra* for a discussion of Item 304(b).

⁹³ 17 CFR 239.11.

⁹⁴ 17 CFR 239.25.

⁹⁵ See Release No. 33-6766 (Apr. 7, 1988) (adopting amendments to Form 8-K, Regulation S-K and Schedule 14A [17 CFR 240.14a-101] related to disclosure concerning a change in a registrant's certifying accountant).

information about changes in the registrant's certifying accountant.⁹⁶ The disclosure item was not included in Form 20-F.⁹⁷ However, the issues underlying the need for this disclosure also apply to foreign private issuers, and the relationship between issuers and their auditors in this area would seem to be as important for investors. Moreover, foreign private issuers that are listed on the New York Stock Exchange (NYSE) are already required by that Exchange to notify the market about a change in their auditors,⁹⁸ although this information is required to be furnished under cover of Form 6-K, which does not have the substantive disclosure requirements of Form 8-K.⁹⁹ As a result, we are proposing amendments that would require substantially the same types of disclosures currently provided by domestic issuers about changes in and disagreements with their certifying accountant.

We are proposing to amend Form 20-F by adding an Item 16F that would elicit the same types of change of accountant disclosures obtained in Item 4.01 (Changes in Registrant's Certifying Accountant) of Form 8-K,¹⁰⁰ including the disclosure requirements of Item 304(a) of Regulation S-K,¹⁰¹ which are referenced in Form 8-K, and Item 9 (Changes in and Disagreements with Accountants on Accounting and Financial

⁹⁶ Release No. 34-14128 (Nov. 2, 1977) [42 FR 58684] (contained in proposed Item 24).

⁹⁷ Form 20-F Adopting Release, supra note 13.

⁹⁸ Section 204.03 of the NYSE Listed Company Manual.

⁹⁹ See supra note 36 for a discussion of the differences between Forms 6-K and 8-K.

¹⁰⁰ Item 4.01 of Form 8-K.

¹⁰¹ 17 CFR 229.304(a).

Disclosure) of Form 10-K,¹⁰² which refers to the disclosure requirements of Item 304(b) of Regulation S-K. Among other things, Item 304(a) of Regulation S-K requires an issuer to disclose whether an independent accountant that was previously engaged as the principal accountant to audit the issuer's financial statements, or a significant subsidiary on which the accountant expressed reliance in its report, has resigned, declined to stand for re-election, or was dismissed. Item 304(a) of Regulation S-K also requires an issuer to disclose any disagreements or reportable events that occurred within the issuer's latest two fiscal years and any interim period preceding the change of accountant. Item 304(b) of Regulation S-K solicits disclosure about whether, during the fiscal year in which the change of accountants took place or during the subsequent year, the issuer had similar, material transactions to those which led to the disagreements with the former accountants, and whether such transactions were accounted for or disclosed in a manner different from that which the former accountants would have concluded was required. If so, Item 304(b) requires the issuer to disclose the existence and nature of the disagreement or reportable event, and also disclose the effect on the financial statements if the method that would have been required by the former accountants had been followed. Because foreign private issuers do not file Forms 8-K and 10-K and are not otherwise subject to Item 304 of Regulation S-K, we are proposing that they provide disclosure about changes in and disagreements with their certifying accountants in their annual reports on Form 20-F, as well as in their initial registration statements filed on Forms 20-F, F-1 and F-4.

¹⁰² Item 9 of Form 10-K.

We are also proposing to amend Forms F-1 and F-4, which are used to register public offerings of securities by foreign private issuers under the Securities Act, to require the new Item 16F disclosure requirement about the issuer's changes in and disagreements with their certifying accountant for first-time registrants with the Commission. We are not proposing to require Item 16F disclosure for repeat registrants because this information would be included in annual reports on Form 20-F filed by repeat registrants. Although we do not make this distinction in Forms S-1 and S-4, domestic issuers are subject to a Form 8-K current report requirement for change of accountant disclosure. Requiring this disclosure for repeat filers using S-1 and S-4 does not create an additional disclosure burden for them.

As proposed, Item 16F is virtually identical to Item 304 of Regulation S-K. However, we have eliminated or modified some of the due dates described in Item 304(a)(3) of Regulation S-K because the disclosure is being made on an annual basis, rather than on a current basis. For example, although Item 16F would require the issuer to provide a copy of the disclosures that it is making in response to Item 16F to the former accountant, it would not require the issuer to provide the disclosures no later than the day that the disclosures are filed with the Commission, as is required by Item 304(a)(3) of Regulation S-K. In addition, we expect that the former accountant would be able to furnish the issuer with a letter stating whether it agrees with the statements made by the issuer in response to Item 16F and, if not, stating the respects in which it does not agree, and that the issuer would be able to file the former accountant's letter as an exhibit to the annual report that contains this disclosure at the time that the annual report is due. Item 304(a)(3) provides that if the former accountant's letter is not available at the time

that the report or registration statement is filed, then the issuer can file the letter with the Commission within ten business days after the filing of the report or registration statement. Because foreign private issuers would be permitted to provide the proposed disclosure in their annual reports, we believe that this accommodation would not be necessary for annual reports unless the change in accountant occurred less than 30 days prior to the filing of the annual report.¹⁰³ As proposed, Item 16F would permit a delayed filing of the former accountant's letter in an annual report only if the change in accountant occurred within this 30-day timeframe.

Comments solicited

27. Should foreign private issuers be required to provide information about changes in and disagreements with their certifying accountant? Would this disclosure be useful to investors? If so, should foreign private issuers be subject to the same disclosure requirements that apply to domestic issuers, or would a different disclosure requirement be more appropriate?

28. Should foreign private issuers be permitted to provide the letter from the former accountant in their annual reports on a delayed basis for a change of accountants that occurs less than 30 days before the annual report is filed, as proposed? Is 30 days an appropriate parameter? Alternatively, should foreign private issuers be permitted to provide the letter from the former accountant on a delayed basis for a change in accountant that occurs up to 45 days or 60 days before the annual report is filed, or only

¹⁰³ Under General Instruction C.(b) of Form 20-F, the information provided in a Form 20-F annual report should be as of the latest practicable date, unless a disclosure item in the Form explicitly directs otherwise. As a result, changes in the foreign private issuer's certifying accountant that occur after the issuer's fiscal year-end, but before the Form 20-F is filed, would be disclosed in the issuer's Form 20-F annual report.

if the change in accountant occurs less than 15 days before the annual report is filed?

Because foreign private issuers provide this disclosure on a delayed basis compared to domestic issuers, is this accommodation necessary?

29. Are there restrictions under a foreign issuer's home country law or regulations that would prohibit an auditor from reporting to a foreign regulator about disagreements with the issuer? If so, how should we address such restrictions?

30. Should the proposed change of accountant disclosure requirements contained in Item 16F be extended to registration statements filed by all foreign private issuers under the Securities Act, not just first-time registrants? Would this impose an undue burden on foreign private issuers that may not be subject to such a disclosure requirement in their home jurisdictions?

C. Annual Disclosure About ADR Fees and Payments

The Commission has long been interested in improving the disclosure provided to investors about the fees and other charges paid in connection with ADR facilities.¹⁰⁴ We continue to believe that ADR holders can benefit from enhanced disclosure in this area, especially in light of new depositary fees that are being charged to ADR holders in connection with sponsored ADR facilities. For example, many depositaries are now charging an annual fee for general depositary services, a fee that was formerly prohibited by some exchanges.¹⁰⁵

¹⁰⁴ We noted the importance of transparency in fee disclosures in our 1991 ADR concept release, Release No. 33-6894 (May 23, 1991) [56 FR 24420].

¹⁰⁵ See Release No. 34-53978 (June 13, 2006) [71 FR 35474] (notice of NYSE rule change to eliminate the requirement that certain services be provided without charge to ADR holders).

Currently, disclosures about fees and other payments made by ADR holders to the depository are provided in the Form 20-F that is filed to register the deposited securities under the Exchange Act,¹⁰⁶ but are not disclosed in the annual report. The information provided is also generic, providing maximums paid on the deposit and withdrawal of the securities underlying the ADRs. Although ADR fees are disclosed in the ADR itself,¹⁰⁷ ADR holders frequently purchase their ADRs in book-entry form and do not see the disclosures provided in the physical certificate. We are proposing to amend Form 20-F by revising Item 12.D.3. and the Instructions to Item 12 to solicit disclosure of these fees on an annual basis, including the annual fee for general depository services. In addition, some depositories may make certain payments to the foreign issuers whose securities underlie the ADRs. These types of payments should also be disclosed because the cost of these payments may be passed on to ADR holders through the fees and other charges that they pay to the depository. The proposed amendments to Item 12.D.3. and the Instructions to Item 12 of Form 20-F would require disclosure of these payments in the registration statement on Form 20-F that is filed for the deposited securities, as well as in the annual report, for sponsored ADR facilities.

Comments solicited

¹⁰⁶ Rule 12a-8 [17 CFR 240.12a-8] exempts depository shares registered on Form F-6 [17 CFR 239.36] under the Securities Act, but not the underlying deposited securities, from the operation of Section 12(a) of the Exchange Act [15 U.S.C. 78l(a)].

¹⁰⁷ As a technical matter, an ADR is the physical certificate that evidences American Depositary Shares (ADS), and an ADS is the security that represents an ownership interest in deposited securities. However, the terms are often used interchangeably by market participants.

31. Would it be useful to investors to receive information about ADR fees and payments made by depositaries on an annual basis? Is there other information relating to ADRs that would be useful to investors on an annual basis, such as the number of ADRs outstanding? Are there other methods by which investors can readily obtain this information? Should foreign private issuers be required to disclose the information in their Form 20-F annual reports only if the information is not disclosed on their websites?

32. Should Item 12 be amended to also explicitly solicit a brief discussion of the reasons why the depositary is making payments to the foreign private issuer, or is disclosure of the amount paid to the issuer sufficient?

33. Should depositaries be required to disclose payments that they make to third parties? Are these payments necessarily passed on to ADR holders?

34. Should Regulation S-K and Form 10-K be amended to elicit similar disclosure from foreign issuers that are not foreign private issuers and that file annual reports on Form 10-K, but that have securities traded in ADR form?

D. Disclosure About Differences in Corporate Governance Practices

Foreign private issuers are subject to different legal and regulatory requirements in their home jurisdictions, and as a result frequently follow different corporate governance practices from domestic companies. In recognition of this, many U.S. securities exchanges exempt listed foreign private issuers from many of their corporate governance requirements.¹⁰⁸ However, these exchanges require these issuers to disclose

¹⁰⁸ See Section 303A.00 of the NYSE Listed Company Manual (noting that foreign private issuers are permitted to follow home country practice instead of the applicable corporate governance provisions of the NYSE Listed Company Manual, except for the requirements pertaining to audit committees, certain certifications, and certain corporate governance disclosures); Section 4350(a)(1) of the Nasdaq Manual (noting

the significant ways in which their corporate governance practices differ from those followed by domestic companies under the relevant exchange's listing standards.

Foreign private issuers may provide this disclosure either in their annual reports, and/or on their websites.¹⁰⁹ Although disclosure of differences in corporate governance practices does not imply a preference for any particular type of corporate governance regime, this disclosure is useful to investors because it facilitates their ability to monitor the issuer's corporate governance practices.

Foreign private issuers frequently opt to provide this disclosure on their websites, rather than in their annual reports. We are proposing to require disclosure of this information in the Form 20-F annual reports filed by all foreign private issuers whose securities are listed on a U.S. exchange. This would consolidate all of the relevant corporate governance disclosure about a listed company in one central location. Currently, foreign private issuers are required to provide in their annual reports the disclosure required by Exchange Act Rule 10A-3(d)¹¹⁰ regarding an exemption from the

that requirements pertaining to audit committees and audit opinions apply, among other things); Section 110 of the Amex Company Guide (stating that in evaluating the listing application of a foreign private issuer, "the Exchange will consider the laws, customs and practices of the applicant's country of domicile, to the extent not contrary to the federal securities laws").

¹⁰⁹ See Section 303A.11 of the NYSE Listed Company Manual; Section 4350(a)(1) of the Nasdaq Manual; Section 110 of the Amex Company Guide.

¹¹⁰ 17 CFR 240.10A-3(d).

listing standards for audit committees.¹¹¹

We propose to add a new Item 16G in Form 20-F that would require foreign private issuers to provide a concise summary in their annual reports of the significant ways in which the foreign private issuer's corporate governance practices differ from the corporate governance practices of domestic companies listed on the same exchange. We expect that the disclosure provided in response to the proposed Item 16G would be similar to the disclosure that foreign private issuers currently provide in response to the corporate governance disclosure requirements of the exchange on which their securities are listed.

Comments solicited

35. Would disclosure of significant differences in the corporate governance practices of foreign private issuers in their annual reports enable investors to better monitor the corporate governance practices of the issuers in which they are investing?

36. Instead of the narrative discussion that is proposed, is there an alternative format, such as a tabular presentation of the differences in corporate governance practices, that would make the information provided in the annual report easier to understand and thus more useful to investors?

37. Is it sufficiently clear what differences in corporate governance should be disclosed? Are there important elements of corporate governance that investors should be informed of and that should be specifically addressed in a company's disclosure under this proposed requirement?

E. Financial Information for Significant, Completed Acquisitions

¹¹¹ See Item 16D of Form 20-F.

We propose to amend Item 17(a) of Form 20-F to require foreign private issuers to provide, in additional circumstances, the financial information required by Rule 3-05 and Article 11¹¹² of Regulation S-X, which pertain, respectively, to the financial statements that must be provided for significant, completed acquisitions and the preparation of pro forma financial statements. Although domestic companies must present the financial statements of significant acquired businesses and pro forma financial information in their registration statements under both the Securities Act and the Exchange Act, as well in a Form 8-K, foreign private issuers only provide this information in the registration statements that they file under the Securities Act and the Exchange Act.

Item 2.01 of Form 8-K¹¹³ requires domestic issuers to disclose certain information when they or one of their majority-owned subsidiaries complete an acquisition or disposition of a significant amount of assets, other than in the ordinary course of business. The Form 8-K filed to report this acquisition or disposition must be filed within four business days after the event has occurred.¹¹⁴ For a business acquisition significant at the 20% or greater level that must be disclosed pursuant to Item 2.01, Item 9.01 of Form 8-K requires the financial statements of the acquired business to be filed with the initial report of the acquisition on Form 8-K, or by amendment no later than 71 calendar

¹¹² 17 CFR 210.11 et seq.

¹¹³ Item 2.01 of Form 8-K.

¹¹⁴ General Instruction B.1. of Form 8-K.

days after the date that the initial report on Form 8-K is due.¹¹⁵ The financial information must be presented in accordance with Rule 3-05 of Regulation S-X, and the pro forma financial information must be presented pursuant to Article 11 of Regulation S-X.¹¹⁶

Foreign private issuers have not been required to present financial information about significant, completed acquisitions in their annual reports under the Exchange Act. When we first proposed Form 20-F, we proposed a disclosure requirement that would have solicited substantially similar information about the acquisition or disposition of assets that is required by Item 2.01 of Form 8-K.¹¹⁷ This proposal was not adopted,¹¹⁸ and the corresponding Rule 3-05 and Article 11 financial statement disclosures were also not implemented as a disclosure requirement for foreign private issuers.

We are now proposing to require foreign private issuers to provide the financial information solicited by Rule 3-05 and Article 11 of Regulation S-X in their Exchange Act annual reports. Because foreign private issuers do not file current reports on Form 8-K, we are not proposing to impose a requirement that this financial information be presented on a more current basis than annually. As proposed, foreign private issuers would provide financial information in their annual report on Form 20-F about highly significant acquisitions completed during the most recent fiscal year covered by their annual report on that Form. We are aware that imposing a disclosure requirement in

¹¹⁵ Item 9.01(a) of Form 8-K. A domestic issuer or a foreign private issuer that is a shell company, however, must report the acquisition within 4 business days on Form 8-K or Form 20-F, respectively. See Release No. 33-8587 (July 15, 2005) [70 FR 42234].

¹¹⁶ Item 9.01(b) of Form 8-K.

¹¹⁷ Release No. 34-14128, supra note 96 (proposing this as Item 23 to the Form).

¹¹⁸ See Form 20-F Adopting Release, supra note 13.

annual reports would incrementally increase compliance costs for foreign private issuers, but we believe that if a single business acquisition is significant at the 50% or greater level, this information is particularly useful to investors and should be disclosed. As proposed, the disclosure requirement would be triggered at the 50% or greater level,¹¹⁹ and would require the provision of financial statements for three fiscal years as prescribed by Rule 3-05(b)(2)(iv) of Regulation S-X.

We are not proposing to require annual reports filed on Form 20-F to contain the information required by Rule 3-05 and Article 11 of Regulation S-K if the information has already been provided previously in a registration statement. In addition, we are not proposing to require financial information about probable acquisitions, or financial information for the aggregation of individually insignificant acquisitions.

Comments solicited

38. If the information about significant, completed acquisitions is disclosed on an annual, as opposed to current, basis, would the information still be useful to investors? Would investors find the information useful even though the disclosure would be provided at least several months after the acquisition was completed?

39. What types of burdens, if any, would be placed on foreign private issuers if they are required to provide financial information disclosure about highly significant, completed acquisitions annually on Form 20-F?

¹¹⁹ The significance of an acquired business is measured by the comparison of: (1) the registrant's investment in the acquired business (acquisition price) to the registrant's total assets, (2) the acquired business' total assets to the total assets of the registrant, or (3) the acquired business' pre-tax income to the pre-tax income of the registrant. See Rule 1-02(w) [17 CFR 210.1-02] of Regulation S-X.

40. As proposed, a foreign private issuer would be required to provide information about a highly significant, completed acquisition in its annual report on Form 20-F. In light of the proposal to accelerate the reporting deadline for annual reports filed on Form 20-F, should foreign private issuers be provided additional time to disclose information about a highly significant, completed acquisition on an amended annual report? If so, should the due date for the filing of this information be based upon the time that the acquisition was consummated? For example, information about a significant acquisition that was consummated early in the calendar year would be due with the annual report filed on Form 20-F, whereas financial information for a highly significant acquisition that occurred late in the calendar year could be provided on a delayed basis beyond the reporting deadline for the annual report filed on Form 20-F.

41. Should foreign private issuers be required to provide financial information for business acquisitions that are significant at the 50% or greater level, or should the test of significance be at the 20% or greater level, as for domestic issuers? Would another significance level between 20% and 50% be more appropriate? To ensure that only very large transactions are required to be presented, should the test of significance be limited to the comparison of the purchase price to the issuer's assets? Alternatively, should a new test be developed for this purpose in which the comparison for significance is based on the size of the issuer's public float?

42. Would it be useful to investors to require annual reports filed on Form 20-F to disclose the information required by Rule 3-05 and Article 11 of Regulation S-K even if the information has been provided previously in a registration statement? What kind of benefits would investors derive from disclosure in the annual reports?

IV. General Request for Comments

We request and encourage any interested person to submit comments on any aspect of our proposals and any of the matters that might have an impact on the proposed amendments. We request comment from investors, issuers, and other users of the information that may be affected by the proposals. We also request comment from service professionals, such as law and accounting firms. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiatives if accompanied by supporting data and analysis of the issues addressed in those comments.

V. Paperwork Reduction Act

A. Background

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").¹²⁰ We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.¹²¹ The titles for the affected collections of information are:

- (1) "Form 20-F" (OMB Control No. 3235-0288);
- (2) "Form F-1" (OMB Control No. 3235-0258);
- (3) "Form F-3" (OMB Control No. 3235-0256); and
- (4) "Form F-4" (OMB Control No. 3235-0325).

Form 20-F sets forth the disclosure requirements for annual reports and registration statements filed by foreign private issuers under the Exchange Act, as well as

¹²⁰ 44 U.S.C. 3501 et seq.

¹²¹ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

many of the disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. Forms F-1, F-3 and F-4 were adopted pursuant to the Securities Act, and set forth the disclosure requirements for registration statements filed by foreign private issuers to offer securities to the public.

The hours and costs associated with preparing, filing and sending these forms and complying with these rules constitute reporting and cost burdens imposed by each collection of information. 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. The information collection requirements related to Forms 20-F, F-1, F-3 and F-4 are mandatory. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system. We have based our estimates of the effect that the proposed rule and form amendments would have on those collections of information primarily on our review of the most recently completed PRA submissions for the affected rules and forms.

The proposed amendments, if adopted, would: (1) Amend Rule 405 of Regulation C under the Securities Act and Exchange Act Rule 3b-4 to permit foreign issuers to test their qualification to use the forms and rules available to foreign private issuers on an annual basis, rather than on the continuous basis that is currently required; (2) Amend Form 20-F to accelerate the filing deadline for annual reports filed by foreign private issuers on Form 20-F, subject to a two-year transition period, and amend Exchange Act Rules 13a-10 and 15d-10 to conform the deadline for transition reports filed by foreign private issuers on Form 20-F with the deadline for annual reports filed on that Form; (3) Amend Form 20-F by eliminating an instruction to Item 17 of that Form,

which permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; (4) Amend Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliate, to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations; (5) Amend Form 20-F and Forms F-1, F-3 and F-4 to require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F; (6) Amend Form 20-F, Forms F-1 and F-4 to require foreign private issuers to disclose information about a change in the issuer's certifying accountant; (7) Amend Form 20-F to require foreign private issuers to disclose the fees and charges paid by ADR holders, the payments made by the depositary to the foreign issuer whose securities underlie the ADRs, and for listed issuers, the differences in the foreign private issuer's corporate governance practices and those applicable to domestic companies under the relevant exchange's listing rules; and (8) Amend Form 20-F to require foreign private issuers to provide certain financial information in their annual reports on Form 20-F about a significant, completed acquisition that is significant at the 50% or greater level when that acquisition is completed after the issuer's first fiscal quarter.

We have based the annual burden and cost estimates of the proposed amendments on the following estimates and assumptions:

- A foreign private issuer incurs or will incur 25% of the annual burden required to produce each Form 20-F, Form F-1, Form F-3, or Form F-4; and

- Outside firms, including legal counsel, accountants and other advisors, incur or will incur 75% of the burden required to produce each Form 20-F, Form F-1, Form F-3, or Form F-4 at an average cost of \$400 per hour.¹²²

We estimated the average number of hours each entity spends completing the forms and the average hourly rate for outside professionals. That estimate includes the time and the cost of in-house preparers, reviews by executive officers, in-house counsel, outside counsel, independent auditors and members of the audit committee.

B. Burden and Cost Estimates Related to the Proposed Amendments

1. Form 20-F

We estimate that currently foreign private issuers file 942 Form 20-Fs each year. We assume that 25% of the burden required to produce the Form 20-Fs is borne internally by foreign private issuers, resulting in 614,891 annual burden hours borne by foreign private issuers out of a total of 2,459,564 annual burden hours. Thus, we estimate that 2,611 total burden hours per response are currently required to prepare the Form 20-F. We further assume that 75% of the burden to produce the Form 20-Fs is carried by outside professionals retained by foreign private issuers at an average cost of \$400 per hour, for a total cost of \$737,868,600.

The proposed amendment to amend Form 20-F to accelerate the filing deadline for annual reports and transitions reports filed on that Form would not change the amount of information required to be included in Exchange Act reports. In connection with this

¹²² In connection with other recent rulemakings, we have had discussions with several law firms to estimate an hourly rate of \$400 as the cost to companies for the services of outside professional retained to assist in the preparation of these disclosures. For Securities Act registration statements, we also consider additional reviews of the disclosure by underwriter's counsel and underwriters.

proposal, we are also proposing to amend Exchange Act Rules 13a-10 and 15d-10, which pertain to transition reports filed on Form 20-F. Our proposed amendments would conform the deadline for transition reports filed on Form 20-F with the proposed deadline for annual reports filed on Form 20-F. These amendments also would not change the amount of information required to be included in Exchange Act reports. Therefore, these proposed amendments would neither increase nor decrease the amount of burden hours necessary to prepare annual reports on Form 20-F for the purposes of the PRA.

With respect to our proposed amendment to require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F, we estimate that approximately 200 companies that file Form 20-F will be impacted by the proposal. We expect that, if adopted, the proposed amendment would cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the proposal, there would occur an increase of 2% (52.22 hours) in the number of burden hours required to prepare their Form 20-F, for a total increase of 10,444 hours as a result of this proposal. We expect that 25% of those increased burden hours (2,611 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (7,833 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$3,133,200 in increased costs to the respondents of the information collection as a result of this proposal.

With respect to our proposed amendment to require disclosure about a change in the issuer's certifying accountant in annual reports and registration statements filed on Form 20-F, we estimate that approximately 90 companies that file Form 20-F will be impacted by the proposal. We expect that, if adopted, the proposed amendment would

cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the proposal, there would occur an increase of .75% (19.58 hours) in the number of burden hours required to prepare their Form 20-F, for a total increase of 1,762.2 hours. We expect that 25% of those increased burden hours (440.55 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (1,321.65 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$528,660 in increased costs to the respondents of the information collection as a result of the proposal.

With respect to our proposed amendment to require disclosure about ADR fees and payments on an annual basis, we estimate that approximately 442 companies that file Form 20-F will be impacted by the proposal. We expect that, if adopted, the proposed amendment would cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the proposal, there would occur an increase of .25% (6.53 hours) in the number of burden hours required to prepare their Form 20-F, for a total increase of 2,886.26 hours. We expect that 25% of those increased burden hours (721.57 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (2,164.71 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$865,884 in increased costs to the respondents of the information collection as a result of these proposal.

With respect to our proposed amendment to require annual disclosure about differences in a listed foreign private issuer's corporate practices and those applicable to domestic companies under the relevant exchange's listing rule, we estimate that approximately 783 companies that file Form 20-F will be impacted by the proposal. We

expect that, if adopted, the proposed amendment would not cause a significant change in the burden hours for those foreign private issuers because they already prepare this information for the exchanges on which they are listed.

With respect to our proposed amendment to eliminate an instruction to Item 17 of Form 20-F, which permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements, we estimate that approximately 5 companies that file Form 20-F will be currently impacted by the proposal. We expect that, if adopted, the proposed amendment would cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the proposal, there would occur an increase of 2% (52.22 hours) in the number of burden hours required to prepare their Form 20-F, for a total increase of 261.1 hours. We expect that 25% of those increased burden hours (65.3 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (195.83 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$78,332 in increased costs to the respondents of the information collection as a result of the proposal.

With respect to our proposed amendment to amend Form 20-F to require foreign private issuers to provide certain financial information in their annual reports on that Form about a significant, completed acquisition that is significant at the 50% or greater level when that acquisition is completed after the issuer's first fiscal quarter, we estimate that approximately 45 companies that file Form 20-F will be currently impacted by the proposal. We expect that, if adopted, the proposed amendment would cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the proposal, there would occur an increase of 20% (522.2 hours)

in the number of burden hours required to prepare their Form 20-F, for a total increase of 23,499 hours. We expect that 25% of those increased burden hours (5,874.75 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (17,624.25 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$7,049,700 in increased costs to the respondents of the information collection as a result of this proposal.

Thus, we estimate that the proposed amendments to Form 20-F would increase the annual burden borne by foreign private issuers in the preparation of Form 20-F from 614,891 hours to 624,604 hours. We further estimate that the proposed amendments would increase the total annual burden associated with Form 20-F preparation to 2,498,417 burden hours, which would increase the average number of burden hours per response to 2652. We further estimate that the proposed amendment would increase the total annual costs attributed to the preparation of Form 20-F by outside firms to \$749,524,376.

2. Form F-1

We estimate that currently foreign private issuers file 42 registration statements on Form F-1 each year. We assume that 25% of the burden required to produce a Form F-1 is borne by foreign private issuers, resulting in 18,890 annual burden hours incurred by foreign private issuers out of a total of 75,560 annual burden hours. Thus, we estimate that 1,799 total burden hours per response are currently required to prepare a registration statement on Form F-1. We further assume that 75% of the burden to produce a Form F-1 is carried by outside professionals retained by foreign private issuers at an average cost of \$400 per hour, for a total cost of \$22,667,400.

We estimate that currently approximately 4 companies that file registration statements on Form F-1 will be impacted by the proposal to require foreign private issuers to provide disclosure about a change in their certifying accountant in their initial registration statements. We expect that, if adopted, the proposed amendment would cause those foreign private issuers to have more burden hours. We estimate that each company affected by the proposal would have a .75% increase (13.49 hours) in the number of burden hours required to prepare their registration statements on Form F-1, for a total increase of 54 hours. We expect that 25% of these increased burden hours (13.5 hours) will be incurred by foreign private issuers. We further expect that 75% of the increased burden hours (40.5 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$16,200 in increased costs to the respondents of the information collection as a result of the proposal.

We estimate that none of the companies that file registration statements on Form F-1 will be impacted by the proposal to require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F. In our experience, the companies that use Form F-1 are engaging in capital raising transactions, so that all registrants have been providing financial information according to Item 18. The proposed amendment would be a technical change to the Form without any expected impact on the companies using that Form.

Thus, we estimate that the proposed amendments to Form F-1 would increase the annual burden incurred by foreign private issuers in the preparation of Form F-1 from 18,890 hours to 18,904 hours. We further estimate that the proposed amendment would increase the total annual burden associated with Form F-1 preparation to 75,614 burden

hours, which would increase the average number of burden hours per response to 1800. We further estimate that the proposed amendment would increase the total annual costs attributed to the preparation of Form F-1 by outside firms to \$22,683,600.

3. Form F-3

We estimate that currently foreign private issuers file 106 registration statements on Form F-3 each year. We assume that 25% of the burden required to produce a Form F-3 is borne by foreign private issuers, resulting in 4,399 annual burden hours incurred by foreign private issuers out of a total of 17,596 annual burden hours. Thus, we estimate that 166 total burden hours per response are currently required to prepare a registration statement on Form F-3. We further assume that 75% of the burden to produce a Form F-3 is carried by outside professionals retained by foreign private issuers at an average cost of \$400 per hour, for a total cost of \$5,278,800.

We estimate that currently approximately 20 companies that file registration statements on Form F-3 will be impacted by the proposal to require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F. We expect that, if adopted, the proposed amendment would cause those foreign private issuers to have more burden hours. We estimate that each company affected by the proposal would have a 2% increase (3.32 hours) in the number of burden hours required to prepare their registration statements on Form F-3, for a total increase of 66.4 hours. We expect that 25% of these increased burden hours (16.6 hours) will be incurred by foreign private issuers. We further expect that 75% of the increased burden hours (49.8 hours) will be incurred by outside firms, at an average cost of \$400 per hour,

for a total of \$19,920 in increased costs to the respondents of the information collection as a result of the proposal.

Thus, we estimate that the proposed amendment to Form F-3 would increase the annual burden incurred by foreign private issuers in the preparation of Form F-3 from 4,399 hours to 4,416 hours. We further estimate that the proposed amendment would increase the total annual burden associated with Form F-3 preparation to 17,663 burden hours, which would increase the average number of burden hours per response to 167. We further estimate that the proposed amendment would increase the total annual costs attributed to the preparation of Form F-3 by outside firms to \$5,298,720.

4. Form F-4

We estimate that currently foreign private issuers file 68 registration statements on Form F-4 each year. We assume that 25% of the burden required to produce a Form F-4 is borne internally by foreign private issuers, resulting in 24,497 annual burden hours incurred by foreign private issuers out of a total of 97,988 annual burden hours. Thus, we estimate that 1,441 total burden hours per response are currently required to prepare a registration statement on Form F-4. We further assume that 75% of the burden to produce a Form F-4 is carried by outside professionals retained by foreign private issuers at an average cost of \$400 per hour, for a total cost of \$29,396,400.

We estimate that currently approximately none of the companies that file registration statements on Form F-4 will be impacted by the proposal to require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F. In our experience, the companies that use Form F-4 have all been providing financial information according to Item 18 because of the types of

transactions that are registered on that Form, so the proposed amendment would be a technical change to the Form without any expected impact on the companies using it.

We estimate that currently approximately 5 companies that file registration statements on Form F-4 will be impacted by the proposal to require foreign private issuers to provide disclosure about a change in their certifying accountant in their initial registration statements. We expect that, if adopted, the proposed amendment would cause those foreign private issuers to have more burden hours. We estimate that each company affected by the proposal would have a .75% increase (10.81 hours) in the number of burden hours required to prepare their registration statements on Form F-1, for a total increase of 54 hours. We expect that 25% of these increased burden hours (13.5 hours) will be incurred by foreign private issuers. We further expect that 75% of the increased burden hours (40.5 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$16,200 in increased costs to the respondents of the information collection as a result of the proposal.

Thus, we estimate that the proposed amendments to Form F-4 would increase the annual burden incurred by foreign private issuers in the preparation of Form F-4 from 24,497 hours to 24,511 hours. We further estimate that the proposed amendment would increase the total annual burden associated with Form F-4 preparation to 98,042 burden hours, which would decrease the average number of burden hours per response to 1,442. We further estimate that the proposed amendment would increase the total annual costs attributed to the preparation of Form F-4 by outside firms to \$29,412,600.

5. Other proposed amendments

The proposed amendments to Securities Act Rule 405 and Exchange Act Rule 3b-4 would revise the definition of “foreign private issuer” to permit foreign issuers to test their status as “foreign private issuers” on the last business day of their second fiscal quarter, rather than continuously, as is currently the case. Our proposed amendments would not change the amount of information required to be included in Securities Act registration statements or Exchange Act reports. Therefore, they would neither increase nor decrease the amount of burden hours necessary to prepare documents under either of those Acts for the purposes of the PRA.

In addition, we also expect the proposed amendment to Exchange Act Rule 13e-3 to have a neutral effect on foreign private issuers. We do not expect a change in the number of foreign private issuers who would be required to comply with Rule 13e-3, or the burden hours required to prepare a Schedule 13E-3.

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our estimates of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;

- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens.

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-05-08. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7-05-08 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street NE, Washington DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

VI. Cost-Benefit Analysis

We are proposing amendments to our rules and forms relating to foreign private issuers that are intended to improve the accessibility of the U.S. public capital markets to these issuers, as well as to enhance the information that is available to investors. The

Commission has considered the costs and benefits as described below and encourages commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs or benefits. Specifically, the Commission requests data to quantify the costs and the value of each of the benefits identified. The Commission also seeks estimates and views regarding the identified costs and benefits of the proposals for particular types of market participants and any other costs or benefits that may result from the adoption of the proposed rule.

1. Annual Test for Foreign Private Issuer Status

A. Expected Benefits

The proposed amendments to the definition of “foreign private issuer” contained in Securities Act Rule 405 and Exchange Act Rule 3b-4 would permit reporting foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year on the last business day of their second fiscal quarter, rather than continuously, as is currently the case. This is the same date used to determine accelerated filer status under Exchange Act Rule 12b-2 and smaller reporting company status in Item 10(f)(2)(i) of Regulation S-K. As a result, these proposed amendments should simplify compliance with the Commission’s regulations by establishing one date that is used to ascertain an issuer’s status. Foreign issuers should benefit as a result of this simplification of their compliance requirements, which could make the U.S. markets more attractive to them as a source of capital and thereby enhance the competitiveness of the U.S. markets compared to other markets. The proposed amendments are expected to reduce the cost for foreign issuers of monitoring whether they qualify as foreign private issuers, including the time spent by management in tracking this information. If more

foreign issuers are encouraged to remain in the U.S. markets and to make public offerings, investors should also benefit because this will enhance their ability to invest in the securities of foreign issuers that have been registered with the Commission, and that are thus subject to the disclosure requirements and investor protections provided by the federal securities laws.

Once a foreign issuer determines that it no longer qualifies as a foreign private issuer, the proposed amendments would provide the issuer with at least six months' advance notice that it must comply with the domestic issuer forms and rules. This would provide these issuers with more time to comply with the reporting requirements applicable to domestic issuers under the Exchange Act, and to modify their information and processing systems to comply with the domestic reporting and registration regime. This includes the requirements to comply with the more extensive executive compensation disclosure requirements that apply to domestic issuers, as well as the proxy rules and Section 16 reporting requirements under the Exchange Act, which do not apply to foreign private issuers. Because the proposed amendments would provide foreign issuers with advance notice when their status changes, more foreign issuers may be encouraged to remain in the U.S. markets, and investors should benefit from the increased opportunities to invest in foreign securities in the United States.

The proposed amendments should mitigate a burden on foreign issuers by reducing the amount of time and the resources they expend to determine their status pursuant to the four-factor test set forth in the definition of "foreign private issuer." In this respect, the proposed amendments would be most beneficial to reporting foreign private issuers that have close to 50% of their outstanding voting securities held of record

by U.S. residents, since they are most at risk of no longer qualifying as foreign private issuers. The current requirement that foreign issuers continuously test their status can result in confusion for investors if a foreign issuer needs to move between foreign and domestic reporting forms in the same fiscal year. For example, investors may be confused if a foreign issuer determines that it no longer qualifies as a foreign private issuer, and then switches from the foreign private issuer forms (Form 6-K and Form 20-F) to the domestic forms (e.g., quarterly reports on Form 10-Q) in the same fiscal year. The proposed amendments would benefit U.S. investors by eliminating this confusion. However, the proposed amendments may not be as helpful in reducing investor confusion with respect to foreign private issuers that have been reporting under the domestic regime and that would now be permitted to switch immediately to the foreign private issuer reporting regime upon the determination of their eligibility to do so.

At the same time, foreign issuers that previously did not qualify as foreign private issuers, but that determine that they would qualify as foreign private issuers, would be able to use the foreign private issuer rules and forms immediately under the proposed amendments. This accommodation could encourage more foreign issuers to enter the U.S. markets and to make public offerings, and should benefit investors by enhancing their ability to invest in foreign securities that have been registered with the Commission.

B. Expected Costs

Investors could incur costs from the proposed amendments if foreign issuers that have been reporting under the domestic reporting regime immediately switch over to the foreign private issuer forms once they qualify as foreign private issuers. Because foreign private issuers have different Exchange Act reporting obligations than domestic issuers

and file on different forms, some investors may find it confusing if a foreign issuer that had been reporting under the domestic reporting regime switches reporting regimes mid-year. In addition, once a foreign issuer switches status from a domestic issuer to a foreign private issuer, investors will no longer have the benefit of the disclosures that were once provided by the foreign issuer on the domestic forms.

Currently, when a foreign issuer no longer qualifies as a foreign private issuer, it must immediately file quarterly reports on Form 10-Q and current reports on Form 8-K. It must also comply with the Commission's proxy rules and the Section 16 insider stock trading and short-swing profit recovery provisions. Under the proposed amendments, when a foreign issuer determines that it no longer qualifies as a foreign issuer, for the six months following the test date, the foreign issuer would be permitted to continue relying on the rules applicable to foreign private issuers, such as the exemption from the proxy rules and Section 16. The foreign issuer would also be allowed to use the forms reserved for foreign private issuers, and to provide current reports on Form 6-K, rather than Exchange Act reports on Forms 10-Q and 8-K. During that period, investors would not have the benefit of the additional disclosures that the foreign issuer would otherwise be required to provide.

2. Proposed Amendments to Form 20-F

The proposed amendments would make several changes to annual reports filed on Form 20-F. We are proposing to accelerate the deadline for annual reports filed on Form 20-F by foreign private issuers. We are also proposing to amend Form 20-F to require certain additional disclosures in annual reports on that Form. The proposed amendments would require issuers to disclose any changes in and disagreements with the registrant's

certifying accountant in their Form 20-F annual reports, as well as in the Securities Act registration statements filed by first-time registrants with the Commission. The proposed amendments would also require disclosure of the fees and other charges paid by ADR holders to depositaries, and any payments made by depositaries to the foreign issuers whose securities underlie the ADRs. In addition, we are proposing to amend Form 20-F to require disclosure in the annual report about the significant differences in the corporate governance practices of listed foreign private issuers compared to the corporate governance practices applicable to domestic companies under the relevant exchange's listing standards. Another proposed amendment would eliminate an instruction to Item 17 of Form 20-F that permits certain foreign private issuers to omit segment data from the U.S. GAAP financial statements. The proposed amendments to Form 20-F would also amend that Form to require foreign private issuers to present information about a significant, completed acquisition that is significant at the 50% or greater level, calculated based on assets or income from continuing operations, in their annual reports on that Form.

In addition to these amendments, we are proposing to eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of Form 20-F for foreign private issuers that are only listing a class of securities on a U.S. national securities exchange, or only registering a class of equity securities under Section 12(g) of the Exchange Act, and not conducting a public offering. The proposed amendments would apply not only to registration statements filed on Form 20-F in the circumstances described above, but also to annual reports filed on that Form. Related to this proposed amendment, we are proposing to eliminate the Item 17 limited reconciliation option for

certain non-capital raising offerings, such as offerings pursuant to dividend reinvestment plans, offerings upon the conversion of securities, or offerings of investment grade securities. The Securities Act registration statement forms available to foreign private issuers (Form F-1, F-3 and F-4) would be amended accordingly.

A. Expected Benefits

We anticipate that the proposed amendments to Form 20-F and the related amendments to the Securities Act registration statement forms available to foreign private issuers would provide a significant benefit to U.S. investors by providing them with enhanced disclosure that is more similar to the disclosures provided by domestic issuers, as well as disclosure on an accelerated basis that is more comparable to the timeframe within which domestic issuers file annual reports. Because of the Commission's integrated disclosure system, in which approximately the same information is provided in both the primary and secondary markets, the disclosure requirements contained in Form 20-F are often more comprehensive than the disclosures required by foreign securities regulators. For example, although many foreign regulators require audited financial statements and a form of management's report in annual reports, they do not require disclosure about executive compensation, description about the issuer's business, or a Management's Discussion and Analysis (MD&A). These additional disclosures are required in the Form 20-F annual reports that foreign private issuers file with the Commission.

Based on our analysis of a sample of Form 20-F annual reports filed with the Commission in the past few years, we estimate that approximately one-third of all such filers currently file Form 20-F annual reports with us within 120 days after their fiscal

year-end. The proposed amendment to accelerate the due date for Form 20-F annual reports would thus affect a majority of the foreign private issuers that file on Form 20-F. As a result of the accelerated deadline, investors may be better able to compare the performance of foreign and domestic issuers, since information about both will be provided on a more contemporaneous basis.

The proposed amendments to require additional disclosure in Form 20-F annual reports should help investors better compare foreign and domestic issuers. Currently, domestic issuers provide disclosure about changes in and disagreements with their certifying accountant on a Form 8-K current report. Listed domestic issuers are also required to comply with the corporate governance requirements of the U.S. exchange on which their securities are listed, although foreign private issuers whose securities are listed on the same exchange are exempt. The proposed amendments would provide investors with more comparable information about foreign private issuers regarding possible audit opinion shopping and corporate governance practices.

The proposed amendments to require disclosure about ADR fees and payments made by depositaries to the foreign issuers whose securities underlie the ADRs will make this information more readily available to investors. The placement of this disclosure in annual reports and Form 20-F registration statements should assist investors in determining the fees related to their investments in ADRs, including indirect costs that may be imposed on them if the depository bank passes along the cost of its payments to foreign issuers to ADR holders. This should better enable investors to determine the value of investing in the ADRs of foreign issuers.

Several of the proposed amendments to Item 17 of Form 20-F may also help ensure that all foreign private issuers provide the same level of financial information, thereby facilitating a readier comparison across all issuers. This could, as a consequence, increase the attractiveness of these companies to investors. For example, the proposed amendments would eliminate the availability of the limited U.S. GAAP reconciliation option in Item 17 of Form 20-F for annual reports, registration statements on Form 20-F that do not involve a public offering, and Securities Act registration statements for certain non-capital raising transactions. Currently, most foreign private issuers that provide U.S. GAAP reconciliation disclose financial information according to Item 18 of Form 20-F. The proposed amendment would ensure that all foreign private issuers provide this level of disclosure. Another proposed amendment would eliminate the instruction to Item 17 of Form 20-F that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements. Although we estimate that less than 10 foreign private issuers use this instruction, the instruction creates an anomaly whereby an issuer is permitted to provide a qualified U.S. GAAP audit report.

Investors are also expected to benefit from the proposed amendment to require foreign private issuers to present information about a highly significant, completed acquisition in their annual reports filed on Form 20-F. Currently, foreign private issuers are not required to provide any information about such transactions in their periodic reports. The proposed amendment would enable investors to receive historical financial information about the acquired company, information they currently receive from domestic registrants, but not from foreign issuers that are acquirers. This information

may help investors to assess the past performance of the acquired entity and its possible effect on the valuation of the acquiring company.

B. Expected Costs

Foreign private issuers could incur costs from the proposed amendments to Form 20-F, and the related amendments to the Securities Act registration statements available to foreign private issuers. In order to comply with the proposed accelerated due dates, many foreign private issuers would likely have to implement new systems for preparing information during the transition period to the new rules. They could be required to prepare annual reports on a dual track, one for the annual report filed with their home country regulator and the Form 20-F annual report. According to our analysis of a sample of Form 20-F annual reports filed with us, approximately one-fifth of all such filers file their Form 20-F annual reports within 90 days of their fiscal year-end, and approximately one-third file their Form 20-F annual reports within 120 days of their fiscal year-end. The cost of preparing filings on an accelerated basis may therefore vary among issuers. In addition, because of the Commission's integrated disclosure system, in which issuers provide approximately the same disclosures to both the primary and secondary markets, the disclosures required in Form 20-F are more substantial than the information required for annual reports in many foreign jurisdictions. The proposed amendments could thus result in increased costs for foreign private issuers.

The proposed amendments to provide additional disclosures in Form 20-F may also impose additional costs on foreign private issuers. With respect to the proposed disclosure regarding ADR fees and payments made by depositaries, we note that the information about ADR fees is provided in the deposit agreement and form of receipt that

are attached as exhibits to the Form F-6 used to register the ADRs under the Securities Act, as well as in the Securities Act registration statement related to the offering of the securities underlying the ADRs. Because the information is already required by the Commission, albeit in filings that most retail investors are not familiar with, we do not believe that the requirement to include this information in the foreign private issuer's annual report on Form 20-F would involve significant compliance costs.

In addition, the information about the payments made by depositaries to foreign private issuers would provide important new information to investors about incentives used by depositaries that may encourage foreign private issuers to sell their securities in ADR form and with a particular depository bank. If foreign issuers are reluctant to disclose this information, they could be discouraged from entering the U.S. markets, or, if they already have established ADR facilities in the United States, from maintaining their ADR facilities. This would reduce the opportunities for investors to invest in foreign securities in the United States.

Foreign private issuers could incur some costs related to the proposal to include information about differences in corporate governance practices for listed foreign private issuers. However, the U.S. exchanges already require that this information be prepared. For foreign private issuers that are listed on U.S. exchanges, the proposed amendment would not involve the collection of new information or preparation of new disclosure, but would simply require that the information also be made available in the annual report, where many investors may expect to see it. As a result, we believe the compliance costs of this proposed amendment would be relatively small. Under the proposed amendments,

corporate governance information would not be required for issuers that are not listed on a U.S. exchange.

The proposed amendments to eliminate the availability of the limited U.S. GAAP reconciliation contained in Item 17 of Form 20-F, and to require segment data in U.S. GAAP financial statements could result in costs for the affected foreign private issuers because they would now need to collect this information and to prepare additional disclosure in their Form 20-F annual reports. However, based on our review of Form 20-F annual report filings made with us for fiscal year 2006, we estimate that most foreign private issuers already provide financial information according to Item 18 of Form 20-F, and that less than 10 foreign private issuers would be affected by the requirement to provide segment data.

Foreign private issuers would also incur costs in connection with the proposal to require disclosure about any changes in and disagreements with the registrant's certifying accountant in Form 20-F annual reports and in Securities Act registration statements filed by first-time registrants. In addition to the preparation costs of including this information in the Form 20-F, the foreign private issuer could also incur certain costs associated with the proposed requirement to obtain a letter from its former accountant stating whether it agrees with the disclosure provided by the issuer in the document filed with the Commission.

Foreign private issuers could also incur compliance costs in connection with the proposal to require information about a highly significant, completed acquisition in annual reports filed on Form 20-F. These costs would include, for example, costs related to the preparation of this information. In some cases, this requirement could deter and

potentially discourage issuers from effectuating certain transactions because of the difficulty of obtaining financial information to comply with this requirement.

Investors may incur costs to the extent that the amendments to Form 20-F discourage foreign private issuers from registering or maintaining their registration with the Commission. If foreign private issuers deregister or do not register their securities under the Securities Act or the Exchange Act, there may be reduced opportunities for investment by U.S. investors in the securities of foreign issuers. Although each of the proposed amendments would affect a different number of foreign private issuers, for purposes of the Paperwork Reduction Act, we estimate that these new disclosures would result in an increased paperwork burden of 34 hours for all respondents and \$9,516,990 for Form 20-F.

3. Exchange Act Rule 13e-3

A. Expected Benefits

We believe that the proposal to amend Exchange Act Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliates, to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations would benefit investors. The proposed amendment would help ensure that Rule 13e-3 covered the types of transactions that were intended when the Commission first adopted the Rule. Investors would benefit because more foreign private issuers are expected to be able to terminate their registration and reporting obligations under the Exchange Act as a result of these recently adopted amendments. If more foreign private issuers decide to conduct going private transactions to terminate their registration or reporting obligations, the proposed amendment to Rule

13e-3 would require more foreign private issuers to comply with that Rule and to file a Schedule 13E-3, as required by that Rule. Investors would benefit from the additional disclosures that would be provided.

B. Expected Costs

Foreign private issuers may incur additional costs in connection with the proposed amendment to Rule 13e-3(a)(3)(ii)(A) if Rule 13e-3 is more easily triggered because of the reference to the new termination of registration and reporting requirements that apply to foreign private issuers. These costs would include, for example, the cost of preparing, filing and disseminating a Schedule 13E-3, as well as any required amendments to that Schedule, with the Commission.

Comments solicited

We solicit comment on the costs and benefits to U.S. and other investors, foreign private issuers and others who may be affected by 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 the proposed amendments. We also request data to quantify the costs and value of the benefits identified. In particular, we solicit comment on:

- The number of current foreign private issuers that are expected to be affected by the proposed amendments;
- The estimated U.S dollar cost to foreign issuers as a result of the proposed amendment to accelerate the due date for filing Form 20-F annual reports;
- The number of current foreign issuers who do not already provide financial information according to Item 18 of Form 20-F; and

- How investors would be affected both directly and indirectly from the proposed amendments, as discussed in this section.

VII. Consideration of Impact on the Economy, Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),¹²³ we solicit data to determine whether the proposals constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: an annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease); 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 the potential impact of the proposals on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views if possible.

Section 2(b) of the Securities Act¹²⁴ and Section 3(f) of the Exchange Act¹²⁵ require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. When adopting

¹²³ Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

¹²⁴ 15 U.S.C. 77b(b).

¹²⁵ 15 U.S.C. 78c(f).

rules under the Exchange Act, Section 23(a)(2) of the Exchange Act¹²⁶ requires us to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The purpose of the proposed amendments to Securities Act Rule 405 and Exchange Act Rule 3b-4, which would permit foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year, are expected to facilitate capital formation by foreign issuers in the U.S. capital markets. The proposed amendments should reduce regulatory compliance burdens for foreign private issuers that rely on the proposed amendments because of the reduction in monitoring costs. Reduced compliance burdens are expected to lower the cost of raising capital in the United States for those issuers. In addition, the competitiveness of the U.S. markets may be enhanced because the reduced monitoring costs may make the markets more attractive to them. The reduction in compliance burdens may also promote efficiency because foreign issuers would no longer need to continuously test their qualification as foreign private issuers.

The proposed amendments to Form 20-F would accelerate the reporting deadline for annual reports on Form 20-F. The proposed amendments to Exchange Act Rules 13a-10 and 15d-10 would conform the due dates for transition reports filed on Form 20-F with the proposed due dates for annual reports on Form 20-F. Several of the proposed amendments to Form 20-F would require more disclosure in the annual reports filed by foreign private issuers. The disclosures required would include information about any

¹²⁶ 15 U.S.C. 78w(a)(2).

changes in and disagreements with the registrant's certifying accountant, ADR fees and payments made by depositaries to the foreign issuers whose securities underlie the ADR, information about corporate governance, and information about highly significant, completed acquisitions. In addition, the proposed amendments would eliminate the availability of the limited U.S. GAAP reconciliation option contained in Item 17 of Form 20-F, and would eliminate an instruction to Item 17 of that Form, which permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements.

These proposed amendments would create a more level playing field between foreign private issuers and U.S. issuers because they would require disclosures from foreign private issuers that are currently required of domestic issuers. Foreign private issuers that file annual reports on Form 20-F would also be required to provide these annual reports in a timeframe that is closer to the annual report due dates imposed on domestic issuers. As a result, the proposed amendments should put foreign private issuers and domestic issuers in a more similar position with respect to their compliance obligations under the Commission's regulations, although the incremental costs of complying with these proposed amendments may also create a disincentive for some foreign private issuers to enter the U.S. capital markets.

The proposed amendments may also facilitate capital formation by foreign companies in the U.S. capital markets by enabling investors to obtain more information about these companies in a timeframe that would make the information useful to them and in a manner that would allow for greater comparability to domestic issuers. This could affect the allocation of capital between foreign private issuers and domestic issuers.

The proposed amendments to Exchange Act Rule 13e-3, which reflect the newly adopted rules pertaining to the termination and deregistration of the reporting obligations of foreign private issuers, could require more foreign private issuers to comply with that Rule and to file a Schedule 13E-3 as a result if more foreign private issuers decide to conduct going private transactions to terminate their registration and reporting obligations. This additional compliance obligation could create a disincentive for foreign private issuers to enter the U.S. markets.

We solicit comment on whether the proposed rules would impose a burden on competition or whether they would promote efficiency, competition and capital formation. For example, would the proposals have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act? Would the proposals create an adverse competitive effect on U.S. issuers or on foreign issuers? Commenters are requested to provide empirical data and other factual support for their views if possible.

VIII. Regulatory Flexibility Act Certification

The Commission hereby certifies pursuant to 5 U.S.C. 605(b), that the amendments to Rule 405 of Regulation C, Form F-1, Form F-3, and Form F-4 under the Securities Act, and Form 20-F, Rule 3b-4, Rule 13a-10, Rule 13e-3 and Rule 15d-10 under the Exchange Act contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed amendments would: (1) Amend Rule 405 of Regulation C under the Securities Act to permit foreign issuers to test their qualification to use the forms and rules available to foreign private issuers on an annual basis, rather than on the continuous basis that is currently required;

(2) Amend Form 20-F to accelerate the filing deadline for annual reports filed by foreign private issuers on Form 20-F, subject to a two-year transition period, and amend Exchange Act Rules 13a-10 and 15d-10 so that the deadline for transition reports filed by foreign private issuers on Form 20-F is the same as the deadline for annual reports filed on Form 20-F; (3) Amend Form 20-F by eliminating an instruction to Item 17 of that Form, which permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; (4) Amend Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliate, to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations; (5) Amend Form 20-F and Forms F-1, F-3 and F-4 to require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F; (6) Amend Form 20-F to require foreign private issuers to disclose information about a change in the issuer's certifying accountant, the fees and charges paid by ADR holders, the payments made by the depository to the foreign issuer whose securities underlie the ADRs, and for listed issuers, the differences in the foreign private issuer's corporate governance practices and those applicable to domestic companies under the relevant exchange's listing rules; and (7) Amend Form 20-F to require foreign private issuers to provide certain financial information in their annual reports on Form 20-F about a significant, completed acquisition that is significant at the 50% or greater level when that acquisition is completed after the issuer's first fiscal quarter.

Based on an analysis of the language and legislative history of the Regulatory Flexibility Act, Congress does not appear to have intended the Act to apply to foreign

issuers. The entities directly affected by the proposed amendments will fall outside the scope of the Act. For this reason, the proposed amendments should not have a significant economic impact on a substantial number of small entities.

We solicit written comments regarding this certification. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

IX. Statutory Authority and Text of the Proposed Amendments

We are proposing amendments to the rules and forms pursuant to the authority set forth in Sections 6, 7, 10 and 19 of the Securities Act, as amended, and Sections 3, 12, 13, 15, 23 and 36 of the Exchange Act, as amended.

List of Subjects

17 CFR Parts 230, 239, 240 and 249

Reporting and recordkeeping requirements, Securities.

Text of the Proposed 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 general authority citation for Part 230 continues to read 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 230.405 is amended by revising the definition of “foreign private issuer” to read as follows:

§230.405 Definition of terms.

* * *

Foreign private issuer. The term foreign private issuer means any foreign issuer other than a foreign government except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

- (1) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and
- (2) Any of the following:
 - (i) The majority of the executive officers or directors are United States citizens or residents;
 - (ii) More than 50 percent of the assets of the issuer are located in the United States; or
 - (iii) The business of the issuer is administered principally in the United States.

In the case of a new registrant with the Commission, the determination of whether an issuer is a foreign private issuer shall be made as of a date within 30 days prior to the issuer's filing of an initial registration statement under either the Act or the Securities Exchange Act of 1934.

Once an issuer qualifies as a foreign private issuer, it will immediately be able to use the forms and rules designated for foreign private issuers until it fails to qualify for this status at the end of its most recently completed second fiscal quarter. An issuer's determination that it fails to qualify as a foreign private issuer governs its eligibility to use the forms and rules designated for foreign private issuers beginning on the first day of the fiscal year following the determination date. Once an issuer fails to qualify for

foreign private issuer status, it will remain unqualified unless it meets the requirements for foreign private issuer status as of the last business day of its second fiscal quarter.

* * * * *

PART 239--FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

3. The authority citation for part 239 continues to read in part 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, 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.

* * * * *

4. Form F-1 (referenced in §239.31) is amended by revising paragraph (c) and Instruction 2 to Item 4 of Part I and removing the Instruction to Item 4A of Part I.

The revisions read as follows:

[Note: The text of Form F-1 does not, and the amendments thereto will not, appear in the Code of Federal Regulations.]

FORM F-1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

PART I

* * * * *

Item 4. Information with Respect to the Registrant and the Offering.

Furnish the following information with respect to the Registrant.

* * * * *

(c) Information required by Item 16F of Form 20-F.

Instructions

2. You do not have to provide the information required by Item 4(c) if you are required to file reports under sections 13(a) or 15(d) of the Exchange Act.

5. Form F-3 (referenced in §239.33) is amended by:

a. In General Instruction I.B.2., removing the phrase “may comply with Item 17 or 18” in the last sentence and adding in its place “must comply with Item 18”;

b. In General Instruction I.B.3., removing the phrase “may comply with Item 17 or 18” in the first sentence and adding in its place “must comply with Item 18”;

c. In General Instruction I.B.4., removing the phrase “may comply with Item 17 or 18” in the second sentence and adding in its place “ must comply with Item 18”; and

d. Revising the Instruction to Item 5 to read as follows:

[Note: The text of Form F-3 does not, and the amendments thereto will not, appear in the Code of Federal Regulations.]

FORM F-3**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

Item 5. Material Changes.

Instruction. Financial statements or information required to be furnished by this Item shall be reconciled pursuant to Item 18 of Form 20-F.

6. Form F-4 (referenced in §239.34) is amended by:
- a. Revising Instruction 1 to Item 11;
 - b. Revising Item 12(b)(2) introductory text and Item 12(b)(3)(vii);
 - c. In Item 12(b)(3)(viii), removing the period and adding in its place “; and” and adding Item 12(b)(3)(ix);
 - d. Adding an Instruction to Item 12;
 - e. Revising Instruction 1 to Item 13;
 - f. Revising Item 14(h);
 - g. In Item 14(i), removing the period and adding in its place “; and”;
 - h. Adding Item 14(j);
 - i. Adding “1” before the existing instruction for Instructions to Item 14 and adding an Instruction 2; and
 - j. In Item 17(b)(5)(ii), removing the period and adding in its place “; and” and adding Item 17(b)(6).

The revisions and additions read as follows:

[Note: The text of Form F-4 does not, and the amendments thereto will not, appear in the Code of Federal Regulations.]

FORM F-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

Item 11. Incorporation of Certain Information by Reference.

Instructions

1. All annual reports or registration statements incorporated by reference pursuant to Item 11 of this Form shall contain financial statements that comply with Item 18 of Form 20-F.

* * * * *

Item 12. Information with Respect to F-3 Registrants.

* * * * *

(b) * * *

(2) Include financial statements and information as required by Item 18 of Form 20-F. In addition, provide:

(3) * * *

(vii) Financial statements required by Item 18 of Form 20-F, and financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued. (Schedules required under Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form, but need not be provided with respect to the company being acquired if information is being furnished pursuant to Item 17(a) of this Form);

* * *

(ix) Item 16F of Form 20-F, change in registrant's certifying accountant.

Instruction

You do not have to provide the information required by Item 12(b)(3)(ix) if you are required to file reports under sections 13(a) or 15(d) of the Exchange Act.

Item 13. Incorporation of Certain Information by Reference.

Instructions

1. All annual reports incorporated by reference pursuant to Item 13 of this Form shall contain financial statements that comply with Item 18 of Form 20-F.

Item 14. Information With Respect to Foreign Registrants Other Than F-3 Registrants.

(a) ***

(h) Financial statements required by Item 18 of Form 20-F, as well as financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued. (Schedules required by Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form);

(j) Item 16F of Form 20-F, change in registrant's certifying accountant.

Instructions

1. ***

2. You do not have to provide the information required by Item 14(j) if you are required to file reports under sections 13(a) or 15(d) of the Exchange Act.

Item 17. Information With Respect to Foreign Companies Other Than F-3 Companies.

* * * * *

(b) * * *

(6) Item 16F(b) of Form 20-F, change in registrant's certifying accountant.

* * * * *

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES

EXCHANGE ACT OF 1934

7. The authority citation for Part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq., and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

8. Section 240.3b-4 is amended by revising paragraph (c) and adding paragraphs (d) and (e) to read as follows:

§240.3b-4 Definition of “foreign government”, “foreign issuer” and “foreign private issuer”.

* * * * *

(c) The term “foreign private issuer” means any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(1) * * *

(d) Notwithstanding paragraph (c) of this rule, in the case of a new registrant with the Commission, the determination of whether an issuer is a foreign private issuer will be made as of a date within 30 days prior to the issuer's filing of an initial registration statement under either the Act or the Securities Act of 1933.

(e) Once an issuer qualifies as a foreign private issuer, it will immediately be able to use the forms and rules designated for foreign private issuers until it fails to qualify for this status at the end of its most recently completed second fiscal quarter. An issuer's determination that it fails to qualify as a foreign private issuer governs its eligibility to use the forms and rules designated for foreign private issuers beginning on the first day of the fiscal year following the determination date. Once an issuer fails to qualify for foreign private issuer status, it will remain unqualified unless it meets the requirements for foreign private issuer status as of the last business day of its second fiscal quarter.

* * * * *

9. Section 240.13a-10 is amended by revising paragraph (g)(3) to read as follows:

§240.13a-10 Transition reports.

* * * * *

(g)(3) The report for the transition period shall be filed on Form 20-F responding to all items to which such issuer is required to respond when Form 20-F is used as an annual report. The financial statements for the transition period filed therewith shall be audited. The transition report shall be filed as follows:

(i) For large accelerated filers and accelerated filers (as defined in §240.12b-2), within 90 days after either the close of the transition period or the date on which the

issuer made the determination to change the fiscal closing date, whichever is later, for fiscal years ending on or after December 15, 2010; and

(ii) For all other issuers, within 120 days after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later, for fiscal years ending on or after December 15, 2010.

* * * * *

10. Section 240.13e-3 is amended by revising paragraph (a)(3)(ii)(A) to read as follows:

§240.13e-3 Going private transactions by certain issuers or their affiliates.

(a) * * *

(3) * * *

(ii) * * *

(A) Causing any class of equity securities of the issuer which is subject to section 12(b) or section 15(d) of the Act to become eligible for termination of registration under Rule 12g-4 [§240.12g-4] or Rule 12h-6 [§240.12h-6], or causing the reporting obligations with respect to such class to become eligible for termination under Rule 12h-6 [§240.12h-6]; or

* * * * *

11. Section 240.15d-10 is amended by revising paragraph (g)(3) to read as follows:

§240.15d-10 Transition reports.

(a) * * *

(g)(3) The report for the transition period shall be filed on Form 20-F responding to all items to which such issuer is required to respond when Form 20-F is used as an annual report. The financial statements for the transition period filed therewith shall be audited. The transition report shall be filed as follows:

(i) For large accelerated filers and accelerated filers (as defined in §240.12b-2), within 90 days after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later, for fiscal years ending on or after December 15, 2010; and

(ii) For all other issuers, within 120 days after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later, for fiscal years ending on or after December 15, 2010.

* * * * *

PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934

12. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq., 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

13. Form 20-F (referenced in §249.220f) is amended by:

- a. Revising General Instructions A.(b) and E.(c);
- b. Revising Items 12.D and 12.D.3, and Instruction 1 to Item 12;
- c. Adding Item 16F and Instructions to Item 16F;
- d. Adding Item 16G and an Instruction to Item 16G;
- e. Revising Item 17(a);

f. Removing Instruction 3 to Item 17, and redesignating Instructions 4, 5 and 6 as 3, 4 and 5; and

g. Revising the Instruction to Item 18.

The additions and revisions read as follows:

[Note: The text of Form 20-F does not, and the amendments thereto will not, appear in the Code of Federal Regulations.]

FORM 20-F

* * * * *

GENERAL INSTRUCTIONS

A. Who May Use Form 20-F and When It Must Be Filed

* * * * *

(b) A foreign private issuer must file its annual report on this Form within the following period:

(1) For large accelerated filers and accelerated filers (as defined in §240.12b-2), within 90 days after the end of the fiscal year covered by the report for fiscal years ending on or after December 15, 2010; and

(2) For all other issuers, within 120 days after the end of the fiscal year covered by the report for fiscal years ending on or after December 15, 2010.

* * * * *

E. Which Items to Respond to in Registration Statements and Annual Reports.

(a) * * *

(c) Financial Statements. An Exchange Act registration statement or annual report filed on this Form must contain the financial statements and related information

specified in Item 18 of this Form. Note that Items 17 and 18 may require you to file the financial statements of other entities in certain circumstances. These circumstances are described in Regulation S-X.

* * * * *

Item 12. Description of Securities Other than Equity Securities.

* * * * *

D. American Depositary Shares. If you are registering securities represented by American depositary receipts in a sponsored facility, provide the following information.

* * * * *

3. Describe all fees and charges that a holder of American depositary receipts may have to pay, either directly or indirectly. Indicate the type of service, the amount of the fees or charges and to whom the fees or charges are paid. In particular, provide information about any fees or charges in connection with (a) depositing or substituting the underlying shares; (b) receiving or distributing dividends; (c) selling or exercising rights; (d) withdrawing an underlying security; (e) transferring, splitting or grouping receipts; and (f) general depositary services, particularly those charged on an annual basis.

In addition, describe all fees and other direct and indirect payments made by the depositary to the foreign issuer of the deposited securities.

Instructions to Item 12:

1. Except for Item 12.D.3., you do not need to provide the information called for by this item if you are using this form as an annual report.

* * * * *

Item 16F. Change in Registrant's Certifying Accountant.

(a)(1) If during the registrant's two most recent fiscal years or any subsequent interim period, an independent accountant who was previously engaged as the principal accountant to audit the registrant's financial statements, or an independent accountant who was previously engaged to audit a significant subsidiary and on whom the principal accountant expressed reliance in its report, has resigned (or indicated it has declined to stand for re-election after the completion of the current audit) or was dismissed, then the registrant shall:

(i) State whether the former accountant resigned, declined to stand for re-election or was dismissed and the date thereof.

(ii) State whether the principal accountant's report on the financial statements for either of the past two years contained an adverse opinion or a disclaimer of opinion, or was qualified or modified as to uncertainty, audit scope, or accounting principles; and also describe the nature of each such adverse opinion, disclaimer of opinion, modification, or qualification.

(iii) State whether the decision to change accountants was recommended or approved by:

(A) Any audit or similar committee of the board of directors, if the issuer has such a committee; or

(B) The board of directors, if the issuer has no such committee.

(iv) State whether during the registrant's two most recent fiscal years and any subsequent interim period preceding such resignation, declination or dismissal there were

any disagreements with the former accountant on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreement(s), if not resolved to the satisfaction of the former accountant, would have caused it to make reference to the subject matter of the disagreement(s) in connection with its report. Also,

(A) describe each such disagreement;

(B) state whether any audit or similar committee of the board of directors, or the board of directors, discussed the subject matter of each of such disagreements with the former accountant; and

(C) state whether the registrant has authorized the former accountant to respond fully to the inquiries of the successor accountant concerning the subject matter of each of such disagreements and, if not, describe the nature of any limitation thereon and the reason therefore.

The disagreements required to be reported in response to this Item include both those resolved to the former accountant's satisfaction and those not resolved to the former accountant's satisfaction. Disagreements contemplated by this Item are those that occur at the decision-making level, i.e., between personnel of the registrant responsible for presentation of its financial statements and personnel of the accounting firm responsible for rendering its report.

(v) Provide the information required by paragraph (a)(1)(iv) of this Item for each of the kinds of events (even though the registrant and the former accountant did not express a difference of opinion regarding the event) listed in paragraphs (a)(1)(v) (A) through (D) of this section, that occurred within the registrant's two most recent fiscal

years and any subsequent interim period preceding the former accountant's resignation, declination to stand for re-election, or dismissal ("reportable events"). If the event led to a disagreement or difference of opinion, then the event should be reported as a disagreement under paragraph (a)(1)(iv) and need not be repeated under this paragraph.

(A) The accountant's having advised the registrant that the internal controls necessary for the registrant to develop reliable financial statements do not exist;

(B) The accountant's having advised the registrant that information has come to the accountant's attention that has led it to no longer be able to rely on management's representations, or that has made it unwilling to be associated with the financial statements prepared by management;

(C)(1) The accountant's having advised the registrant of the need to expand significantly the scope of its audit, or that information has come to the accountant's attention during the time period covered by Item 16F(a)(1)(iv), that if further investigated may:

(i) Materially impact the fairness or reliability of either: a previously issued audit report or the underlying financial statements; or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report (including information that may prevent it from rendering an unqualified audit report on those financial statements); or

(ii) Cause it to be unwilling to rely on management's representations or be associated with the registrant's financial statements; and

(2) Due to the accountant's resignation (due to audit scope limitations or otherwise) or dismissal, or for any other reason, the accountant did not so expand the scope of its audit or conduct such further investigation; or

(D)(1) The accountant's having advised the registrant that information has come to the accountant's attention that it has concluded materially impacts the fairness or reliability of either (i) a previously issued audit report or the underlying financial statements, or (ii) the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report (including information that, unless resolved to the accountant's satisfaction, would prevent it from rendering an unqualified audit report on those financial statements); and

(2) Due to the accountant's resignation, dismissal or declination to stand for re-election, or for any other reason, the issue has not been resolved to the accountant's satisfaction prior to its resignation, dismissal or declination to stand for re-election.

(2) If during the registrant's two most recent fiscal years or any subsequent interim period, a new independent accountant has been engaged as either the principal accountant to audit the registrant's financial statements, or as an independent accountant to audit a significant subsidiary and on whom the principal accountant is expected to express reliance in its report, then the registrant shall identify the newly engaged accountant and indicate the date of such accountant's engagement. In addition, if during the registrant's two most recent fiscal years, and any subsequent interim period prior to engaging that accountant, the registrant (or someone on its behalf) consulted the newly engaged accountant regarding:

(i) Either: The application of accounting principles to a specified transaction, either completed or proposed; or the type of audit opinion that might be rendered on the registrant's financial statements, and either a written report was provided to the registrant or oral advice was provided that the new accountant concluded was an important factor considered by the registrant in reaching a decision as to the accounting, auditing or financial reporting issue; or

(ii) Any matter that was either the subject of a disagreement (as defined in Item 16F(a)(1)(iv) and the related instructions to this Item) or a reportable event (as described in Item 16F(a)(1)(v)), then the registrant shall:

(A) So state and identify the issues that were the subjects of those consultations;

(B) Briefly describe the views of the newly engaged accountant as expressed orally or in writing to the registrant on each such issue and, if written views were received by the registrant, file them as an exhibit to the annual report requiring compliance with this Item 16F(a);

(C) State whether the former accountant was consulted by the registrant regarding any such issues, and if so, provide a summary of the former accountant's views; and

(D) Request the newly engaged accountant to review the disclosure required by this Item 16F(a) before it is filed with the Commission and provide the new accountant the opportunity to furnish the registrant with a letter addressed to the Commission containing any new information, clarification of the registrant's expression of its views, or the respects in which it does not agree with the statements made by the registrant in response to Item 16F(a). The registrant shall file any such letter as an exhibit to the annual report containing the disclosure required by this Item.

(3) The registrant shall provide the former accountant with a copy of the disclosures it is making in response to this Item 16F(a). The registrant shall request the former accountant to furnish the registrant with a letter addressed to the Commission stating whether it agrees with the statements made by the registrant in response to this Item 16F(a) and, if not, stating the respects in which it does not agree. The registrant shall file the former accountant's letter as an exhibit to the annual report or registration statement containing this disclosure. If the former accountant's letter is unavailable at the time that the registration statement is filed, then the registrant shall request the former accountant to provide the letter as promptly as possible so that the registrant can file the letter with the Commission within ten business days after the filing of the registration statement. If the change in accountants occurred less than 30 days prior to the filing of the annual report and the former accountant's letter is unavailable at the time that the annual report is filed, then the registrant shall request the former accountant to provide the letter as promptly as possible so that the registrant can file the letter with the Commission within ten business days after the filing of the annual report. In either case, the former accountant may provide the registrant with an interim letter highlighting specific areas of concern and indicating that a more detailed letter will be forthcoming. If not filed with the annual report or registration statement containing the registrant's disclosure under this Item 16F(a), then the interim letter, if any, shall be filed by the registrant by amendment promptly.

(b) If: (1) In connection with a change in accountants subject to paragraph (a) of this Item 16F, there was any disagreement of the type described in paragraph (a)(1)(iv) or any reportable event as described in paragraph (a)(1)(v) of this Item;

(2) During the fiscal year in which the change in accountants took place or during the subsequent fiscal year, there have been any transactions or events similar to those which involved such disagreement or reportable event; and

(3) Such transactions or events were material and were accounted for or disclosed in a manner different from that which the former accountants apparently would have concluded was required, the registrant shall state the existence and nature of the disagreement or reportable event and also state the effect on the financial statements if the method had been followed which the former accountants apparently would have concluded was required.

These disclosures need not be made if the method asserted by the former accountants ceases to be generally accepted because of authoritative standards or interpretations subsequently issued.

Instructions to Item 16F:

1. If you are filing Form 20-F as a registration statement under the Exchange Act, you do not have to provide the information required by Item 16F if you are already required to file reports under sections 13(a) or 15(d) of the Exchange Act. Item 16F applies to all annual reports filed on Form 20-F.

2. The disclosure called for by paragraph (a) of this Item need not be provided if it has been previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (§240.12b-2 of this chapter). The disclosure called for by paragraph (b) of this Item must be furnished, where required, notwithstanding any prior disclosure about accountant changes or disagreements.

3. The information required by paragraph (a) of this Item need not be provided for a company being acquired by the registrant in a transaction being registered on Form F-4 that is not subject to the filing requirements of either section 13(a) or 15(d) of the Exchange Act.

4. The term “disagreements” as used in this Item shall be interpreted broadly to include any difference of opinion concerning any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure which (if not resolved to the satisfaction of the former accountant) would have caused it to make reference to the subject matter of the disagreement in connection with its report. It is not necessary for there to have been an argument to have had a disagreement, merely a difference of opinion. For purposes of this Item, however, the term “disagreements” does not include initial differences of opinion based on incomplete facts or preliminary information that were later resolved to the former accountant’s satisfaction by, and providing the registrant and the accountant do not continue to have a difference of opinion upon, obtaining additional relevant facts or information.

5. In determining whether any disagreement or reportable event has occurred, an oral communication from the engagement partner or another person responsible for rendering the accounting firm’s opinion (or his/her designee) will generally suffice as the accountant advising the registrant of a reportable event or as a statement of a disagreement at the “decision-making level” within the accounting firm and require disclosure under this Item.

6. The term “board of directors” as used in this Item 16F has the meaning set forth in §240.10A-3(e)(2).

Item 16G. Corporate Governance.

If the registrant's securities are listed on a national securities exchange, provide a concise summary of any significant ways in which its corporate governance practices differ from those followed by domestic companies under the corporate governance standards of that exchange.

Instruction to Item 16G:

Item 16G only applies to annual reports, and not to registration statements on Form 20-F. Registrants should provide a brief and general discussion, rather than a detailed, item-by-item analysis.

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Item 17. Financial Statements.

(a) The registrant shall furnish financial statements for the same fiscal years and accountants' certificates that would be required to be furnished if the registration statement were on Form 10 or the annual report on Form 10-K. In addition, in an annual report the registrant shall furnish the information required by Rule 3-05, for the periods required by Rule 3-05(b)(2)(iv), and Article 11 of Regulation S-X (§210.3-05 and §210.11 *et seq.* of this chapter) for any acquisition completed during the most recent fiscal year covered by the Form 20-F that is significant under the definition in Rule 1-02(w) of Regulation S-X (§210.1-02(w) of this chapter), substituting 50 percent for 10 percent. However, the information required by Rule 3-05 and Article 11 of Regulation S-X is not required in an annual report filed on Form 20-F if the information has already been provided previously in a registration statement. In an annual report, the registrant does not need to provide Rule 3-05 and Article 11 of Regulation S-X information for

probable acquisitions, and does not need to provide Rule 3-05 and Article 11 of Regulation S-X information for the aggregation of individually insignificant acquisitions. Schedules designated by §§210.12-04, 210.12-09, 210.12-15, 210.12-16, 210.12-17, 210.12-18, 210.12-28, and 210.12-29 of this chapter shall also be furnished if applicable to the registrant.

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Item 18. Financial Statements.

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Instruction to Item 18:

All of the instructions to Item 17 also apply to this Item.

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By the Commission.



Nancy M. Morris
Secretary

Dated: February 29, 2008