

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 August 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 Atkins was Commissioner from July 29, 2002 to August 1, 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

8 Documents

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 28352 / August 5, 2008

In the Matter of

ING CLARION REAL ESTATE INCOME FUND
ING CLARION GLOBAL REAL ESTATE FUND
and ING CLARION REAL ESTATE SECURITIES, L.P.
201 King of Prussia Road, Suite 600
Radnor, PA 19087

(812-13074)

ORDER UNDER SECTION 6(c) OF THE INVESTMENT COMPANY ACT OF 1940
("Act") GRANTING AN EXEMPTION FROM SECTION 19(b) OF THE ACT AND
RULE 19b-1 UNDER THE ACT

ING Clarion Real Estate Income Fund, ING Clarion Global Real Estate Income Fund (the "Funds") and ING Clarion Real Estate Securities, L.P. filed an application on March 26, 2004, which was amended on February 1, 2007, June 12, 2008 and July 8, 2008. Applicants requested an order under section 6(c) of the Act granting an exemption from section 19(b) of the Act and rule 19b-1 under the Act to conditionally permit the Funds to make periodic distributions of long-term capital gains with respect to the Funds' outstanding common stock as frequently as twelve times each year and as frequently as distributions are specified in the terms of any outstanding preferred stock.

On July 8, 2008, a notice of the filing of the application was issued (Investment Company Act Release No. 28329). The notice gave interested persons an opportunity to request a hearing and stated that an order granting 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.

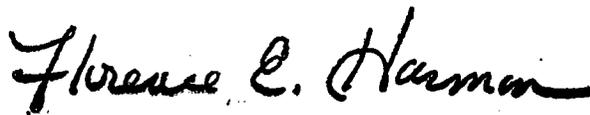
The matter has been considered and it is found, on the basis of the information set forth in the application, as amended, that granting the requested relief is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

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Accordingly, in the matter of ING Clarion Real Estate Income Fund, et al. (File No. 812-13074),

IT IS ORDERED, under section 6(c) of the Act, that the requested exemption from section 19(b) of the Act and rule 19b-1 under the Act, is granted, effective immediately, subject to the conditions contained in the application, as amended.

By the Commission.

A handwritten signature in cursive script that reads "Florence E. Harmon".

Florence E. Harmon
Acting Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58338 / August 11, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13125

In the Matter of

James M. Jordan,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
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") against James M. Jordan ("Jordan" or "Respondent").

II.

In anticipation of the institution of these proceedings, the 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, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

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

1. Jordan, age 73, resides in Pitt Meadows, British Columbia. From at least September 1998 through September 11, 2000, Jordan sold investment contract securities in the form of sale-leaseback transactions for ETS Payphones, Inc. ("ETS"). From at least November 1999 through at least June 2000, Jordan sold investment contract securities in the form of sale-leaseback transactions for Global Telelink Services, Inc. ("GTS").

2. On May 5, 2008, an order was entered against Jordan permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. William P. Sauer, James M. Jordan and Phil D. Kerley, Civil Action Number 1:02-CV-2191, in the United States District Court for the Northern District of Georgia. Jordan consented to the order.

3. The Commission's complaint alleged that, in connection with the unregistered sale of investment contracts, Jordan fraudulently sold at least \$84 million of the ETS investment and at least \$10 million of the GTS investments. According to the complaint, the ETS and GTS investment agreements were substantially similar in structure, although each investment had a different purchase price and promised investors a slightly different return varying from 14 percent to 15 percent. The complaint also alleged that ETS and GTS depended on the sale of new investments in order to meet their current financial obligations, such as investor lease payments and refunds. The complaint alleged that Jordan knew, or was severely reckless in failing to discover, that ETS, GTS and GCC were functioning as Ponzi schemes. The Commission's complaint also alleged that Jordan knew, or was severely reckless in not knowing, that his representations that ETS and GTS were safe investments and that ETS and GTS were profitable companies, were false.

4. The complaint also alleged that by virtue of his conduct, Jordan engaged in business as a broker-dealer and induced and attempted to induce the purchase and sale of securities. Jordan was not registered with the Commission as a broker or dealer, and was not associated with any broker or dealer.

IV.

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

Accordingly, it is hereby ORDERED:

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

Any reapplication for association by the Respondents 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 Respondents, 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.

Florence E. Harmon
Acting 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. 58360 / August 14, 2008

INVESTMENT ADVISERS ACT OF 1940
Release No. 2769 / August 14, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13131

In the Matter of

BRYAN S. BEHRENS,

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 Bryan S. Behrens ("Behrens" 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.4 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. Behrens, age 44, is a resident of Omaha, Nebraska. From June 2000 to December 2007, Behrens was a principal of Sunset Financial Services, Inc. ("Sunset Financial"), a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and an investment adviser registered with several states. Behrens also operated a Sunset Financial branch office.

2. Behrens is the President and Chief Executive Officer of 21st Century Financial Group, Inc. ("21st Century Financial"), a financial planning and insurance firm.

3. Behrens is the President of National Investments, Inc. ("National Investments"), a private Nevada company based in Omaha, Nebraska.

4. On July 28, 2008, a final judgment was entered by consent against Respondent permanently restraining and enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Bryan S. Behrens, et. al., Civil Action Number 8:08CV13, in the United States District Court for the District of Nebraska.

5. The Commission's complaint alleged that, from at least year 2002, Respondent operated a fraudulent Ponzi-like investment scheme that succeeded in raising at least \$6.5 million from investors, some of whom are senior citizens, and that Respondent misappropriated more than \$3.5 million of investor funds for his personal use. The complaint further alleged that:

- Behrens solicited investors from acquaintances and clients that he met through 21st Century Financial. Behrens represented to investors that National Investments was an investment opportunity for them to receive regular, monthly income.
- Behrens materially misled investors by telling them that National Investments would lend their money out to others at a higher interest rate in order to generate profits, though Behrens and National Investments did not operate or generate profits in this manner.
- Behrens failed to disclose that he paid old investors with money from new investors, and used investors' funds for his personal use.

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.

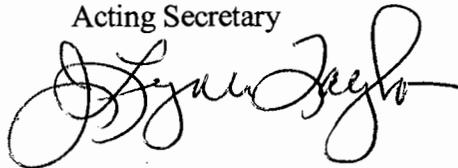
Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent 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.

Florence E. Harmon
Acting Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 15, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13134

In the Matter of

Sunbase Asia, Inc.
(n/k/a Centire International, Inc.),
Supply Chain Services, Inc.,
Sustainable Development International, Inc.
(n/k/a Clean Energy, Inc.),
SWI Steelworks, Inc.
(f/k/a ESC Envirotech Systems Corp.), and
Symphony Telecom Corp.,

Respondents

**ORDER INSTITUTING
PROCEEDINGS AND NOTICE OF
HEARING PURSUANT TO SECTION
12(j) OF THE SECURITIES
EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Sunbase Asia, Inc. (n/k/a Centire International, Inc.), Supply Chain Services, Inc., Sustainable Development International, Inc. (n/k/a Clean Energy, Inc.), SWI Steelworks, Inc. (f/k/a ESC Envirotech Systems Corp.); and Symphony Telecom Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Sunbase Asia, Inc. (n/k/a Centire International, Inc.) (CIK No. 95626) is a Nevada corporation located in Tampa, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Sunbase is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2000, which reported a net loss of over \$3.4 million for the prior nine months. On June 26, 2008, Sunbase filed a Form 15-12G to deregister its stock, but that form was invalid on its face because it indicated that the company's stock had more than 500 shareholders of record.

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2. Supply Chain Services, Inc. (CIK No. 1086239) is a void Delaware corporation located in Kowloon, Hong Kong with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Supply 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, which reported a net loss of \$528,105 for the prior six months.

3. Sustainable Development International, Inc. (n/k/a Clean Energy, Inc.) (CIK No. 1075999) is a defaulted Nevada corporation located in Edmonton, Alberta, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Sustainable is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended October 31, 2000. As of November 26, 2007, the company's common stock (symbol "CLER") was traded on the over-the-counter markets.

4. SWI Steelworks, Inc. (f/k/a ESC Envirotech Systems Corp.) (CIK No. 906455) is a British Columbia corporation located in Vancouver, British Columbia, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). SWI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the fiscal year ended December 31, 1992.

5. Symphony Telecom Corp. (CIK No. 701304) is a void Delaware corporation located in Brampton, Ontario, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Symphony is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed an amended Form 10-QSB for the period ended March 31, 2002, which reported a net loss of over \$969,553 for the prior three months. As of December 3, 2007, the company's common stock (symbol "SYPY") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

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

7. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16 requires certain foreign private issuers to furnish quarterly and other material reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they

are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

8. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 or 13a-16 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 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, registered, or Express Mail, or by other means of verifiable delivery.

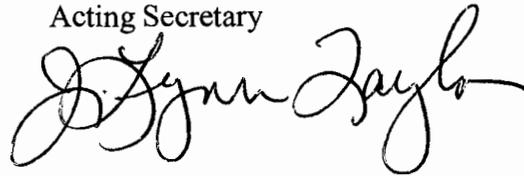
IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

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.

Florence E. Harmon
Acting Secretary

Attachment

A handwritten signature in cursive script, reading "J. Lynn Taylor".

By: J. Lynn Taylor
Assistant Secretary

Appendix 1

Chart of Delinquent Filings In The Matter of Sunbase Asia, Inc. (n/k/a Centire International, Inc.)

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>Sunbase Asia, Inc. (n/k/a Centire International, Inc.)</i>	<i>10-K</i>	12/31/00	04/02/01	Not filed	88
	<i>10-Q</i>	03/31/01	05/15/01	Not filed	87
	<i>10-Q</i>	06/30/01	08/14/01	Not filed	84
	<i>10-Q</i>	09/30/01	11/14/01	Not filed	81
	<i>10-K</i>	12/31/01	04/01/02	Not filed	76
	<i>10-Q</i>	03/31/02	05/15/02	Not filed	75
	<i>10-Q</i>	06/30/02	08/14/02	Not filed	72
	<i>10-Q</i>	09/30/02	11/14/02	Not filed	69
	<i>10-K</i>	12/31/02	03/31/03	Not filed	65
	<i>10-Q</i>	03/31/03	05/15/03	Not filed	63
	<i>10-Q</i>	06/30/03	08/14/03	Not filed	60
	<i>10-Q</i>	09/30/03	11/14/03	Not filed	57
	<i>10-K</i>	12/31/03	03/30/04	Not filed	53
	<i>10-Q</i>	03/31/04	05/17/04	Not filed	51
	<i>10-Q</i>	06/30/04	08/16/04	Not filed	48
	<i>10-Q</i>	09/30/04	11/15/04	Not filed	45
	<i>10-K</i>	12/31/04	03/31/05	Not filed	41
	<i>10-Q</i>	03/31/05	05/16/05	Not filed	39
	<i>10-Q</i>	06/30/05	08/15/05	Not filed	36
	<i>10-Q</i>	09/30/05	11/14/05	Not filed	33
	<i>10-K</i>	12/31/05	03/31/06	Not filed	29
	<i>10-Q</i>	03/31/06	05/15/06	Not filed	27
	<i>10-Q</i>	06/30/06	08/14/06	Not filed	24
	<i>10-Q</i>	09/30/06	11/14/06	Not filed	21
	<i>10-K</i>	12/31/06	04/02/07	Not filed	16
	<i>10-Q</i>	03/31/07	05/15/07	Not filed	15
	<i>10-Q</i>	06/30/07	08/14/07	Not filed	12
	<i>10-Q</i>	09/30/07	11/14/07	Not filed	9
	<i>10-K</i>	12/31/07	03/31/08	Not filed	5
	<i>10-Q</i>	03/31/08	05/15/08	Not filed	3
	<i>10-Q</i>	06/30/08	08/14/08	Not filed	0

Total Filings Delinquent

31

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Supply Chain Services, Inc.	<i>10-QSB</i>	09/30/01	11/14/01	Not filed	81
	<i>10-KSB</i>	12/31/01	04/01/02	Not filed	76
	<i>10-QSB</i>	03/31/02	05/15/02	Not filed	75
	<i>10-QSB</i>	06/30/02	08/14/02	Not filed	72
	<i>10-QSB</i>	09/30/02	11/14/02	Not filed	69
	<i>10-KSB</i>	12/31/02	03/31/03	Not filed	65
	<i>10-QSB</i>	03/31/03	05/15/03	Not filed	63
	<i>10-QSB</i>	06/30/03	08/14/03	Not filed	60
	<i>10-QSB</i>	09/30/03	11/14/03	Not filed	57
	<i>10-KSB</i>	12/31/03	03/30/04	Not filed	53
	<i>10-QSB</i>	03/31/04	05/17/04	Not filed	51
	<i>10-QSB</i>	06/30/04	08/16/04	Not filed	48
	<i>10-QSB</i>	09/30/04	11/15/04	Not filed	45
	<i>10-KSB</i>	12/31/04	03/31/05	Not filed	41
	<i>10-QSB</i>	03/31/05	05/16/05	Not filed	39
	<i>10-QSB</i>	06/30/05	08/15/05	Not filed	36
	<i>10-QSB</i>	09/30/05	11/14/05	Not filed	33
	<i>10-KSB</i>	12/31/05	03/31/06	Not filed	29
	<i>10-QSB</i>	03/31/06	05/15/06	Not filed	27
	<i>10-QSB</i>	06/30/06	08/14/06	Not filed	24
	<i>10-QSB</i>	09/30/06	11/14/06	Not filed	21
	<i>10-KSB</i>	12/31/06	04/02/07	Not filed	16
	<i>10-QSB</i>	03/31/07	05/15/07	Not filed	15
	<i>10-QSB</i>	06/30/07	08/14/07	Not filed	12
	<i>10-QSB</i>	09/30/07	11/14/07	Not filed	9
	<i>10-KSB</i>	12/31/07	03/31/08	Not filed	5
	<i>10-Q*</i>	03/31/08	05/15/08	Not filed	3
	<i>10-Q*</i>	06/30/08	08/14/08	Not filed	0
Total Filings Delinquent					28

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, are in the process of being removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal is taking effect over a transition period that will conclude on March 15, 2009, so by that date, all reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB will be required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than \$75 million in public equity float as of the end of its most recently completed second fiscal quarter) will have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Sustainable Development International, Inc. (n/k/a Clean Energy, Inc.)	10-QSB	01/31/01	03/19/01	Not filed	89
	10-QSB	04/30/01	06/14/01	Not filed	86
	10-QSB	07/31/01	09/14/01	Not filed	83
	10-KSB	10/31/01	01/29/02	Not filed	79
	10-QSB	01/31/02	03/18/02	Not filed	77
	10-QSB	04/30/02	06/14/02	Not filed	74
	10-QSB	07/31/02	09/16/02	Not filed	71
	10-KSB	10/31/02	01/29/03	Not filed	67
	10-QSB	01/31/03	03/17/03	Not filed	65
	10-QSB	04/30/03	06/16/03	Not filed	62
	10-QSB	07/31/03	09/15/03	Not filed	59
	10-KSB	10/31/03	01/29/04	Not filed	55
	10-QSB	01/31/04	03/16/04	Not filed	53
	10-QSB	04/30/04	06/14/04	Not filed	50
	10-QSB	07/31/04	09/14/04	Not filed	47
	10-KSB	10/31/04	01/31/05	Not filed	43
	10-QSB	01/31/05	03/17/05	Not filed	41
	10-QSB	04/30/05	06/14/05	Not filed	38
	10-KSB	10/31/05	01/30/06	Not filed	31
	10-QSB	01/31/06	03/17/06	Not filed	29
	10-QSB	04/30/06	06/14/06	Not filed	26
	10-QSB	07/31/06	09/14/06	Not filed	23
	10-KSB	10/31/06	01/29/07	Not filed	19
	10-QSB	01/31/07	03/19/07	Not filed	17
	10-QSB	04/30/07	06/14/07	Not filed	14
	10-QSB	07/31/07	09/14/07	Not filed	11
	10-KSB	10/31/07	01/29/08	Not filed	7
	10-QSB	01/31/08	03/17/08	Not filed	5
	10-QSB	04/30/08	06/16/08	Not filed	2

Total Filings Delinquent

29

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
SWI Steelworks, Inc. (f/k/a ESC Envirotech Systems Corp.)	20-F	12/31/93	06/30/94	Not filed	170
	20-F	12/31/94	06/30/95	Not filed	158
	20-F	12/31/95	07/01/96	Not filed	145
	20-F	12/31/96	06/30/97	Not filed	134
	20-F	12/31/97	06/30/98	Not filed	122
	20-F	12/31/98	06/30/99	Not filed	110
	20-F	12/31/99	06/30/00	Not filed	98
	20-F	12/31/00	07/02/01	Not filed	85
	20-F	12/31/01	07/01/02	Not filed	73
	20-F	12/31/02	06/30/03	Not filed	62
	20-F	12/31/03	06/30/04	Not filed	50
	20-F	12/31/04	06/30/05	Not filed	38
	20-F	12/31/05	06/30/06	Not filed	26
	20-F	12/31/06	07/02/07	Not filed	13
	20-F	12/31/07	06/30/08	Not filed	2

Total Filings Delinquent 15

Symphony Telecom Corp.

10-KSB	06/30/02	09/30/02	Not filed	71
10-QSB	09/30/02	11/14/02	Not filed	69
10-QSB	12/31/02	02/14/03	Not filed	66
10-QSB	03/31/03	05/15/03	Not filed	63
10-KSB	06/30/03	09/29/03	Not filed	59
10-QSB	09/30/03	11/14/03	Not filed	57
10-QSB	12/31/03	02/17/04	Not filed	54
10-QSB	03/31/04	05/17/04	Not filed	51
10-KSB	06/30/04	09/28/04	Not filed	47
10-QSB	09/30/04	11/15/04	Not filed	45
10-QSB	12/31/04	02/14/05	Not filed	42
10-QSB	03/31/05	05/16/05	Not filed	39
10-KSB	06/30/05	09/28/05	Not filed	35
10-QSB	09/30/05	11/14/05	Not filed	33
10-QSB	12/31/05	02/14/06	Not filed	30
10-QSB	03/31/06	05/15/06	Not filed	27
10-KSB	06/30/06	09/28/06	Not filed	23
10-QSB	09/30/06	11/14/06	Not filed	21

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Symphony Telecom Corp. <i>(continued)</i>	10-QSB	12/31/06	02/14/07	Not filed	18
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-KSB	06/30/07	09/28/07	Not filed	11
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-QSB	12/31/07	2/14/08	Not filed	6
	10-QSB	03/31/07	05/15/07	Not filed	15
Total Filings Delinquent		24			

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 15, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13133

In the Matter of

Walking Stick Oil & Gas Corp.,
Waycool3D, Inc.,
Wineshares International, Inc.,
World Callnet, Inc., and
World Container Corp.,

Respondents.

ORDER INSTITUTING
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Walking Stick Oil & Gas Corp., Waycool3D, Inc., Wineshares International, Inc., World Callnet, Inc., and World Container Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Walking Stick Oil & Gas Corp. (CIK No. 881913) is a British Columbia corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Walking Stick is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the fiscal year ended December 31, 1992, which reported a deficit of \$1.4 million as of December 31, 1992.

2. Waycool3D, Inc. (CIK No. 1120089) is a New Jersey corporation located in Grand Forks, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Waycool3D 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 \$88,742 for the prior three months.

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3. Wineshares International, Inc. (CIK No. 1118183) is a revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wineshares 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 January 31, 2003, which reported a net loss of \$202,178 since inception in 2000.

4. World Callnet, Inc. (CIK No. 1014491) is a void Delaware corporation located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). World Callnet 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 \$10 million for the prior nine months.

5. World Container Corp. (CIK No. 745374) is a Minnesota corporation located in Edina, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). World Container is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended February 29, 1992.

B. DELINQUENT PERIODIC FILINGS

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

7. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires domestic issuers to file quarterly reports (Forms 10-Q or 10-QSB). Rule 13a-16 requires foreign private issuers to furnish quarterly and other reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

8. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 or 13a-16 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)].

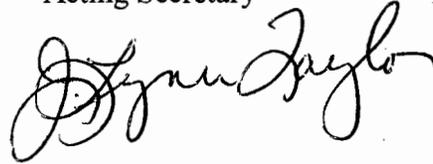
In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in 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.

Florence E. Harmon
Acting Secretary

Attachment

A handwritten signature in cursive script, appearing to read "J. Lynn Taylor".

By: J. Lynn Taylor
Assistant Secretary

Appendix 1

Chart of Delinquent Filings *Walking Stick Oil & Gas Corp., et al.*

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>Walking Stick Oil & Gas Corp.</i>					
	20-F	12/31/93	06/30/94	Not filed	170
	20-F	12/31/94	06/30/95	Not filed	158
	20-F	12/31/95	07/01/96	Not filed	145
	20-F	12/31/96	06/30/97	Not filed	134
	20-F	12/31/97	06/30/98	Not filed	122
	20-F	12/31/98	06/30/99	Not filed	110
	20-F	12/31/99	06/30/00	Not filed	98
	20-F	12/31/00	07/02/01	Not filed	85
	20-F	12/31/01	07/01/02	Not filed	62
	20-F	12/31/02	06/30/03	Not filed	50
	20-F	12/31/03	06/30/04	Not filed	38
	20-F	12/31/04	06/30/05	Not filed	38
	20-F	12/31/05	06/30/06	Not filed	26
	20-F	12/31/06	07/02/07	Not filed	13
	20-F	12/31/07	06/30/08	Not filed	2
Total Filings Delinquent		15			
<i>Waycool3D, Inc.</i>					
	10-QSB	09/30/02	11/14/02	Not filed	69
	10-KSB	12/31/02	03/31/03	Not filed	65
	10-QSB	03/31/03	05/15/03	Not filed	63
	10-QSB	06/30/03	08/14/03	Not filed	60
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-KSB	12/31/03	03/30/04	Not filed	53
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-QSB	06/30/04	08/16/04	Not filed	48

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Waycool3D, Inc.	10-QSB	09/30/04	11/15/04	Not filed	45
	10-KSB	12/31/04	03/31/05	Not filed	41
	10-QSB	03/31/05	05/16/05	Not filed	39
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-KSB	12/31/05	03/31/06	Not filed	29
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	12/31/07	Not filed	8
	10-K*	12/31/07	03/31/08	Not filed	5
	10-Q*	03/31/08	05/15/08	Not filed	3

Total Filings Delinquent 23

Wineshares International, Inc.

10-KSB	04/30/03	07/29/03	Not filed	61
10-QSB	07/31/03	09/15/03	Not filed	59
10-QSB	10/31/03	12/15/03	Not filed	56
10-QSB	01/31/04	03/16/04	Not filed	53
10-KSB	04/30/04	07/29/04	Not filed	49
10-QSB	07/31/04	09/14/04	Not filed	47
10-QSB	10/31/04	12/15/04	Not filed	44
10-QSB	01/31/05	03/17/05	Not filed	41
10-KSB	04/30/05	07/29/05	Not filed	37
10-QSB	07/31/05	09/14/05	Not filed	35
10-QSB	10/31/05	12/15/05	Not filed	32
10-QSB	01/31/06	03/17/06	Not filed	29
10-KSB	04/30/06	07/31/06	Not filed	25
10-QSB	07/31/06	09/14/06	Not filed	23

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>Wineshares International, Inc.</i>					
	<i>10-QSB</i>	10/31/06	12/15/06	Not filed	20
	<i>10-QSB</i>	01/31/07	03/19/07	Not filed	17
	<i>10-KSB</i>	04/30/07	07/30/07	Not filed	13
	<i>10-QSB</i>	07/31/07	09/14/07	Not filed	11
	<i>10-QSB</i>	10/31/07	12/17/07	Not filed	8
	<i>10-QSB</i>	01/31/08	03/17/08	Not filed	5
	<i>10-K*</i>	04/30/08	07/29/08	Not filed	1

Total Filings Delinquent

21

World Callnet, Inc.

<i>10-KSB</i>	09/30/00	12/29/00	Not filed	92
<i>10-QSB</i>	12/31/00	02/14/01	Not filed	90
<i>10-QSB</i>	03/31/01	05/15/01	Not filed	87
<i>10-QSB</i>	06/30/01	08/14/01	Not filed	84
<i>10-KSB</i>	09/30/01	12/31/01	Not filed	80
<i>10-QSB</i>	12/31/01	02/14/02	Not filed	78
<i>10-QSB</i>	03/31/02	05/15/02	Not filed	75
<i>10-QSB</i>	06/30/02	08/14/02	Not filed	72
<i>10-KSB</i>	09/30/02	12/30/02	Not filed	68
<i>10-QSB</i>	12/31/02	02/14/03	Not filed	66
<i>10-QSB</i>	03/31/03	05/15/03	Not filed	63
<i>10-QSB</i>	06/30/03	08/14/03	Not filed	60
<i>10-KSB</i>	09/30/03	12/29/03	Not filed	56
<i>10-QSB</i>	12/31/03	02/17/04	Not filed	54
<i>10-QSB</i>	03/31/04	05/17/04	Not filed	51
<i>10-QSB</i>	06/30/04	08/16/04	Not filed	48
<i>10-KSB</i>	09/30/04	12/29/04	Not filed	44
<i>10-QSB</i>	12/31/04	02/14/05	Not filed	42
<i>10-QSB</i>	03/31/05	05/16/05	Not filed	39
<i>10-QSB</i>	06/30/05	08/15/05	Not filed	36
<i>10-KSB</i>	09/30/05	12/29/05	Not filed	32
<i>10-QSB</i>	12/31/05	02/14/06	Not filed	30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
World Callnet, Inc.					
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-KSB	09/30/06	12/29/06	Not filed	20
	10-QSB	12/31/06	02/14/07	Not filed	18
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-KSB	09/30/07	12/29/07	Not filed	8
	10-QSB	12/31/07	02/14/08	Not filed	6
	10-QSB	03/31/08	05/15/08	Not filed	3

Total Filings Delinquent 31

World Container Corp.

10-Q	05/31/92	07/15/92	Not filed	193
10-Q	08/31/92	10/15/92	Not filed	190
10-Q	11/30/92	01/14/93	Not filed	187
10-K	02/28/93	05/31/93	Not filed	183
10-Q	05/31/93	07/15/93	Not filed	181
10-Q	08/31/93	10/15/93	Not filed	178
10-Q	11/30/93	01/14/94	Not filed	175
10-K	02/28/94	05/30/94	Not filed	171
10-Q	05/31/94	07/15/94	Not filed	169
10-Q	08/31/94	10/17/94	Not filed	166
10-Q	11/30/94	01/16/95	Not filed	163
10-K	02/28/95	05/29/95	Not filed	159
10-Q	05/31/95	07/17/95	Not filed	157
10-Q	08/31/95	10/16/95	Not filed	154
10-Q	11/30/95	01/15/96	Not filed	151
10-K	02/29/96	05/29/96	Not filed	147
10-Q	05/31/96	07/15/96	Not filed	145
10-Q	08/31/96	10/15/96	Not filed	142

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
World Container Corp.	<i>10-Q</i>	11/30/97	01/14/98	Not filed	127
	<i>10-K</i>	02/28/97	05/29/97	Not filed	135
	<i>10-Q</i>	05/31/97	07/15/97	Not filed	133
	<i>10-Q</i>	08/31/97	10/15/97	Not filed	130
	<i>10-Q</i>	11/30/97	01/14/98	Not filed	127
	<i>10-K</i>	02/28/98	05/29/98	Not filed	123
	<i>10-Q</i>	05/31/98	07/15/98	Not filed	121
	<i>10-Q</i>	08/31/98	10/15/98	Not filed	118
	<i>10-Q</i>	11/30/98	01/14/99	Not filed	115
	<i>10-K</i>	02/28/99	06/01/99	Not filed	110
	<i>10-Q</i>	05/31/99	07/15/99	Not filed	109
	<i>10-Q</i>	08/31/99	10/15/99	Not filed	106
	<i>10-Q</i>	11/30/99	01/14/00	Not filed	103
	<i>10-K</i>	02/29/00	05/30/00	Not filed	99
	<i>10-Q</i>	05/31/00	07/17/00	Not filed	97
	<i>10-Q</i>	08/31/00	10/16/00	Not filed	94
	<i>10-Q</i>	11/30/00	01/16/01	Not filed	91
	<i>10-K</i>	02/28/01	05/29/01	Not filed	87
	<i>10-Q</i>	05/31/01	07/16/01	Not filed	85
	<i>10-Q</i>	08/31/01	10/15/01	Not filed	82
	<i>10-Q</i>	11/30/01	01/14/02	Not filed	79
	<i>10-K</i>	02/28/02	05/29/02	Not filed	75
	<i>10-Q</i>	05/31/02	07/15/02	Not filed	73
	<i>10-Q</i>	08/31/02	10/15/02	Not filed	70
	<i>10-Q</i>	11/30/02	01/14/03	Not filed	67
	<i>10-K</i>	02/28/03	05/29/03	Not filed	63
	<i>10-Q</i>	05/31/03	07/15/03	Not filed	61
	<i>10-Q</i>	08/31/03	10/15/03	Not filed	58
	<i>10-Q</i>	11/30/03	01/14/04	Not filed	55
	<i>10-K</i>	02/29/04	06/01/04	Not filed	50
	<i>10-Q</i>	05/31/04	07/15/04	Not filed	49
	<i>10-Q</i>	08/31/04	10/15/04	Not filed	46

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
World Container Corp.					
	10-Q	11/30/04	01/14/05	Not filed	43
	10-K	02/28/05	05/30/05	Not filed	39
	10-Q	05/31/05	07/15/05	Not filed	37
	10-Q	08/31/05	10/17/05	Not filed	34
	10-Q	11/30/05	01/16/06	Not filed	31
	10-K	02/28/06	05/29/06	Not filed	27
	10-Q	05/31/06	07/17/06	Not filed	25
	10-Q	08/31/06	10/16/06	Not filed	22
	10-Q	11/30/06	01/15/07	Not filed	19
	10-K	02/28/07	05/29/07	Not filed	15
	10-Q	05/31/07	07/16/07	Not filed	13
	10-Q	08/31/07	10/17/07	Not filed	10
	10-Q	11/30/07	01/14/08	Not filed	7
	10-K	02/28/08	05/28/08	Not filed	3
	10-Q	05/31/08	07/15/08	Not filed	1

Total Filings Delinquent 65

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, are in the process of being removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal is taking effect over a transition period that will conclude on March 15, 2009, so by that date, all reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB will be required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than \$75 million in public equity float as of the end of its most recently completed second fiscal quarter) will have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 20, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13142

In the Matter of

Aqua Vie Beverage Corp.,
Asia Biotechnology Group, Inc.,
Caravan Acquisition Corp.,
Century Investments International, Inc.,
Diversified Holdings International, Inc.,
Milinx Business Group, Inc., and
MSC Group, Inc.,

Respondents.

ORDER INSTITUTING
PROCEEDINGS AND NOTICE OF
HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF
1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Aqua Vie Beverage Corp., Asia Biotechnology Group, Inc., Caravan Acquisition Corp., Century Investments International, Inc., Diversified Holdings International, Inc., Milinx Business Group, Inc., and MSC Group, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Aqua Vie Beverage Corp. ("Aqua Vie") (CIK No. 1068104) is a void Delaware corporation located in Ketchum, Idaho with a class of equity securities registered pursuant to Exchange Act Section 12(g). Aqua Vie 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 April 30, 2003, which reported a net loss of over \$1 million for the prior three months. On January 17, 1995, an involuntary Chapter 11 petition was filed against Aqua Vie in the U.S. Bankruptcy Court for the District of Idaho, and the

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case was closed on June 8, 1999. As of August 5, 2008, the company's common stock (symbol "AQVB") was quoted on the Pink Sheets and had one market maker.

2. Asia Biotechnology Group, Inc. ("Asia Biotechnology") (CIK No. 1302646) is a forfeited Delaware corporation located in Harbin, Heilongjiang Province, China, with a class of equity securities registered pursuant to Exchange Act Section 12(g). Asia Biotechnology is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2006, which reported a net loss of \$2,500 for the prior three months. As of August 5, 2008, the company's common stock (symbol "ABTH") was traded on the over-the-counter markets.

3. Caravan Acquisition Corp. ("Caravan") (CIK No. 1107602) is a void Delaware corporation located in Vancouver, British Columbia, Canada with a class of equity securities registered pursuant to Exchange Act Section 12(g). Caravan 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, 2001, which reported a net loss of \$6,074 for the prior three months.

4. Century Investments International, Inc. ("Century Investments") (CIK No. 1046134) is a void Delaware corporation located in Seattle, Washington with a class of equity securities registered pursuant to Exchange Act Section 12(g). Century Investments is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1998.

5. Diversified Holdings International, Inc. ("Diversified") (CIK No. 1046135) is a void Delaware corporation located in Seattle, Washington with a class of equity securities registered pursuant to Exchange Act Section 12(g). Diversified 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, 1998.

6. Milinx Business Group, Inc. ("Milinx") (CIK No. 1088815) is a void Delaware corporation located in Las Vegas, Nevada with a class of equity securities registered pursuant to Exchange Act Section 12(g). Milinx is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed its Form 10-Q for the period ended March 31, 2002, which reported a net loss of \$583,521 for the prior three months. On August 16, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Washington, and the case was dismissed on December 19, 2002. As of August 5, 2008, the company's stock (symbol "MIXB") was traded on the over-the-counter markets.

7. MSC Group, Inc. ("MSC") (CIK No. 1107573) is a void Delaware corporation located in Singapore City, Singapore with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). MSC 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 \$250,605 for the prior three months.

B. DELINQUENT PERIODIC FILINGS

8. 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 at their most recent address shown in their most recent filing with the Commission, or did not receive the letters because of their failure to keep an updated address on file with the Commission as required by Commission rules.

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 and Rule 13a-13 requires issuers to file quarterly reports.

10. As a result of their failure to file required periodic filings, 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 of this Order are true, and 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 to revoke the registrations of each class of securities registered pursuant to Exchange Act Section 12 of the Respondents identified in Section II.

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 each 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 a 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 each Respondent personally, by certified or registered mail, or by any other means permitted by the Commission's Rules of Practice.

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

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

By the Commission.

Florence E. Harmon
Acting Secretary

Attachment

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

Appendix 1

**Chart of Delinquent Filings
Aqua Vie Beverage Corp., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Aqua Vie Beverage Corp.					
	10-KSB	07/31/03	10/29/03	Not filed	58
	10-QSB	10/31/03	12/15/03	Not filed	56
	10-QSB	01/31/04	03/16/04	Not filed	53
	10-QSB	04/30/04	06/14/04	Not filed	50
	10-KSB	07/31/04	10/29/04	Not filed	46
	10-QSB	10/31/04	12/15/04	Not filed	44
	10-QSB	01/31/05	03/17/05	Not filed	41
	10-QSB	04/30/05	06/14/05	Not filed	38
	10-KSB	07/31/05	10/31/05	Not filed	34
	10-QSB	10/31/05	12/15/05	Not filed	32
	10-QSB	01/31/06	03/17/06	Not filed	29
	10-QSB	04/30/06	06/14/06	Not filed	26
	10-KSB	07/31/06	10/30/06	Not filed	22
	10-QSB	10/31/06	12/15/06	Not filed	20
	10-QSB	01/31/07	03/19/07	Not filed	17
	10-QSB	04/30/07	06/14/07	Not filed	14
	10-KSB	07/31/07	10/29/07	Not filed	10
	10-QSB	10/31/07	12/17/07	Not filed	8
	10-Q*	01/31/08	03/17/08	Not filed	5
	10-Q*	04/30/08	06/16/08	Not filed	2
Total Filings Delinquent	20				
Asia Biotechnology Group, Inc.					
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-KSB	12/31/07	03/31/08	Not filed	5
	10-Q*	03/31/08	05/15/08	Not filed	3

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Asia Biotechnology Group, Inc.					
	10-Q*	06/30/08	08/14/08	Not filed	0
Total Filings Delinquent	9				
Caravan Acquisition Corp.					
	10-KSB	12/31/01	04/01/02	Not filed	76
	10-QSB	03/31/02	05/15/02	Not filed	75
	10-QSB	06/30/02	08/14/02	Not filed	72
	10-QSB	09/30/02	11/14/02	Not filed	69
	10-KSB	12/31/02	03/31/03	Not filed	65
	10-QSB	03/31/03	05/15/03	Not filed	63
	10-QSB	06/30/03	08/14/03	Not filed	60
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-KSB	12/31/03	03/30/04	Not filed	53
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-QSB	06/30/04	08/16/04	Not filed	48
	10-QSB	09/30/04	11/15/04	Not filed	45
	10-KSB	12/31/04	03/31/05	Not filed	41
	10-QSB	03/31/05	05/16/05	Not filed	39
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-KSB	12/31/05	03/31/06	Not filed	29
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-KSB	12/31/07	03/31/08	Not filed	5
	10-Q*	03/31/08	05/15/08	Not filed	3
	10-Q*	06/30/08	08/14/08	Not filed	0
Total Filings Delinquent	27				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Century Investments International, Inc.	10-KSB	12/31/98	03/31/99	Not filed	113
	10-QSB	03/31/99	05/17/99	Not filed	111
	10-QSB	06/30/99	08/16/99	Not filed	108
	10-QSB	09/30/99	11/15/99	Not filed	105
	10-KSB	12/31/99	03/30/00	Not filed	101
	10-QSB	03/31/00	05/15/00	Not filed	99
	10-QSB	06/30/00	08/14/00	Not filed	96
	10-QSB	09/30/00	11/14/00	Not filed	93
	10-KSB	12/31/00	04/02/01	Not filed	88
	10-QSB	03/31/01	05/15/01	Not filed	87
	10-QSB	06/30/01	08/14/01	Not filed	84
	10-QSB	09/30/01	11/14/01	Not filed	81
	10-KSB	12/31/01	04/01/02	Not filed	76
	10-QSB	03/31/02	05/15/02	Not filed	75
	10-QSB	06/30/02	08/14/02	Not filed	72
	10-QSB	09/30/02	11/14/02	Not filed	69
	10-KSB	12/31/02	03/31/03	Not filed	65
	10-QSB	03/31/03	05/15/03	Not filed	63
	10-QSB	06/30/03	08/14/03	Not filed	60
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-KSB	12/31/03	03/30/04	Not filed	53
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-QSB	06/30/04	08/16/04	Not filed	48
	10-QSB	09/30/04	11/15/04	Not filed	45
	10-KSB	12/31/04	03/31/05	Not filed	41
	10-QSB	03/31/05	05/16/05	Not filed	39
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-KSB	12/31/05	03/31/06	Not filed	29
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-KSB	12/31/07	03/31/08	Not filed	5
	10-Q*	03/31/08	05/15/08	Not filed	3
	10-Q*	06/30/08	08/14/08	Not filed	0
Total Filings Delinquent	39				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Diversified Holdings International, Inc.	10-KSB	12/31/98	03/31/99	Not filed	113
	10-QSB	03/31/99	05/17/99	Not filed	111
	10-QSB	06/30/99	08/16/99	Not filed	108
	10-QSB	09/30/99	11/15/99	Not filed	105
	10-KSB	12/31/99	03/30/00	Not filed	101
	10-QSB	03/31/00	05/15/00	Not filed	99
	10-QSB	06/30/00	08/14/00	Not filed	96
	10-QSB	09/30/00	11/14/00	Not filed	93
	10-KSB	12/31/00	04/02/01	Not filed	88
	10-QSB	03/31/01	05/15/01	Not filed	87
	10-QSB	06/30/01	08/14/01	Not filed	84
	10-QSB	09/30/01	11/14/01	Not filed	81
	10-KSB	12/31/01	04/01/02	Not filed	76
	10-QSB	03/31/02	05/15/02	Not filed	75
	10-QSB	06/30/02	08/14/02	Not filed	72
	10-QSB	09/30/02	11/14/02	Not filed	69
	10-KSB	12/31/02	03/31/03	Not filed	65
	10-QSB	03/31/03	05/15/03	Not filed	63
	10-QSB	06/30/03	08/14/03	Not filed	60
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-KSB	12/31/03	03/30/04	Not filed	53
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-QSB	06/30/04	08/16/04	Not filed	48
	10-QSB	09/30/04	11/15/04	Not filed	45
	10-KSB	12/31/04	03/31/05	Not filed	41
	10-QSB	03/31/05	05/16/05	Not filed	39
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-KSB	12/31/05	03/31/06	Not filed	29
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
10-QSB	03/31/07	05/15/07	Not filed	15	
10-QSB	06/30/07	08/14/07	Not filed	12	
10-QSB	09/30/07	11/14/07	Not filed	9	
10-KSB	12/31/07	03/31/08	Not filed	5	
10-Q*	03/31/08	05/15/08	Not filed	3	
10-Q*	06/30/08	08/14/08	Not filed	0	
Total Filings Delinquent		39			

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Milinx Business Group, Inc.					
	10-K	06/30/02	09/30/02	Not filed	71
	10-Q	09/30/02	11/14/02	Not filed	69
	10-Q	12/31/02	02/14/03	Not filed	66
	10-Q	03/31/03	05/15/03	Not filed	63
	10-K	06/30/03	09/29/03	Not filed	59
	10-Q	09/30/03	11/14/03	Not filed	57
	10-Q	12/31/03	02/17/04	Not filed	54
	10-Q	03/31/04	05/17/04	Not filed	51
	10-K	06/30/04	09/28/04	Not filed	47
	10-Q	09/30/04	11/15/04	Not filed	45
	10-Q	12/31/04	02/14/05	Not filed	42
	10-Q	03/31/05	05/16/05	Not filed	39
	10-K	06/30/05	09/28/05	Not filed	35
	10-Q	09/30/05	11/14/05	Not filed	33
	10-Q	12/31/05	02/14/06	Not filed	30
	10-Q	03/31/06	05/15/06	Not filed	27
	10-K	06/30/06	09/28/06	Not filed	23
	10-Q	09/30/06	11/14/06	Not filed	21
	10-Q	12/31/06	02/14/07	Not filed	18
	10-Q	03/31/07	05/15/07	Not filed	15
	10-K	06/30/07	09/28/07	Not filed	11
	10-Q	09/30/07	11/14/07	Not filed	9
	10-Q	12/31/07	2/14/08	Not filed	6
	10-Q	03/31/08	5/15/08	Not filed	3
Total Filings Delinquent		24			

MSC Group, Inc.

10-QSB	12/31/02	02/14/03	Not filed	66
10-KSB	03/31/03	06/30/03	Not filed	62
10-QSB	06/30/03	08/14/03	Not filed	60
10-QSB	09/30/03	11/14/03	Not filed	57
10-QSB	12/31/03	02/17/04	Not filed	54
10-KSB	03/31/04	06/29/04	Not filed	50
10-QSB	06/30/04	08/16/04	Not filed	48
10-QSB	09/30/04	11/15/04	Not filed	45
10-QSB	12/31/04	02/14/05	Not filed	42

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
MSC Group, Inc.					
	10-KSB	03/31/05	06/29/05	Not filed	38
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-QSB	12/31/05	02/14/06	Not filed	30
	10-KSB	03/31/06	06/29/06	Not filed	26
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-QSB	12/31/06	02/14/07	Not filed	18
	10-KSB	03/31/07	06/29/07	Not filed	14
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-QSB	12/31/07	02/14/08	Not filed	6
	10-K*	03/31/08	06/30/08	Not filed	2
	10-Q*	06/30/08	08/14/08	Not filed	0
Total Filings Delinquent		23			

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, are in the process of being removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal is taking effect over a transition period that will conclude on March 15, 2009, so by that date, all reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB will be required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than \$75 million in public equity float as of the end of its most recently completed second fiscal quarter) will have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 58418 / August 25, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13143

In the Matter of

WILLIAM CLARK DAVIS,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
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") against William Clark Davis ("Respondent" or "Davis").

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 admitting the Commission's jurisdiction over him and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, 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. Davis was the president and CEO of Continental Capital Corporation ("CCC"), the parent company of Continental Capital Securities, Inc. ("CCS") and Continental Capital Investment Services, Inc. ("CCIS"), both broker-dealers that were registered with the Commission.

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Davis was a registered representative with CCIS from March 2001 until March 2003. Davis, 62 years old, is a resident of Lambertville, Michigan.

2. The Commission's complaint alleged that beginning in May 2001, Davis: (1) defrauded investors by purchasing promissory notes on their behalf, without their knowledge or consent; (2) liquidated securities in customer brokerage accounts and used the proceeds to purchase promissory notes; (3) executed the transactions by having customers sign blank letters of authorization ("LOAs"), by misrepresenting to customers the purpose of the LOAs, and by forging customer signatures on LOAs; (4) had a financial interest in all of the companies issuing promissory notes; and (5) sold unregistered securities.

3. On February 19, 2008, the court entered a permanent injunction order against Davis, permanently enjoining him from future violations of Sections 5 and 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10 (b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled United States Securities and Exchange Commission v. William Clark Davis, Civil Action Number 3:03CV7332, in the United States District Court for the Northern District of Ohio.

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, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent be, and hereby is barred from association with any broker or dealer;

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.

Florence E. Harmon
Acting 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. 8953 / August 26, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12925

In the Matter of :

Euro Capital Incorporated, :

Respondent. :

ORDER MAKING FINDINGS
STAYING PROCEEDINGS,
SPECIFYING PROCEDURES
AND DELEGATING AUTHORITY

I.

In these proceedings instituted on January 4, 2008, pursuant to Rule 258 of the General Rules and Regulations under the Securities Act of 1933 ("Securities Act") as to Respondent Euro Capital Incorporated ("Euro Capital"), Euro Capital has submitted an Offer of Settlement ("Offer") which the Securities and Exchange Commission ("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 Making Findings, Staying Proceedings, Specifying Procedures and Delegating Authority ("Order"), as set forth below.

II.

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

A. Euro Capital is a Delaware Corporation with its principal office located in Dallas, Texas.

B. On December 17, 2007, Euro Capital filed an offering statement with the Commission pursuant to Regulation A on Form 1-A (the Offering").

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.

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C. On January 4, 2008, based upon information reported to it by its staff, the Commission entered an order temporarily suspending Euro Capital's Regulation A exemption pursuant to Rule 258 of the General Rules and Regulations under the Securities Act. The Commission's January 4, 2008 order also gave notice that any person having an interest in the matter could file with the Secretary of the Commission a written request for a hearing to determine whether the suspension should be vacated or made permanent.

D. Euro Capital requested a hearing, and on March 10, 2008, based on representations made by the parties, the hearing set on this matter previously scheduled for March 19, 2008, was postponed.

III.

Undertaking

Respondent undertakes to file, within ten (10) business days of the date of this Order, a written request, signed by an authorized representative of the Respondent, to withdraw its December 17, 2007, offering statement. The written request shall be addressed to the Director of the Division of Corporation Finance and shall state that the request is made pursuant to this Order and shall further state that Euro Capital has raised no funds pursuant to the Offering.

IV.

In view of the foregoing, and based upon Euro Capital's Offer,

It is hereby ORDERED that:

A. This proceeding is stayed until further order of the Commission or the Administrative Law Judge in this proceeding or in accordance with the provisions of this Order.

B. The temporary suspension imposed by the Commission pursuant to its January 4, 2008, order in these proceedings ("Temporary Suspension") shall remain in effect until further order of the Commission, except for purposes of permitting the Respondent to request the withdrawal of its December 17, 2007, offering statement as specified in Section III.

C. Euro Capital shall comply with the undertaking set forth in Section III. above. If Euro Capital fails to make the written request within the time frame established in Section III. of this Order then an Order Making Findings and Permanently Suspending Regulation A Exemption ("Suspension Order") in the form agreed to in the Offer, and attached to the Offer as Exhibit A, shall be entered making the Temporary Suspension permanent. Such suspension Order will be entered by the Commission upon being notified by the staff of the Division of Enforcement that Euro Capital failed to comply with the time frame provided in Section III. of this Order.

D. The Commission hereby delegates to the Director of the Division of Corporation Finance, and to any Deputy, Associate, or Assistant Director in the Division of Corporation Finance, authority to accept the Respondent's written request as specified in Section III. above and to reject the request if it fails to comply with the requirements of the undertaking.

E. In the event that the Director of Division of Corporation Finance accepts the Respondent's withdrawal request, then the Commission will issue an order vacating the Temporary Suspension and dismissing this proceeding without prejudice.

F. An order vacating the Temporary Suspension may not be considered or represented to be any statement or representation by the Commission concerning the merits of Euro Capital's securities.

By the Commission.



Florence E. Harmon
Acting 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 August 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 Atkins was Commissioner from July 20, 2002 to August 1, 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

ELISSE B. WALTER, COMMISSIONER

21 Documents

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58280 / August 1, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2856 / August 1, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-10664

..... :
In the Matter of : CORRECTED
: :
Jeffrey Bacsik, CPA : ORDER GRANTING APPLICATION FOR
: REINSTATEMENT TO APPEAR AND PRACTICE
: BEFORE THE COMMISSION AS AN ACCOUNTANT
: :
..... :

On December 27, 2001, Jeffrey Bacsik ("Bacsik") 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 Bacsik pursuant to Rule 102(e) of the Commission's Rules of Practice.¹ Bacsik consented to the entry of the December 27, 2001 order without admitting or denying the findings therein. This order is issued in response to Bacsik's application for reinstatement to practice before the Commission as an accountant.

Bacsik served as the engagement partner for Deloitte & Touche LLP's ("Deloitte") audits of Fine Host Corporation's ("Fine Host") financial statements for fiscal year 1996. Bacsik also served as the engagement partner for the audits of Fine Host's financial statements for fiscal years 1993 through 1995 that were incorporated in a Form S-1 that went effective on June 19, 1996. The Commission found that Fine Host engaged in an extensive financial fraud that, when detected, resulted in the collapse of its stock price and, eventually, the end of its existence as a public company. The fraud involved, as its primary mechanism, the improper capitalization of millions of dollars in company expenses as assets. Fine Host also manipulated acquisition reserve accounts, income from vendor rebates and other items for the purpose of managing reported earnings. Bacsik, as the engagement partner on the Deloitte audit team, failed to ensure that the audit team conducted appropriate audit procedures, in many instances improperly relying on representations of Fine Home management as the source of audit evidence. This failure to exercise due professional care, ensure that the audit team obtained sufficient competent

¹ See Accounting and Auditing Enforcement Release No. 1482 dated December 27, 2001. Bacsik was permitted, pursuant to the order, to apply for reinstatement after two years upon making certain showings.

evidential matter and maintain an attitude of professional skepticism constituted improper professional conduct under Rule 102(e) of the Commission's Rules of Practice.

Bacsik has met all of the conditions set forth in the original order and, in his capacity as an independent accountant, has stated that he will comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to all requirements relating to registration, inspections, concurring partner reviews and quality control standards. 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, Bacsik 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.

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 the information supplied, representations made, and undertakings agreed to by Bacsik, it appears that he has complied with the terms of the December 27, 2001 order denying him the privilege of 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 Bacsik, 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, and that Bacsik, by undertaking to comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards, in his practice before the Commission as an independent accountant has shown good cause for reinstatement. Therefore, it is accordingly,

² Rule 102(e)(5)(i) provides:

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58293 / August 1, 2008

INVESTMENT ADVISERS ACT OF 1940
Release No. 2766 / August 1, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13113

In the Matter of

GORDON R. MOORE,

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 Gordon R. Moore ("Respondent" or "Moore").

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)

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of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Moore was a registered representative with AXA Advisors, LLC ("AXA") from June 1, 2001 through July 23, 2007 until he resigned in connection with an investigation by the Colorado Attorney General's office into his conduct. AXA registered with the Commission as a broker-dealer in 1974 and as an investment adviser in 1978. Moore operated an office in Longmont, Colorado and was supervised by an AXA branch office in Denver, Colorado. Moore, 30 years old, is a resident of Longmont.

2. On August 24, 2007, in Case No. 07CR10369 in the District Court for the City and County of Denver, Moore was charged with forty-five felony counts of securities fraud, theft, computer crime, criminal impersonation, forgery, and attempt to influence a public official. On January 8, 2008, Moore pled guilty to one count each of three class three felonies: securities fraud, theft, and computer crime. On February 26, 2008, Moore was sentenced to two years probation and ordered to pay criminal restitution in an amount based on the commissions he earned from his fraudulent activities.

3. The counts of the criminal indictment to which Moore pled guilty alleged, inter alia, that Moore fraudulently induced many investors, the majority of whom were current teachers in Colorado public schools, to consent to rollover their retirement investments from their Colorado Public Employees' Association ("PERA") 401(k) accounts into new AXA 403(b) accounts during the period July 2004 through June 2007. Moore misrepresented the PERA rollover rules to investors and induced them to sign documents which he later falsified. Moore fraudulently induced approximately \$1,665,166 worth of direct customer rollovers into AXA's 403(b) plan using this scheme.

IV.

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

Accordingly, it is hereby ORDERED:

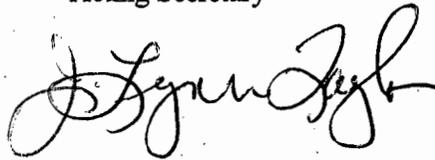
Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Moore be, and hereby is barred from association with any broker, dealer, or investment adviser;

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.

Florence E. Harmon
Acting Secretary

A handwritten signature in cursive script, appearing to read "J. Lynn Taylor".

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 241 and 271

[Release Nos. 34-58288, IC-28351; File No. S7-23-08]

COMMISSION GUIDANCE ON THE USE OF COMPANY WEB SITES

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation; solicitation of comment.

SUMMARY: We are publishing this interpretive release to provide guidance regarding the use of company web sites under the Exchange Act and the antifraud provisions of the federal securities laws. We are soliciting comment on issues relating to company use of technology generally in providing information to investors.

DATES: Effective Date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comment Date: Comments should be received on or before [insert date 90 days after publication in the Federal Register].

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/interp.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number S7-23-08 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper comments:

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

All submissions should refer to File Number S7-23-08. This file number should be included on the subject line if email 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 web site (<http://www.sec.gov/rules/interp.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: Jeffrey Cohan, Kim McManus or Mark Vilardo, Special Counsels in the Office of Chief Counsel, Division of Corporation Finance, at (202) 551-3500, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

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I. Introduction and Overview

A. Introduction

In its February 2008 Progress Report, the Federal Advisory Committee on Improvements to Financial Reporting recommended that we provide more guidance as to how companies can use their web sites to provide information to investors in compliance with the federal securities laws, particularly with respect to the Securities Exchange Act of 1934 (the “Exchange Act”).¹ Prompted, in part, by this report, we believe that to encourage the continued development of company web sites as a significant vehicle for the dissemination to investors of important company information, it is an appropriate time to provide additional Commission guidance specifically addressing company web sites.² While we addressed certain discrete Internet issues relating to the Securities Act of 1933 (the “Securities Act”) in 2005,³ we last provided guidance in 2000 on the electronic delivery of disclosure documents, company liability for web site content, as well as other matters.⁴ We noted then that, given the speed at which technological advances are developing, and the translation of those technologies into investor tools, we expected to revisit the guidance provided at that time in order to update and supplement it as appropriate.⁵

¹ See Progress Report of the SEC Advisory Committee on Improvements to Financial Reporting, Release No. 33-8896 (Feb. 14, 2008) (“CIFiR Progress Report”), available at <http://www.sec.gov/rules/other/2008/33-8896.pdf>.

² In this release the term “company web site” and the use of the term “web site” in the context of companies refer to public (Internet) company sites, as distinguished from private (intranet) sites. A company web site is maintained by or for the company and contains information about the company.

³ See Securities Offering Reform, Release No. 33-8591 (Aug. 3, 2005) [70 FR 44721] (“Securities Offering Reform Release”).

⁴ See Use of Electronic Media, Release No. 33-7856 (Apr. 28, 2000) [65 FR 25843] (“2000 Electronics Release”).

⁵ See id. at Section II.D.

Given the development and proliferation of company web sites since 2000, and our expectation that continued technological advances will further enhance the quality, not just the quantity, of information delivered and available to investors on such web sites, as well as the speed at which such information reaches the market, we are issuing this interpretive release⁶ to provide additional guidance on the use of company web sites with respect to the antifraud provisions and certain relevant Exchange Act provisions of the federal securities laws.⁷ Our guidance focuses principally on:⁸

- When information posted on a company web site is “public” for purposes of the applicability of Regulation FD;
- Company liability for information on company web sites – including previously posted information, hyperlinks to third-party information, summary information and the content of interactive web sites;
- The types of controls and procedures advisable with respect to such information; and
- The format of information presented on a company web site, with the focus on readability, not printability.

⁶ We do not view the guidance in this release as a delineation of the outer limits of how technology can or should be used on company web sites.

⁷ In addition to the Exchange Act, companies must also consider whether their web sites may involve issues under the Securities Act, which we discussed in our 2000 Electronics Release. For example, a company in registration must consider the application of Section 5 of the Securities Act to all of its communications with the public – including information on a company’s web site. See 2000 Electronics Release, *supra* note 4. This consideration is important with regard to any company engaged in offering and selling its securities, including companies engaged in continuous offerings of their securities, such as mutual funds. Because our rules adopted as part of Securities Offering Reform in 2005 answered many of the key issues relating to company web site use under the Securities Act, this release will focus on the antifraud provisions and certain Exchange Act provisions only. See Securities Offering Reform Release, *supra* note 3; Securities Act Rule 433 [17 CFR 230.433].

⁸ For purposes of this release generally, we are using the term “company” to refer to entities that are corporations, partnerships and other types of registrants subject to the periodic reporting and antifraud provisions of the Exchange Act, including registered investment companies.

We have long recognized the vital role of the internet and electronic communications in modernizing the disclosure system under the federal securities laws and in promoting transparency, liquidity and efficiency in our trading markets.⁹ Central to the effective operation of our trading markets is the ongoing dissemination of information by companies about themselves and their securities. A reporting company's reports that it files under the Exchange Act and other publicly available information form the basis for the market's evaluation of the company and the pricing of its securities, and investors in the secondary market use that information in making their investment decisions.

Ongoing technological advances in electronic communications have increased both the markets' and investors' demand for more timely company disclosure and the ability of companies to capture, process and disseminate this information to market participants. Indeed, one of the key benefits of the Internet is that companies can make information available to investors quickly and in a cost-effective manner. Recently, we noted that approximately 80% of investors in mutual funds in the United States have access to the Internet in their homes.¹⁰ Investors are turning increasingly to electronic

⁹ See, e.g., The Impact of Recent Technological Advances on the Securities Markets (Sept. 1997) (available at <http://www.sec.gov/news/studies/techrp97.htm>). In this report, we stated that we were mindful of the benefits of increasing use of new technologies for investors and the markets, and have encouraged experimentation and innovation by adopting flexible interpretations of the federal securities laws. We noted that our approach has balanced the goals of promoting the benefits of electronic media, with the need to protect investors and the integrity of the markets from fraud and abuse. We also emphasized the importance of continued coordination with market participants and federal, state and international regulators as technological advances develop. See also Securities Offering Reform Release, supra note 3.

¹⁰ See Internet Availability of Proxy Materials, Release No. 34-55146, at Section I (Jan. 22, 2007) [72 FR 4147] ("Internet Proxy Release"). The Investment Company Institute reported that, in 2006, 92% of mutual fund shareholders had Internet access. See Sandra West & Victoria Leonard-Chambers, Ownership of Mutual Funds and Use of the Internet, 2006, Investment Company Institute Research Fundamentals (Oct. 2006), available at <http://ici.org/stats/res/fm-v15n6.pdf>. In 2005, that figure was at 88%. Additionally, the Investment Company Institute reported that 79% of all U.S. adults had Internet access in 2005. See Sandra West & Victoria

media and to company and third-party web sites as sources of information to aid in their investment decisions, particularly since many types of investment-related company information are available only in electronic form. We believe that the Internet has helped to transform the trading markets by enabling many retail investors to have ready access to company information.¹¹

Through the years, we have taken a number of steps to encourage the dissemination of information electronically via the Internet, as we believe that widespread access to company information is a key component of our integrated disclosure scheme, the efficient functioning of the markets, and investor protection. Today, all companies must make their Commission filings electronically through our Electronic Data Gathering, Analysis and Retrieval (“EDGAR”) system,¹² and we provide free access to EDGAR on a real-time basis through our Internet web site, www.sec.gov.¹³ In addition to our ongoing efforts to improve and modernize EDGAR, we have

Leonard-Chambers, *Mutual Fund Shareholders’ Use of the Internet*, 2005, Investment Company Institute Research Fundamentals (Feb. 2006), available at <http://www.ici.org/pdf/fm-v15n2.pdf>. According to the Pew Internet & American Life Project, as of an October-December 2007 survey, 75% of adults use the Internet. See http://www.pewinternet.org/trends/User_Demo_2.15.08.htm.

¹¹ See, e.g., Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports, Release No. 33-8128, at Section II.D.1 (Sept. 5, 2002) [67 FR 58480] (“Accelerated Periodic Report Filing Release”) (“Online access to Internet information also helps to democratize the capital markets by enabling many small investors to access corporate information.”).

¹² A limited number of forms continue to be permitted to be filed in paper. For example, we permit paper filing of Form 1-A [17 CFR 239.90] and Form 144 [17 CFR 239.144]. In addition, SEC registered investment advisers make some of their filings electronically through the Investment Adviser Registration Depository.

¹³ Since 1983, when the Commission first began to develop an electronic disclosure system, we have been continually improving and modernizing electronic access to companies’ Commission filings, as well as requiring more forms to be filed electronically rather than in paper. The pilot program for EDGAR was established in the early 1980s pursuant to a Congressional mandate and the system was fully implemented, effective January 30, 1995. For a summary of the development of EDGAR, see the staff’s report, “Electronic Filing and the EDGAR System: A Regulatory Overview,” (Oct. 3, 2006), available at <http://www.sec.gov/info/edgar/regoverview.htm>.

encouraged, and recently proposed requiring,¹⁴ companies to provide financial information on EDGAR in interactive data files, which would make financial information easier for investors to analyze, as well as help automate regulatory filings and business information processing. We also proposed rule amendments requiring mutual funds to provide certain key information from their prospectuses in interactive data format.¹⁵ Interactive data has the potential to increase the speed, accuracy and usability of financial and other disclosure, and eventually to reduce costs.¹⁶

As we have developed EDGAR to facilitate and promote electronic availability of information, we also have encouraged companies to make their Commission filings and other company information available on their web sites. We believe that company disclosure should be more readily available to investors in a variety of locations and formats to facilitate investor access to that information. Although our rules do not

¹⁴ On May 30, 2008, we published proposed rule amendments requiring companies to provide their financial statements, including financial statement footnotes and schedules, in interactive data format on EDGAR. The proposed rules would require a company to provide such interactive data in its annual and quarterly reports, transition reports, and Securities Act registration statements. Companies that maintain web sites also would be required to post this new interactive data on their web sites. See Interactive Data to Improve Financial Reporting, Release No. 33-8924 (May 30, 2008) [73 FR 32794] (“Interactive Data Proposing Release”).

¹⁵ See Interactive Data For Mutual Fund Risk/Return Summary, Release No. 33-8929 (June 10, 2008) [73 FR 35442] (“Mutual Fund Interactive Data Proposing Release,” together with the Interactive Data Proposing Release supra note 14, the “Interactive Data Proposing Releases”).

¹⁶ Companies create interactive data files by defining – or “tagging” – their financial statements using elements and labels from a standard list of interactive data tags. Data tagging provides a format for enhancing financial and other reporting data using electronic formats such as eXtensible Mark-Up Language (XML) and its derivatives, such as eXtensive Business Reporting Language (XBRL). General information concerning interactive data is available on our web site at <http://www.sec.gov/spotlight/xbrl.shtml>. See also XBRL Voluntary Financial Reporting Program on the EDGAR System, Release No. 33-8529 (Feb. 3, 2005) [70 FR 6556]; and Extension of Interactive Data Voluntary Reporting Program on the EDGAR System to Include Mutual Fund Risk/Return Summary Information, Release No. 33-8823 (July 11, 2007) [72 FR 39290].

require reporting companies to establish or maintain web sites, our rules do promote and, in some cases require, companies to use web sites to make required disclosures.¹⁷

A company's web site is an obvious place for investors to find information about the company,¹⁸ and a substantial majority of large public companies already provide access to their Commission filings through their web sites.¹⁹ Technological advances, and the reduced costs associated with the implementation of technologies over time, now allow companies to include more "interactive" and current information on their web sites than was the case previously, thereby moving web sites away from the filing cabinet or "static" paradigm to a "dynamic" paradigm, one shaped by the market's desire for more current, searchable and interactive information.²⁰ We recognize that allowing companies

¹⁷ See Section I.B, *infra*. See also Exchange Act Section 16(a)(4)(C) [15 U.S.C. 78(p)(a)(4)(C)]. This section was enacted pursuant to the Sarbanes-Oxley Act of 2002 [Pub. L. No. 107-204, 116 Stat. 745 (2002)] and requires that companies post Section 16 reports on their web site if they maintain one. Section 16(a)(4)(C) evidences Congress's recognition of the informational utility of company web sites. While our rules do not require companies to establish web sites, the New York Stock Exchange does require its listed companies, with certain exceptions, to establish and maintain their own web sites. See NYSE Listed Company Manual, Section 303A.14.

¹⁸ Since their first appearance on the World Wide Web, company web sites typically have included copies of Commission filings or a hyperlink to the Commission's EDGAR database, along with certain other previously posted historical information, such as earnings releases. Some companies also have provided limited "real-time" information, such as stock data links. For a discussion of the content of company web sites in 1998 and prior years, see generally Robert Prentice et al., *Corporate Website Disclosure and Rule 10b-5: An Empirical Evaluation*, 36 Am. Bus. L.J. 531 ("Prentice"); Howard M. Friedman, *Securities Regulation in Cyberspace* §10.01 (3rd ed. Supp. 2006) ("Friedman").

¹⁹ A 2002 study by our Office of Economic Analysis revealed that approximately 83% of companies with a public float of at least \$75 million (other than registered investment companies) provide some form of access to their Commission filings through their web sites, either via a hyperlink with a third-party service providing real-time access to the filings (45%), by posting the filings directly on their web sites (29%) or via a hyperlink to our EDGAR database (15%). See Accelerated Periodic Report Filing Release, *supra* note 11.

²⁰ For example, web pages created in a "dynamic" format, such as "active server page," are database driven, permitting automatic updating of the content. This differs from the traditional, "static" HTML pages that can only be altered by the webmaster. "Push" technology, such as e-mail alerts or "RSS" feeds, enables the automatic, electronic dissemination of new information on the site to subscribers. "Interactive" investor-related tools and functionality, such as "blogs" and electronic shareholder forums, promote direct communications with companies, their officers and other representatives.

to present data in formats different from those dictated by our forms or more technologically advanced than EDGAR may be beneficial to investors.²¹ Indeed, because we recognize the enormous potential for the Internet to promote the goals of the federal securities laws,²² we wish to continue to encourage companies to develop their web sites in compliance with the federal securities laws so that they can serve as effective information and analytical tools for investors.²³ Enhanced company web site presentation of information can benefit investors of all types by enabling them to gather information about a company at a level of detail they believe is satisfactory for their purposes.²⁴

B. Overview of Exchange Act Rules on the Use of Company Web Sites

We have issued a series of interpretive releases and rules that promote the use of company web sites as a means for companies to communicate and provide information to

²¹ As we noted in a recent release, Shareholder Choice Regarding Proxy Materials, Release No. 34-56135, at Section VI.C.1 (Jul. 26, 2007) [72 FR 42221] (“Shareholder Choice Release”): “Information in electronic documents is often more easily searchable than information in paper documents. Shareholders will be better able to go directly to any section of the document that they are particularly interested in. The amendments also will permit shareholders to more easily evaluate data and transfer data using analytical tools such as spreadsheet programs. Such tools enable users to compare relevant data about several companies more easily.”

²² See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (explaining that the purpose common to the securities laws was to “substitute a philosophy of full disclosure for the philosophy of caveat emptor”).

²³ While EDGAR and the Commission’s web site continue to serve as the core source of companies’ securities-related information online, we recognize that the technological capacities of company web sites may allow for presentation and manipulation of large quantities of data in ways that exceed EDGAR’s current capacities. For example, while the recently introduced RSS feed on the Commission’s web site allows access to documents in interactive data format in the pilot program, some commercial and company web sites enable users to receive the filings of companies of their choice.

²⁴ In discussing the use of company web sites to provide information in a tiered format, the Federal Advisory Committee on Improvements to Financial Reporting recently observed in its February 2008 Progress Report: “A valuable element of many of such [company] web site presentations is that they present the most important general information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links. In this way, viewers can follow a path into, and thereby obtain increasingly greater details about, the financial statements, a company’s strategy and products, its management and corporate governance, and its many other areas in which investors and others may have an interest.” See CFIIR Progress Report, supra note 1.

investors under the Securities Act and the Exchange Act.²⁵ A fundamental principle underlying these interpretations and rules is that, where access is freely available to all, use of electronic media is at least equal to other methods of delivering information or making it available to investors and the market. Further, we have recognized that, in some cases, allowing companies to provide information on their web sites has advantages for investors over mandating that EDGAR serve as the exclusive venue and format for company disclosures.²⁶ Indeed, today we have reached a point where the availability of information in electronic form – whether on EDGAR or a company web site – is the superior method of providing company information to most investors, as compared to other methods.

Our rules and interpretations that promote the use of web sites generally work in two different respects. First, when delivery of documents is required under the federal securities laws, we have encouraged the delivery in electronic format or recognized that electronic access can satisfy delivery – hence, prospectuses and proxy materials can be delivered or otherwise made available using electronic communications and the Internet in certain circumstances.²⁷ Indeed with respect to proxy materials, certain companies are

²⁵ See generally 2000 Electronics Release, supra note 4; Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458] (“1995 Electronics Release”); Use of Electronic Media by Broker-Dealers, Release No. 33-7288 (May 9, 1996) [61 FR 24643] (“1996 Electronics Release”).

²⁶ See, e.g., Regulation G [17 CFR 244.100]; Instruction 2 to Item 407(b)(2) of Regulation S-K [17 CFR 229.407(b)(2)]; Exchange Act Rule 12d-2(c)(2)(iii) [17 CFR 240.12d-2(c)(2)(ii)]. See generally Accelerated Periodic Report Filing Release, supra note 11, at Section IV.B.1.

²⁷ See Securities Act Rule 172 [17 CFR 230.172]; Securities Offering Reform Release, supra note 3; Internet Proxy Release, supra note 10; Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33-8861 (Nov. 30, 2007) [72 FR 67790] (“Mutual Fund Summary Prospectus Proposing Release”) (proposing to permit funds to satisfy their prospectus delivery obligations by sending or giving key information directly to investors in the form of a summary prospectus and providing the statutory prospectus on an Internet web site).

required to post their proxy materials on a specified, publicly accessible Internet web site (other than EDGAR) and provide record holders with a notice informing them that the materials are available and explaining how to access those materials.²⁸ Second, where disclosure of information is required under the Exchange Act, we have allowed companies to make such information available to investors on their web sites with their web sites serving, depending on the circumstance, as a supplement to EDGAR, as an alternative to EDGAR, or as a stand-alone method of providing information to investors independent of EDGAR.

When a company web site serves as a supplement to EDGAR, company information is available both on EDGAR and on the company's web site. We have promoted this supplemental use of web sites by requiring, for example, that:

²⁸ See Shareholder Choice Release, *supra* note 21. While large accelerated filers, not including registered investment companies, are currently required to comply with these rules, starting January 1, 2009, these rules will apply to all filers and other soliciting parties. Perhaps the most significant change effected by this rulemaking is the shift whereby electronic availability can serve as the default means of delivery, with shareholders having to "opt out" to receive paper delivery. The requirement that any shareholder lacking Internet access, or preferring delivery of a paper copy of the proxy materials, can make a permanent request to receive a paper copy of the proxy materials (and all future proxy materials) at no charge mitigates concerns about Internet access. In adopting these notice and access model rules, we recognized that "[a]s technology continues to progress, accessing the proxy materials on the Internet should increase the utility of our disclosure requirements to shareholders. Information in electronic documents is often more easily searchable than information in paper documents. Shareholders will be better able to go directly to any section of the document that they are particularly interested in." *Id.* at Section VI.C.1. It is significant to note that these rules neither require, nor permit, solicitations pursuant to the notice and access model with respect to business combination transactions. Based on statistics compiled by Broadridge, a proxy distribution service provider, beneficial owner (which include retail investors) participation in proxy voting has diminished since the adoption of the notice and access model rules. See Broadridge, Notice & Access: Statistical Overview of Use with Beneficial Shareholders as of May 31, 2008, available at <http://broadridge.com/notice-and-access/NAStatsStory.pdf>.

- Companies disclose their web site addresses in annual reports on Form 10-K and state whether their Exchange Act reports are available on their web sites;²⁹
- Mutual funds disclose in their prospectuses whether shareholder reports are available on their web sites, and if not, why not;³⁰
- Companies make their Exchange Act reports available on their web sites as a condition to incorporating by reference previously filed reports into prospectuses filed as part of registration statements on Form S-1 or Form S-11;³¹
- Companies post on their web sites, if they have one, all beneficial ownership reports filed by officers, directors and principal security holders under Section 16(a) of the Exchange Act;³² and
- Companies post on their web sites, if they have one, notice of their intent to delist or deregister their securities.³³

²⁹ Accelerated filers and large accelerated filers are required to disclose this information. Non-accelerated filers are encouraged to do so. See Item 101(e) of Regulation S-K [17 CFR 229.101(e)].

³⁰ See Item 1(b) of Form N-1A. See also Item 1.1.d. of Form N-2 (providing a similar requirement for closed-end funds).

³¹ See Form S-1, General Instruction VII.F [17 CFR 239.11]; Form S-11, General Instruction H.6 [17 CFR 239.18]. In the adopting release for the Form S-11 amendments, we noted that companies could satisfy this requirement by “including hyperlinks directly to the reports or other materials filed on EDGAR or on another third-party web site where the reports or other materials are made available in the appropriate timeframe and access to the reports or other materials is free of charge to the user.” See Revisions to Form S-11 to Permit Historical Incorporation by Reference, Release No. 33-8909, at Section I.B.1(a) (Apr. 10, 2008) [73 FR 20512].

³² See Exchange Act Section 16(a)(4)(C) and Rule 16a-3(k) [17 CFR 240.16a-3(k)]. See also Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5, Release No. 33-8230 (May 7, 2003) [68 FR 25787].

³³ See Exchange Act Rule 12d2-2(c)(2)(iii) [17 CFR 240.12d2-2(c)(2)(iii)]. See also Exchange Act Rule 12d2-2(c)(3) [17 CFR 240.12d2-2(c)(3)] (imposing a similar requirement on a national securities exchange to post on its web site any notice it receives from a company indicating the

In addition, we have proposed in the Interactive Data Proposing Releases that companies that maintain web sites be required to post their interactive data files on their web sites.³⁴

In some situations, we have given companies the choice and flexibility of satisfying an Exchange Act disclosure requirement either by filing the disclosure on EDGAR or by making it available on the company's web site, thereby using company web sites as an alternative to EDGAR. For example:

- A company may disclose non-GAAP financial measures and Regulation G required information on its web site;³⁵
- An asset-backed issuer may post disclosure of static pool data on its web site rather than filing it on EDGAR;³⁶
- A company may provide its audit, nominating or compensation committee charters on its web site as an alternative to providing them in its proxy or information statement;³⁷

company has determined to withdraw a class of securities from listing and/or registration on the exchange).

³⁴ See Interactive Data Proposing Release, supra note 14; and Mutual Fund Interactive Data Proposing Release, supra note 15.

³⁵ See Conditions for Use of Non-GAAP Financial Measures, Release No. 33-8176 (Jan. 22, 2003) [68 FR 4819]. In that release, we recommended that companies provide ongoing web site access to this information for a period of at least 12 months. Although we understand that some companies may be reducing such web site access to a single quarter, we continue to believe that companies should retain the information on their web sites for 12 months. We believe such a retention time period is appropriate to enable quarter-to-quarter comparisons. Financial information disclosed on web sites is still subject to the limitations on disclosure of non-GAAP financial information set forth in Regulation G. See id.

³⁶ See Asset-Backed Securities, Release No. 33-8518, at Section III.B.4.b. (Dec. 22, 2004) [70 FR 1505] ("Asset-Backed Release") (discussing the ability to post disclosure of static pool data that is required in registered sales of asset-backed securities on web sites rather than filing it on EDGAR, subject to certain conditions). In this context, we resolved the potential conflict between the need to include material information in a prospectus offering asset-backed securities and the technical limitations of EDGAR that may have limited the ability of asset-backed issuers to provide that information in the format most useful for investors by adopting an alternative accommodation via which the information posted on a web site will be deemed to be included in the prospectus when done in compliance with Item 312 of Regulation S-T [17 CFR 232.312].

- A company may disclose a material amendment to its code of ethics, or a material waiver of a provision of its code of ethics, by posting the information on its web site rather than filing a Form 8-K;³⁸ and
- A company may provide information regarding board member attendance at the annual shareholder meeting on its web site rather than in its proxy statement.³⁹

Finally, we have recently recognized that, in very limited circumstances, a company's web site can even serve as a standalone method of providing information to investors wholly independent of EDGAR. We have permitted certain foreign private issuers to use their web sites as the primary or stand-alone source of information about the company as a basis for maintaining an exemption from Exchange Act registration and reporting requirements, under certain circumstances.⁴⁰

³⁷ See Instruction 2 to Item 407(b)(2) of Regulation S-K [17 CFR 229.407(b)(2)]. As we noted above, the New York Stock Exchange has also implemented rules that recognize the value of company web sites as an important source of corporate governance information. See, e.g., NYSE Listed Company Manual, Sections 303A.10 and 303A.14 and note 17 supra.

³⁸ See Item 406(d) of Regulation S-K [17 CFR 229.406(d)]; Item 5.05(c) of Form 8-K [17 CFR 249.308].

³⁹ See Instruction to Item 407(b)(2) of Regulation S-K.

⁴⁰ We recently adopted new Exchange Act Rule 12h-6 [17 CFR 240.12h-6] and accompanying rule amendments to extend the Exchange Act Rule 12g3-2(b) [17 CFR 240.12g3-2(b)] exemption to a foreign private issuer and prior Form 15 filer immediately upon its termination of reporting under Rule 12h-6. To maintain that exemption, the company must publish specified home country documents in English on its Internet web site or through an electronic information delivery system generally available to the public in its primary trading markets. See Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Release No. 34-55540 (Mar. 27, 2007) [72 FR 16933]. The purpose of these provisions, and the additional changes that have been proposed to the availability of the exemption from registration pursuant to Rule 12g3-2(b), is to provide U.S. investors with Internet access to ongoing material information about a foreign private issuer that is required by its home country following its termination of reporting under Rule 12h-6. See Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Release No. 34-57350 (Feb. 19, 2008) [73 FR 10101]. We also recently proposed rules that would permit exchange-traded funds to be actively managed provided certain conditions are met, including that fund composition information is maintained every business day on a publicly accessible web site, with such web site posting being the

II. Application of Certain Provisions of the Federal Securities Laws to Information Presented on Company Web Sites

A. Evaluation of "Public" Nature of Information on Company Web Sites

As we note above, there has been a dramatic increase in the use of company web sites since our 2000 Electronics Release and the adoption of Regulation FD.⁴¹

Companies are providing greater amounts and types of information on their web sites, which, as a result, are increasingly viewed by investors as key sources of information about the company.⁴² As companies use their web sites to a greater extent to provide comprehensive information about themselves, some have raised questions as to the treatment of information posted on a company web site under the federal securities laws.⁴³ We note that such questions have numerous implications under the federal securities laws.⁴⁴

Although we have not addressed the question of whether and when information on a company's web site is considered public for purposes of determining if a subsequent selective disclosure of such information may implicate Regulation FD, we believe that in view of the significant technological advances and the pervasive use of the Internet by companies, investors and other market participants since 2000, it is now an appropriate

standalone method of providing such information to the public. See Exchange-Traded Funds, Release No. 33-8901 (Mar. 11, 2008) [73 FR 14618].

⁴¹ See Selective Disclosure and Insider Trading, Release No. 33-7881, at Section II.B.2 (Aug. 15, 2000) [65 FR 51715] ("Regulation FD Adopting Release").

⁴² See Section I, supra. There also has been significant growth in the use of the Internet by the public. As noted in the Internet Proxy Release, research submitted to the Commission during the comment period indicated that approximately 80% of mutual fund investors in the United States have access to the Internet in their homes. See Internet Proxy Release, supra note 10, at Section I.

⁴³ The Federal Advisory Committee on Improvements to Financial Reporting requested that the Commission clarify this point in its CIFI Progress Report. See CIFI Progress Report, supra note 1, at Chapter 4, Section III.

⁴⁴ See 2000 Electronics Release, supra note 4.

time to provide additional guidance regarding the public nature of disclosures on company web sites for purposes of Regulation FD. Accordingly, we are providing guidance as to the circumstances under which information posted on a company web site (whether by or on behalf of such company) would be considered “public” for purposes of evaluating the (1) applicability of Regulation FD to subsequent private discussions or disclosure of the posted information and (2) satisfaction of Regulation FD’s “public disclosure” requirement.⁴⁵

1. Whether and When Information Is “Public” for Purposes of the Applicability of Regulation FD

Evaluating whether and when information posted on a company web site is public so that a subsequent disclosure of that information to an enumerated person in Regulation FD is not a disclosure of non-public information implicates many of the same issues that Regulation FD itself was adopted to address.⁴⁶ In particular, Regulation FD was adopted to address the problem of selective disclosure of material information by companies, in

⁴⁵ We are not addressing issues relating to insider trading that may be implicated by disclosures on company web sites. In addition, our guidance is not intended to modify the positions we have expressed regarding the Securities Act implications of disclosures on company web sites, including when such disclosures may constitute offers or the implications for private offerings. For example, in the 2000 Electronics Release, we discussed the extent to which a company’s use of an Internet web site could constitute a “general solicitation.” See 2000 Electronics Release, supra note 4, at Section II.C.2.

Our guidance also is not intended to address issues under Securities Act Rule 144(c) [17 CFR 230.144(c)]. We note, for example, that the concept of “public information” for non-reporting companies contained in Rule 144(c)(2) is based on access. We believe that non-reporting companies should focus on the availability of information required by Rule 144 rather than on dissemination of that information as further discussed in this section. Likewise, under Rule 144A(d)(1)(i) [17 CFR 230.144A(d)(1)(i)], sellers and persons acting on their behalf may look to publicly available financial statements for a prospective purchaser; and under Rule 144A(d)(4)(i), certain companies are required to provide access to specified company information to security holders and prospective purchasers. As with Rule 144, the concept of dissemination as we discuss in this section is not a condition to reliance on Rule 144A.

Regulation FD applies to closed-end investment companies but does not apply to other investment companies. Exchange Act Rule 101(b) [17 CFR.243.101(b)(definition of issuer for purposes of Regulation FD)].

⁴⁶ See Regulation FD [17 CFR 243.100 et seq.].

which “a privileged few gain an informational edge -- and the ability to use that edge to profit -- from their superior access to corporate insiders, rather than from their skill, acumen, or diligence.”⁴⁷ We must, therefore, keep that in mind when providing guidance on when information is considered public for purposes of assessing whether a subsequent selective disclosure may implicate Regulation FD.

“In order to make information public, it must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information.”⁴⁸ Thus, in evaluating whether information is public for purposes of our guidance, companies must consider whether and when: (1) a company web site is a recognized channel of distribution, (2) posting of information on a company web site disseminates the information in a manner making it available to the securities marketplace in general, and (3) there has been a reasonable waiting period for investors and the market to react to the posted information.

With respect to the first element of this analysis, as we have noted above, we believe that a company’s web site can be a valuable channel of distribution for information about a company, its business, financial condition and operations.⁴⁹ As we discuss below, whether a company’s web site is a recognized channel of distribution of information will depend on the steps that the company has taken to alert the market to its

⁴⁷ See Regulation FD Adopting Release, supra note 41 at Section II.A. In the Regulation FD Adopting Release, we stated our belief that Regulation FD struck an appropriate balance. It established a clear rule prohibiting unfair selective disclosure and encouraged broad public disclosure. We also believed that Regulation FD should not impede ordinary course business communications. See id. at Section II.A.4.

⁴⁸ Faberge, Inc., 45 S.E.C. 249, 255 (1973). See also Regulation FD Adopting Release, supra note 41, at Section II.B (“Information is nonpublic if it has not been disseminated in a manner making it available to investors generally.”).

⁴⁹ See Section I.B, supra. See Interactive Data Proposing Release, supra note 14.

web site and its disclosure practices, as well as the use by investors and the market of the company's web site.

With respect to the second element of the analysis, the question of what “disseminated” means in the context of web site disclosure, we recognize that, today, news is disseminated in an electronic world – one in which the accessibility to the information is not limited to reading a newspaper or the “broad tape.” There are now many different channels of distribution of news and other information which account for the rapid dissemination of news today (and also the corresponding capacity for rapid trading based on such information). Because companies of all sizes now have the capacity to present information on their web sites to all investors on a broadly accessible basis, and because investors correspondingly have the capability to easily find and retrieve information about companies by searching the World Wide Web, we now analyze the concept of “dissemination” through a changed lens. Consequently, we believe that, in the context of a company web site that is known by investors as a location of company information, the appropriate approach to analyzing the concept of “dissemination” for purposes of the “public” test as it relates to the applicability of Regulation FD to a subsequent disclosure should be to focus on (1) the manner in which information is posted on a company web site and (2) the timely and ready accessibility of such information to investors and the markets.⁵⁰

⁵⁰ In our recent proposals regarding interactive data, we stated that we believed that “web site availability of the interactive data would encourage its widespread dissemination.” Interactive Data Proposing Release, *supra* note 14, at Section II.B.5. In that release, we recognized the increasing role that company web sites perform in supplementing the information filed electronically with the Commission by delivering financial and other disclosure directly to investors. *Id.*

Some factors, though certainly non-exclusive ones, for companies to consider in evaluating whether their company web site is a recognized channel of distribution and whether the company information on such site is “posted and accessible” and therefore “disseminated,” include:

- Whether and how companies let investors and the markets know that the company has a web site and that they should look at the company’s web site for information. For example, does the company include disclosure in its periodic reports (and in its press releases) of its web site address and that it routinely posts important information on its web site?
- Whether the company has made investors and the markets aware that it will post important information on its web site and whether it has a pattern or practice of posting such information on its web site;
- Whether the company’s web site is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the web site in the location known and routinely used for such disclosures, and whether the information is presented in a format readily accessible to the general public;
- The extent to which information posted on the web site is regularly picked up by the market and readily available media, and reported in, such media or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved. For example, in evaluating accessibility to the posted information, companies that

are well-followed by the market and the media may know that the market and the media will pick up and further distribute the disclosures they make on their web sites. On the other hand, companies with less of a market following, which may include many companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's web site and that they should look at the company web site for current information about the company;

- The steps the company has taken to make its web site and the information accessible, including the use of "push" technology,⁵¹ such as RSS feeds, or releases through other distribution channels either to widely distribute such information or advise the market of its availability. We do not believe, however, that it is necessary that push technology be used in order for the information to be disseminated, although that may be one factor to consider in evaluating the accessibility to the information;⁵²
- Whether the company keeps its web site current and accurate;
- Whether the company uses other methods in addition to its web site posting to disseminate the information and whether and to what extent those other

⁵¹ Push technology, or server push, describes a type of Internet-based communication where the request for the transmission of information originates with the publisher or central server. It is contrasted with pull technology, where the request for the transmission of information originates with the receiver or client.

⁵² Companies should also consider the extent to which their Internet infrastructure can accommodate spikes in traffic volume that may accompany a major company development.

methods are the predominant methods the company uses to disseminate information; and

- The nature of the information.

The third element in evaluating whether and when information posted on a company's web site would be public for purposes of evaluating whether a subsequent selective disclosure may implicate Regulation FD is whether investors and the market have been afforded a reasonable waiting period to react to the information. What constitutes a reasonable waiting period depends on the circumstances of the dissemination, which, in the context of company web sites, may include:

- the size and market following of the company;
- the extent to which investor oriented information on the company web site is regularly accessed;
- the steps the company has taken to make investors and the market aware that it uses its company web site as a key source of important information about the company, including the location of the posted information;
- whether the company has taken steps to actively disseminate the information or the availability of the information posted on the web site, including using other channels of distribution of information; and
- the nature and complexity of the information.⁵³

⁵³

See Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968) (noting that "where the news is of a sort which is not readily translatable into investment action, insiders may not take advantage of their advance opportunity to evaluate the information by acting immediately upon dissemination").

We emphasize that companies must look at the particular facts and circumstances in determining whether the reasonable waiting period element is satisfied. What may be a reasonable waiting period after posting information on a company web site for a particular company and a particular type of information may not be one for other companies or other types of information. For example, a large company that frequently uses its web site as a key resource for providing information, has taken steps to make investors and the market aware of this, and reasonably believes that its web site is well-followed by investors and other market participants, may get comfortable with a waiting period that is shorter than a waiting period for a company that is not in the same situation.

If the information is important, companies should consider taking additional steps to alert investors and the market to the fact that important information will be posted – for example, prior to such posting, filing or furnishing such information to us or issuing a press release with the information. Adequate advance notice of the particular posting, including the date and time of the anticipated posting and the other steps the company intends to take to provide the information, will help make investors and the market aware of the future posting of information, and will thereby facilitate the broad dissemination of the information.

The question of what constitutes a reasonable waiting period has been frequently litigated in the context of insider trading.⁵⁴ While we are not addressing when

⁵⁴ See SEC v. Ingoldsby, No. 88-1001-MA, 1990 U.S. Dist. LEXIS 11383 (D. Mass. May 15, 1990); SEC v. MacDonald, 568 F.Supp. 111, 113 (D.R.I. 1983), *aff'd*, 725 F.2d 9 (1st Cir. 1984); SEC v. Materia, No. 82 Civ. 6225, 1983 U.S. Dist. LEXIS 11130 (S.D.N.Y. Dec. 5, 1983); DuPont Glore Forgan, Inc. v. Arnold Bernhard & Co., Inc., No. 73 Civ. 3071, 1978 U.S. Dist. LEXIS 20385 (S.D.N.Y. Mar. 6, 1978). See also In re Apollo Group Inc. Sec. Litig., 509 F.Supp. 2d 837, 846 (D. Ariz. 2007) (In this securities-fraud class action, the Court declined to adopt a bright-line rule presuming an immediate market reaction, based on the efficient market theory, and instead focused on the specific facts of each case.); In re Crossroads Sys., Inc., 2002 U.S. Dist. LEXIS 26716, (W.D. Tex. Nov. 22, 2002), *aff'd*, Greenberg v. Crossroads Sys., Inc., 364 F.3d 657,

information is “public” for purposes of insider trading, the cases in this area may provide guidance to companies for purposes of Regulation FD. As we have noted, what constitutes a reasonable waiting period is a facts and circumstances determination.

Hence, under the foregoing analysis, if information on a company’s web site is public, then subsequent selective disclosure of that information – such as to an analyst in a private conversation – would not trigger Regulation FD because such information, even if material, would not be non-public.⁵⁵ It is important to note that, although posting information on a company’s web site in a location and format readily accessible to the general public would not be “selective” disclosure, the information may not be “public” for purposes of determining whether a subsequent selective disclosure implicates Regulation FD. If, however, under the foregoing analysis, information on a company’s web site is not public, then subsequent selective disclosure of that information, if material, may trigger the application of Regulation FD.

2. Satisfaction of Public Disclosure Requirement of Regulation FD

Rule 101(e) of Regulation FD requires that once a selective disclosure has been made, the company must file or furnish a Form 8-K or use an alternative method or methods of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public – simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure.⁵⁶ In adopting Regulation FD in 2000, we discussed the role of company web sites in satisfying the

660-661 (5th Cir. 2004) (In this securities-fraud class action, the Court employed a two-day window, concluding that an efficient market will digest unexpected new information within two days of its release.).

⁵⁵ The standard to satisfy “public disclosure” in Regulation FD following a selective disclosure is governed by Rule 101(e).

⁵⁶ See Rules 100(a) and 101(e) of Regulation FD.

alternative public disclosure provisions of the regulation. At the time, we stopped short of concluding that disclosure on a company web site would, itself, be an acceptable method of “public disclosure” of material non-public information for purposes of compliance with Regulation FD, but we recognized that web site disclosure and webcasting could constitute integral parts of a model method of disclosure in satisfaction of the regulation. With regard to disclosure solely via a company web site, we stated that “[a]s technology evolves and as more investors have access to and use the Internet...we believe that some companies, whose web sites are widely followed by the investment community, could use such a method.”⁵⁷

As we stated above in the context of whether information posted on a company web site would be “public” so that a subsequent selective disclosure would not implicate Regulation FD, we now believe that technology has evolved and the use of the Internet has grown such that, for some companies in certain circumstances, posting of the information on the company’s web site, in and of itself, may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD. Companies will need to consider whether and when postings on their web sites are “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”⁵⁸ To do so, companies can look to the factors we have outlined above regarding the first two elements of the analysis – whether the company web site is a recognized channel of distribution and whether the information is “posted and accessible” and, therefore, “disseminated.”⁵⁹ As

⁵⁷ See Regulation FD Adopting Release, *supra* note 41, at Section II.B.4.b.

⁵⁸ See Rule 101(e)(2) of Regulation FD.

⁵⁹ Under Regulation FD, when an issuer makes a selective disclosure, it must also provide general public disclosure, either simultaneously or promptly. Thus, the third element of the public test we discuss above — whether investors and the market have been afforded a reasonable waiting period

part of that evaluation, companies also will need to consider their web sites' capability to meet the simultaneous or prompt timing requirements for public disclosure once a selective disclosure has been made.⁶⁰ Because the company has the responsibility for evaluating whether a method or combination of methods of disclosure would satisfy the alternative public disclosure provision of Regulation FD, it remains the company's responsibility to evaluate whether a posting on its web site would satisfy this requirement.⁶¹

B. Antifraud and Other Exchange Act Provisions

The antifraud provisions of the federal securities laws apply to company statements made on the Internet in the same way they would apply to any other statement made by, or attributable to, a company.⁶² This includes postings on and hyperlinks from

to react to the information — does not apply in analyzing whether the general public disclosure requirements of Regulation FD have been satisfied.

⁶⁰ For purposes of Regulation FD, a posting on a blog, by or on behalf of the company, would be treated the same as any other posting on a company's web site. The company would have to consider the factors outlined above to determine if the blog posting could be considered "public."

⁶¹ We recognized in Regulation FD that "the issuer may use a method 'or combination of methods' of disclosure, in recognition of the fact that it may not always be possible or desirable for an issuer to rely on a single method of disclosure as reasonably designed to effect broad public disclosure." "[A]n issuer's methods of making disclosure in a particular case should be judged with respect to what is 'reasonably designed' to effect broad, non-exclusionary distribution in light of all the relevant facts and circumstances." Regulation FD Adopting Release, supra note 41.

⁶² See, e.g., 1995 Electronics Release, supra note 25, at n. 11 ("The liability provisions of the federal securities laws apply equally to electronic and paper-based media. For instance, the antifraud provisions of the federal securities laws as set forth in Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10b-5] thereunder would apply to any information delivered electronically, as it does to information delivered in paper."); 1996 Electronics Release, supra note 25, at Section I, n. 4 ("The substantive requirements and liability provisions of the federal securities laws apply equally to electronic and paper-based media. For example, the antifraud provisions of the Exchange Act and Rule 10b-5 thereunder . . . apply to information delivered and communications transmitted electronically, to the same extent as they apply to information delivered in paper form."); 2000 Electronics Release, supra note 4, at Section II.B. ("It is important for companies . . . to keep in mind that the federal securities laws apply in the same manner to the content of their web sites as to any other statements made by or attributable to them.").

company web sites that satisfy the relevant jurisdictional tests.⁶³ As we noted in the 2000 Electronics Release, companies should be mindful that they “are responsible for the accuracy of their statements that reasonably can be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the Internet.”⁶⁴

Accordingly, a company should keep in mind the applicability of the antifraud provisions of the federal securities laws, including Exchange Act Section 10(b) and Rule 10b-5, to the content of its web site.⁶⁵ These provisions contain a general prohibition on making material misstatements and omissions of fact in connection with the purchase or sale of securities.⁶⁶

In the Rule 10b-5 context, to satisfy the materiality requirement, “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”⁶⁷ Whether information posted on a company’s web site is considered part of

⁶³ See 2000 Electronics Release, *supra* note 4, at Section II.B.

⁶⁴ See 2000 Electronics Release, *supra* note 4, at Section II.B.1.

⁶⁵ Rule 10b-5 [17 CFR 240.10b-5] makes it unlawful to “make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading” (emphasis added). See 2000 Electronics Release, *supra* note 4. In addition, Securities Act Section 17(a) [15 U.S.C. 77q(a)] applies to the offer and sale of securities. See also Prentice, *supra* note 18, at 542 (noting that the Commission’s antifraud legal regime under Section 10(b) and Rule 10b-5 applies to all manner of electronic disclosure).

⁶⁶ Section 10(b) and Rule 10b-5 have a scienter requirement, unlike some other provisions in the federal securities laws. See, e.g., Securities Act Section 17(a)(2)[15 U.S.C. 77l(a)(2)]. For cases discussing the scienter requirement of Section 10(b) and Rule 10b-5, see, e.g., SEC v. McNulty, 137 F.3d 732 (2d Cir. 1998), *cert. denied*, 525 U.S. 931 (1998); Lanza v. Drexel & Co., 419 F.2d 1277 (2d Cir. 1973); Hollinger v. Titan Capital, Inc., 914 F.2d 1564, 1569 (9th Cir. 1990); Aaron v. SEC, 446 U.S. 680 (1980).

⁶⁷ TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 448-449 (1976). See also Basic v. Levinson, 485 U.S. 224, 231 (1988). In Basic v. Levinson, the U.S. Supreme Court “expressly adopt[ed] the TSC Industries standard of materiality for the §10(b) and Rule 10b-5 context.” *Id.* at 232.

the “total mix” for purposes of analyzing materiality is a facts and circumstances determination. As we discuss below, we believe that companies can take certain steps that affect whether information located on or hyperlinked from a company’s web site is part of such “total mix” of information.⁶⁸ In this release, we are providing guidance regarding certain issues that arise under the antifraud provisions relating to disclosures on company web sites.

In addition, under certain of our rules, companies may disclose information exclusively on their web sites rather than filing such disclosures or materials on EDGAR. While the provisions of Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 12b-20 apply to Exchange Act filings made by companies with the Commission, such provisions generally do not apply to disclosures on company web sites. However, if a company fails to satisfy a web site disclosure option that is an alternative to filing or furnishing an Exchange Act report, an action could be brought under the Exchange Act reporting provisions based on the company’s failure to file the report.⁶⁹

1. Effect of Accessing Previously Posted Materials or Statements on Company Web Sites

⁶⁸ In this regard, we believe the “buried facts” doctrine applies to electronic disclosures. Under this doctrine, a court would consider disclosure to be false and misleading if its overall significance is obscured because material information is “buried,” for example, in a footnote or appendix. We have addressed the application of the buried facts doctrine in the context of an introduction or overview section of Item 303 of Regulation S-K – Management’s Discussion and Analysis of Financial Condition and Results of Operations and summary disclosure in plain English. In addition, in the context of the use of summary information in the electronics disclosure context we discuss in Part II.B.3 below, we note that the failure to include every material disclosure that is being summarized should not automatically trigger the “buried facts” doctrine. See Commission Guidance Regarding Management’s Discussion and Analysis, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056] (“MD&A Release”); Plain English Disclosure, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6370].

⁶⁹ See, e.g., Exchange Act Section 13(a) [15 U.S.C. 78m] (requiring companies with a class of securities registered under the Exchange Act to file reports prescribed by the Commission) and Exchange Act Rule 13a-1 [17 CFR 240.13a-1] (requiring such companies to file an annual report with the Commission).

In our 2000 Electronics Release, we discussed liability concerns arising from accessing previously posted materials or statements on a company's web site.⁷⁰ Since the publication of our 2000 Electronics Release, we understand that some companies continue to be concerned about whether previously posted materials or statements on their web site that are accessed at a later time will be considered "republished" at that later date, with attendant securities law liability.⁷¹ We understand that companies may continue to be concerned that they may have a duty to update the previously posted materials or statements if they are considered to be a new statement by being "republished" each time the materials or statements are accessed on the web site.⁷² In 2005, we addressed the treatment of previously posted (which we called historical) information on a company's web site in the context of registered offerings under the Securities Act.⁷³ We believe it is now appropriate to provide clarity with respect to the treatment of such previously posted materials or statements under the antifraud provisions of the federal securities laws.

We do not believe that companies maintaining previously posted materials or statements on their web sites are reissuing or republishing such materials or information

⁷⁰ See 2000 Electronics Release, supra note 4, at Section II.D.

⁷¹ See id. at Section II.D.5. As discussed in the 2000 Electronics Release, "a press release disseminated over a wire service or through other customary means is considered to have been 'issued' once, and thereafter is not recirculated to the marketplace. The same press release posted on a company's web site potentially has a longer life because it provides a record that can be accessed by investors at any time and upon which investors potentially could rely when making an investment decision without independent verification. In effect, a statement may be considered to be 'republished' each time that it is accessed by an investor or, for that matter, each day that it appears on the web site. Commentators have suggested that if a statement is deemed to be republished, it may potentially give rise to liability under Section 10(b) of the Exchange Act and Rule 10b-5." Id.

⁷² Specifically, if previously posted information is considered republished, companies may be concerned that even if the information was accurate when initially posted or issued, it may no longer be current or accurate when it is accessed at a later date.

⁷³ See Securities Offering Reform Release, supra note 3, at Section III.D.3.b.iii.(E)(2).

for purposes of the antifraud provisions of the federal securities laws just because the materials or statements remain accessible to the public. Of course, the antifraud provisions would apply to statements contained in posted materials when such statements were initially made. If a company affirmatively restates or reissues a statement, the antifraud provisions would apply to such statements when the company restates or reissues the statement. This affirmative restatement or reissuance may create a duty to update the statement so that it is accurate as of the date it is restated or reissued. As a general matter, we believe that the fact that investors can access previously posted materials or statements on a company's web site does not in itself mean that such previously posted materials or statements have been reissued or republished for purposes of the antifraud provisions of the federal securities laws, that the company has made a new statement, or that the company has created a duty to update the materials or statements.

In circumstances where it is not apparent to the reasonable person that the posted materials or statements speak as of a certain date or earlier period, then to assure that investors understand that the posted materials or statements speak as of a date or period earlier than when the investor may be accessing the posted materials or statements, we believe that previously posted materials or statements that have been put on a company's web site should be:

- Separately identified as historical or previously posted materials or statements, including, for example, by dating the posted materials or statements; and

- Located in a separate section of the company's web site containing previously posted materials or statements.⁷⁴

2. Hyperlinks to Third-Party Information

Another area we addressed previously that continues to raise questions involves the use of hyperlinks to third-party information.⁷⁵ Companies include on their web sites hyperlinks to third-party information for a variety of reasons, including as part of their ongoing communications to their customers, investors and the markets. In our 2000 Electronics Release, we discussed the implications for the use of hyperlinks from company web sites to third-party information in the context of both the Securities Act and the antifraud provisions of the federal securities laws. While we believe that the treatment of hyperlinks for purposes of the Securities Act is clear from our prior interpretation, we understand that companies continue to be concerned about their liability for hyperlinks to third-party information included on their web sites as part of their ongoing communications to the public, including investors and the markets.⁷⁶ In light of these concerns, we believe it is appropriate to provide additional guidance to companies as to the circumstances under which they may have liability for posted information outside the context of the offer and sale of securities under the Securities Act.

⁷⁴ These considerations mirror those found in Rule 433(e)(2) under the Securities Act [17 CFR 230.433(e)(2)].

⁷⁵ A "hypertext link," or "hyperlink," is an electronic path often displayed in the form of highlighted text, graphics or a button that associates an object on a web page with another web page address. It allows the user to connect to the desired web page address immediately by clicking a computer-pointing device on the text, graphics or button. See 2000 Electronics Release, *supra* note 4, at n. 7 (citing Harvey L. Pitt & Dixie L. Johnson, Avoiding Spiders on the Web: Rules of Thumb for Companies Using Web Sites and E-Mail, in Practising Law Institute, Securities Law & the Internet, No. 1127 (1999), at 107-118, n. 5).

⁷⁶ See CIFIr Progress Report, *supra* note 1, at Chapter 4, Section III.

Under Section 10(b) of the Exchange Act and Rule 10b-5, a company can be held liable for third-party information to which it hyperlinks from its web site and which could be attributable to the company. As we explained in the 2000 Electronics Release, whether third-party information is attributable to a company depends upon whether the company has: (1) involved itself in the preparation of the information, or (2) explicitly or implicitly endorsed or approved the information.⁷⁷ In the case of company liability for statements by third parties such as analysts, the courts and we have referred to the first line of inquiry as the “entanglement” theory and the second as the “adoption” theory.⁷⁸ While we are addressing the use of hyperlinks to third-party information in the context of the antifraud provisions, this guidance does not affect our interpretation regarding the use of hyperlinks to third-party information in the context of offers and sales of securities under the Securities Act.⁷⁹

Our focus in the 2000 Electronics Release was to help companies understand what factors may be relevant in determining whether they have adopted hyperlinked

⁷⁷ See 2000 Electronics Release, supra note 4, at Section II.B. Of course, as stated in the 2000 Electronics Release, “in the context of a document required to be filed or delivered under the federal securities laws, we believe that when a company embeds a hyperlink to a web site within the document, the company should always be deemed to be adopting the hyperlinked information. In addition, when a company is in registration, if the company establishes a hyperlink (that is not embedded within a disclosure document) from its web site to information that meets the definition of an “offer to sell,” “offer for sale” or “offer” under Section 2(a)(3) of the Securities Act, a strong inference arises that the company has adopted that information for purposes of Section 10(b) of the Exchange Act and Rule 10b-5.” But see Exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act for Registered Investment Companies, Release No. 33-7877 (Jul. 27, 2000) [65 FR 47281] at notes 18-24 and accompanying text (clarifying how this guidance applies to mutual funds).

⁷⁸ See generally 2000 Electronics Release, supra note 4 at Sections II.A.4. and II.B.1. As we stated in the 2000 Electronics Release, “[i]n the case of hyperlinked information, liability under the “entanglement” theory would depend upon a company’s level of pre-publication involvement in the preparation of the information. In contrast, liability under the “adoption” theory would depend upon whether, after its publication, a company, explicitly or implicitly endorses or approves the hyperlinked information.”

⁷⁹ See Securities Offering Reform Release, supra note 3, at Section III.D.3.b.iii.(E); 2000 Electronics Release, supra note 4, at Section II.B.1.; Securities Act Rule 433.

information.⁸⁰ We explained that the following, non-exhaustive list of factors may influence that analysis:

- Context of the hyperlink – what the company says about the hyperlink or what is implied by the context in which the company places the hyperlink;
- Risk of confusing the investors – the presence or absence of precautions against investor confusion about the source of the information; and
- Presentation of the hyperlinked information – how the hyperlink is presented graphically on the web site, including the layout of the screen containing the hyperlink.⁸¹

We understand that some companies may still wish for further elaboration of some of the issues addressed regarding the application of the adoption theory.

Accordingly, we are providing further guidance on these issues as they relate to the adoption theory.

In evaluating the potential antifraud liability of a company under the adoption theory with respect to third-party information to which the company provides a hyperlink in the context of providing information about the company and its business, we believe the focus should be on whether a company has explicitly or implicitly approved or endorsed the statement of a third-party such that the company should be liable for that statement. Because an explicit approval or endorsement is, by definition, plainly evident, the analytical scrutiny is on the circumstances or conditions under which a company can

⁸⁰ Some commenters on the 2000 Electronics Release criticized the “facts-and-circumstances” approach we adopted, arguing that it leads to uncertainty and could result in companies providing less useful information to investors. See, e.g., comment letters from The Bond Market Association and Fidelity Investments, which are publicly available at <http://www.sec.gov/rules/interp/s71100.shtml> or at our Public Reference Room at 100 F Street, NE, Washington D.C. 20549 in File No. S7-11-00.

⁸¹ See 2000 Electronics Release, supra note 4, at Section II.B.1.

fairly be said to have implicitly approved or endorsed a third-party statement by hyperlinking to that information. The key question in the hyperlinking context, therefore, is: Does the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information?

We believe that in evaluating whether a company has implicitly approved or endorsed information on a third-party web site to which it has established a hyperlink, one important factor is what the company says about the hyperlink, including what is implied by the context in which the company places the hyperlink.⁸² In considering the context of the hyperlink, we begin with the assumption that providing a hyperlink to a third-party web site indicates that the company believes the information on the third-party web site may be of interest to the users of its web site. Otherwise, it is unclear to us why the company would provide the link. To avoid potential confusion or misunderstanding about what the company's view or opinion is with respect to the information to which the company has provided a hyperlink, the company should consider explaining the context for the hyperlink – and thereby make explicit, rather than implicit, why the hyperlink is being provided. For example, a company might explicitly endorse the hyperlinked information or suggest that the hyperlinked information supports a particular assertion on the company's web site. Alternatively, a company might simply note that the third-party web site contains information that may be of interest or of use to the reader.

⁸² We note that companies can have different audiences for different pages on their web sites. For example, a consumer products company may have customer-oriented pages, or supplier-oriented pages, on its web site, as well as investor-oriented pages, such as an investor relations page. Because of its context, a third-party hyperlink on a customer-oriented page – for example, the company manufactures laundry detergent and provides a link to a third-party clothing care web site – has different implications from a securities law perspective than a hyperlink to a research analyst's report on an investor-oriented page.

The nature and content of the hyperlinked information also should be considered in deciding how to explain the context for the hyperlink. The degree to which a company is making a selective choice to hyperlink to a specific piece of third-party information likely will indicate the extent to which the company has a positive view or opinion about that information. For example, a company including a hyperlink to a news article that is highly laudatory of management should consider explanatory language about the source and why the company is providing the hyperlink in order to avoid the inference that the company is commenting on or even approving its accuracy, or was involved in its preparation. Conversely, the more general or broad-based the hyperlinked information is, the company may consider providing a more general explanation. For example, if a company has a media page and simply provides hyperlinks to recent news articles, both positive and negative, about the company, the risk that a company may have liability regarding a particular article or that it endorses or approves of each and every news article may be reduced. In this case, a title such as "Recent News Articles" may be all the explanation that a company may determine is needed to avoid being considered to have adopted the materials.⁸³

In addition to an explanation of why a company is including particular hyperlinks on its web site, a company also may determine to use other methods, including "exit

⁸³ Of course, a further explanation may be necessary depending on the manner by which a company limits the sources of its recent news articles. For example, if a company only includes recent news articles published by bullish industry journals, the limited nature of the sources should be clear and the company should explain why it selected the sources identified.

In addition, any SEC-registered investment adviser (or investment adviser that is required to be SEC registered) that includes, in its web site or in other electronic communications, a hyperlink to postings on third-party web sites, should carefully consider the applicability of the advertising provisions of the Investment Advisers Act of 1940 ("Advisers Act"). Under the Advisers Act, it is a fraudulent act for an investment adviser to, among other things, refer to testimonials in its advertisements. See Section 206(4) of the Advisers Act [15 U.S.C. 806-6(4)]; Rule 206(4)-1(a)(1) [17 CFR 275.206(4)-1(a)(1)].

notices” or “intermediate screens,” to denote that the hyperlink is to third-party information. While the use of “exit notices” or “intermediate screens” helps to avoid confusion as to the source of the third-party information, no one type of “exit notice” or “intermediate screen” will absolve companies from antifraud liability for third-party hyperlinked information.⁸⁴ For example, if there is only one analyst report out of many that provides a positive outlook on the company’s prospects, and the company provides a hyperlink to the one positive analyst report and to no other, and does not mention the fact that all the other analyst reports are negative on the company’s prospects, then even the use of an “exit notice” or “intermediate screen” or explanatory language may not be sufficient to avoid the inference that the company has approved or endorsed the one positive analyst’s report.

With regard to the use of disclaimers generally, as we noted in the 2000 Electronics Release, we do not view a disclaimer alone as sufficient to insulate a company from responsibility for information that it makes available to investors whether through a hyperlink or otherwise.⁸⁵ Accordingly, a company would not be shielded from antifraud liability for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading. This would be the case even where the company uses a disclaimer and/or other features designed to indicate that it has not adopted the false or misleading information to which it has provided the hyperlink. Our concern is that an alternative approach could result in unscrupulous companies using disclaimers as shields from liability for making false or misleading statements. We again remind companies

⁸⁴ We do not believe that the failure to use “exit notices” or “intermediate screens” should automatically result in a determination that a company has adopted third-party information.

⁸⁵ See 2000 Electronics Release, supra note 4, at Section II.B.1.a. and n. 61.

that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws.⁸⁶

3. Summary Information

A third area in which we are providing guidance is with respect to companies' use of summaries or overviews to present information, particularly financial information, on their web sites.⁸⁷ We understand that some companies may be concerned as to the treatment of summary or overview information contained on their web sites under the antifraud provisions of the federal securities laws.⁸⁸ By definition, these summaries or overviews do not, without more, include the more detailed information from which they are derived or on which they are based.

We have encouraged and, in some cases, required the inclusion of summaries or overviews in prospectuses and in Exchange Act reports to highlight important information for investors.⁸⁹ We believe that summary information can be particularly

⁸⁶ See id.

⁸⁷ Our discussion is intended to provide guidance generally regarding a company's use of summarized information. This guidance does not supersede more specific requirements covering the use of summaries or their content that are or may be contained in our rules. See e.g., Mutual Fund Summary Prospectus Proposing Release, supra note 27.

⁸⁸ See CIFI R Progress Report, supra note 1, at Chapter 4, Section III.

⁸⁹ We have encouraged or required summaries or overviews in the following contexts:

- We have suggested that Management's Discussion and Analysis disclosures could benefit from an introductory section or overview providing context for the more detailed information following it and thereby facilitating a reader's understanding of the disclosures. See MD&A Release, supra note 68. In that release, we also encouraged companies to consider using other means of providing clearer disclosure, such as tabular presentations and the use of section headings to assist readers in following the flow of the MD&A. We have also encouraged companies to use a "layered" approach in their MD&A disclosures.
- We adopted the Compensation Discussion and Analysis section in Regulation S-K Item 402 to provide a narrative, analytical overview to executive compensation disclosure. See Executive Compensation and Related Person Disclosure, Release No. 33-8732A, at Section I (Aug. 29, 2006) [71 FR 53158].

appropriate and helpful to investors, such as when it relates to lengthy or complex information. For similar reasons, we believe the use of summaries or overviews on web sites can be helpful to investors. We note, however, that summaries or overviews standing alone and which a reasonable person would not perceive as summary, and which do not provide additional information to alert a reader as to where more detailed information is located, could result in investors not necessarily understanding that the statements should be read in the context of the information being summarized. Consequently, when using summaries or overviews on web sites, companies should consider ways to alert readers to the location of the detailed disclosure from which such summary information is derived or upon which such overview is based, as well as to other information about a company on a company's web site.

In presenting information in a summary format or as part of an overview, companies should consider the context in which such information is presented. Just as with hyperlinks to third-party information, companies should consider using appropriate explanatory language to identify summary or overview information. As an example, a summary page on a company web site that is identified and presented in a manner similar to an introductory page in a "glossy" annual report – with graphs and charts illustrating key performance metrics derived from financial statements contained in later pages of the same document – would likely be viewed as a summary. Conversely, where summary

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- We require prospectuses to include a plain English "summary of the information in the prospectus where the length or complexity of the prospectus makes a summary useful." See Item 503(a) of Regulation S-K [17 CFR 229.503(a)].
 - We recently proposed rules that would require key information to appear in a summary section at the front of mutual fund prospectuses. See Mutual Fund Summary Prospectus Proposing Release, supra note 27.

information is not identified as such, the reader may be confused and fail to appreciate that the information is not complete.

We encourage companies that use summaries or overviews of more complete information located elsewhere on their web sites to consider employing disclosure and other techniques designed to highlight the nature of summaries or overviews in order to help minimize the chance that investors would be confused as to the level of incompleteness inherent in these disclosures. To this end, companies may wish to consider the following techniques that may highlight the nature of summary or overview information:

- Use of appropriate titles. An appropriate title or heading that conveys the summary, overview or abbreviated nature of the information could help to avoid unnecessary confusion;
- Use of additional explanatory language. Companies may consider using additional explanatory language to identify the text as a summary or overview and the location of the more detailed information;
- Use and placement of hyperlinks. Placing a summary or overview section in close proximity to hyperlinks to the more detailed information from which the summary or overview is derived or upon which the overview is based could help an investor understand the appropriate scope of the summary information or overview while making clearer the context in which the summary or overview should be viewed;⁹⁰ and

⁹⁰

We believe this approach is analogous to the “envelope” theory, which describes how and when information from different sources may be deemed to have been delivered together. In the 1995 Electronics Release, supra note 25, we explained that documents appearing in close proximity to each other on the same web page and documents hyperlinked together will be considered delivered

- Use of “layered” or “tiered” format. In addition to providing hyperlinks to more complete information, companies can organize their web site presentations such that they present the most important summary or overview information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links.⁹¹ In this way, viewers can follow a logical path into, and thereby obtain increasingly greater details about, the financial statements, a company’s strategy and products, its management and corporate governance, and the many other areas in which investors and others may have an interest.

4. Interactive Web Site Features

We believe that it is important to provide guidance that will promote robust use by companies of their web sites. One example of such robust use is making the company web site interactive. We note that companies are increasingly using their web sites to take advantage of the latest interactive technologies for communicating over the Internet with various stakeholders, from customers to vendors and investors. These communications can take various forms, ranging from “blogs” to “electronic shareholder forums.” Since all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws, companies should consider taking

together, analogizing it to delivery of the information in paper form in the same envelope. *Id.* at Questions 15 and 16. Similarly, providing hyperlinks to the complete information from which the summary is derived or upon which an overview is based can lead to this information being considered to be provided together or, at a minimum, directing the reader to the location of the more detailed information.

⁹¹ We have taken a similar approach in our proposed rules regarding prospectus delivery for open-end mutual funds. See the Mutual Fund Summary Prospectus Proposing Release, *supra* note 27.

steps to put into place controls and procedures to monitor statements made by or on behalf of the company on these types of electronic forums.⁹²

Company-sponsored “blogs,” which can include CEO blogs and investor relations blogs, among others, are recent additions to company web sites.⁹³ Companies can use these for a variety of purposes, including allowing for the exchange of opinions and ideas between a company’s management or certain other employees and its various stakeholders.⁹⁴ The open format of blogs makes them an attractive forum for ongoing communications between and among companies and their clients, customers, suppliers, shareholders and other stakeholders.

Similar to blogs, electronic shareholder forums can serve as a means for investors to communicate with companies and each other and to provide investor feedback on various issues in a real-time basis, and we have adopted rules to encourage their use.⁹⁵

⁹² Whether an individual is acting on behalf of a company will, as always, be a facts and circumstances determination. We note that companies generally have policies on who may speak on behalf of the company and on maintaining the confidentiality of company information for purposes of Regulation FD compliance and insider trading and tipping liability.

⁹³ A “blog” has been defined as “[a] Website (or section of a Website) where users can post a chronological, up-to-date e-journal entry of their thoughts. [I]t is an open forum communication tool that, depending on the Website, is either very individualistic or performs a crucial function for an organization or company. There are three basic varieties of blogs: those that post links to other sources, those that compile news and articles, and those that provide a forum for opinions and commentary.” See <http://www.netlingo.com/lookup.cfm?term=blog>.

⁹⁴ For example, a manufacturing company could sponsor a blog for its staff tasked with designing, developing and troubleshooting products. Vendors and end-users likely would find such a forum helpful. Shareholders also may welcome the opportunity to view and/or join a discussion of the uses of a company’s existing products to better understand one of the means a company derives revenues, especially with the “front-line” employees responsible for those products.

⁹⁵ See Electronic Shareholder Forums, Release No. 34-57172 (Jan. 18, 2008) [73 FR 4450] (“Shareholder Forum Release”). In this release, we adopted amendments to the proxy rules to clarify that participation in an electronic shareholder forum that could potentially constitute a solicitation subject to the proxy rules is exempt from most of the proxy rules if all of the conditions to the exemption are satisfied. In addition, the amendments state that a shareholder, company, or third party acting on behalf of a shareholder or company that establishes, maintains or operates an electronic shareholder forum will not be liable under the federal securities laws for any statement or information provided by another person participating in the forum. The amendments did not provide an exemption from Rule 14a-9 [17 CFR 240.14a-9], which prohibits

These forums are designed to promote interactive communication – between and among the company and its various stakeholders and with the public at large.

We acknowledge the utility these interactive web site features afford companies and shareholders alike, and want to promote their growth as important means for companies to maintain a dialogue with their various constituencies. As we noted in the Shareholder Forum Release, companies may find these forums “of use in better gauging shareholder interest with respect to a variety of topics,” and the forums “could be used to provide a means for management to communicate with shareholders by posting press releases, notifying shareholders of record dates, and expressing the views of the company’s management and board of directors.”⁹⁶ Accordingly, we are providing the following guidance for companies hosting or participating in blogs or electronic shareholder forums:

- The antifraud provisions of the federal securities laws apply to blogs and to electronic shareholder forums. As stated above, companies are responsible for statements made by the companies, or on their behalf, on their web sites or on third party web sites, and the antifraud provisions of the federal securities laws reach those statements. While blogs or forums can be informal and conversational in nature, statements made there by the company (or by a person acting on behalf of the company) will not be treated differently from other

fraud in connection with the solicitation of proxies. The general disclosure obligations under the federal securities laws continue to apply to these forums as well. See id. at n. 88 (referring participants in shareholder forums to the requirements of Regulation FD); and id. at n. 24 (reminding participants that the antifraud provisions of Rule 14a-9 may require a participant in a forum that otherwise allows anonymity to identify itself if failure to do so in the circumstance would result in omission of a “material fact necessary in order to make the statements therein not false or misleading.”).

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See id. at Section I.

company statements when it comes to the antifraud provisions of the federal securities laws. Employees acting as representatives of the company should be aware of their responsibilities in these forums, which they cannot avoid by purporting to speak in their “individual” capacities.

- Companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum. Any term or condition of a blog or shareholder forum requiring users to agree not to make investment decisions based on the blog’s or forum’s content or disclaiming liability for damages of any kind arising from the use or inability to use the blog or forum is inconsistent with the federal securities laws and, we believe, violates the anti-waiver provisions of the federal securities laws.⁹⁷ A company is not responsible for the statements that third parties post on a web site the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties. The company remains responsible for its own statements made (including statements made on its behalf) in a blog or a forum.⁹⁸

C. Disclosure Controls and Procedures

Postings on a company’s web site also may implicate Exchange Act rules governing certification requirements relating to disclosure controls and procedures.⁹⁹

⁹⁷ See Securities Act Section 14 [15 U.S.C. 77n]; Exchange Act Section 29(a) [15 U.S.C. 78cc]; Section 47(a) of the Investment Company Act of 1940 (“Investment Company Act”) [15 U.S.C. 80a-46(a)] and Section 215(a) of the Advisers Act [15 U.S.C. 806-15].

⁹⁸ See, e.g., Rule 14a-17(b) [17 CFR 240.14a-17(b)]. Of course, the company may be held responsible under the “adoption theory” or “entanglement theory” if the company adopts, endorses, or approves the statement. See generally Section II.B.2., *supra*.

⁹⁹ Exchange Act Rules 13a-15(e) [17 CFR 240.13a-15(e)] and 15d-15(e) [17 CFR 240.15d-15(e)] and Investment Company Act Rule 30a-3(c) [17 CFR 270.30a-3(c)] define “disclosure controls and procedures” as those controls and procedures designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is:

Under these rules, a company's principal executive officer and principal financial officer must certify that they are responsible for establishing and maintaining disclosure controls and procedures, that such controls and procedures have been designed to ensure that material information relating to the company is made known to them, that they have evaluated the effectiveness of the disclosure controls and procedures as of the end of a reporting period, and that they have disclosed in the company's periodic report for that reporting period their conclusions about the effectiveness of those controls and procedures.¹⁰⁰

As discussed above in Section I.B, we have adopted rules permitting companies to satisfy certain Exchange Act disclosure obligations by posting that information on their web sites as an alternative to providing that information in an Exchange Act report.¹⁰¹ If a company elects to satisfy such disclosure obligations by posting the information on its web site, disclosure controls and procedures would apply to such information because it is information required to be disclosed by the company in Exchange Act reports. Failure to make those disclosures on the company's web site would result in an Exchange Act report being incomplete. For example, if the company failed to disclose waivers of its code of ethics on its web site, it would need to file an Item 5.05 Form 8-K; if the company failed to disclose its board policy on director attendance at the annual meeting

(1) "recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms," and

(2) "accumulated and communicated to the company's management . . . as appropriate to allow timely decisions regarding required disclosure."

¹⁰⁰ See Exchange Act Rule 13a-14(a) [17 CFR 240.13a-14(a)]; Exchange Act Rule 15d-14(a) [17 CFR 240.15d-14(a)]; Item 601(b)(31)(i) of Regulation S-K [17 CFR 229.601(b)(31)(i)]; Investment Company Act Rule 30a-2(a) [17 CFR 270.30a-2(a)].

¹⁰¹ See Section I.B, supra.

of security holders on its web site, it would need to do so in its proxy statement.¹⁰²

Hence, companies must make sure that their disclosure controls and procedures are designed to address the disclosure of such information on their web sites.

On the other hand, disclosure controls and procedures do not apply to other disclosures of information on a company's web site. This means that the principal executive officer and principal financial officer will not be disclosing their conclusions regarding the effectiveness of any controls that a company may have in place regarding its web site disclosure of information, other than those controls with respect to information that is posted as an alternative to being provided in an Exchange Act report. That said, other disclosures on a company's web site are subject to antifraud liability, and companies also need to consider whether such disclosures are in compliance with Regulation FD, the Securities Act, and the federal proxy rules, among others.

D. Format of Information and Readability

The nature of online information is increasingly interactive, not static. The inability to print a particular browser screen or presentation, particularly one designed for interactive viewing and not for reading outside the electronic context, is not inherently detrimental to its readability. We do not think it is necessary that information appearing on company web sites satisfy a printer-friendly standard¹⁰³ unless our rules explicitly require it.¹⁰⁴ For example, our notice and access model requires that electronically posted

¹⁰² See Instruction to Item 407(b)(2) of Regulation S-K [17 CFR 229.407(b)(2)].

¹⁰³ See 1996 Electronics Release, supra note 25 at Section II.A.2. We use the term "printer-friendly" to describe a version of a web page that is formatted for printing. For example, if a web page includes advertising and navigation, those items may be removed to format the relevant content for printing on standard size paper.

¹⁰⁴ For example, Exchange Act Rule 14a-16(c) [17 CFR 240.14a-16(c)] requires proxy materials to be presented in a format convenient for both reading online and printing in paper when delivered electronically. See the text accompanying note [97] supra. See Shareholder Choice Release,

proxy materials be presented in a format “convenient for both reading online and printing on paper.”¹⁰⁵ Hence, all other information on a company’s web site need not be made available in a format comparable to paper-based information.¹⁰⁶

III. Request for Comment

We invite interested parties to submit written comment on any other approaches or issues involved in facilitating the use of electronic media, including as a result of technological developments, to further the disclosure purposes of the federal securities laws.

List of Subjects in 17 CFR Parts 241 and 271

Securities

Amendment of the Code of Federal Regulations

supra note 21, at n. 35: “We believe that requiring readable and printable formats is important so that shareholders have meaningful access to the proxy materials.” Similarly, proposed Rule 498 under the Securities Act would permit the obligation to deliver a statutory prospectus relating to a mutual fund to be satisfied by sending or giving a summary prospectus and providing the statutory prospectus online. If provided online, proposed Securities Act Rule 498(f)(2)(i) would require that the statutory prospectus be presented in a format that is “convenient for both reading online and printing on paper.” See Mutual Fund Summary Prospectus Proposing Release, supra note 27, at Section II.B.3. and n. 113.

¹⁰⁵ See Exchange Act Rule 14a-16(c); Internet Proxy Release, supra note 10, at n. 82.

¹⁰⁶ See 1996 Electronics Release, supra note 25, at Section II.A.2. As we noted in the 2000 Electronics Release, if special software is required in order to view information aimed at investors that a company puts on its web site, we believe the company should make a free, downloadable version of the software available on the web site or the site should contain information on the location where the required software may be downloaded free of charge so that all investors can effectively access the information provided. In the case of interactive data, we have taken a different approach. We have proposed that companies that maintain web sites post on their web sites the same interactive data they file or furnish with certain Exchange Act reports and Securities Act registration statements. We have not proposed, however, that registrants also provide interactive data viewers (or information on how to obtain viewers) on their web sites. Instead, we have determined to allow third parties to develop viewers, anticipating that these viewers will, over time, become more readily accessible at a little or no cost to investors. The Commission makes several interactive data viewers available through its web site at <http://www.sec.gov/spotlight/xbrl/xbrlwebapp.shtml>. See Interactive Data Proposing Releases, supra note 14, at Section II.A, and supra note 15.

For the reasons set out in the preamble, Title 17 Chapter II of the Code of Federal Regulations is amended as set forth below:

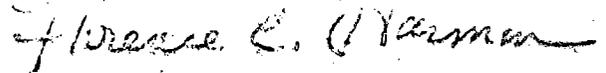
**PART 241— INTERPRETATIVE RELEASES RELATING TO THE
SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND
REGULATIONS THEREUNDER**

Part 241 is amended by adding Release No. 34-58288 and the release date of August 1, 2008, to the list of interpretive releases.

**PART 271—INTERPRETATIVE RELEASES RELATING TO THE
INVESTMENT COMPANY ACT OF 1940 AND GENERAL RULES AND
REGULATIONS THEREUNDER**

Part 271 is amended by adding Release No. IC-28351 and the release date of August 1, 2008, to the list of interpretive releases.

By the Commission.



Florence E. Harmon
Acting Secretary

Dated: August 1, 2008

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 1, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13112

In the Matter of

KENT D. NELSON,

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

AND NOTICE OF HEARING

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 Kent D. Nelson ("Respondent" or "Nelson").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From April 1999 through January 2001, Respondent was a registered representative associated with Linsco/Private Ledger Corporation, a dually registered investment adviser/broker-dealer now known as LPL Financial Corp. From at least January 2001 through March 2005, Nelson was the sole owner and operator of Strategic Investment Services, LLC, an investment adviser registered with the State of California. Respondent, 43 years old, is a resident of Lompoc, California.

B. ENTRY OF RESPONDENT'S CRIMINAL CONVICTIONS

2. On September 14, 2005, Nelson pleaded guilty to one count of mail fraud in violation of Title 18 United States Code, Section 1341 before the United States District Court for the District of New Mexico, in United States v. Kent Nelson, Crim. Information No. 05-2021 JP. On September 12, 2007, a judgment in the criminal case was entered against Nelson. He was sentenced to a prison term of 36 months followed by three years of supervised release, ordered to pay a fine in the amount of \$175,000, and ordered to forfeit his interest in certain real property.

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3. The count of the criminal information to which Nelson pleaded guilty alleged, among other things, that from December 1999 through March 2005, Nelson devised a scheme and artifice to defraud by depriving the people of the State of New Mexico of the intangible right of honest services of their public officials. More specifically, the information alleges that Nelson paid substantial sums of money in order to corruptly influence the Treasurer of the State of New Mexico to award securities work to Nelson, and used the United States mail to pay kickbacks to the Treasurer of the State of New Mexico.

4. On May 8, 2007, Nelson pleaded guilty to one count of racketeering in violation of §30-42-4(C), New Mexico Statutes Annotated (1978), in State of New Mexico v. Nelson, No. D-0101-CR-2006-0264, and was convicted and received a nine-year suspended sentence, with three years of probation.

5. The count of the New Mexico state grand jury indictment to which Nelson pleaded guilty alleged, among other things, that on or between January 1, 1999 and June 1, 2004, Nelson intentionally engaged in a pattern of racketeering activity involving the investment of state funds, and that the pattern of racketeering activity included two or more crimes of bribery of a public officer or public employee and/or offering or paying illegal kickbacks.

6. In addition, on January 3, 2006, the California Corporations Commissioner issued an Order Barring Kent Douglas Nelson From Any Position of Employment, Management or Control of Any Investment Adviser, Broker-Dealer or Commodity Adviser Pursuant to [California] Corporations Code Section 25232.1.

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 proceedings be instituted 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;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) of the Exchange Act; and

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers 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 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 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 him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

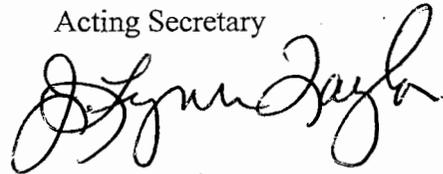
This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 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.

Florence E. Harmon
Acting Secretary



By: J. Lynn Taylor
Assistant Secretary

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 58309 / August 5, 2008

ACCOUNTING AND AUDITING ENFORCEMENT

Release No. 2858 / August 5, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13114 / August 5, 2008

In the Matter of

ERNST & YOUNG LLP,
JOHN F. FERRARO, CPA, and
MICHAEL G. LUTZE, CPA,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 4C AND 21C
OF THE SECURITIES EXCHANGE ACT
OF 1934 AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 102(e)(1)(ii) of the Commission's Rules of Practice, against Ernst & Young LLP ("E&Y") and John F. Ferraro, CPA ("Ferraro"), and pursuant to Exchange Act Section 4C and Rule 102(e)(1)(ii) of the Commission's Rules of Practice against Michael G. Lutze, CPA ("Lutze") (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement ("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 Public Administrative and

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Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. Overview

This matter arises from an independence-impairing business relationship between E&Y and Mark C. Thompson, while Thompson was a member of the board of directors of three of its audit clients. The E&Y/Thompson relationship involved their collaboration in creating a series of audio CDs called *The Ernst & Young Thought Leaders Series*. The relationship spanned 19 months—October 2002 through early May 2004—during the entirety of which Thompson served as a director of E&Y audit client Company A, and during parts of which Thompson also served (i) as a member of Company A's Audit Committee; and (ii) as a director of two other E&Y audit clients: Company B and Company C. As detailed below, through their acts and omissions in this matter, all three Respondents engaged in improper professional conduct; Respondents E&Y and Ferraro were each a cause of certain issuer-reporting violations; and E&Y also violated, and Ferraro was a cause of E&Y's violations of, Rule 2-02(b) of Regulation S-X.

B. Respondents

Ernst & Young LLP ("E&Y") is a professional services firm, headquartered in New York City, with offices located throughout the United States. At all relevant times and continuing to the present, E&Y has provided auditing, consulting, and tax services to a variety of companies, including companies whose securities are registered with the Commission and trade in the U.S. markets.

John F. Ferraro, CPA, a resident of Magnolia, Massachusetts, has been a CPA for over twenty-seven years; he has been licensed as a CPA by the state of Wisconsin since May 1980. He currently also has an active license in Ohio, and inactive or expired licenses in New York, Illinois, Kansas and Missouri. Ferraro was at all relevant times an E&Y partner and Vice-Chairman of the firm whose title was Americas Vice-Chair of Markets, with oversight responsibility for the firm's sales organization. Ferraro first joined the firm in 1977, and by October 2002 had at least 19 years of public-company audit experience. He has not practiced as an auditor for at least the last five years.

Michael G. Lutze, CPA, a resident of Brookfield, Wisconsin, has been a licensed CPA for over twenty-four years; he has been licensed as a CPA by the state of Wisconsin since January 1984. He currently also has active licenses in Illinois, Minnesota and Pennsylvania, and an expired

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.

license in Maine. Lutze was at all relevant times an E&Y audit partner. Lutze became the coordinating partner on E&Y's Company A audit engagement in April 2003 and served in that role until May 2005.

C. Relevant Issuers

At all relevant times, Company A's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange, and its fiscal year has ended on the last day of February. E&Y served as Company A's auditor from August 1994 until May 2005.

At all relevant times, Company B's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange, and its fiscal year has ended on the last day of April. E&Y has served as Company B's auditor since April 2002.

At all relevant times, Company C's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and traded on the NASDAQ National Market, and its fiscal year has ended on the last day of December. E&Y served as Company C's auditor from May 2002 until May 2007.

D. The Director

Mark C. Thompson served on Company A's board from March 2000 through May 4, 2004, and on its Audit Committee from March 2000 until August 2003. Thompson served on Company B's board from March 2000 until September 10, 2003; and on Company C's board from February 26, 2004 until May 10, 2004. As a board member of these issuers, Thompson participated in annual board votes concerning E&Y's retention as auditor; these included votes on the inclusion of recommendations to retain E&Y in annual proxy solicitations to shareholders. Thompson also signed Forms 10-K filed with the Commission by Company A and Company B containing statements that each issuer's auditor was independent. As a member of Company A's Audit Committee, Thompson shared direct responsibility, under Company A's Audit Committee Charter, "for the appointment ... compensation and oversight ... of the [company's] independent auditor." See Appendix A to Company A's May 20, 2003 proxy statement.

E. FACTS

1. Establishment and Operation of the Relationship

In October 2002, at a time when Thompson was serving on the boards of two E&Y public company audit clients—Company A and Company B—and while Thompson was also serving on Company A's audit committee, E&Y entered into the business relationship with Thompson that is the subject of this proceeding. At the time, Thompson had recently completed a two-year project involving the production of eight CDs of prominent-leader interviews for his first customer for such an effort and wished to continue working on similar ventures. For its part, E&Y had recently

established what it termed an “industry sector focus” approach to business development, which aimed to build its partners’ expertise as “thought leaders” within particular industries and industry sectors.

During this period Respondent Ferraro was serving as the firm’s Vice-Chair for Markets. In early October 2002, at the suggestion of an E&Y sales partner, Ferraro met with Thompson. Shortly thereafter, Thompson furnished a plan for a “pilot program” of four audio CDs to be called the “*E&Y Thought Leaders Series*.” In this plan, Thompson proposed creating CDs of interviews of industry CEOs, with each CD featuring a particular industry or industry sector. According to Thompson’s proposal, he would appear as host on the CDs; E&Y partners would also appear on the CDs and would—with Thompson’s coaching and assistance—conduct the interviews of the industry leaders. In this way, Thompson proposed to “build the confidence and visibility” of E&Y “subject matter experts” and to promote them “as Thought Leaders in interviews that give [them] *a seat at the table* with CEOs and CFOs to discuss critical leadership issues in key industry sectors.” (Italics in original.)

Ferraro agreed to Thompson’s proposal and, when the two met again later that month, signed a one-page contract, thereby launching the venture. This initial contract was for \$104,000. Ferraro knew, at the time he signed the initial contract, that Thompson was a director of Company A and Company B, and that both companies were E&Y audit clients. Notwithstanding this knowledge, Ferraro failed to seek, or perform, or otherwise obtain any auditor-independence assessment prior to executing the contract. Ferraro had only limited involvement with the matter thereafter, because he asked one of his direct reports to implement the pilot series. On June 4, 2003, upon the pilot series’ completion, Ferraro’s direct report signed a second, more detailed agreement with Thompson to produce additional CDs over a two-year period for a fee of \$270,000 per year, with an option to cancel after one year.

In its operation, the relationship proceeded in accordance with Thompson’s proposal, and the resulting CDs were provided to prospective E&Y audit and non-audit clients for business development purposes. During the course of the venture, memoranda were circulated within the firm characterizing the project as “Business Development Support for [E&Y’s] Industry Sector Leaders” with “every potential to define [E&Y] as the number one provider” and “obviously great business development for E&Y’s [audit and non-audit] strategies.” The venture’s business-development aims embraced not only the CDs’ distribution, but also their creation; as one internal memorandum noted: “Since the CEO [interviewee] and the [E&Y] Partner actually sit at the table together, the opportunity to discuss business and make a ‘sales call’ with the decision maker is obviously much more direct than with distributing traditional brochures. For example, after we completed the interview with [one public company CEO] we were immediately able to set up meetings for anticipated projects valued at \$500,000. That’s just one of the nine CEO meetings so far.”

Each CD’s packaging included both E&Y’s and Thompson’s proprietary logos and website addresses. Each CD’s packaging also listed the name, title and contact information for E&Y personnel within the relevant industry or industry sector. Each CD included language recommending the services of E&Y and also endorsing a CD product line of Thompson; and each

CD contained statements reflecting that it was the product of collaboration between Thompson and E&Y. Both Thompson and the E&Y personnel working on the project routinely addressed one another as members of a team; in one such message, an E&Y sales partner thanked Thompson for his “commitment to helping us win.” During the course of the relationship, E&Y and Thompson produced a total of seven completed CDs, in five separate audiobooks; and E&Y paid Thompson compensation totaling \$377,500—a sum comprising, unbeknownst to E&Y, approximately half of Thompson’s net income at the time.

2. E&Y Claimed Independence From Company A, Company B and Company C

Notwithstanding the fact that its business relationship with Thompson proceeded contemporaneously with either periods covered by its audits of companies on whose boards Thompson sat, or periods during which the work on those audits was performed, or both, E&Y claimed to be independent in its audit reports for Company A’s 2002 through 2004 fiscal years, Company B’s 2003 and 2004 fiscal years, and Company C’s 2004 fiscal year.² With E&Y’s knowledge and consent, those audit reports were, in turn, included, or incorporated by reference, in their clients’ annual reports on Form 10-K and proxy statements filed with the Commission throughout the relevant period.

In addition, E&Y expressly confirmed to Company A, Company B, and Company C at the end of each affected fiscal year that it was “independent” and therefore able to serve as each client’s external auditor. These written confirmations—called ISB(1) Letters (for Independence Standards Board Standard No. 1, *Independence Discussions With Audit Committees*)—did not disclose E&Y’s business relationship with Thompson until after the relationship was terminated in early May 2004.

3. Respondent Lutze Fails to Respond to an Email Referencing the Relationship

On August 7, 2003, Respondent Lutze—who had been serving as the coordinating partner on the Company A audit engagement since April 2003—learned, for the first time, through an email from another E&Y partner, that Thompson was serving as a “paid advisor to E&Y at the National Industry level,” and that the E&Y partner sending the email was “not sure what this all entails other than some consulting/advisory type work.” At the time, Lutze knew that Thompson was then serving on Company A’s Audit Committee and board; but Lutze took no follow-up action, whether to learn the relationship’s details, or to assess, or have others assess, its independence implications, or to inform Company A of its existence, or otherwise. On April 19, 2004, E&Y furnished an ISB(1) letter to Company A that did not disclose the firm’s business relationship with Thompson. On April 29, 2004, Company A filed its annual report on form 10-K with the Commission, which included the purportedly “independent” audit report that Lutze had overseen.

² For the fiscal years referenced in text that ended prior to E&Y’s termination of its business relationship with Thompson in May 2004, i.e., Company A’s 2002 and 2003 fiscal years and Company B’s 2003 and 2004 fiscal years, E&Y’s audit fees totaled \$2,381,965.

4. E&Y Performs a Flawed Independence Assessment of the Relationship, On Which It Relies in Continuing to Claim Independence Thereafter

By April 2004, E&Y's policies required that matters potentially bearing on independence (i) be elevated for review by the firm's independence office; and (ii) be promptly disclosed, by the relevant coordinating audit partner, to the audit client. On April 19, 2004, as the firm considered whether to renew its relationship with Thompson, Ferraro's direct report notified the firm's independence office of the relationship and inquired whether it was embraced by these policies. The independence office responded affirmatively, thereby initiating an E&Y process that led to Lutze's informing Company A's financial management of the relationship on May 4, 2004. (Prior to that day, neither E&Y nor Thompson had disclosed the relationship to Company A.) At approximately the same time, E&Y terminated its relationship with Thompson and, thereafter, certain E&Y partners for the first time conducted an analysis of the relationship's independence implications. The conclusion reached through that assessment was that the relationship did not impair the firm's independence because it fit within the "consumer in the ordinary course of business" exception to the independence rules' general prohibition on such relationships. See Rule 2-01(c)(3) of Regulation S-X; see also Codification of Financial Reporting Policies, § 602.02.e. This conclusion was erroneous, for the reasons set forth below.

Within weeks, E&Y relied on its erroneous independence analysis in claiming to be independent from Company B, on whose board Thompson had served during the fiscal year covered by E&Y's claim. E&Y's Company B audit report, with this incorrect claim of independence, was filed with Company B's July 14, 2004 Form 10-K and its August 12, 2004 proxy statement.

5. Respondent Lutze Furnishes Letter that Fails Fully to Inform Company A

On May 4, 2004, the same day that E&Y informed Company A of Thompson's undisclosed business relationship with E&Y, Company A immediately asked for and received Thompson's resignation. On May 12, 2004, Company A's Audit Committee, through a member of Company A's management, asked Lutze to confirm in writing that neither he, nor the prior coordinating partner, nor anyone currently serving on the Company A audit engagement was aware, at any time prior to May 4, 2004, of the engagement between E&Y and Thompson. Shortly after receiving this request, Lutze remembered and then promptly retrieved, reviewed, and forwarded to other E&Y partners the email concerning the E&Y/Thompson relationship that he had received on August 7, 2003. Nevertheless, on May 14, 2004, Lutze furnished to Company A's Audit Committee a letter on behalf of E&Y that failed fully to disclose the August 7, 2003 email that he had received. This letter, which was included in Company A's Audit Committee Minute Book, inadequately informed Company A regarding Lutze's pre-May 2004 notice of the E&Y/Thompson relationship. Based on the letter from Lutze, Company A believed that Lutze had no notice of the business relationship between Thompson and the firm before May 4, 2004. This understanding was a material factor in Company A's decision to continue to retain E&Y as its auditor. Company A also materially relied upon this mistaken understanding from the letter in connection with the language of two subsequent filings it made with the Commission: its May 14, 2004 Form 8-K and its May 17, 2004 proxy statement.

6. E&Y Again Fails Fully to Inform Company A's Audit Committee

At the time it requested the May 14th letter, Company A's Audit Committee had also requested a commitment by an E&Y "national managing partner to personally appear" before the Committee at its next meeting and "be prepared to answer all questions of the Committee regarding," among other things, "the reasons why the relationship was not communicated to Company A until May 4, 2004." A senior E&Y official accordingly appeared (along with others from the firm) at the company's June 23, 2004 Audit Committee meeting. The senior E&Y official, who knew of the August 7, 2003 email, stated to the Committee that it was certain E&Y policies, adopted in the Spring of 2004, that caused the relationship to surface, and that E&Y had not disclosed the relationship to Company A earlier because the policies in question were not in place in prior years. The Committee emerged from the meeting with the continued impression that no one on E&Y's audit team was aware of the E&Y/Thompson relationship prior to May 2004. This incorrect understanding was recorded in the Audit Committee's minutes.

F. LEGAL ANALYSIS

1. Independence Principles Governing the E&Y/Thompson Relationship

The basic elements of an auditor independence violation in the business-relationship context are (1) an independence-impairing relationship; (2) existing during all or part of the period covered by the audit, or the period of the audit work, or both; followed by (3) issuance of an audit report claiming to be independent from the client.³ See Rule 2-01(c)(3) of Regulation S-X.⁴ Business relationships with persons associated with the audit client in a decision-making capacity, such as audit client directors, officers and substantial stockholders are embraced by this prohibition. See Rule 2-01(c)(3). Section 6.02.02.e of the Commission's Codification of Financial Reporting Policies ("Codification") (available at 7 Fed. Sec. L. Rep. (CCH) ¶ 73,272) provides, among other things, that:

³ An independence violation need not be consummated through the filing of a year-end audit report falsely claiming independence, because the Commission requires that interim financial statements included in quarterly reports on Form 10-Q must also be reviewed by an independent public accountant. See Rule 10-01(d) of Regulation S-X.

⁴ Rule 2-01(c)(3) provides:

An accountant is not independent if, at any point during the audit and professional engagement period, the accounting firm or any covered person in the firm has any direct or material indirect business relationship with an audit client, or with persons associated with the audit client in a decision-making capacity, such as an audit client's officers, directors, or substantial stockholders. The relationships described in this paragraph do not include a relationship in which the accounting firm or covered person in the firm provides professional services to an audit client or is a consumer in the ordinary course of business.

In addition to the relationships specifically prohibited by Rule 2-01, joint business ventures, limited partnership agreements, investments in supplier or customer companies, leasing interests, (except for immaterial landlord-tenant relationships) and sales by the accountant of items other than professional services are examples of other connections which are also included within this classification.

The instant relationship fits squarely within one of the Codification's specific factual examples at Section 6.02.02.e. Example 18 provides:

Facts: A consultant to an accounting firm was also a director and member of the audit committee of a client served by the accounting firm. The consultant's compensation from each of these two involvements was significant in relation to his total earnings.

Conclusion: The apparent conflict of interest which arose from the dual roles of the consultant caused the appearance of the accounting firm's independence to be affected adversely.

As in Example 18, E&Y's relationship with Thompson impaired the appearance of E&Y's independence because Thompson was an audit-client director and audit committee member whose compensation from the relationship with E&Y constituted approximately one-half of his net income.

Rule 2-01(c)(3) provides an exception for "relationship[s] in which the accounting firm or covered person in the firm provides professional services to an audit client or is a consumer in the ordinary course of business." This exception is applicable only if both of its prongs are met, that is, the relationship must be "in the normal course of business" for both parties, and at least one of the parties must be "acting in the capacity of a consumer." See *Commission Letter dated 2/14/89, responding to 3/29/88 Petition by Arthur Andersen & Co. and Others* (available at: <http://www.sec.gov/info/accountants/noaction/aaartan1.htm>) (hereinafter the "1989 Response") at 7-8 (rejecting petitioners' claim that subcontracting falls within the exception because "while the prime/subcontractor provision of services might be in the normal course of the auditor's and client's businesses, neither party is acting in the capacity of a consumer"). Further, in rejecting the petitioners' request to permit prime/subcontractor relationships — "or any other similar cooperative service arrangement" — between auditors and their audit clients so long as they were not quantitatively material to either party, *id.* at 1, the 1989 Response explained that the "closeness and unity of interest inherent in [such] joint business ventures" creates an intolerable risk that "financial statement users [may] question the auditor's objectivity." *Id.* at 8. This risk derives, according to the 1989 Response, from the fact that prime/subcontractor ventures entail the two parties (i) "join[ing] together in a profit-seeking venture," thereby creating a "unity of interest" *id.* at 4; (ii) rendering, to some extent, "the auditor's interest . . . wedded to that of its client" thereby creating a situation of "interdependence"; *id.*; or (iii) working together as "coventurers" to generate "interdependent" revenues from a third party. *Id.* at 6. According to the 1989 Response, any auditor-audit client business relationship containing such features possesses an unacceptable "mutuality or identity of interest" between the auditor and the audit client because, in it, "the advancement of the auditor's interest would, to some extent, be dependent upon the client," which

is inconsistent with the essential requirement that the appearance of independence be maintained. *Id.* at 7.

Here, the E&Y/Thompson relationship was a direct business relationship between E&Y and an audit client director, and therefore within the independence rules' general prohibition. The relationship's collaborative nature—as detailed above—gave it the very kind of “mutuality of interest” that the Codification and the *1989 Response* proscribe. The venture does not fit within either prong of the narrow consumer in the ordinary course of business exception. It involved an auditor's and an audit client director's collaboration in creating customized joint products designed for use by third parties. Thompson's past experience with closely similar ventures was limited to just one prior customer; and his relationship with E&Y had been established by high-level signatories on both sides. (Ferraro, who signed the initial contract with Thompson on E&Y's behalf, was a Vice-Chair of the firm at the time.)

2. Violation of Rule 2-02(b) of Regulation S-X and of Issuer Reporting Provisions

Because E&Y's business relationship with Thompson impaired E&Y's independence, and endured for 19 months, it both constituted and caused certain statutory and regulatory violations.

Each time E&Y signed an audit report for Company A, Company B or Company C where either the period covered by the audit, or the period of the audit work, or both, overlapped with its business relationship with Thompson, E&Y directly violated Rule 2-02(b) of Regulation S-X. *See* Rule 2-02(b) (requiring accountant's report to “state whether the audit was made in accordance with generally accepted auditing standards”). Issuing an audit report, or issuing a consent for the filing of an audit report, incorrectly stating that the audit was performed in accordance with the independence requirements of GAAS violates Rule 2-02(b). The E&Y fiscal year-end audit reports incorrectly stating that they were performed in accordance with the independence standards of GAAS included (i) for Company A, reports dated April 1, 2003 and March 29, 2004; (ii) for Company B, reports dated May 27, 2003 and May 26, 2004; and (iii) for Company C, a report dated March 7, 2005.⁵ In addition to issuing each of these reports, E&Y also issued consents for their inclusion with later Commission filings.

Likewise, each time non-independent audit reports were filed with Company A's, Company B's or Company C's annual reports and proxy statements, the issuer violated federal securities statutes and rules requiring that those Commission filings include independently audited financials. *See* Exchange Act §§ 13(a) and 14(a) and Rules 13a-1 and 14a-3 thereunder (requiring annual reports and proxy statements to include independently audited financials).⁶ E&Y bears

⁵ The two audit reports referenced in text that were dated after May 24, 2004—the effective date of PCAOB Auditing Standard 1—were required to state that they were performed in accordance with the standards of the PCAOB; while the remaining reports, all dated prior to May 24, 2004, were required to state they were performed in accordance with the standards of GAAS.

⁶ The filings that failed to include or incorporate independently-audited financials included (i) for Company A, annual reports filed May 30, 2003 and April 29, 2004; and proxy statements filed May 20, 2003 and May 17, 2004; (ii) for Company B, annual reports filed July 22, 2003 and

responsibility for causing all of these reporting violations, since it should have known that the firm's business relationship with Thompson would cause all three issuers on whose boards Thompson sat to lack independent audits and thus to violate the reporting provisions listed above.

Ferraro bears responsibility for being a cause of some of the foregoing violations. Such liability requires findings that (1) a primary violation occurred; (2) an act or omission by the respondent contributed to the violation; and (3) the respondent knew, or should have known, that his or her conduct would contribute to the violation. *See, e.g., Gateway Int'l Holdings, Inc., Exchange Act Rel. No. 53907 (May 31, 2006), 88 SEC Docket 430, 444; Erik W. Chan, 77 SEC Docket 851, 859-60 (Apr. 4, 2002).* Here, by his act of entering into the relationship despite knowing that Thompson served on the boards of Company A and Company B and that both were firm audit clients, Ferraro both contributed to, and should have known his actions would contribute to, E&Y's violations of Rule 2-02(b) of Regulation S-X with respect to E&Y's Company A and Company B audit reports. Likewise, Ferraro should have known his act of entering into the relationship would cause Company A and Company B to lack independent audits and thus to violate the reporting provisions set forth above in connection with their annual reports and proxy statements.

3. Improper Professional Conduct

All three Respondents' actions with respect to E&Y's independence-impairing relationship with Thompson constituted improper professional conduct under Exchange Act § 4C and Rule 102(e) of the Commission's Rules of Practice. Rule 102(e) and Exchange Act Section 4C both define improper professional conduct to include "highly unreasonable conduct" in a situation where the auditor "knows, or should know, that heightened scrutiny is required." The Commission has made clear that auditor independence is *always* an area requiring heightened scrutiny. *See* Adopting Release for Rule 102(e) [Rel. Nos. 33-7593, 34-40567, 1998 SEC LEXIS 2256 (Oct. 19, 1998)] ("Because of the importance of an accountant's independence to the integrity of the financial reporting system, the Commission has concluded that circumstances that raise questions about an accountant's independence always merit heightened scrutiny.") Likewise, the Commission has found negligent conduct where an auditor, when it knew or should have known that independence was implicated, failed to gather all the salient relevant facts pertinent to the independence determination. *Matter of KPMG Peat Marwick LLP*, Rel. No. 34-43862, 54 S.E.C. 1135, 1182-83 (Jan. 19, 2001), *reconsideration denied*, Rel. Nos. 34-44050 and AAER-1374 (Mar. 8, 2001), *petition for review denied*, 289 F.3d 109 (D.C. Cir. 2002).

In this case, there were repeated failures of this nature, including (i) at the point of entry into the E&Y/Thompson relationship, when no independence review was sought despite Ferraro's knowledge that Thompson was serving on the boards of two firm audit clients; (ii) at the point when Lutze received an email referencing the relationship in August 2003, when no follow up action was taken; and (iii) at the point when annual ISB(1) letters were prepared, when the relationship was not identified. E&Y bears responsibility for all of this improper professional
(..continued)

July 14, 2004; and proxy statements filed August 4, 2003 and August 12, 2004; and (iii) for Company C, an annual report and a proxy statement filed March 8 and April 6, 2005.

conduct, while Ferraro bears responsibility for that occurring at the point of entry into the relationship, and Lutze for the failure to respond to the August 2003 email.

By furnishing to Company A's Audit Committee a letter and an in-person presentation that failed fully to disclose the August 7, 2003 email that Lutze had received concerning the E&Y/Thompson relationship, E&Y and Lutze engaged in improper professional conduct under Rule 102(e) and Exchange Act Section 4C. Rule 102(e) proceedings are warranted where, as here, (i) the standard violated is within the coverage of Rule 102(e); (ii) the violation was committed "in circumstances meeting one of [the] standards of culpability" articulated in the Rule; and (iii) the violation threatens "the integrity of Commission processes" or "affects the operation of the federal securities laws." See Rel. Nos. 33-7593, 34-40567 (October 19, 1998) (Adopting Release for the current Rule 102(e)), 1998 SEC LEXIS 2256 at *45 & *58.

With respect to the first factor, the professional standards violated here include ethical rules that were expressly incorporated in the adopting release for the current version of Rule 102(e) in 1998—and whose violation has been the subject of Commission 102(e) proceedings in the past.⁷ Specifically, Rule 102(e)'s adopting release states that the "applicable professional standards" referenced in Rule 102(e) include the AICPA Code of Professional Conduct ("AICPA Code") (See 1998 SEC LEXIS 2256 at *19.) That Code, in turn, includes Rule 501, which proscribes, among other things, negligently making a communication to an audit client that fails fully to inform that audit client under the circumstances of this case.

With respect to the second factor, the instant conduct was committed in circumstances meeting Rule 102(e)'s "highly unreasonable" negligence standard. E&Y and Lutze should have known that the circumstances of the May 14, 2004 letter to, and the senior E&Y official's June 23, 2004 appearance before, the Audit Committee were those in which heightened scrutiny was warranted. The Audit Committee had specifically asked for the communications, under circumstances suggesting the Audit Committee intended to rely on them in connection with some action it would take; and the communications touched upon auditor independence—which, as the Commission has stated, is always a matter warranting heightened scrutiny. See 1998 SEC LEXIS 2256 at *34. Thus, by furnishing the May 14, 2004 letter that inadequately informed Company A, and by making a presentation at the June 23, 2004 Company A Audit Committee meeting that did not correct the letter's inadequate disclosure, E&Y and Lutze negligently permitted Company A to not be fully informed by their communications regarding Lutze's and the other E&Y auditors' pre-May 2004 notice of the E&Y/Thompson relationship—and did so in circumstances where they should have known that heightened scrutiny was warranted.

Finally, the instant violation threatened both the integrity of Commission processes and the proper operation of the federal securities laws: the party not fully informed by these communications was a public company; the company's mistaken understanding concerned a matter that was material to the company; and that mistaken understanding impacted the company's

⁷ See *In re Clete D. Madden, CPA and David L. Huffman, CPA*, Admin. Proc. File No. 3-12252 (March 30, 2006); *In re Oliver Flanagan, Chartered Accountant*, Admin. Proc. File No. 3-11269 (Sep. 25, 2003); *In re Alan S. Goldstein, CPA*, Admin. Proc. File No. 3-8463 (Sept. 6, 1994).

decisions regarding the language of two of its Commission filings: its May 14, 2004 8-K and its May 17, 2004 proxy statement, as well as its decision to retain E&Y as its auditor.

IV.

Based on the foregoing, the Commission finds that Respondent E&Y (a) engaged in improper professional conduct pursuant to Exchange Act Section 4C and Rule 102(e) of the Commission's Rules of Practice; (b) violated Rule 2-02(b) of Regulation S-X; and (c) caused Company A, Company B and Company C to violate Exchange Act Sections 13(a) and 14(a), and Exchange Act Rules 13a-1 and 14a-3.

Based on the foregoing, the Commission finds that Respondent Ferraro (a) engaged in improper professional conduct pursuant to Exchange Act Section 4C and Rule 102(e) of the Commission's Rules of Practice; (b) was a cause of E&Y's violation of Rule 2-02(b) of Regulation S-X; and (c) was a cause of Company A's and Company B's violations of Exchange Act Sections 13(a) and 14(a), and Exchange Act Rules 13a-1 and 14a-3.

Based on the foregoing, the Commission finds that Respondent Lutze engaged in improper professional conduct pursuant to Exchange Act Section 4C and Rule 102(e) of the Commission's Rules of Practice.

E&Y's Remedial Efforts

In determining to accept the Offer, the Commission considered the remedial steps taken by E&Y. Since the conduct discussed in this Order, E&Y has significantly improved its independence policies and procedures. E&Y has, among other things, established a new business-relationship evaluation process for review and evaluation of both existing and new business relationships.

V.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED, effective immediately, that Respondents E&Y, Ferraro and Lutze each be, and hereby is, censured.

IT IS FURTHER ORDERED that Respondent E&Y shall, within ten (10) days of the entry of this Order, pay disgorgement of \$2,381,965 and prejudgment interest of \$537,022.79 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 E&Y as a Respondent in these proceedings, and the file number of these proceedings, a copy of which cover

letter and money order or check shall be sent to J. Lee Buck, II, Deputy Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5631.

IT IS FURTHER ORDERED, effectively immediately, that Respondent Ferraro shall cease and desist from causing any violations and any future violations of Rule 2-02 of Regulation S-X, and from causing any violations and any future violations of Sections 13(a) and 14(a) of the Securities Exchange Act of 1934, and Rules 13a-1 and 14a-3 thereunder.

IT IS FURTHER ORDERED, effectively immediately, that Respondent Lutze is denied the privilege of appearing or practicing before the Commission as an accountant. After one year from the date of this Order, Respondent Lutze 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 Lutze'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 Lutze, 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 Lutze, 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 Lutze 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 Lutze acknowledges his responsibility, as long as Respondent Lutze 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.

The Commission will consider an application by Respondent Lutze 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 Lutze's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Florence E. Harmon
Acting Secretary

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

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 58310 / August 5, 2008

ACCOUNTING AND AUDITING ENFORCEMENT

Release No. 2859 / August 5, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13115 / August 5, 2008

In the Matter of

MARK C. THOMPSON,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND A
CEASE-AND-DESIST ORDER PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Mark C. Thompson ("Thompson" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("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 Remedial Sanctions and a Cease-and-Desist Order ("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. Overview

This matter arises from a business relationship between Respondent Mark C. Thompson and Ernst & Young LLP ("E&Y") at a time when E&Y was serving as auditor for three public companies on whose boards Thompson sat: Company A, Company B and Company C. The business relationship involved Thompson's and E&Y's collaboration in creating a series of audio CDs designed for business development purposes. The relationship spanned 19 months -- October 2002 through early May 2004 -- during the entirety of which Thompson served on Company A's board, and during parts of which Thompson also served (i) as a member of Company A's Audit Committee; and (ii) as a member of the boards of directors of Company B and Company C. All three companies had engaged E&Y as auditor prior to the commencement of Thompson's business relationship with E&Y. As detailed below, the relationship impaired E&Y's independence as the auditor of each of these issuers, thereby causing each issuer to lack independently audited financial statements. By entering into and participating in this independence-impairing relationship, by failing to disclose the resulting conflict of interest, and by signing three annual reports and one audit committee report incorrectly claiming that the companies' auditor was independent, Thompson was a cause of each issuer's resulting reporting violations.

B. Respondent

Mark C. Thompson is a resident of San Jose, California. Respondent is in the business of facilitating and coaching others to facilitate interviews and discussions with business, political and entertainment leaders. At the time he entered into the business relationship with E&Y that is the subject of this proceeding, Thompson had recently completed a two-year project involving the production of eight CDs of prominent-leader interviews for his first customer for such an effort. Thompson served on Company A's board from March 2000 through May 4, 2004, and on its Audit Committee from March 2000 until August 2003. Thompson served on Company B's board from March 2000 until September 10, 2003; and on Company C's board from February 26, 2004 until May 10, 2004.

C. Relevant Issuers

At all relevant times, Company A's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange, and its fiscal year has ended on the last day of February. E&Y served as Company A's auditor from August 1994 through February 2005.

At all relevant times, Company B's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange, and

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.

its fiscal year has ended on the last day of April. E&Y has served as Company B's auditor since April 2002.

At all relevant times, Company C's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and traded on the NASDAQ National Market, and its fiscal year has ended on the last day of December. E&Y served as Company C's auditor from May 2002 until May 2007.

D. The Audit Firm

Ernst & Young LLP ("E&Y") is a professional services firm, headquartered in New York City, with offices located throughout the United States. At all relevant times and continuing to the present, E&Y has provided auditing, consulting, and tax services to a variety of companies, including companies whose securities are registered with the Commission and trade in the U.S. markets.

E. FACTS

1. The Relationship Between Respondent and E&Y

In mid-October 2002, Thompson entered into the business relationship with E&Y that is the subject of this proceeding. At the time Thompson entered into this relationship, he should have known that (i) Company A and Company B were then employing E&Y as their outside auditor; (ii) as a Company A and Company B director he was called upon, at least annually, to sign each company's annual report stating its auditor was independent, to vote on the retention of each company's auditor, and to vote on the inclusion of auditor-retention recommendations in proxy solicitations to each company's shareholders; and (iii) as a member of Company A's audit committee, Thompson shared direct responsibility, under Company A's Audit Committee Charter, "for the appointment ... compensation and oversight ... of the [company's] independent auditor." See Appendix A to Company A's May 20, 2003 proxy statement.

The relationship entailed the creation of a series of audio CDs of interviews of corporate CEOs, with each CD featuring a particular industry or industry sector. Thompson appeared as host on each CD; on each CD various E&Y partners, with Thompson's coaching and assistance, conducted interviews of the executives. (None of the E&Y partners appearing on the CDs performed any work on E&Y's Company A, Company B or Company C audit engagements.) The CDs were provided to prospective E&Y audit and non-audit clients for business development purposes. Each CD's packaging included both E&Y's and Thompson's proprietary logos and website addresses. Each CD's packaging also listed the name, title and contact information for E&Y personnel within the relevant industry or industry sector. Each CD contained statements reflecting that it was the product of collaboration between Thompson and E&Y. During the course of the relationship, E&Y and Thompson produced a total of seven completed CDs, in five separate audiobooks; and E&Y paid Thompson compensation of \$377,500. Also during the course of the relationship, Thompson's director compensation from Company A, Company B and Company C totaled \$100,662.33.

2. Insufficient Communication about the Nature of the Relationship to the Issuers' Boards

As a member of three boards of directors, Thompson was required to complete annual Director and Officer ("D&O") questionnaires for use in compiling their annual reports and proxy statements. Each of these questionnaires included queries concerning the nature of any relationships between Thompson and E&Y. Thompson did not fully furnish the details of his relationship with E&Y in response to these items.

During the course of the relationship, Thompson took part in votes to retain E&Y as each company's outside auditor and to recommend the same to shareholders in annual proxy solicitations. At the time he cast these votes, Thompson did not disclose his business relationship with E&Y, and the proxy solicitations likewise did not disclose the relationship. As a board member of Company A and Company B, Thompson signed annual reports on Form 10-K stating that each company's auditor was independent. As an Audit Committee member of Company A, Thompson shared responsibility, under Company A's Audit Committee Charter, for the "appointment ... compensation and oversight" of the company's outside auditor. See Appendix A to Company A's May 20, 2003 proxy statement. Company A's proxy statement filed May 20, 2003 stated that the Audit Committee had appointed E&Y as the company's independent auditor and that the Board recommended that shareholders ratify that appointment.

In February 2004, Thompson joined Company C's board of directors. Thompson did not complete or return the D&O questionnaire he received from Company C until he resigned from its Board in May 2004. While a director, Thompson cast a vote to include in Company C's annual proxy solicitation to shareholders the recommendation that E&Y be retained as its outside auditor for the company's next fiscal year. Thompson did not disclose his business relationship with E&Y; Company C's subsequently filed proxy statement likewise did not disclose it.

F. LEGAL ANALYSIS

1. Impairment of E&Y's Independence As Auditor

The auditor independence rules generally prohibit all direct, and all material indirect, business relationships between auditors and their audit clients, including audit-client directors like Thompson. See Rule 2-01(c)(3) of Regulation S-X.² The Thompson/E&Y relationship that

² Rule 2-01(c)(3) provides:

An accountant is not independent if, at any point during the audit and professional engagement period, the accounting firm or any covered person in the firm has any direct or material indirect business relationship with an audit client, or with persons associated with the audit client in a decision-making capacity, such as an audit client's officers, directors, or substantial stockholders. The relationships described in this paragraph do not include a relationship in which the accounting firm or covered person in the firm provides professional services to an audit client or is a consumer in the ordinary course of business.

is the subject of this proceeding falls within this general prohibition. The prohibition's sole exception -- for "consumer in the ordinary course of business" relationships -- is available only where a relationship is both "in the ordinary course of business" for both parties, and at least one of the parties is acting as a "consumer." *Id.*; see also *Commission Letter dated 2/14/89, responding to 3/29/88 Petition by Arthur Andersen & Co. and Others* (available at: <http://www.sec.gov/info/accountants/noaction/aaartan1.htm>) (hereinafter the "1989 Response") at 7-8. The 1989 Response identifies features of business relationships that give rise to an unacceptable "mutuality of interest" between an auditor and an audit client, where "the advancement of the auditor's interest would, to some extent, be dependent upon the client," which is inconsistent with the essential requirement that the appearance of independence be maintained. Here, based on the facts detailed above, the relationship's collaborative nature gave it the very kind of "mutuality of interest" that the 1989 Response proscribes. The CDs were joint products; and the furtherance of their business development aims hinged upon third parties reviewing and listening to, and thereby being the end-users of, those CDs. Thompson's past experience with closely similar ventures was limited to just one prior customer. In summary, Thompson's relationship with E&Y does not qualify for the consumer in the ordinary course of business exception because, while both of the exception's prongs must be satisfied, it satisfied neither.

2. The Issuer Reporting Violations

Each time non-independent audit reports were filed with Company A's and Company B's annual reports and proxy statements, the issuer violated federal securities statutes and rules requiring that those filings include independently audited financials. See Exchange Act §§ 13(a) and 14(a) and Rules 13a-1 and 14a-3 thereunder (requiring annual reports and proxy statements to include independently audited financials). With respect to the proxy statements, each time Company A, Company B and Company C issued proxy solicitations to shareholders recommending E&Y's retention as auditor without disclosing that one of the directors favoring the recommendation had a business relationship with E&Y, the issuer violated Exchange Act Section 14(a) and Rule 14a-9 thereunder. See *Wilson v. Great American Industries, Inc.*, 855 F.2d 987, 993-94 (2d Cir. 1988) (failure to disclose, in proxy statement recommending shareholder approval of company's sale, that a director recommending the transaction had a "long-standing business relationship" with individuals controlling the acquiring company, violated Exchange Act Section 14(a) and Rule 14a-9 thereunder); accord *Kas v. Financial General Bankshares, Inc.*, 796 F.2d 508, 515 (D.C. Cir. 1986) (directors' relationship with a party to a proposed transaction "would in all probability have assumed actual significance in the deliberations of a reasonable shareholder," so proxy soliciting shareholder approval of that transaction had to disclose the relationship, to give shareholders "a context to enable [them] to evaluate [the directors'] endorsement").

Commission statements interpreting Rule 2-01(c)(3) are found in the Commission's Codification of Financial Reporting Policies ("Codification") at Section 6.02.02.e. (available at 7 Fed. Sec. L. Rep. (CCH) ¶ 73,272).

3. Respondent's Liability for Causing the Reporting Violations

Liability for causing reporting violations requires findings that (1) a primary violation occurred; (2) an act or omission by the respondent contributed to the violation; and (3) the respondent knew, or should have known, that his or her conduct would contribute to the violation. *Gateway Int'l Holdings, Inc., Exchange Act Rel. No. 53907 (May 31, 2006), 88 SEC Docket 430, 444; Erik W. Chan, 77 SEC Docket 851, 859-60 (Apr. 4, 2002)*. Here, based on the facts detailed above, Thompson was a cause of each issuer's resulting reporting violations.

IV.

Based on the foregoing, the Commission finds that Respondent Thompson was a cause of Company A's and Company B's violations of Exchange Act Sections 13(a) and 14(a) and Rules 13a-1 and 14a-3 thereunder, and was a cause of Company A's, Company B's and Company C's violations of Exchange Act Section 14(a) and Rule 14a-9 thereunder.

V.

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

Accordingly, it is hereby ORDERED, effective immediately, that Respondent Thompson shall cease and desist from causing any violations and any future violations of Sections 13(a) and 14(a) of the Securities Exchange Act of 1934, and Rules 13a-1, 14a-3 and 14a-9 thereunder;

IT IS FURTHER ORDERED that Respondent Thompson shall, within ten (10) days of the entry of this Order, pay disgorgement of \$100,662.33 and prejudgment interest of \$23,254.94, for a total of \$123,917.27, 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 Thompson as a Respondent in these proceedings, and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to J. Lee Buck, II, Deputy Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5631.

By the Commission.

Florence E. Harmon
Acting Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58318 / August 6, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13119

In the Matter of

SIMON CHONG,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
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") against Simon Chong ("Chong" 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 15(b) of the Securities Exchange Act of 1934, 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. From 1991 through October 1998, Chong was employed at John Dawson & Associates ("JDAI"), a broker-dealer registered with the Commission, as JDAI's Chief Operating Officer and as a registered representative. Chong owned approximately 40% of the firm over time and had primary responsibility for marketing and recruiting and some responsibility for operations and administration at JDAI.

2. On July 27, 2007, Chong pled guilty to six counts of wire fraud under 18 U.S.C. §§ 1343 and 1346 before the United States District Court for the Northern District of Illinois, in United States v. Cho, et al., Crim. Indictment No. 1:04-CR-166. On March 21, 2008, a judgment in the criminal case was entered against Chong. He was sentenced to a term of imprisonment of 48 months, ordered to pay restitution in the amount of \$2,929,701 and placed on 3 years probation following his release from prison.

3. The counts of the criminal superseding information to which Chong pled guilty alleged, inter alia, that Chong, for the purpose of executing a scheme to defraud, reallocated favorable trades from certain JDAI proprietary firm accounts to his father's account at JDAI. The criminal superseding information alleged, inter alia, that these after-the-fact trade allocations either profited Chong's father's account or served to avoid losses in his account.

IV.

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

Accordingly, it is hereby ORDERED:

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

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.

Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 6, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13121

In the Matter of

MARTIN A. ARMSTRONG,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO SECTION
203(f) OF THE INVESTMENT ADVISERS
ACT OF 1940
AND NOTICE OF HEARING

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 Martin A. Armstrong ("Respondent" or "Armstrong").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Armstrong was the founder, chairman and controlling officer of Princeton Economics International Ltd. and controlled all of Princeton Economics' subsidiaries, through his ownership of Princeton Economics. Armstrong claimed to be a top economist, market expert, and commodities trader and has been referred to in a news article as "the biggest individual silver trader on the New York Mercantile Exchange." From at least 1996 through 1999, Armstrong acted as an investment adviser without registering with the Commission. Armstrong, 58 years old, is incarcerated at the Federal Correctional Institution in Fort Dix, New Jersey.

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B. ENTRY OF THE INJUNCTION/RESPONDENT'S CRIMINAL CONVICTION

1. On July 22, 2008, a Final Consent Judgment as to Martin A. Armstrong was entered against Armstrong, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Martin A. Armstrong, et al., Civil Action Number 99 Civ. 9667, in the United States District Court for the Southern District of New York.

2. The Commission's complaint alleged that Armstrong, together with the entities he controlled, perpetrated a massive fraud by raising millions of dollars by fraudulently offering and selling promissory notes issued by subsidiaries of the entities he controlled to Japanese corporations. In offering and selling those notes, Armstrong represented that the issuers would deposit the proceeds of the note sales into segregated accounts, and use those proceeds to purchase conservative investments, such as securities issued by the United States Treasury. However, Armstrong lost hundreds of millions of dollars through risky currency and commodities trading, commingled investor funds, used investor funds to conceal trading losses, and arranged for the mailing of letters that materially overstated the net asset value of the accounts purportedly underlying investors' notes.

3. On January 7, 2000, the district court issued an order requiring Armstrong to turnover certain enumerated items, including rare coins, gold bullion bars and coins and various antiquities, to the court appointed Receiver. Armstrong failed to comply with the order, and accordingly the district court found him in contempt on January 14, 2000 and ordered him confined to coerce compliance with the turnover order. The turnover order was affirmed by the Second Circuit on November 27, 2006, Armstrong v. Guccione, 470 F.3d 89 (2d Cir. 2006). Armstrong never complied and on April 27, 2007, the district court determined that the turnover order no longer had coercive effect.

4. On August 17, 2006, Armstrong pled guilty to one count of conspiracy to commit securities fraud, wire fraud and commodities fraud in violation of 18 U.S.C. Section 371 before the United States District Court for the Southern District of New York, in United States v. Martin A. Armstrong, 99 CR 00997. On April 10, 2007, Armstrong was sentenced to serve 60 months in federal prison and ordered to pay restitution of \$80,000,001.

5. The count of the indictment to which Armstrong pled guilty alleged, inter alia, that Armstrong defrauded investors and obtained money and property by means of materially false and misleading statements, that he used the United States mails to send false account statements, and that he caused commercial interstate carriers to deliver investors' checks to him.

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 proceedings be instituted 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. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers 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 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 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 him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

It is further ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 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.

Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 6, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13120

In the Matter of

MARC WILLIS,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND NOTICE OF HEARING

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") against Marc Willis ("Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Respondent, 48 years old, is a resident of Chicago, Illinois. From 1993 through October 1998, Respondent was employed at John Dawson & Associates, Inc. ("JDAI"), a broker-dealer registered with the Commission, as JDAI's Chief Compliance Officer. Respondent's responsibility in that position was to ensure JDAI's compliance with securities laws and regulations.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On August 10, 2007, Respondent pled guilty to one count of wire fraud under 18 U.S.C. §§ 1343 and 1346 before the United States District Court for the Northern District of Illinois, in United States v. Cho, et al., Crim. Indictment No. 1:04-CR-166. On March 27, 2008, a judgment in the criminal case was entered against Respondent. He was sentenced to a term of imprisonment of 10 days, ordered to pay \$7,758 in restitution, ordered to perform 1,000 hours of community service and placed on 4 years probation.

3. The count of the criminal superseding information to which Respondent pled guilty alleged, inter alia, that Respondent, for the purpose of executing a scheme to defraud,

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consented to the favorable reallocation of trades from certain JDAI accounts to accounts in the name of his mother and brother at JDAI. The count of the superseding information to which Respondent pled guilty also alleged that Respondent knew that these favorable trades were not initiated or authorized by his mother or brother and that these trades were allocated after-the-fact to his mother's and brother's trading accounts as a means of transferring funds to them at the expense of the firm and/or other customers to which the profits should have legitimately been allocated.

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 proceedings be instituted 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. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) 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 the Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If the 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 him 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 the Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 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.

Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 6, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13118

In the Matter of

PETER IN CHO,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND NOTICE OF HEARING

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") against Peter In Cho ("Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Respondent, 40 years old, is a resident of Arlington Heights, Illinois. From 1991 to 1998, Respondent worked for John Dawson & Associates, Inc. ("JDAI"), a broker-dealer registered with the Commission, as JDAI's President and Chief Executive Officer and as a registered representative.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On July 27, 2007, Respondent pled guilty to 16 counts of wire fraud under 18 U.S.C. §§ 1343 and 1346 before the United States District Court for the Northern District of Illinois, in United States v. Cho, et al., Crim. Indictment No. 1:04-CR-166. On March 21, 2008, a judgment in the criminal case was entered against Respondent. He was sentenced to a term of imprisonment of 65 months, ordered to pay restitution in the amount of \$6,336,236 and placed on 3 years probation following his release from prison.

3. The counts of the criminal indictment to which Respondent pled guilty alleged, inter alia, that Respondent devised, intended to devise, and participated in a scheme to defraud in which Respondent and others caused and directed: (1) fraudulent and fictitious stock

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and options trading in firm and customer accounts; (2) inventory "parking" in customer and firm accounts in order to conceal excessive or losing stock and options inventory positions; (3) inventory "kiting" between the "Average Price Account" and firm proprietary accounts in order to satisfy margin requirements and artificially inflate buying power in firm proprietary accounts; (4) fraudulent "trade allocations" by creating, assigning, and/or transferring profitable securities and options trades to certain firm, employee, and customer accounts, and losing trades to other accounts; and (5) the misappropriation and conversion of customer and firm funds.

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 proceedings be instituted 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. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) 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 the Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If the 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 him 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 the Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 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.

Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 7, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13123

In the Matter of

ALEXANDER & WADE,
INC. AND JAMES Y. LEE,

Respondents.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933

I.

The Securities and Exchange Commission ("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 Alexander & Wade, Inc. ("AWI") and James Y. Lee ("Lee") (collectively, the "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. AWI is a California corporation with its principal place of business in San Diego, California. It purports to provide investment banking services to young growth companies seeking access to capital markets. It is not registered with the Commission.

2. Lee, age 52, is a resident of Alameda, California. During the relevant time period, Lee held the title of Advisor at AWI and controlled AWI's business.

B. SUMMARY

3. This proceeding concerns the abuse of Form S-8 registration statements by several microcap issuers that – under the advice and guidance of AWI and Lee – raised millions of dollars by selling their common stock to the public in violation of the registration requirements of the federal securities laws.

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4. From mid-2002 through mid-2005, AWI and Lee caused violations of Sections 5(a) and 5(c) of the Securities Act by introducing at least fourteen clients (the “Issuers”) to so-called employee stock option programs, under which the Issuers sold billions of shares of common stock in unregistered offerings.

5. Under the programs, the Issuers improperly registered the shares underlying the stock options on Form S-8 registration statements and then received the bulk of the sales proceeds as payment for the options’ exercise price. The programs functioned as public offerings in which the Issuers’ employees were used as conduits to the market so that the Issuers could raise capital without complying with the registration requirements of the Securities Act.

6. AWI and Lee introduced the programs to the Issuers, helped implement the programs and provided advice on how to administer the programs, even though they knew, or should have known, that their conduct was contributing to the Issuers’ registration violations.

C. FACTS

The Issuers Violated Section 5 of the Securities Act through Employee Stock Option Programs

7. Beginning in mid-2002, the Issuers implemented virtually identical employee stock option programs set forth in documents titled Employee Stock Incentive Plans (“ESIPs”). All of the ESIPs used stock options and shares registered on Form S-8.

8. The Issuers were reporting companies under Section 13 of the Securities Act. Prior to implementing the ESIP programs,¹ the Issuers had limited operational histories and generated little revenue. During the course of the programs, the Issuers’ stocks were quoted on the OTC Bulletin Board at less than a penny per share and their stock prices generally trended downward.

9. The Issuers each filed Form S-8 registration statements during the relevant time period, resulting in millions and, in some cases, billions of shares being registered by individual Issuers. The following table details the Form S-8 filings and post-effective amendments registering options and shares under the ESIP programs for six of the Issuers:

<u>Issuer</u>	<u># of S-8 Filings</u>	<u># of Shares Registered</u>
Cybertel Capital Corp.	11	6,185,000,000
Marshall Holdings International, Inc.	7	16,793,496,800
Global Materials & Services, Inc.	15	13,316,000,000
Palomar Enterprises, Inc.	8	2,479,000,000
Winsted Holdings, Inc.	10	2,260,000,000
Zann Corp.	10	1,456,860,000

¹ As used herein, the term “ESIP programs” refers to the Issuers’ employee stock options programs where each Issuer issued Form S-8 shares under a series of ESIPs.

10. The ESIP documents were attached as exhibits to the Issuers' Form S-8 registration statements and were substantially similar in all material respects.

11. As implemented by the Issuers, the ESIP programs had several distinctive features that taken together virtually guaranteed that options would be exercised and the underlying shares simultaneously sold to the public at or near the time the options were granted:

a. The option exercise price floated with the market value of an Issuer's stock at the time of exercise. The exercise price was typically set at 85% of the proceeds from the sale of the shares underlying the options. This ensured that the options were immediately "in the money" – that is, the exercise price would always be less than the market price whenever the options were exercised – and that the Issuer, not the employee, would receive most of the benefit from an increase in stock price after the time of grant.

b. The options vested immediately, meaning that there was no waiting period after the options were granted or any other condition that needed to be met before the options could be exercised.

c. A cashless method was used to exercise the options, meaning that the exercise price was remitted to the Issuer from the sales proceeds of the shares underlying the options.

12. The ESIP programs were set up so that the Issuers and all of their employees had brokerage accounts at the same broker-dealer firm. When the broker-dealer opened the accounts for the employees, it typically obtained standing orders or other instructions from the employees that the options should be exercised immediately after grant. Also, it required the employees to fill out and have notarized multiple blank authorizations in advance of the Issuers' granting any options. The Issuers collected and forwarded these authorizations to the broker-dealer as part of setting up the Issuers' ESIP programs. The authorizations gave the broker-dealer authority to (1) sell the shares underlying any options granted by the Issuers and (2) exercise the options using the sales proceeds from the underlying shares to pay the exercise price.

13. When the Issuers granted the options, they sent the broker-dealer share certificates representing the number of shares underlying the options granted. Upon receipt of the certificates, the broker-dealer sold the shares underlying the options to the public. It then calculated the options' exercise price at 85% of the sales price, and routed the exercise price proceeds to the Issuers' accounts and the remainder, minus fees, to the employees' accounts.

14. The unique design of the ESIP programs (*i.e.*, the high-percentage exercise price that was based on the market value at the time of exercise, the immediate vesting and the use of cashless exercise) and the generally declining price of the Issuers' stock all but guaranteed that the employees exercised their options and simultaneously sold their shares within days of grant. Moreover, other than the initial decision to sign up for the program, the employees did not make any decisions concerning the options' exercise or the sale of the underlying shares during the course of the ESIP programs. The combination of the standing order, blank authorizations and the

cashless exercise meant that the stock was sold to the public nearly immediately upon the options' grant. In some cases, the employees were not notified of an option grant until after they received their portion of the sale proceeds of the underlying shares. By virtue of the programs' structure and administration, the Issuers controlled the timing of sales to the public through the timing of their option grants and received the vast majority of the sale proceeds. The employees simply served as conduits.

15. These near-immediate sales of shares underlying the options resulted in millions and, in many cases, billions of shares of each Issuer's stock being sold to the public, which severely diluted the ownership interests of existing shareholders and further decreased the Issuers' stock price.

16. The Issuers issued options to employees frequently, in some cases as many as five times in a given month. As a result, the Issuers were able to generate cash flows from the payments for the exercised options that greatly exceeded their revenues and allowed them to fund their otherwise failing operations. By comparison, the employees received relatively modest amounts (approximately 7%-8% of the sales proceeds).

17. Pursuant to the Securities Act, registrants may use Form S-8 registration statements to register securities issued to compensate employees and consultants for *bona fide* services not connected with the offer or sale of securities. Because of the compensatory purpose and the presumed familiarity of employees and consultants with the registrant's business, Form S-8's disclosure requirements are abbreviated as compared to statements registering shares used to raise capital.

18. The ESIP programs implemented by the Issuers functioned as public offerings to raise capital. The Issuers used their employees as conduits to offer shares to the public without providing the disclosures and rights afforded by registration.

19. Because Form S-8 statements cannot be used to raise capital, no registration statements were in effect or filed as to the shares issued under the ESIP programs. As a result, the Issuers violated Section 5 of the Securities Act by issuing shares in unregistered offerings.

AWI and Lee Caused the Issuers' Section 5 Violations

20. The Issuers hired AWI to provide general business consulting services.

21. Lee held the title of Advisor at AWI. He controlled AWI and held himself out to the Issuers as one of AWI's partners. On AWI's behalf, he met with the Issuers and performed most of the consulting services.

22. AWI entered into Independent Client Service Agreements with many of the Issuers. The agreements set forth the services AWI would provide, including advising and assisting the Issuers in setting up a "Form S-8 program." For three Issuers, the agreements also expressly

provided that AWI would “[a]dvise, assist and provide all documentation . . . in setting up S-8 for employee payroll and stock options *to pay monthly Client expenses.*” (emphasis added.)

23. AWI and Lee introduced the ESIP programs to the Issuers and described the programs’ structure in detail. They presented the programs to the Issuers as a means to compensate employees and generate funds to pay company expenses.

24. Lee represented to at least one Issuer that AWI had refined and perfected the program, that many companies used the ESIP program, and that the best attorneys – as well as the Commission – had reviewed the programs’ legality.

25. AWI and Lee helped the Issuers implement the ESIP programs, in part, by referring them to the broker-dealer that provided the brokerage services necessary to administer the programs and the attorney who provided the legal services necessary to implement the programs.

26. After the Issuers implemented the ESIP programs, AWI, through Lee, continued to advise some Issuers on their ESIP programs’ administration. This included monitoring the programs and advising the Issuers on how to determine the number of options to issue and when to file new Form S-8 statements.

27. The Issuers compensated AWI and Lee for their consulting services through cash payments of \$2,131,981 and Form S-8 stock liquidated for \$734,394, for a total of \$2,866,375. Of this amount, \$873,000 was transferred to Golden Capital Corp., another company associated with Lee.

28. AWI and Lee caused the Issuers’ registration violations under Section 5 of the Securities Act. AWI and Lee introduced the Issuers to the ESIP programs, explained the programs’ structure, referred them to the broker-dealer and attorney that were providing the programs’ brokerage and legal services and continued to advise some Issuers once they had launched their ESIP programs. Without AWI’s and Lee’s involvement, the Issuers would not have violated Section 5.

29. Furthermore, AWI and Lee knew or should have known that their conduct contributed to the Issuers’ violations. AWI and Lee pitched the program to the Issuers as a means to generate cash to fund operations. They knew that the Issuers were struggling financially and, in some cases, were hired specifically to help the Issuers locate funding. Additionally, because they continued to advise some Issuers after the programs’ implementations, they were aware that those Issuers were issuing huge numbers of Form S-8 shares to the public.

30. Thus, AWI and Lee knew or should have known that, by virtue of their advice and instruction to the Issuers, the ESIP programs would be used – and in fact were used – by the Issuers to raise capital to fund operations through the unregistered sale of shares to the public.

D. VIOLATIONS

31. As a result of the conduct described above, AWI and Lee caused violations of Sections 5(a) and 5(c) of the Securities Act, which prohibit the direct or indirect offer and sale of securities through the mails or in interstate commerce unless a registration statement is in effect or has been filed with the Commission or a registration exemption applies.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it appropriate that 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; and

B. Whether, pursuant to Section 8A of the Securities Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a) and 5(c) of the Securities Act and whether Respondents should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities 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 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.

Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2768 / August 7, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12910

In the Matter of

GEORGE J. SANDHU,

Respondent.

:
:
:
: ORDER MAKING FINDINGS
: AND IMPOSING REMEDIAL SANCTIONS
: PURSUANT TO SECTION 203(f) OF THE
: INVESTMENT ADVISERS ACT OF 1940
:
:

I.

On December 21, 2007, the Securities and Exchange Commission ("Commission") issued an Order Instituting Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and Notice of Hearing, AP File No. 3-12910. Respondent George J. Sandhu ("Sandhu" or "Respondent"), has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of settling these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, prior to a hearing pursuant to the Commission's Rules of Practice, 17 C.F.R. § 201.100 *et seq.*, and without admitting or denying the Commission's findings contained herein, except as to the jurisdiction of the Commission over him and over the subject matter of these proceedings, and the findings contained in Section II. 3, which are admitted, Respondent Sandhu consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Order"), as set forth below.

II.

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

1. Sandhu admits the jurisdiction of the Commission over him and over the matters set forth in the Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, and Notice of Hearing ("Order Instituting Proceedings").

2. Sandhu, age 42, resides in New York, New York. Between at least September 1998 and November 2001, and again from January 2003 through at least August 2003, Sandhu was

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associated with an investment adviser, International Investment Group, LLC, which is registered with the Commission.

3 On November 26, 2007, without admitting or denying the allegations of the Commission's complaint, Sandhu consented to entry of a permanent injunction enjoining him from future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Universal Express, Inc., et al., civil action number 1:04-cv-02322 (GEL), in the United States District Court for the Southern District of New York.

4 According to the Commission's complaint, Sandhu participated in a scheme to defraud investors by writing two letters to Universal Express, Inc. that falsely represented financial commitments to the company. The company, in turn, used the false letters as a basis to issue materially false or misleading press releases which resulted in increases in Universal Express' share price and trading volume. The Commission's complaint alleged that in March 2002, Sandhu wrote and signed a letter addressed to Universal Express in which he represented that as an investment adviser to a fund, that the fund had "authorized up to \$7,500,000 in additional capital from the Fund for future approve [Universal Express] acquisitions," and that he was "also prepared based upon due diligence and proper collateral to arrange an additional \$50,000,000 in long term financing" In fact, at the time of Sandhu's letter, the value of the fund's total assets was only \$4 million to \$5 million. The Commission's complaint further alleged that Sandhu wrote and signed a second letter to Universal Express in May 2002 in which he stated that the fund "would be committed to the funding of the combined company." The Commission's complaint also alleged that between August 2001 and December 2003, Sandhu was a necessary participant in the offer and sale of shares of Universal Express common stock through brokerage accounts of third parties when no registration statement was filed or in effect, and no exemption from registration applied.

III.

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

Accordingly, it is ORDERED that pursuant to Section 203(f) of the Advisers Act, Respondent Sandhu be, and hereby is, barred from association with an investment adviser with the right to reapply for association after three years to the appropriate self-regulatory organization, or if there is none, to the Commission. 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.



Florence E. Harmon
Acting Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 8950 / August 7, 2008

SECURITIES EXCHANGE ACT OF 1934

Release No. 58325 / August 7, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13122

In the Matter of

FINANCE 500, INC.,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS, PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933 AND SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER AS TO
FINANCE 500, INC.**

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 Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Finance 500, Inc. ("Finance 500" 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 Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to Finance 500, Inc. ("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

From October 2002 through August 2005, Finance 500, a broker-dealer, violated Sections 5(a) and 5(c) of the Securities Act by selling a massive number of shares in unregistered offerings under so-called employee stock option programs implemented by thirty-five issuer customers (the "Issuers"). The programs functioned as public distributions of securities using the Issuers' employees as conduits so that the Issuers could raise capital without complying with the registration requirements of the federal securities laws. The Issuers improperly registered the shares sold on Form S-8 registration statements and then received the bulk of the shares' sales proceeds. Finance 500, through one of its registered representatives, administered the brokerage aspects of the programs despite red flags suggesting that the shares it sold were issued through unregistered offerings.

Respondent

1. **Finance 500**, a California corporation with its principal offices in Irvine, California, has been registered with the Commission as a broker-dealer since 1982. Finance 500's primary business is selling and underwriting brokered Certificates of Deposit. It also conducts a market making business and a general retail securities business. During the relevant period, the retail business had roughly 80 registered representatives in 15 branch offices and included the employee stock option business that is the focus of this Order.

Background

2. Sections 5(a) and 5(c) of the Securities Act prohibit any person from using interstate commerce to directly or indirectly sell or offer to sell a security unless a registration statement is filed with the Commission. Registrants that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act and are current in their filings may use Form S-8 registration statements to register the offer and sale of securities to their employees, including consultants, to compensate them for *bona fide* services or to provide incentives. Because of the compensatory purpose and the employees' and consultants' familiarity with the registrant's business, Form S-8's disclosure requirements are abbreviated as compared to statements registering shares to raise capital. A registrant cannot use Form S-8 to issue shares to employees who act as conduits for the sale of S-8 stock to the public because the transaction that takes place – the distribution of securities to the public – is not registered.

3. From October 2002 through August 2005 (the "relevant period"), Finance 500, through one of its registered representatives, provided brokerage services for the employee

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.

stock option programs implemented by thirty-five Issuers. The Issuers were microcap companies that had limited operational histories, generated little revenue and had low priced securities listed on the OTC Bulletin Board that were thinly traded before the Issuers began to issue Form S-8 shares.

4. The Issuers used employee stock plans generally titled Employee Stock Incentive Plans (“ESIPs”) that issued shares registered on Form S-8.² Attached to the Forms S-8 were the ESIPs and attorney opinion letters stating that the S-8 shares, when issued and sold, would be validly issued, fully paid and non-assessable.

5. As administered, the Issuers’ ESIP programs shared three key characteristics that, when combined, virtually ensured that the options would be exercised and the underlying shares simultaneously sold to the public at or near the time the options were granted. First, the option exercise price floated with the market value of an Issuer’s stock at the time of exercise. The exercise price was typically set by the Issuers at 85% of the proceeds from the sale of the shares underlying the options. This meant that the options were always “in the money” – or that the exercise price was less than the market price at the time of exercise – and that the employee would receive relatively little benefit from an increase in stock price. Second, the options vested immediately, meaning that the options could be exercised at any time after the date of grant. Third, the programs used a cashless exercise method where the exercise price was remitted to the Issuer from the sales proceeds of the shares underlying the options. Accordingly, the employees did not have to pay any money out-of-pocket to exercise the options.

6. The Issuers and their employees had brokerage accounts with Finance 500. When the Issuers granted the options, they sent Finance 500 share certificates representing the number of Form S-8 shares underlying the options. The great majority of employees had standing orders with Finance 500 to exercise their options immediately. Upon receipt of the share certificates, Finance 500 sold the shares underlying the options in unsolicited sales to the public. Then Finance 500 calculated the options’ exercise price at 85% of the sales price and credited the exercise price proceeds to the Issuers’ accounts and the remainder, minus brokerage and clearing fees, to the employees’ accounts.

7. There was one registered representative responsible for the employee stock option business at Finance 500. The representative brought the business with him from his prior brokerage firm. When the representative began working at Finance 500, the employee stock option business comprised approximately 10% to 15% of his total business, but grew to 60% at its height. The representative became one of the broker-dealer’s top producers and eventually earned the highest commission rate at the firm.

8. The manner in which the Issuers implemented their ESIP programs (*i.e.*, the high-percentage exercise price that was based on the market value at the time of exercise, the immediate vesting and use of a cashless exercise), combined with the employees’ standing orders

² “ESIP programs” means the Issuers’ employee stock options programs where each Issuer issued Form S-8 shares under a series of ESIPs.

to exercise immediately, all but ensured that the options were exercised and the underlying shares simultaneously sold within days of grant. This resulted in millions and, in many cases, billions of shares in each Issuer's stock being sold to the public, which severely diluted the ownership interests of existing shareholders. The Issuers received payment for the exercised options that greatly exceeded their revenues and allowed them to fund their otherwise failing operations. By comparison, the employees received relatively modest amounts (approximately 7%-8% of the sales proceeds).

9. The ESIP programs functioned as public offerings to raise capital. The Issuers essentially used their employees as conduits to offer shares to the public without providing the disclosures required by the registration provisions. As such, the employees acted as underwriters.

10. Because the Form S-8 statements cannot be used to raise capital, no registration statements were in effect or filed as to the shares issued under the ESIP programs. As a result, the shares were sold in unregistered offerings.

11. While administering the brokerage aspects of the ESIP programs, Finance 500 encountered red flags indicating that Issuers' employees were underwriters to unregistered offerings. These red flags included: (1) the employees' nearly immediate exercise of options after grant, (2) the simultaneous exercise and sale of the shares underlying the options, (3) the floating exercise price, (4) the huge number of shares sold in previously thinly-traded stock of microcap companies, (5) the large amounts of money received in each of the Issuers' Finance 500 accounts, (6) the relatively small amounts received in the employee accounts, and (7) the fact that the employees were related to the Issuers.

12. These red flags should have prompted Finance 500 to inquire further as to whether the employees were underwriters in unregistered offerings. Finance 500's inquiries on this subject, however, were inadequate.

13. As a result of the conduct described above, Finance 500 willfully violated Sections 5(a) and 5(c) of the Securities Act,³ which prohibit using interstate commerce to directly or indirectly, in the absence of any applicable exemption, sell or offer to sell a security unless a registration statement is filed with the Commission.

³ A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

Finance 500's Remedial Efforts

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 and in the public interest to impose the sanctions agreed to in Respondent Finance 500's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) of the Exchange Act, it is hereby ORDERED that:

A. Respondent Finance 500 cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act;

B. Respondent Finance 500 is censured.

C. IT IS FURTHER ORDERED that Respondent shall, within ten (10) days of the entry of this Order, pay disgorgement of \$271,484 and prejudgment interest of \$74,015 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. 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 Finance 500 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, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, Illinois, 60604.

By the Commission.

Florence E. Harmon
Acting 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. 58348 / August 12, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2862 / August 12, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13127

In the Matter of

JEFFREY P. JORISSEN (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 Jeffrey P. Jorissen ("Respondent" or "Jorissen") 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 Commission, or to which the Commission is a party, and without admitting or denying the findings

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.

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herein, except as to the Commission's jurisdiction over him and over the subject matter of these proceedings and the findings contained in Section 3 of Part III 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. Jorissen, age 63, is a certified public accountant licensed to practice in the State of Michigan. At all times relevant to this matter, he served as Chief Financial Officer, Senior Vice President, Secretary, and Treasurer of Sun Communities, Inc. ("Sun").

2. Sun is a Maryland corporation operating as a real estate investment trust headquartered in Southfield, Michigan. Through various subsidiaries, Sun owns, operates, develops and finances manufactured housing communities. At all times relevant to this matter, Sun's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange.

3. On February 22, 2006, the Commission filed a complaint against Jorissen and others in SEC v. Jorissen et al (E.D. Mich.) Civil Action No. 2:06-10845. On July 21, 2008, the Court entered an order permanently enjoining Jorissen, by consent, from future violations of Rule 13b2-1 under the Securities Exchange Act of 1934 ("Exchange Act"), and from aiding and abetting violations of Sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. Jorissen was also ordered to pay a \$25,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that from the first quarter of 2000 through the third quarter of 2002, Sun engaged in false financial record-keeping and reporting. The complaint alleged that Sun's financial statements failed to properly account for losses resulting from Sun's investment in a joint venture involved in the development of manufactured housing communities. The Commission alleged that contrary to generally accepted accounting principles, Sun failed to account for any of the joint venture's losses during seven quarters and underreported Sun's share of the losses in four additional quarters. The complaint also alleged that Sun maintained an improper "cookie jar reserve" and improperly smoothed earnings, and that Sun's false financial statements were incorporated in documents filed with the SEC, including quarterly reports, annual reports, and non-periodic filings. The complaint alleged that Jorissen, in his position as Chief Financial Officer, initiated and directed Sun's false record-keeping and reporting.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Respondent is suspended from 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/her practice before the Commission will be reviewed either by the independent audit committee of the public company for which he/she works or in some other acceptable manner, as long as he/she 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/she 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/she 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/her 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.



Florence E. Harmon
Acting Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58356 / August 13, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13130

In the Matter of	:	ORDER INSTITUTING
	:	ADMINISTRATIVE PROCEEDINGS
Christopher L. Martin,	:	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 Christopher L. Martin ("Martin" or "Respondent") 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 Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below,

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 . . . 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.

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. Martin, age 41, is and has been an attorney licensed to practice in the State of Texas. He served as general counsel to HCC Insurance Holdings, Inc. between July 1997 and November 2006, when he resigned. While general counsel, Martin reviewed and signed proxy statements, and reviewed registration statements and periodic reports filed with the Commission and disseminated to investors.

2. HCC Insurance Holdings, Inc. ("HCC") was, at all relevant times, a Delaware corporation with its principal place of business in Houston, Texas. HCC provides insurance coverage and related services to commercial customers and individuals. At all relevant times, HCC's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the New York Stock Exchange.

3. On July 21, 2008, the Commission filed a complaint against Martin in SEC v. Christopher L. Martin, (Civil Action No. 4:08-cv-02270), in the United States District Court for the Southern District of Texas. On July 22, 2008, the court entered an order permanently enjoining Martin, by consent, from future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 ("Securities Act"), Sections 13(b)(5) and 16(a) of the Exchange Act, and Exchange Act Rules 13b2-1, 13b2-2, and 16a-3, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, 13a-13, 14a-3, and 14a-9 thereunder. Martin was ordered to pay a \$50,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that Martin facilitated a scheme to backdate stock-option grants at HCC. Between 1997 and 2005, Martin prepared documents indicating that HCC's option grants had been made on earlier dates when HCC's stock price had closed lower, whereas in fact no such grants had been made on those dates. These inaccurate and misleading documents included written actions of the compensation committee and option agreements. In part due to Martin's conduct, between 1997 and 2005 HCC (i) filed materially false and misleading financial statements that materially understated its compensation expenses and materially overstated its annual net income and earnings per share, and (ii) made disclosures in its periodic filings and proxy statements that falsely portrayed HCC's options as having been granted at exercise prices equal to the fair market value of HCC's common stock on the date of the grant. HCC also provided materially misleading statements to its auditors, as a consequence of Martin's preparing documents bearing inaccurate grant dates.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Martin is suspended from appearing or practicing before the Commission as an attorney for two years from the date of the entry of this Order.

B. Before appearing and resuming practice before the Commission, Martin will submit an affidavit to the Commission's Office of the General Counsel truthfully stating, under penalty of perjury, that he has complied with the Commission's orders, that he is not subject to any suspension or disbarment as an attorney by a court of the United States or of any state, territory, district, commonwealth, or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Florence E. Harmon
Acting Secretary

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III(3) below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to 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. Scott Hirth, age 41, is a resident of Carleton, Michigan. Hirth was the Vice-President of Finance and Chief Financial Officer of ProQuest Company's Information and Learning Division from 1999 through 2005.

2. ProQuest Company, now known as Voyager Learning Company (collectively "ProQuest"), was a Delaware corporation with its headquarters located in Ann Arbor, Michigan between 2001 and 2005. ProQuest was formerly known as Bell & Howell Company from 1907 to 2001. ProQuest specialized in aggregating, organizing and packaging data from various publishers to provide information-service products to its customers.

3. On July 28, 2008, a final judgment was entered against Hirth, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rules 10b-5, 13b2-1, 13b2-2 thereunder, and from 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, 13a-11 and 13a-13 thereunder in the civil action entitled Securities and Exchange Commission v. Scott Hirth et al., Civil Action Number 08-cv-13139, in the United States District Court for the Eastern District of Michigan. Hirth was also ordered to pay \$233,676.00 in disgorgement of ill-gotten gains, \$54,474.25 in prejudgment interest, a \$130,000 civil money penalty, and was prohibited from serving as an officer or director of an issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

4. The Commission's complaint alleged, among other things, that Hirth engaged in accounting fraud at ProQuest from at least 2001 through 2005. At the end of monthly and quarterly reporting periods, Hirth made fraudulent manual journal entries in order to favorably alter ProQuest's financial results and these manual journal entries were designed to increase revenue and decrease expenses at ProQuest. The complaint alleged that through these false accounting entries, Hirth materially inflated ProQuest's reported Earnings Before Interest and

Taxes ("EBIT") for 2001 through 2004 and the first three quarters of 2005. This false EBIT information was disclosed to the investing public in ProQuest's registration statements, financial reports, and filings such as its S-3, S-8, Form 10-K, and Form 10-Q filings made with the Commission. The complaint further alleged that Hirth's scheme overstated ProQuest's EBIT by 31% between 2001 and the first three quarters of 2005.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Hirth is suspended from appearing or practicing before the Commission as an accountant.

By the Commission.

Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 19, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13138

In the Matter of

**Atomic Burrito, Inc.,
Earthcare Co.,
Global Concepts, Ltd.,
New York Bagel Enterprises, Inc.,
Precept Business Services, Inc.,
Reorganized Sale OKWD, Inc.,
Villageworld.com, Inc.
(n/k/a Biometrics 2000 Corp.),
and
Wireless Webconnect!, Inc.,**

Respondents.

**ORDER INSTITUTING
PROCEEDINGS AND NOTICE OF
HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF
1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Atomic Burrito, Inc., Earthcare Co., Global Concepts, Ltd., New York Bagel Enterprises, Inc., Precept Business Services, Inc., Reorganized Sale OKWD, Inc., Villageworld.com, Inc. (n/k/a Biometrics 2000 Corp.) and Wireless Webconnect!, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Atomic Burrito, Inc. ("Atomic Burrito") (CIK No. 916298) is a suspended Oklahoma corporation located in Oklahoma City, Oklahoma with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Atomic Burrito 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, 2001, which reported a net loss of \$240,815 for the prior three months. As of August 4, 2008, the

company's common stock (symbol "ATOM") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

2. Earthcare Co. ("Earthcare") (CIK No. 1057489) is a delinquent Delaware corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Earthcare is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the period ended September 30, 2001, which reported a net loss of over \$28 million for the prior three months. On April 11, 2002, Earthcare filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Texas, which is still pending. As of August 4, 2008, the company's common stock (symbol "ECCOQ") was quoted on the Pink Sheets, had three market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

3. Global Concepts, Ltd. ("Global Concepts") (CIK No. 1055313) is a delinquent Colorado corporation located in Montclair, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Global Concepts 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, 2005. As of August 4, 2008, the company's common stock (symbol "GCCP") was quoted on the Pink Sheets, had fifteen market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

4. New York Bagel Enterprises, Inc. ("New York Bagel") (CIK No. 1016694) is a forfeited Kansas corporation located in Oklahoma City, Oklahoma with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). New York Bagel 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 29, 1999, which reported a net loss of \$541,356 for the prior thirty-nine weeks. On February 3, 2000, the company filed a Chapter 11 petition with the U.S. Bankruptcy Court for the District of Kansas, and the case was closed on February 6, 2003. As of August 4, 2008, New York Bagel's common stock (symbol "NYBSQ") was quoted on the Pink Sheets, had three market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Precept Business Services, Inc. ("Precept Business Services") (CIK No. 1051285) is a forfeited Texas corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Precept is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed an amended and restated Form 10-Q for the period ended March 31, 2000, which reported a net loss of over \$19 million for the prior three months. On February 22, 2001, Precept Business Services filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Texas that was subsequently converted to Chapter 7, and the case was closed on April 21, 2006. As of August 4, 2008, the company's common stock (symbol "PBSI") was quoted on the Pink Sheets, had four market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

6. Reorganized Sale OKWD, Inc. ("Reorganized Sale") (CIK No. 73609) is a North Carolina corporation located in Durham, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Reorganized Sale 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, 2003. On November 15, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which is still pending. As of August 4, 2008, the company's common stock (symbol "OKWHQ") was quoted on the Pink Sheets, had nine market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

7. Villageworld.com, Inc. (n/k/a Biometrics 2000 Corp.) ("Biometrics") (CIK No. 1006708) is a New York corporation located in Springfield, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Biometrics is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004, which reported a net loss of over \$1 million for the prior nine months. On October 15, 2005, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Pennsylvania, venue was subsequently transferred to the Southern District of New York, and the case is still pending. Villageworld changed its name to Biometrics 2000 Corp., but failed to report this change in the Commission's EDGAR database as required by Commission rules. As of August 4, 2008, the company's common stock (symbol "BTOO") was quoted on the Pink Sheets, had eleven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

8. Wireless Webconnect!, Inc. ("Wireless") (CIK No. 818674) is a void Delaware corporation located in Richardson, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wireless 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 March 31, 2002, which reported a net loss of \$236,047 for the prior three months. As of August 4, 2008, the company's common stock (symbol "WWCO") was quoted on the Pink Sheets, had eight market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

9. 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.

10. 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, and Rule 13a-13 requires domestic issuers to file quarterly reports.

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Florence E. Harmon
Acting Secretary

Attachment


By: Jill M. Peterson
Assistant Secretary

Appendix 1

**Chart of Delinquent Filings
Atomic Burrito, Inc., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Atomic Burrito, Inc.					
	10-KSB	12/31/01	04/01/02	Not filed	76
	10-QSB	03/31/02	05/15/02	Not filed	75
	10-QSB	06/30/02	08/14/02	Not filed	72
	10-QSB	09/30/02	11/14/02	Not filed	69
	10-KSB	12/31/02	03/31/03	Not filed	65
	10-QSB	03/31/03	05/15/03	Not filed	63
	10-QSB	06/30/03	08/14/03	Not filed	60
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-KSB	12/31/03	03/30/04	Not filed	53
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-QSB	06/30/04	08/16/04	Not filed	48
	10-QSB	09/30/04	11/15/04	Not filed	45
	10-KSB	12/31/04	03/31/05	Not filed	41
	10-QSB	03/31/05	05/16/05	Not filed	39
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-KSB	12/31/05	03/31/06	Not filed	29
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-KSB	12/31/07	03/31/08	Not filed	5
	10-Q*	03/31/08	05/15/08	Not filed	3
	10-Q*	06/30/08	08/14/08	Not filed	0
Total Filings Delinquent	27				

Earthcare Co.

10-K	12/31/01	04/01/02	Not filed	76
10-Q	03/31/02	05/15/02	Not filed	75
10-Q	06/30/02	08/14/02	Not filed	72
10-Q	09/30/02	11/14/02	Not filed	69
10-K	12/31/02	03/31/03	Not filed	65
10-Q	03/31/03	05/15/03	Not filed	63

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
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Earthcare Co.

10-Q	06/30/03	08/14/03	Not filed	60
10-Q	09/30/03	11/14/03	Not filed	57
10-K	12/31/03	03/30/04	Not filed	53
10-Q	03/31/04	05/17/04	Not filed	51
10-Q	06/30/04	08/16/04	Not filed	48
10-Q	09/30/04	11/15/04	Not filed	45
10-K	12/31/04	03/31/05	Not filed	41
10-Q	03/31/05	05/16/05	Not filed	39
10-Q	06/30/05	08/15/05	Not filed	36
10-Q	09/30/05	11/14/05	Not filed	33
10-K	12/31/05	03/31/06	Not filed	29
10-Q	03/31/06	05/15/06	Not filed	27
10-Q	06/30/06	08/14/06	Not filed	24
10-Q	09/30/06	11/14/06	Not filed	21
10-K	12/31/06	04/02/07	Not filed	16
10-Q	03/31/07	05/15/07	Not filed	15
10-Q	06/30/07	08/14/07	Not filed	12
10-Q	09/30/07	11/14/07	Not filed	9
10-K	12/31/07	03/31/08	Not filed	5
10-Q	03/31/08	05/15/08	Not filed	3
10-Q	06/30/08	08/14/08	Not filed	0

Total Filings Delinquent 27

Global Concepts, Ltd.

10-QSB	09/30/05	11/14/05	Not filed	33
10-KSB	12/31/05	03/31/06	Not filed	29
10-QSB	03/31/06	05/15/06	Not filed	27
10-QSB	06/30/06	08/14/06	Not filed	24
10-QSB	09/30/06	11/14/06	Not filed	21
10-KSB	12/31/06	04/02/07	Not filed	16
10-QSB	03/31/07	05/15/07	Not filed	15
10-QSB	06/30/07	08/14/07	Not filed	12
10-QSB	09/30/07	11/14/07	Not filed	9
10-KSB	12/31/07	03/31/08	Not filed	5
10-Q*	03/31/08	05/15/08	Not filed	3
10-Q*	06/30/08	08/14/08	Not filed	0

Total Filings Delinquent 12

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
New York Bagel Enterprises, Inc.	10-KSB	12/29/99	03/28/00	Not filed	101
	10-QSB	03/29/00	05/15/00	Not filed	99
	10-QSB	06/28/00	08/14/00	Not filed	96
	10-QSB	09/27/00	11/13/00	Not filed	93
	10-KSB	12/27/00	03/27/01	Not filed	89
	10-QSB	03/28/01	05/14/01	Not filed	87
	10-QSB	06/27/01	08/13/01	Not filed	84
	10-QSB	09/26/01	11/12/01	Not filed	81
	10-KSB	12/26/01	03/26/02	Not filed	77
	10-QSB	03/27/02	05/13/02	Not filed	75
	10-QSB	06/26/02	08/12/02	Not filed	72
	10-QSB	09/25/02	11/12/02	Not filed	69
	10-KSB	12/25/02	03/25/03	Not filed	65
	10-QSB	03/26/03	05/12/03	Not filed	63
	10-QSB	06/25/03	08/11/03	Not filed	60
	10-QSB	09/24/03	11/10/03	Not filed	57
	10-KSB	12/31/03	03/30/04	Not filed	53
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-QSB	06/30/04	08/16/04	Not filed	48
	10-QSB	09/29/04	11/15/04	Not filed	45
	10-KSB	12/29/04	03/29/05	Not filed	41
	10-QSB	03/30/05	05/16/05	Not filed	39
	10-QSB	06/29/05	08/15/05	Not filed	36
	10-QSB	09/28/05	11/14/05	Not filed	33
	10-KSB	12/28/05	03/28/06	Not filed	29
	10-QSB	03/29/06	05/15/06	Not filed	27
	10-QSB	06/28/06	08/14/06	Not filed	24
	10-QSB	09/27/06	11/13/06	Not filed	21
	10-KSB	12/27/06	03/27/07	Not filed	17
	10-QSB	03/28/07	05/14/07	Not filed	15
	10-QSB	06/27/07	08/13/07	Not filed	12
	10-QSB	09/26/07	11/12/07	Not filed	9
	10-KSB	12/26/07	03/25/08	Not filed	5
	10-Q*	03/26/08	05/12/08	Not filed	3
	10-Q*	06/25/08	08/11/08	Not filed	0

Total Filings Delinquent 35

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Precept Business Services, Inc.	10-K	06/30/00	09/28/00	Not filed	95
	10-Q	09/30/00	11/14/00	Not filed	93
	10-Q	12/31/00	02/14/01	Not filed	90
	10-Q	03/31/01	05/15/01	Not filed	87
	10-K	06/30/01	09/28/01	Not filed	83
	10-Q	09/30/01	11/14/01	Not filed	81
	10-Q	12/31/01	02/14/02	Not filed	78
	10-Q	03/31/02	05/15/02	Not filed	75
	10-K	06/30/02	09/30/02	Not filed	71
	10-Q	09/30/02	11/14/02	Not filed	69
	10-Q	12/31/02	02/14/03	Not filed	66
	10-Q	03/31/03	05/15/03	Not filed	63
	10-K	06/30/03	09/29/03	Not filed	59
	10-Q	09/30/03	11/14/03	Not filed	57
	10-Q	12/31/03	02/17/04	Not filed	54
	10-Q	03/31/04	05/17/04	Not filed	51
	10-K	06/30/04	09/28/04	Not filed	47
	10-Q	09/30/04	11/15/04	Not filed	45
	10-Q	12/31/04	02/14/05	Not filed	42
	10-Q	03/31/05	05/16/05	Not filed	39
	10-K	06/30/05	09/28/05	Not filed	35
	10-Q	09/30/05	11/14/05	Not filed	33
	10-Q	12/31/05	02/14/06	Not filed	30
	10-Q	03/31/06	05/15/06	Not filed	27
	10-K	06/30/06	09/28/06	Not filed	23
	10-Q	09/30/06	11/14/06	Not filed	21
	10-Q	12/31/06	02/14/07	Not filed	18
	10-Q	03/31/07	05/15/07	Not filed	15
	10-K	06/30/07	09/28/07	Not filed	11
	10-Q	09/30/07	11/14/07	Not filed	9
	10-Q	12/31/07	03/31/08	Not filed	5
	10-Q	03/31/08	05/15/08	Not filed	3

Total Filings Delinquent 32

**Reorganized Sale
OKWD, Inc.**

10-Q	03/31/04	05/17/04	Not filed	51
10-Q	06/30/04	08/16/04	Not filed	48

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Reorganized Sale OKWD, Inc.	<i>10-K</i>	09/30/04	12/29/04	Not filed	44
	<i>10-Q</i>	12/31/04	02/14/05	Not filed	42
	<i>10-Q</i>	03/31/05	05/16/05	Not filed	39
	<i>10-Q</i>	06/30/05	08/15/05	Not filed	36
	<i>10-K</i>	09/30/05	12/29/05	Not filed	32
	<i>10-Q</i>	12/31/05	02/14/06	Not filed	30
	<i>10-Q</i>	03/31/06	05/15/06	Not filed	27
	<i>10-Q</i>	06/30/06	08/14/06	Not filed	24
	<i>10-K</i>	09/30/06	12/29/06	Not filed	20
	<i>10-Q</i>	12/31/06	02/14/07	Not filed	18
	<i>10-Q</i>	03/31/07	05/15/07	Not filed	15
	<i>10-Q</i>	06/30/07	08/14/07	Not filed	12
	<i>10-K</i>	09/30/07	12/31/07	Not filed	8
	<i>10-Q</i>	12/31/07	02/14/08	Not filed	6
	<i>10-Q</i>	03/31/08	05/15/08	Not filed	3
	<i>10-Q</i>	06/30/08	08/14/08	Not filed	0

Total Filings Delinquent 18

**Villageworld.com,
Inc. (n/k/a
Biometrics 2000
Corp.)**

<i>10-KSB</i>	12/31/04	03/31/05	Not filed	41
<i>10-QSB</i>	03/31/05	05/16/05	Not filed	39
<i>10-QSB</i>	06/30/05	08/15/05	Not filed	36
<i>10-QSB</i>	09/30/05	11/14/05	Not filed	33
<i>10-KSB</i>	12/31/05	03/31/06	Not filed	29
<i>10-QSB</i>	03/31/06	05/15/06	Not filed	27
<i>10-QSB</i>	06/30/06	08/14/06	Not filed	24
<i>10-QSB</i>	09/30/06	11/14/06	Not filed	21
<i>10-KSB</i>	12/31/06	04/02/07	Not filed	16
<i>10-QSB</i>	03/31/07	05/15/07	Not filed	15
<i>10-QSB</i>	06/30/07	08/14/07	Not filed	12
<i>10-QSB</i>	09/30/07	11/14/07	Not filed	9
<i>10-KSB</i>	12/31/07	03/31/08	Not filed	5
<i>10-Q*</i>	03/31/08	05/15/08	Not filed	3

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Villageworld.com, Inc. (n/k/a Biometrics 2000 Corp.)	<i>10-Q*</i>	06/30/08	08/14/08	Not filed	0
Total Filings Delinquent	15				
Wireless Webconnect!, Inc.	<i>10-Q</i>	06/30/02	08/14/02	Not filed	72
	<i>10-Q</i>	09/30/02	11/14/02	Not filed	69
	<i>10-K</i>	12/31/02	03/31/03	Not filed	65
	<i>10-Q</i>	03/31/03	05/15/03	Not filed	63
	<i>10-Q</i>	06/30/03	08/14/03	Not filed	60
	<i>10-Q</i>	09/30/03	11/14/03	Not filed	57
	<i>10-K</i>	12/31/03	03/30/04	Not filed	53
	<i>10-Q</i>	03/31/04	05/17/04	Not filed	51
	<i>10-Q</i>	06/30/04	08/16/04	Not filed	48
	<i>10-Q</i>	09/30/04	11/15/04	Not filed	45
	<i>10-K</i>	12/31/04	03/31/05	Not filed	41
	<i>10-Q</i>	03/31/05	05/16/05	Not filed	39
	<i>10-Q</i>	06/30/05	08/15/05	Not filed	36
	<i>10-Q</i>	09/30/05	11/14/05	Not filed	33
	<i>10-K</i>	12/31/05	03/31/06	Not filed	29
	<i>10-Q</i>	03/31/06	05/15/06	Not filed	27
	<i>10-Q</i>	06/30/06	08/14/06	Not filed	24
	<i>10-Q</i>	09/30/06	11/14/06	Not filed	21
	<i>10-K</i>	12/31/06	04/02/07	Not filed	16
	<i>10-Q</i>	03/31/07	05/15/07	Not filed	15
	<i>10-Q</i>	06/30/07	08/14/07	Not filed	12
	<i>10-Q</i>	09/30/07	11/14/07	Not filed	9
	<i>10-K</i>	12/31/07	03/31/08	Not filed	5
	<i>10-Q</i>	03/31/08	05/15/08	Not filed	3
	<i>10-Q</i>	06/30/08	08/14/08	Not filed	0
Total Filings Delinquent	25				

**Months Delinquent
(rounded up)**

Company Name Form Type Period Ended Due Date Date Received

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, are in the process of being removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal is taking effect over a transition period that will conclude on March 15, 2009, so by that date, all reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB will be required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than \$75 million in public equity float as of the end of its most recently completed second fiscal quarter) will have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 19, 2008

IN THE MATTER OF	:	
	:	
Atomic Burrito, Inc.,	:	
Earthcare Co.,	:	
Global Concepts, Ltd.,	:	
New York Bagel Enterprises, Inc.,	:	ORDER OF SUSPENSION OF
Precept Business Services, Inc.,	:	TRADING
Reorganized Sale OKWD, Inc.,	:	
Villageworld.com, Inc.	:	
(n/k/a Biometrics 2000 Corp.),	:	
and	:	
Wireless Webconnect!, Inc.	:	
	:	
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 Atomic Burrito, Inc. because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Earthcare Co. because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Global Concepts, Ltd. because it has not filed any periodic reports since the period ended June 30, 2005.

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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of New York Bagel Enterprises, Inc. because it has not filed any periodic reports since the period ended September 29, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Precept Business Services, Inc. because it has not filed any periodic reports since the period ended March 31, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Reorganized Sale OKWD, Inc. because it has not filed any periodic reports since the period ended December 31, 2003.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Villageworld.com, Inc. (n/k/a Biometrics 2000 Corp.) because it has not filed any periodic reports since the period ended September 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Wireless Webconnect!, Inc. because it has not filed any periodic reports since the period ended March 31, 2002.

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 companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in Atomic Burrito, Inc., Earthcare Co., Global Concepts, Ltd., New York Bagel Enterprises, Inc., Precept Business Services, Inc., Reorganized Sale OKWD, Inc., Villageworld.com Inc. (n/k/a Biometrics 2000 Corp.) and Wireless Webconnect!, Inc. is suspended for the period from 9:30 a.m. EDT on August 19, 2008, through 11:59 p.m. EDT on September 2, 2008.

By the Commission.

Florence E. Harmon
Acting Secretary


By: Jill M. Peterson
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58403 / August 21, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12918

In the Matter of

**vFinance Investments, Inc.,
Nicholas Thompson and
Richard Campanella,**

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 AS TO NICHOLAS THOMPSON**

I.

In these proceedings, instituted on January 3, 2008 pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), respondent Nicholas Thompson ("Thompson" or "Respondent") has submitted an Offer of Settlement ("Offer") which the Securities and Exchange Commission ("Commission") has determined to accept.

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 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 as to Nicholas Thompson ("Order"), as set forth below.

III.

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

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.

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A. SUMMARY

1. These proceedings involve the failure of a registered broker-dealer to maintain all documents pertinent to its business and provide those documents to the Commission in a prompt fashion for inspection and review.

2. The broker-dealer in this case, vFinance Investments, Inc. (“vFinance”), violated the federal securities laws by failing to preserve and produce the customer correspondence of its registered representative, Thompson. Thompson repeatedly failed to produce records and deliberately deleted data from his hard drive relating to a matter under investigation by the Commission. vFinance’s Chief Operating Officer/Chief Compliance Officer failed to respond promptly to the Commission’s document requests and failed to address Thompson’s non-compliance with the firm’s document retention policies.

B. RESPONDENTS

3. vFinance is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and is a member of the NASD. vFinance is a Florida corporation with its principal executive offices in Boca Raton, Florida, and is a wholly-owned subsidiary of vFinance, Inc., a Delaware corporation whose securities are registered with the Commission pursuant to Section 12(g) of the Exchange Act. During 2004 and 2005, vFinance had about 25 branch offices and 125 registered representatives nationwide. On April 12, 2005, the Commission entered an Order Instituting Administrative Proceedings in *In the Matter of vFinance Investments, Inc.*, Admin. Proc. File No. 3-11895, finding that vFinance had failed reasonably to supervise a trader through the inadequate implementation of supervisory procedures for preventing market manipulation. In settlement of that proceeding, vFinance retained an independent consultant who provided vFinance in early July 2005 with a preliminary report of the need to improve its supervision of traders.

4. Thompson was a registered representative associated with vFinance and the manager of a small vFinance branch in Flemington, New Jersey from 2002 until 2006. During 2004 and 2005, Thompson supervised one other registered representative (his father) and an administrative assistant in the Flemington branch. Thompson is 41 years old and resides in Kintnersville, Pennsylvania. While at vFinance, Thompson was authorized by vFinance’s head trader to serve as a market maker of a microcap oil and gas firm, the shares of which were quoted on the OTC Bulletin Board, which became the subject of a Commission investigation into potential violations of the federal securities laws.

5. The person at vFinance who served as Chief Operating Officer and Chief Compliance Officer during 2004 and 2005 (the “COO/CCO”) has been affiliated with vFinance as a registered representative since 2001. The COO/CCO became President of vFinance in January 2006 and then President and CEO of vFinance in July 2006. The COO/CCO also is a director of vFinance, Inc. The COO/CCO is 56 years old and resides in Boca Raton, Florida.

C. vFINANCE HAD A DUTY TO RETAIN AND PRODUCE DOCUMENTS

6. Section 17(a) of the Exchange Act mandates that broker-dealers “shall make and keep for prescribed periods such records, furnish copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for

the protection of investors, or otherwise in furtherance of the purposes of this title.” Pursuant to its authority under Section 17(a), the Commission promulgated Rule 17a-4(b)(4), which requires broker-dealers to preserve for at least three years (the first two in an easily accessible place) “originals of all communications received and copies of all communications sent ... relating to its business as such.” The Commission also promulgated Rule 17a-4(j), which requires broker-dealers to “furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the [broker-dealer] that are required to be preserved under [Rule 17a-4], or any other records of the [broker-dealer] subject to examination under Section 17(b) of the [Exchange Act] that are requested by the representative of the Commission.” The Commission has made clear that it is of “overriding importance” that broker-dealers comply with the requests of regulatory authorities during investigations. *See In the Matter of Wedbush Securities, Inc.*, 48 S.E.C. 963, 971-72 (1988).

7. vFinance had in place certain procedures and policies with respect to document retention, but failed to develop reasonable systems to implement them. vFinance’s policies required Thompson to retain copies of all correspondence in his branch in correspondence files.

8. In his role as Chief Operating Officer, the COO/CCO was responsible for vFinance’s document retention practices.

9. vFinance had an unwritten policy prohibiting the use of non-vFinance email accounts for work purposes. vFinance adopted a policy in August 2003 requiring that instant messages be printed and saved in paper files. vFinance’s systems did not retain instant messages or emails in non-vFinance email accounts.

10. The COO/CCO prepared the vFinance instant message policy citing the July 2003 NASD Notice to Members entitled “Instant Messaging,” which said “[m]embers that permit instant messaging must use a platform that enables the member to monitor, archive, and retrieve message traffic.”

11. vFinance executives knew the firm was required to monitor and maintain customer correspondence in branch offices. On March 22, 2004, the chairman of vFinance, Inc. sent the COO/CCO and vFinance’s then-President an email with a link to SEC Staff Legal Bulletin No. 17. The bulletin said, “if firms permit communications with customers from employees’ home computers or personal computers not connected to the firm’s network, SRO rules require firms to employ systems to monitor those communications.” The bulletin specifically cited firms’ obligation “to maintain copies of incoming and outgoing correspondence” in branch offices under Section 17(a) of the Exchange Act and Rule 17a-4.

D. vFINANCE, AIDED AND ABETTED BY THE COO/CCO AND THOMPSON, FAILED TO RETAIN DOCUMENTS

12. Since at least 2003, Thompson used non-vFinance email accounts and instant messages to communicate with customers and for other business purposes. As previously described, vFinance policies required Thompson to retain in correspondence files copies of all work-related emails and instant messages, including paper copies of all instant messages. Nonetheless, Thompson deleted numerous work-related emails and instant messages from his

computer, and did not print out and retain the emails and messages in hard-copy correspondence files. Thompson also periodically deleted all documents from his computer by reformatting the hard drive and wiping it clean.

13. The COO/CCO relied on annual office inspections and branch manager questionnaires to monitor the firm's document retention practices in branch offices. The vFinance employee who visited Thompson's branch office sent notes and reports to the COO/CCO that discussed Thompson's document retention practices. The notes from his first visit to Thompson's office in December 2003 said Thompson had "no written correspondence," which was highly unusual because Thompson was engaged in extensive retail trading and market making activities while at vFinance. In 2003, 2004 and 2005, he reported to the COO/CCO and vFinance that Thompson was using an instant message program for business purposes and not retaining messages in paper files as required. He reported to the COO/CCO and vFinance again in 2005 that his review of Thompson's "incoming and outgoing correspondence, faxes and e-mails revealed very little correspondence with clients" (which was inexplicable given Thompson's extensive retail trading and market making activities).

14. The COO/CCO was separately on notice as early as March 2004 that Thompson was not complying with the firm's policy against using non-vFinance email for work purposes. In March 2004, he received a work-related email from Thompson's personal blast.net account. In August 2004, the COO/CCO received an email from Thompson's personal account discussing trading in the issuer's stock.

15. On September 1, 2005, vFinance's head trader, whom the COO/CCO directed to collect documents from Thompson in response to the staff's request, copied the COO/CCO on an email he sent to Thompson stating that "the firm definitely captures all emails, except the ones from a personal account like [your blast.net] account ... **you** are required to retain the ones from your personal account."

16. No one at vFinance ever reprimanded Thompson or told him to stop using personal email and instant message accounts to communicate with customers or to print and save instant messages.

E. vFINANCE, AIDED AND ABETTED BY THE COO/CCO AND THOMPSON, FAILED TO PRODUCE DOCUMENTS PROMPTLY

17. In mid-2005, the staff of the Commission was conducting an investigation into possible securities law violations involving a microcap oil and gas company (the "issuer"). On July 18, 2005, the Commission's staff sent a letter to the COO/CCO asking vFinance to preserve all documents relating to the issuer and to produce documents – including trading records and correspondence – regarding the issuer. Only an incomplete and tardy production of documents was made by vFinance in response to that July 18th request, and vFinance failed (through the COO/CCO) to address whether Thompson preserved and produced all documents relating to the issuer.

18. In August 2005, the Commission's staff asked vFinance (through the COO/CCO) for the contents of Thompson's computer hard drive and made the same request of Thompson's

legal counsel in September 2005. vFinance and the COO/CCO failed to take any action at that time to provide the Commission with Thompson's computer hard drive. Additionally, rather than producing and saving all materials relating to the issuer, Thompson deleted from his computer files and correspondence relating to the issuer and other companies for which Thompson's firm was a market maker. Furthermore, in or around November 2005, Thompson ran a special disk wiping program designed to eliminate all traces of the erased files on his hard drive. Thompson then loaded specially selected emails and messages that he had set aside back onto his computer before producing it to the Commission's staff on February 14, 2006, without telling the Commission staff about his deletions.

19. The COO/CCO was the person at vFinance responsible for responding to the staff's document requests on behalf of vFinance, first as Chief Compliance Officer and Chief Operating Officer, and then as President. The COO/CCO repeatedly told the staff that vFinance would not physically go to Thompson's vFinance branch office to look for documents because Thompson's employment status was that of an independent contractor rather than an employee. In fact, Thompson's independent contractor agreement required Thompson to give vFinance access to all business records in his office upon request.

20. In response to the staff's July 2005 document request, the COO/CCO sent the staff some records electronically stored at vFinance's headquarters office for some (but not all) of the accounts that traded in the issuer's stock, and told the staff that Thompson had no correspondence related to the issuer. vFinance produced a small number of additional documents in September and October 2005 in response to the staff's request, but the documents still did not include any of Thompson's customer correspondence. On November 18, 2005, the COO/CCO incorrectly certified that vFinance's document production was complete.

21. After the Commission issued a formal order of investigation relating to the issuer in May 2006, the staff issued subpoenas to Thompson and vFinance covering the same documents that had been requested in July 2005 and extending the relevant time period to the date of the subpoenas. Thompson produced no additional documents. When Thompson resigned from vFinance in August 2006, vFinance did not attempt to retrieve his vFinance documents.

22. vFinance ultimately produced additional documents, but not until December 2006, after the staff told vFinance that the staff had learned from other sources that there were at least three additional vFinance accounts that had traded in the issuer's securities during the relevant time period. In February 2007, nineteen months after the staff's first document request, vFinance produced account records for all accounts that had traded the issuer's stock. At the same time, vFinance also produced a small number of Thompson's instant messages that it claimed to have recently discovered – nineteen months after the staff's initial document request – and told the staff these were the only instant messages of Thompson's it had retained.

23. In March 2007, the COO/CCO finally searched Thompson's office for documents. The COO/CCO located additional responsive documents from Thompson's paper customer files, but could not find Thompson's emails and instant messages.

F. VIOLATIONS

24. As a result of the conduct described above, vFinance willfully violated Section 17(a) of the Exchange Act and Rules 17a-4(b)(4) and 17a-4(j) thereunder when it failed to retain for at least three years (the first two in an easily accessible place) Thompson's electronic communications relating to vFinance's business as such, and failed to furnish promptly to the staff upon request records that vFinance was required to maintain.

25. As a result of the conduct described above, Thompson willfully aided and abetted and caused vFinance's violations of Section 17(a) of the Exchange Act and Rules 17a-4(b)(4) and 17a-4(j) thereunder. Thompson knowingly provided substantial assistance to vFinance in furtherance of vFinance's violations by communicating with customers using accounts outside the vFinance network, only keeping copies of those communications on his computer, and periodically deleting all documents from his computer by reformatting and wiping it clean. Thompson delayed producing his hard drive for six months, and never provided any documents from his paper customer files to vFinance or the staff in response to the staff's requests.

IV.

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

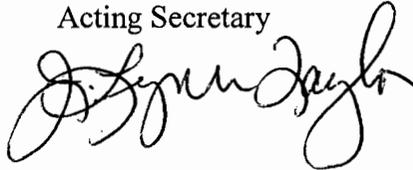
Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

- A. Respondent Thompson cease and desist from causing any violations and any future violations of Section 17(a) of the Exchange Act and Rules 17a-4(b)(4) and 17a-4(j) promulgated thereunder;
- B. Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Thompson be, and hereby is barred from association with any broker or dealer, with the right to reapply for association after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.
- C. 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.
- D. Respondent shall, within thirty (30) business days of the entry of this Order, pay a civil money penalty in the amount of \$30,000 to the United States Treasury. If

timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. 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 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 Steven Buchholz, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104.

By the Commission.

Florence E. Harmon
Acting Secretary

A handwritten signature in cursive script, appearing to read "J. Lynn Taylor".

By: J. Lynn Taylor
Assistant Secretary

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to 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. Traveller, age 40, is a resident of North Logan, Utah. From August 28, 2003 until February 28, 2005, Traveller was a member of the Board of Directors of 21st Century Inc. ("21st Century"). During the relevant period, Traveller provided consulting services that facilitated 21st Century's election to be regulated as a business development company. Traveller obtained a license as a CPA from the State of California in 1994. The license lapsed in 2003 after he failed to renew it.

2. 21st Century was, at all relevant times, a Nevada corporation with its principal place of business in Las Vegas, Nevada. As a business development company regulated under the Investment Company Act of 1940, 21st Century raised capital and made investments in various entities. At all relevant times, 21st Century's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the Over-the-Counter Bulletin Board. On November 1, 2005, 21st Century filed for protection under Chapter 11 of the U.S. Bankruptcy Code and was formally dissolved by the State of Nevada on July 13, 2007.

3. On April 10, 2008, the Commission filed a complaint against Traveller in SEC v. Compass Capital Group, Inc., et al., Civil Action No. 2:08-cv-00457-ECR-PAL (D. Nev.). On August 6, 2008, the U.S. District Court for the District of Nevada entered an order permanently enjoining Traveller, by consent, from future violations of Section 17(a) of the Securities Act of 1933; Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder and from aiding and abetting 21st Century's violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. Traveller also was ordered to pay a \$50,000 civil money penalty and was barred for five years from acting as an officer or director of a public company and from participating in an offering of penny stock.

4. The Commission's complaint alleged, among other things, that Traveller violated the antifraud provisions of the securities laws when he supervised the drafting of 21st Century's 2004 Form 1-E and offering circular and failed to ensure that proper disclosures were made concerning the precarious financial state of the company. In August 2004, Traveller drafted a memo describing 21st Century as a "house of cards." Traveller further noted that the company was in a "cash crisis" and that its financial statements did not clearly present its financial condition. The complaint also alleged that Traveller failed to disclose the terms of 21st

Century's financing arrangement with Compass Capital and that Compass Capital was acting as an underwriter for the company's 2004 offering. The complaint further alleged that Traveller aided and abetted 21st Century's reporting and record-keeping violations when he knew in August 2004 that the CEO's brothers had loaned money for operating capital to 21st Century and did nothing to ensure the disclosure of those loans. He also agreed to approve certain investments after they had been made, in violation of the company's internal policies, and prepared false Board minutes concerning the Board's determination of the fair values of the company's assets that were supplied to 21st Century's auditors in connection with their 2003 audit of 21st Century.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Traveller is suspended from appearing or practicing before the Commission as an accountant.

B. After five 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/she 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/she 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.



Florence E. Harmon
Acting Secretary

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.3., below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to 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. Dahl, age 65, is a resident of Plano, Texas. From June 2000 through April 2002, Dahl rendered accounting services to 21st Century Technologies, Inc. ("21st Century") on a contract basis. From April 2002 through November 2004, Dahl served as 21st Century's Chief Financial Officer. He signed and certified 21st Century's annual report on Form 10-K for the year 2003 and its quarterly reports on Form 10-Q for the first and second quarters of 2004 as the company's Chief Financial Officer. At all relevant times, Dahl has also been self-employed as a certified public accountant. Dahl's CPA license was granted by the State of Texas.

2. 21st Century was, at all relevant times, a Nevada corporation with its principal place of business in Las Vegas, Nevada. As a business development company regulated under the Investment Company Act of 1940, 21st Century raised capital and made investments in various entities. At all relevant times, 21st Century's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the Over-the-Counter Bulletin Board. On November 1, 2005, 21st Century filed for protection under Chapter 11 of the U.S. Bankruptcy Code and was formally dissolved by the State of Nevada on July 13, 2007.

3. On April 10, 2008, the Commission filed a complaint against Dahl in SEC v. Compass Capital Group, Inc., et al., Civil Action No. 2:08-cv-00457-ECR-PAL (D. Nev.). On August 6, 2008, the U.S. District Court for the District of Nevada entered an order permanently enjoining Dahl, by consent, from future violations of Rule 13a-14 promulgated under the Exchange Act and from aiding and abetting violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. Dahl was also ordered to pay a \$5,000 civil money penalty and barred from participating in an offering of penny stock.

4. The Commission's complaint alleged, among other things, that Dahl aided and abetted 21st Century's violations of Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 when he prepared 21st Century's false and misleading Form 10-K for 2003 and Forms 10-Q for the first and second quarters of 2004. The complaint alleged that Dahl also violated Exchange Act Rule 13a-14 when he certified that those filings were complete and accurate, even though they contained material omissions concerning certain of 21st Century's reported investments. The complaint further alleged, among other things, that Dahl knew at the time he certified certain filings that (i) a supposed "commercial loan" was actually a loan to prevent a foreclosure

on a personal residence; and (ii) the recipient of another loan was misidentified in 21st Century's filings with the Commission in order to avoid potential stigma from association with the entity that received the loan, which was involved in pornography.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Dahl is suspended from appearing or practicing before the Commission as an accountant.

B. After 12 months 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.



Florence E. Harmon
Acting 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 August 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.

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

KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

19 Documents

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

July 31, 2008

IN THE MATTER OF
GLOBAL DIAMOND EXCHANGE, INC.

**ORDER OF SUSPENSION
OF TRADING**

File No. 500-1

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of Global Diamond Exchange, Inc. ("Global Diamond") because there is a lack of current and accurate information concerning its securities. Questions have arisen concerning the company's current business operations, control of the company, and the company's reliance on Rule 504 of Regulation D of the Securities Act of 1933 in conducting a distribution of its securities. Global Diamond, a company that has made no public filings with the Commission, is quoted on the Pink Sheets under the ticker symbol GBDX.

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. EDT, July 31, 2008, through 11:59 p.m. EDT, on August 13, 2008.

By the Commission.



Florence E. Harmon
Acting Secretary

*Commissioners Aguilar and
Paredes not participating*

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-58324; File Nos. SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01)

August 7, 2008

Self-Regulatory Organizations; Boston Stock Exchange, Incorporated; Boston Stock Exchange Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Amending the Certificate of Incorporation of Boston Stock Exchange, Incorporated; Notice of Filing of Amendment No. 1 to a Proposed Rule Change Relating to the Acquisition of the Boston Stock Exchange, Incorporated by The NASDAQ OMX Group, Inc., and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1; Notice of Filing of Amendment No. 1 to a Proposed Rule Change Relating to a Proposal to Transfer Boston Stock Exchange, Incorporated's Ownership Interest in Boston Options Exchange Group, LLC and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1; Notice of Filing of Amendment No. 1 to a Proposed Rule Change by the Boston Stock Exchange Clearing Corporation Relating to Amendment of its Articles of Organization and By-Laws in Connection with the Planned Acquisition by The NASDAQ OMX Group, Inc., and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

I. Introduction

On April 21, 2008, the Boston Stock Exchange, Inc. ("BSE") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder² to: (1) amend and restate the BSE Certificate in its entirety to reflect the planned acquisition of BSE by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"), the parent corporation of The NASDAQ Stock Market LLC ("Nasdaq"); (2) replace the BSE Constitution in its entirety with proposed new BSE By-Laws; (3) adopt a written operating agreement for its subsidiary, Boston Options Exchange Regulation, LLC ("BOXR"), and amend the BOXR By-Laws; (4) obtain approval for a change of control of BSX Group, LLC ("BSX"), which would operate, upon Commission approval of certain proposed rule changes, BSE's equities trading facility, and make related

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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amendments to the Operating Agreement of BSX; (5) adopt two rules; and (6) obtain Commission approval for the affiliation between BSE and certain broker-dealer subsidiaries of NASDAQ OMX (collectively, the "BSE Governance Proposal"). The BSE Governance Proposal was published for comment in the Federal Register on May 8, 2008.³ The Commission received no comments on the BSE Governance Proposal. On July 28, 2008, BSE filed Amendment No. 1 to the BSE Governance Proposal.⁴ This order provides notice of and requests comment on Amendment No. 1 to the BSE Governance Proposal and approves the BSE Governance Proposal, as modified by Amendment No. 1, on an accelerated basis.

On April 23, 2008, BSE filed with the Commission a proposed rule change ("BOX Transfer Proposal") to transfer its ownership interest in the Boston Options Exchange Group, LLC ("BOX"), the operator of BSE's Boston Options Exchange facility ("BOX Market"), to MX US 2, Inc. ("MX US"), a wholly-owned U.S. subsidiary of the Montréal Exchange Inc. ("MX"), and to amend the BOX LLC Agreement. The BOX Transfer Proposal was published for comment in the Federal Register on May 8, 2008.⁵ The Commission received no comments on the BOX Transfer Proposal. On July 28, 2008, BSE filed Amendment No. 1 to the BOX Transfer Proposal.⁶ This order provides notice of and requests comment on Amendment No. 1 to

³ See Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (SR-BSE-2008-23) ("BSE Governance Proposal Notice").

⁴ In Amendment No. 1 to the BSE Governance Proposal, BSE filed NASDAQ OMX's Certificate and By-Laws, as proposed to be amended in connection with the acquisition of BSE by NASDAQ OMX, and proposed to make a non-substantive correction in the purpose section of the original filing. See *infra* note 104 and accompanying text.

⁵ See Securities Exchange Act Release No. 57762 (May 1, 2008), 73 FR 26170 (SR-BSE-2008-25) ("BOX Transfer Proposal Notice").

⁶ In Amendment No. 1 to the BOX Transfer Proposal, BSE proposes to clarify Section 8.4(g) of the BOX LLC Agreement.

the BOX Transfer Proposal and approves the BOX Transfer Proposal, as modified by Amendment No. 1, on an accelerated basis.

On April 23, 2008, BSE filed with the Commission a proposed rule change (“BSE Interim Certificate Proposal”) to amend the BSE Certificate to permit BSE to make distributions to BSE membership owners in connection with the transfer of its ownership interest in BOX. The BSE Interim Certificate Proposal was published for comment in the Federal Register on May 7, 2008.⁷ The Commission received no comment letters regarding the BSE Interim Certificate Proposal. On July 28, 2008, BSE filed Amendment No. 1 to the BSE Interim Certificate Proposal.⁸ This order approves the BSE Interim Certificate Proposal as modified by Amendment No. 1.

On April 24, 2008, the Boston Stock Exchange Clearing Corporation (“BSECC”) filed with the Commission a proposed rule change (“BSECC Governance Proposal”). The BSECC Governance Proposal was published for comment in the Federal Register on May 13, 2008.⁹ The Commission received no comments on the BSECC Governance Proposal. On July 28, 2008, BSECC filed Amendment No. 1 to the BSECC Governance Proposal.¹⁰ This order provides notice of and requests comment on Amendment No. 1 to the BSECC Governance Proposal and

⁷ See Securities Exchange Act Release No. 57760 (May 1, 2008), 73 FR 25809 (SR-BSE-2008-02) (“BSE Interim Certificate Proposal Notice”).

⁸ In Amendment No. 1 to the BSE Interim Certificate Proposal, BSE proposes to correct typographical errors in the proposed amendments to the current BSE Certificate. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for comment.

⁹ See Securities Exchange Act Release No. 57782 (May 6, 2008), 73 FR 27583 (SR-BSECC-2008-01) (“BSECC Governance Proposal Notice”).

¹⁰ In Amendment No. 1 to the BSECC Governance Proposal, BSECC filed NASDAQ OMX’s Certificate and NASDAQ OMX’s By-Laws, as proposed to be amended in connection with the acquisition of BSE by NASDAQ OMX. See *infra* note 258 and accompanying text.

approves the BSECC Governance Proposal, as modified by Amendment No. 1, on an accelerated basis.

II. Discussion and Commission Findings

After careful review, the Commission finds that the BSE Interim Certificate Proposal, the BSE Governance Proposal, and the BOX Ownership Transfer Proposal are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹¹ Specifically, the Commission finds that these proposed rule changes are consistent with Section 6(b)(5) of the Act,¹² which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. The Commission also finds that these proposed rule changes are consistent with Section 6(b)(1) of the Act,¹³ which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange; Section 6(b)(3) of the Act,¹⁴ which requires, in part, that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of

¹¹ In approving these proposed rule changes, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(5).

¹³ 15 U.S.C. 78f(b)(1).

¹⁴ 15 U.S.C. 78f(b)(3).

its affairs; and Section 6(b)(7) of the Act,¹⁵ which requires, in part, that the rules of an exchange provide a fair procedure for disciplining members.

The Commission also finds that the BSECC Governance Proposal is consistent with Section 17A(b)(3)(C) of the Act,¹⁶ which requires, in part, that the rules of a registered clearing agency assure the fair representation of its shareholders (or members) and participants in the selection of its board of directors and administration of its affairs.

The discussion below does not review every detail of each of the proposed rule changes, but focuses on the most significant rules and policy issues considered by the Commission in reviewing the proposals.

NASDAQ OMX, the parent corporation of Nasdaq, and BSE have entered into an agreement pursuant to which NASDAQ OMX would acquire all of the outstanding membership interests in BSE (“BSE Acquisition”).¹⁷ Following the BSE Acquisition, BSE would be a wholly-owned subsidiary of NASDAQ OMX. The BSE Acquisition would have the effect of: (1) converting BSE, a registered national securities exchange, from a Delaware, non-stock corporation into a Delaware stock corporation; and (2) demutualizing BSE by separating equity ownership in BSE from trading privileges on BSE. BSE members would receive cash as consideration for their ownership interests in BSE and would not retain any ownership interest in BSE or its affiliates. NASDAQ OMX plans that BSE would operate as a separate self-regulatory organization (“SRO”) with rules, memberships, and listings that are separate and distinct from those of Nasdaq.¹⁸

¹⁵ 15 U.S.C. 78f(b)(7).

¹⁶ 15 U.S.C. 78q-1(b)(3)(C).

¹⁷ See BSE Governance Proposal Notice, *supra* note 3, 73 FR 26159.

¹⁸ See Securities Exchange Act Release No. 57761 (May 1, 2008), 73 FR 26182, at 26183

BSE has four affiliates: BSX, BOX, BOXR, and BSECC. BSE owns 53.21% of BSX, which operated the Boston Equities Exchange (“BeX”) until BeX ceased operations in September 2007.¹⁹ The remaining 46.79% of BSX is owned by Citigroup Financial Strategies Inc., Credit Suisse First Boston Next Fund Inc., LB 1 Group, Inc., Fidelity Global Brokerage Group, Inc., and Merrill Lynch L.P. Holdings Inc. Following the BSE Acquisition, NASDAQ OMX indirectly would own, through its ownership of BSE, the 53.21% of BSX that BSE would continue to own. In addition, NASDAQ OMX would acquire the 46.79% interest in BSX that is not presently owned by BSE. Consequently, BSX would become a wholly-owned subsidiary of NASDAQ OMX.²⁰

NASDAQ OMX would not acquire BSE’s interest in BOX, the transfer of which to a third party is a condition to the closing of the BSE Acquisition.²¹ BSE proposes to transfer its 21.87% ownership interest in BOX to MX US, a wholly-owned subsidiary of MX.²² BSE intends to distribute the proceeds from the BOX transfer to its member owners by redeeming a portion of each BSE member ownership for a pro rata share of the net proceeds.²³ Although BSE no longer would hold an ownership interest in BOX, as discussed in greater detail below,²⁴ the BOX Market would remain a facility of BSE and, therefore, BSE would continue to have self-regulatory obligations with respect to the BOX Market.²⁵

(SR-NASDAQ-2008-035) (“NASDAQ OMX By-Laws Proposal Notice”).

¹⁹ See infra note 222.

²⁰ See BSE Governance Proposal Notice, supra note 3, 73 FR at 26159. See also infra notes 222-244 and accompanying text.

²¹ See BSE Interim Certificate Proposal Notice, supra note 7, 73 FR at 25810.

²² See BOX Transfer Proposal Notice, supra note 5, 73 FR at 26170.

²³ See BSE Interim Certificate Proposal Notice, supra note 7, 73 FR at 25810.

²⁴ See infra notes 124-136 and accompanying text.

²⁵ 15 U.S.C. 78c(a)(2). See also BOX Transfer Proposal Notice, supra note 5, 73 FR at

Finally, BOXR and BSECC are wholly-owned subsidiaries of BSE and, therefore, following the BSE Acquisition would become wholly-owned, indirect subsidiaries of NASDAQ OMX.²⁶

Following the BSE Acquisition, Nasdaq OMX would own five SROs: Nasdaq, BSE, BSECC, Philadelphia Stock Exchange, Inc. (“Phlx”) and Stock Clearing Corporation of Philadelphia (“SCCP”).²⁷ As discussed below, the Commission believes that the ownership of BSE and BSECC by the same public holding company that owns Nasdaq, Phlx, and SCCP would not impose any burden on competition not necessary or appropriate in furtherance of the Act’s purposes.²⁸ The Commission previously has approved proposals in which a holding company owns multiple SROs.²⁹ However, the BSE Acquisition is the first instance in which the Commission is approving the ownership by one holding company of three exchanges and two clearing agencies.³⁰ The Commission’s experience to date with the issues raised by the

26171.

²⁶ See BSECC Governance Proposal Notice, supra note 9, 73 FR at 27583.

²⁷ See Securities Exchange Act Release No. 57703 (April 23, 2008), 73 FR 23293 (April 29, 2008) (SR-Phlx-2008-31) (notice of proposed rule change related to NASDAQ OMX’s acquisition of Phlx (“Phlx Acquisition”)). See also Securities Exchange Act Release No. 57818 (May 14, 2008), 73 FR 29171 (May 20, 2008) (SR-SCCP-2008-01) (notice of proposed rule change to amend and restate the Articles of Incorporation of the Stock Clearing Corporation of Philadelphia (“SCCP”) in connection with the Phlx Acquisition). See also Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (order approving SR-Phlx-2008-31) and 58180 (July 17, 2008), 73 FR 42890 (July 23, 2008) (order approving SR-SCCP-2008-01).

²⁸ 15 U.S.C. 78f(b)(8) and 15 U.S.C. 78q-1(b)(3)(I).

²⁹ See, e.g., Securities Exchange Act Release Nos. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (approving proposed rule change relating to the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); 58179, supra note 27.

³⁰ The Depository Trust and Clearing Corporation (“DTCC”) is a holding company that at one point owned five registered clearing agencies: the National Securities Clearing Corporation (“NSCC”), the Depository Trust Company (“DTC”), the Government

ownership by a holding company of one or more SROs has not presented any concerns that have not been addressed, for example, by Commission-approved measures at the holding company level that are designed to protect the independence of each SRO.³¹

The Commission believes that the current market for cash equity trading venues is highly competitive. Existing exchanges face significant competition from other exchanges and from non-exchange entities such as alternative trading systems that trade the same or similar financial instruments.³² New entrants to the market do not face significant barriers to entry. In this regard, the Chicago Board Options Exchange, Incorporated and the International Securities Exchange, LLC a few years ago commenced trading of cash equity securities.³³ In addition,

Securities Clearing Corporation (“GSCC”), the MBS Clearing Corporation (“MBSCC”), and the Emerging Markets Clearing Corporation (“EMCC”). See Securities Exchange Act Release Nos. 41786 (August 24, 1999), 64 FR 47882 (September 1, 1999) (SR-DTC-99-17); 41800 (August 27, 1999), 64 FR 48694 (September 7, 1999) (SR-NSCC-99-10); 44987 (October 25, 2001), 66 FR 55218 (November 1, 2001) (SR-EMCC-2001-03); 44988 (October 25, 2001), 66 FR 55222 (November 1, 2001) (SR-MBSCC-2001-01); and 44989 (October 25, 2001), 66 FR 55220 (November 1, 2001) (SR-GSCC-2001-11). These clearing agencies provided clearance and settlement services for different instruments or provided different clearance and settlement services for the same instruments. The GSCC and the MBSCC have since merged to form the Fixed Income Clearing Corporation (“FICC”). See Securities Exchange Act Release No. 47015 (December 17, 2002), 67 FR 78531 (December 24, 2002) (SR-GSCC-2002-09 and SR-MBSCC-2002-01). The EMCC no longer operates as a clearing agency.

³¹ See *infra* notes 38-47, 258-261 and accompanying text for a discussion of proposals by BSE and BSECC to adopt NASDAQ OMX’s By-Laws as part of their rules. See also Securities Exchange Act Release No. 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (order approving SR-NASDAQ-2008-035) (“NASDAQ OMX By-Laws Approval Order”).

³² See, e.g., Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144 (July 11, 2008), in which the Commission recognized that “[n]ational securities exchanges registered under Section 6(a) of the Exchange Act face increased competitive pressures from entities that trade the same or similar financial instruments”

³³ See Securities Exchange Act Release Nos. 55389 (March 2, 2007), 72 FR 10575 (March 8, 2007) (order approving the establishment of CBOE Stock Exchange, LLC); 55392 (March 2, 2007), 72 FR 10572 (March 8, 2007) (order approving trading rules for non-option securities trading on CBOE Stock Exchange, LLC); 54528 (September 28,

other entities have recently applied for exchange registration, which provides evidence that they have determined there are benefits in starting a new exchange to compete in the marketplace.³⁴ In addition, since BeX ceased operating in September 2007, BSE has zero market share in cash equity trading, and prior to September 2007, BSE had a very small market share. Therefore, the BSE Acquisition would not change the number of active exchanges or the distribution of market share across exchanges. Accordingly, the Commission finds that the BSE's proposed rule changes are consistent with Section 6(b)(8), which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

With regard to NASDAQ OMX's ownership of two registered clearing agencies following the BSE Acquisition, the Commission does not believe the acquisition of BSECC and SCCP by NASDAQ OMX would reduce competition with respect to the clearance and settlement of securities transactions. The Commission notes that NSCC currently provides clearance and settlement services and a central counterparty guarantee for virtually all trades on the New York Stock Exchange LLC, Nasdaq, the American Stock Exchange LLC and for all regional exchanges, electronic communications networks and alternative trading systems in the U.S.³⁵ In September 2007, BSECC ceased processing trades and currently provides only limited account maintenance services to its participants. SCCP continues to forward trades to NSCC for

2006), 71 FR 58650 (October 4, 2006) (order approving rules governing ISE's electronic trading system for equities).

³⁴ See Securities Exchange Act Release No. 57322 (February 13, 2008), 73 FR 9370 (February 20, 2008) (File No. 10-182) (notice of application and Amendment No. 1 thereto by BATS Exchange, Inc. for registration as a national securities exchange).

³⁵ See Annual Report for the Depository Trust and Clearing Corporation for 2007, page 14. NSCC is a subsidiary of the DTCC, as are the FICC and the DTC.

clearance and settlement.³⁶ The Commission will continue to evaluate the competitive environment should the operations of either BSECC or SCCP expand, taking into account the maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents.³⁷ For these reasons, the Commission finds that the BSECC's proposed rule change is consistent with Section 17A(b)(3)(I), which requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

Finally, the Commission will continue to monitor holding companies' ownership of multiple SROs for compliance with the Act, the rules and regulations thereunder, as well as the SRO's own rules.

A. BSE

1. Relationship between NASDAQ OMX and BSE; Jurisdiction over NASDAQ OMX

After the BSE Acquisition, BSE would become a subsidiary of NASDAQ OMX.

Although NASDAQ OMX is not itself an SRO, its activities with respect to the operation of BSE must be consistent with, and must not interfere with, the self-regulatory obligations of BSE. NASDAQ OMX's By-Laws make applicable to all of NASDAQ OMX's SRO subsidiaries, including BSE (after the BSE Acquisition), certain provisions of NASDAQ OMX's Certificate and NASDAQ OMX's By-Laws that are designed to maintain the independence of each of its SRO subsidiaries' self-regulatory function, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary

³⁶ In recent years, both BSECC and SCCP have forwarded all trades to NSCC for clearance and settlement.

³⁷ See 15 U.S.C. 78q-1(a)(2)(A).

and the Commission to fulfill their regulatory and oversight obligations under the Act.³⁸

The By-Laws of NASDAQ OMX specify that NASDAQ OMX and its officers, directors, employees, and agents irrevocably submit to the jurisdiction of the United States federal courts, the Commission, and each self-regulatory subsidiary of NASDAQ OMX for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of any self-regulatory subsidiary.³⁹ Further, NASDAQ OMX agreed to provide the Commission with access to its books and records.⁴⁰ NASDAQ OMX also agreed to keep confidential non-public information relating to the self-regulatory function of BSE and not to use such information for any non-regulatory purpose.⁴¹ In addition, the NASDAQ OMX Board, as well as its officers, employees, and agents are required to give due regard to the preservation of the independence of BSE's self-

³⁸ Provisions of NASDAQ OMX's Certificate and By-Laws are rules of BSE and BSECC because they are stated policies, practices, or interpretations of BSE and BSECC, pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder. Accordingly, BSE and BSECC filed them with the Commission. See Amendment No. 1 to the BSE Governance Proposal, supra note 4, and Amendment No. 1 to the BSECC Governance Proposal, supra note 10 and infra note 258 and accompanying text.

³⁹ See proposed Section 12.3, NASDAQ OMX By-Laws.

⁴⁰ See proposed Section 12.1(c), NASDAQ OMX By-Laws. To the extent that they relate to the activities of BSE, all books, records, premises, officers, directors, and employees of NASDAQ OMX would be deemed to be those of the BSE. See id.

⁴¹ See proposed Section 12.1(b), NASDAQ OMX By-Laws. This requirement to keep confidential non-public information relating to the self-regulatory function is designed to prevent attempts to limit the Commission's ability to access and examine such information or limit the ability of directors, officers, or employees of NASDAQ OMX from disclosing such information to the Commission. See id. Other holding companies with SRO subsidiaries have undertaken similar commitments. See, e.g., Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979, at 71983 (December 19, 2007) (SR-ISE-2007-101) (order approving the acquisition of International Securities Exchange, LLC's parent, International Securities Exchange Holdings, Inc., by Eurex Frankfurt AG).

regulatory function.⁴² Similarly, the NASDAQ OMX Board, when evaluating any issue, would be required to take into account the potential impact on the integrity, continuity, and stability of its SRO subsidiaries.⁴³ Finally, the NASDAQ OMX By-Laws require that any changes to the NASDAQ OMX Certificate and By-Laws be submitted to the Board of Directors of each of its SRO subsidiaries, including BSE, and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.

The Commission believes that the NASDAQ OMX By-Laws, as amended to accommodate the BSE Acquisition, are designed to facilitate the BSE's ability to fulfill its self-regulatory obligations and are, therefore, consistent with the Act. In particular, the Commission believes these changes are consistent with Section 6(b)(1) of the Act,⁴⁴ which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

Under Section 20(a) of the Act,⁴⁵ any person with a controlling interest in NASDAQ OMX would be jointly and severally liable with and to the same extent that NASDAQ OMX is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In

⁴² See Section 12.1(a), NASDAQ OMX By-Laws.

⁴³ See proposed Section 12.7, NASDAQ OMX By-Laws.

⁴⁴ 15 U.S.C. 78f(b)(1).

⁴⁵ 15 U.S.C. 78t(a).

addition, Section 20(e) of the Act⁴⁶ creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act⁴⁷ authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

2. BSE Certificate

In the BSE Governance Proposal, BSE proposes to amend and restate the BSE Certificate in its entirety. The restated BSE Certificate would provide for the issuance of 1,000 shares of common stock (“BSE Common Stock”), all of which would be held by NASDAQ OMX.⁴⁸ The restated BSE Certificate would further provide that NASDAQ OMX may not transfer or assign any shares of BSE Common Stock, in whole or in part, to any entity, unless such transfer or assignment is filed with and approved by the Commission under Section 19 of the Act and the rules promulgated thereunder.⁴⁹ In addition, the restated BSE Certificate would contain provisions relating to the BSE board of directors (“BSE Board”) including that the total number of directors (“BSE Directors”) constituting the BSE Board would be fixed from time to time by NASDAQ OMX, as the sole stockholder, and would be elected by NASDAQ OMX to hold office until their respective successors have been duly elected and qualified.⁵⁰ Of particular importance are the BSE Board composition requirements in the BSE By-Laws relating to

⁴⁶ 15 U.S.C. 78t(e).

⁴⁷ 15 U.S.C. 78u-3.

⁴⁸ See Article Fourth, restated BSE Certificate.

⁴⁹ Id.

⁵⁰ See Article Fifth, restated BSE Certificate.

independence and fair representation of members.⁵¹ Finally, the restated BSE Certificate would specifically provide that BSE's business would include actions that support its regulatory responsibilities under the Act.⁵²

The Commission finds that the BSE Certificate, as proposed to be amended and restated, is consistent with the Act, and, in particular, with Sections 6(b)(1) and 6(b)(3) of the Act. The Commission believes that the restated BSE Certificate is designed to allow BSE to exercise those powers necessary to carry out the purposes of the Act and ensure compliance by its members with the Act and BSE rules. The Commission further believes that the restriction on the transfer or assignment of any shares of BSE Common Stock without Commission approval would minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, BSE, or BOXR to carry out their regulatory responsibilities under the Act.

3. Proposed New BSE By-Laws

In the BSE Governance Proposal, the BSE proposes to replace its Constitution with new BSE By-Laws. The new BSE By-Laws reflect NASDAQ OMX's expectation that BSE would be operated with governance, regulatory, and market structures similar to those of Nasdaq. Key provisions of these new BSE By-Laws are discussed below.

The property, business, and affairs of BSE would be managed under the direction of the BSE Board.⁵³ The exact number of BSE Directors would be determined by NASDAQ OMX, as the sole stockholder, but in no event would the BSE Board have fewer than ten directors.⁵⁴

⁵¹ See infra notes 53-84 and accompanying text.

⁵² See Article Third, restated BSE Certificate.

⁵³ See Article IV, BSE By-Laws.

⁵⁴ See Section 4.2, BSE By-Laws. In addition, no decrease in the number of BSE Directors would shorten the term of any incumbent BSE Director. See Article Fifth, restated BSE Certificate.

Moreover, the number of Non-Industry Directors,⁵⁵ including at least three Public Directors⁵⁶ and at least one BSE Director representative of issuers and investors,⁵⁷ would have to equal or exceed the sum of the number of Industry Directors⁵⁸ and Member Representative Directors.⁵⁹ Further, at least 20% of the BSE Directors would have to be Member

⁵⁵ “Non-Industry Director” is a BSE Director (excluding Staff Directors) who is: (i) a Public Director; (ii) an officer or employee of an issuer of securities listed on BSE; or (iii) any other individual who would not be an Industry Director. See Article I(bb), BSE By-Laws.

⁵⁶ “Public Director” is a BSE Director who has no material business relationship with a broker or a dealer, BSE or its affiliates, or FINRA. See Article I(gg), BSE By-Laws.

⁵⁷ See Section 4.3(a), BSE By-Laws. The BSE Director representative of issuers and investors would be nominated by the Nominating and Governance Committee and elected by NASDAQ OMX as the sole stockholder. See Sections 4.4(a) and 4.14(b), BSE By-Laws.

⁵⁸ “Industry Director” is a person who: (i) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than 10% of the equity of a broker or dealer, and the broker or dealer accounts for more than 5% of the gross revenues received by the consolidated entity; (iii) owns more than 5% of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed 10% of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20% or more of the professional revenues received by the Industry Director or 20% or more of the gross revenues received by the Industry Director’s firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50% or more of the voting stock of a broker or dealer, and such services relate to the director’s, officer’s, or employee’s professional capacity and constitute 20% or more of the professional revenues received by the Industry Director or 20% or more of the gross revenues received by the Industry Director’s firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to BSE or any affiliate thereof or to FINRA or has had any such relationship or provided any such services at any time within the prior three years. See Article I(t), BSE By-Laws.

⁵⁹ See Section 4.3(a), BSE By-Laws. “Member Representative Director” is a BSE Director who has been elected by NASDAQ OMX as the sole stockholder after having been nominated by the Member Nominating Committee or voted upon by BSE members pursuant to the BSE By-Laws (or elected by the stockholders without such nomination or voting in the case of the initial Member Representative Directors elected pursuant to Section 4.3(b) of the BSE By-Laws). See Article I(x), BSE By-Laws.

Representative Directors and, as is currently the case, one Industry Director would have to be selected as a representative of a firm or organization that is registered with BSE for the purposes of participating in options trading on the BOX Market (“BOX Participant Director”).⁶⁰ A BSE Director could not be subject to a statutory disqualification.⁶¹ The new BSE By-Laws also permit up to two officers of BSE, who would otherwise be considered Industry Directors, to be designated as Staff Directors,⁶² and thereby be excluded from the definition of Industry Director.⁶³

The initial BSE Board would be selected by NASDAQ OMX, as the sole stockholder, immediately following the BSE Acquisition. NASDAQ OMX would hold a special meeting (or sign a consent in lieu thereof) for the purpose of electing the BSE Board. The initial BSE Board would satisfy the compositional requirements in the BSE By-Laws.⁶⁴ Specifically, the initial BSE Board would consist of at least three Public Directors, one or two Staff Directors, at least two Member Representative Directors,⁶⁵ an Industry Director representing BOX Participants,⁶⁶ at

⁶⁰ See Section 4.4, BSE By-Laws, and Section 14, BOXR By-Laws.

⁶¹ See Section 4.3(a), BSE By-Laws.

⁶² “Staff Director” is a BSE Director, selected at the sole discretion of the BSE Board, who is an officer of BSE. See Article I(g), BSE By-Laws.

⁶³ The exclusion of Staff Directors from the definition of Industry Director is consistent with provisions previously approved by the Commission. See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving application of Nasdaq for registration as a national securities exchange) (“Nasdaq Exchange Approval Order”). See also Securities Exchange Act Release No. 44280 (May 8, 2001), 66 FR 26892 (May 15, 2001) (order approving amendment to the National Association of Securities Dealers (“NASD”) By-Laws to allow for the treatment of Staff Governors as “neutral” for purposes of Industry/Non-Industry balancing on the NASD Board of Governors).

⁶⁴ See Section 4.3(b), BSE By-Laws.

⁶⁵ The initial Member Representative Directors would be officers, directors, or employees of BSE members. See BSE Governance Proposal Notice, *supra* note 3, at 73 FR 26162.

⁶⁶ “BOX Participant” is a firm or organization that is registered with BOX for purposes of

least one Non-Industry Director representative of issuers and investors, and such additional Industry and Non-Industry Directors as NASDAQ OMX, as the sole stockholder, deems appropriate, consistent with the compositional requirements of the BSE By-Laws.⁶⁷ As soon as practicable after election of the initial BSE Board, BSE would hold its annual meeting for the purpose of electing directors in accordance with the procedures set forth in the BSE By-Laws.⁶⁸ For subsequent boards, BSE Directors, other than the Member Representative Directors and the BOX Participant Director,⁶⁹ would be nominated by a Nominating Committee appointed by the BSE Board⁷⁰ and then elected by NASDAQ OMX as sole stockholder.⁷¹

The BSE Board also would appoint a Member Nominating Committee composed of no fewer than three and no more than six members.⁷² All members of the Member Nominating Committee would be associated persons of a current BSE member. The BSE Board would

participating in options trading on the BOX Market as an order flow provider or market maker. See Section 1.1, 6th BOX LLC Agreement. See also BOX Rules, Chapter II.

⁶⁷ See Section 4.3(b), BSE By-Laws. See also BSE Governance Proposal Notice, supra note 3, 73 FR at 26162.

⁶⁸ Id. Specifically, in accordance with Section 14.4(b) of the BSE By-Laws, the initial BSE Board selected by NASDAQ OMX would appoint a Nominating Committee and Member Nominating Committee, and such committees would nominate candidates for election pursuant to the procedures set forth in Section 4.4 of the BSE By-Laws, which process is described below. Telephone conversation between John Yetter, Vice President and Deputy General Counsel, Nasdaq, and Nancy Burke-Sanow, Assistant Director, and Jennifer Dodd, Special Counsel, Division of Trading and Markets, Commission, on June 11, 2008. In Amendment No. 1 to the BSE Governance Proposal, BSE states that the initial BSE Board will populate the Committees of the BSE Board and BSE's standing committees in accordance with the compositional requirements of Sections 4.13 and 4.14 of the BSE By-Laws. See Amendment No. 1 to the BSE Governance Proposal, supra note 4. The Commission notes that this would include the initial Nominating Committee and Member Nominating Committee. See Section 4.14(b), BSE By-Laws.

⁶⁹ See infra notes 207-216 and accompanying text for a description of the nomination and election process for the BOX Participant Director who would serve on the BSE Board.

⁷⁰ See Section 4.14(b), BSE By-Laws.

⁷¹ See Section 4.4(a), BSE By-Laws.

⁷² See Section 4.14, BSE By-Laws.

appoint such individuals after appropriate consultation with representatives of BSE members.

The Member Nominating Committee would nominate candidates for the Member Representative Director positions to be filled. The candidates nominated by the Member Nominating Committee would be included on a formal list of candidates ("List of Candidates").

BSE members may nominate additional candidates for inclusion on the List of Candidates by submitting, within the prescribed timeframe that is based on the preceding year's voting date ("Voting Date"),⁷³ a timely written petition executed by the authorized representatives of 10% or more of all BSE members. If there is only one candidate for each

⁷³ The Voting Date is a date selected by the BSE Board for BSE members to vote with respect to Member Representative Directors in the event there is more than one candidate for a Member Representative Director position ("Contested Vote"). As described below, the BSE Board would select a Voting Date each year. However, a vote would be conducted on the Voting Date only in the event of Contested Vote. See BSE Governance Proposal Notice, supra note 3, 73 FR at 26161, n.11.

In Amendment No. 1 to the BSE Governance Proposal, BSE states that: "In order to make the intent of this definition clearer, immediately following the closing of the [BSE Acquisition], [BSE] will propose to the newly constituted Board of the Exchange an amendment to the definition to read as follows: "'Voting Date' means the date selected by the Board on an annual basis, on which [BSE members] may vote with respect to Member Representative Directors in the event of a Contested Vote." Following approval by the [BSE] Board, [BSE] will immediately file the amendment as a proposed rule change for approval by the Commission. This clarifying change could not be included in this filing because Article XX of [BSE's] current Constitution, which is being replaced by the proposed [BSE] By-Laws, provides that [BSE's] members must approve amendments to the [BSE] Constitution. The [BSE] members voted, on December 4, 2007, to approve the [BSE] By-Laws as submitted in this filing and it would have been impracticable and unduly expensive to seek a second member vote for approval of this clarifying change. Following adoption of the new By-Laws, the [BSE] Board will have authority to approve By-Law amendments." See Amendment No. 1 to the BSE Governance Proposal, supra note 4.

Also, in the case of the first annual meeting held pursuant to the new BSE By-Laws, a nomination for the Member Representative Director positions would be considered timely if delivered not earlier than the close of business on the later of the 120th day prior to the first Voting Date and not later than the close of business on the 90th day prior to the first Voting Date, or the 10th day following the day on which public announcement of such Voting Date is first made. See BSE Governance Proposal Notice, supra note 3, 73 FR at 26161, n.12. See also Section 4.4(d), BSE By-Laws.

Member Representative Director seat by the date on which a BSE member may no longer submit a timely nomination, the Member Representative Directors would be elected by NASDAQ OMX directly from the List of Candidates nominated by the Member Nominating Committee. If the number of candidates on the List of Candidates exceeds the number of Member Representative Director positions to be filled, there would be a Contested Vote,⁷⁴ in which case each BSE member would have the right to cast one vote for each Member Representative Director position to be filled.⁷⁵ The persons on the List of Candidates who receive the most votes would be submitted to NASDAQ OMX for election,⁷⁶ and NASDAQ OMX would elect those candidates.⁷⁷

The Commission finds that the proposed changes regarding the composition of the BSE Board are consistent with the Act, including Section 6(b)(1) of the Act,⁷⁸ which requires, among other things, that a national securities exchange be organized to carry out the purposes of the Act

⁷⁴ See Section 1(k), BSE By-Laws.

⁷⁵ In Amendment No. 1 to the BSE Governance Proposal, BSE states that: "In order to limit the influence that a single affiliated group of members might exercise over [BSE], immediately following the closing of the [BSE Acquisition], [BSE] will propose to the newly constituted [BSE Board] an amendment to stipulate that no [BSE member], either alone or together with its affiliates, may account for more than 20% of the votes cast for a candidate, and any votes cast by such [BSE member], either alone or together with its affiliates, in excess of such 20% limitation shall be disregarded. Following approval by the [BSE] Board, [BSE] will immediately file the amendment as a proposed rule change for approval by the Commission. This clarifying change could not be included in this filing because Article XX of [BSE's] current Constitution, which is being replaced by the proposed [BSE] By-Laws, provides that [BSE's] members must approve amendments to the Constitution. The members voted, on December 4, 2007, to approve the By-Laws as submitted in this filing and it would have been impracticable and unduly expensive to seek a second member vote for approval of this clarifying change. Following adoption of the new [BSE] By-Laws, the [BSE] Board will have authority to approve [BSE] By-Law amendments." See Amendment No. 1 to the BSE Governance Proposal, *supra* note 4.

⁷⁶ See Section 4.4(f), BSE By-Laws.

⁷⁷ See Section 4.4(b), BSE By-Laws.

⁷⁸ 15 U.S.C. 78f(b)(1).

and comply with the requirements of the Act. The Commission previously has stated its belief that the inclusion of public, non-industry representatives on exchange oversight bodies is critical to an exchange's ability to protect the public interest.⁷⁹ Further, public representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of the BSE Board to address issues in a non-discriminatory fashion and foster the integrity of BSE. The Commission also finds that the composition of the BSE Board satisfies Section 6(b)(3) of the Act,⁸⁰ which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange or with a broker or dealer.

The fair representation requirement in Section 6(b)(3) of the Act is intended to give members a voice in the selection of the exchange's directors and the administration of its affairs. The Commission finds that the requirement under BSE By-Laws that at least 20% of the BSE Directors represent members,⁸¹ and the process for selecting Member Representative Directors, are designed to ensure the fair representation of BSE members on the BSE Board. The Commission believes that the method for selecting Member Representative Directors on the BSE Board allows members to have a voice in BSE's use of its self-regulatory authority.⁸² In

⁷⁹ See Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998). See also Securities Exchange Act Release Nos. 53382, *supra* note 29, 71 FR at 11261 n.121 and accompanying text; 53128, *supra* note 63, 71 FR at 3553, n.54 and accompanying text; and 44442 (June 18, 2001), 66 FR 33733, n.13 and accompanying text, (June 25, 2001) (SR-PCX-01-03).

⁸⁰ 15 U.S.C. 78f(b)(3).

⁸¹ See Section 4.3(a), BSE By-Laws.

⁸² In addition, the BSE By-Laws provide that one BSE Director would represent BOX Participants. See *infra* notes 207-216 and accompanying text for a description of the

particular, the Commission notes that the Member Nominating Committee is composed solely of persons associated with BSE members and is selected after consultation with representatives of BSE members. In addition, the BSE By-Laws include a process by which members can directly petition and vote for representation on the BSE Board. The Commission therefore finds that the process for selecting Member Representative Directors to the BSE Board is consistent with Section 6(b)(3) of the Act.⁸³ The Commission also notes that these provisions are consistent with previous proposals approved by the Commission.⁸⁴

4. Committees

The proposed new BSE By-Laws would include provisions governing the composition and authority of various BSE committees established by the BSE Board.⁸⁵ The BSE By-Laws would establish several standing BSE Board committees that are composed solely of BSE Directors and would delineate their general duties and compositional requirements.⁸⁶ These committees are the Executive Committee, the Finance Committee, the Management Compensation Committee, the Audit Committee, and the Regulatory Oversight Committee (“BSE ROC”). In addition to these committees, the BSE By-Laws provide for the appointment by the BSE Board of certain standing committees, not composed solely of BSE Directors, to administer various provisions of the rules that BSE expects to propose with respect to

nomination and election process for the BOX Participant Director who would serve on the BSE Board.

⁸³ 15 U.S.C. 78f(b)(3).

⁸⁴ See, e.g., Securities Exchange Act Release Nos. 58179, supra note 27; 53128, supra note 63; and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (order approving the demutualization of Phlx).

⁸⁵ See Sections 4.12-4.14, BSE By-Laws.

⁸⁶ See Section 4.13, BSE By-Laws.

governance, listing, equity trading, and member discipline.⁸⁷ These committees include the Member Nominating Committee, the Nominating Committee, the BSE Listing and Hearings Review Council, the BSE Review Council, the Quality of Markets Committee, the Market Operations Review Committee, the Arbitration and Mediation Committee, and the Market Regulation Committee.

As noted above, all members of the Member Nominating Committee must be associated persons of a BSE member. In addition, at least 20% of the members of the BSE Listing and Hearings Review Council, the BSE Review Council, the Quality of Markets Committee, and the Market Operations Review Committee must be composed of Member Representatives. Moreover, the Nominating Committee, the BSE Review Council, the Quality of Markets Committee, the Arbitration and Mediation Committee, and the Market Regulation Committee must be compositionally balanced between Industry members⁸⁸ and Non-Industry members.⁸⁹ These compositional requirements are designed to ensure that members are protected from unfair, unfettered actions by an exchange pursuant to its rules, and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. The Commission believes that the proposed compositional balance of these BSE committees is consistent with the Section 6(b)(3) of the Act because it provides for the fair representation of BSE members in the administration of the affairs of BSE.⁹⁰

5. Regulatory Oversight Responsibilities and Regulatory Funds

The BSE By-Laws would provide that the BSE Board, when evaluating any proposal,

⁸⁷ See Section 4.14 and Articles VI-VII, BSE By-Laws.

⁸⁸ See Article I(u), BSE By-Laws.

⁸⁹ See Article I(cc), BSE By-Laws.

⁹⁰ See, e.g., Securities Exchange Act Release Nos. 58179, supra note 27; 53128, supra note 63; and 49098, supra note 84.

would, to the fullest extent permitted by applicable law, take into account: (i) the potential impact thereof on the integrity, continuity, and stability of BSE and the other operations of BSE, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (ii) whether such would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.⁹¹ Taken together, these provisions reinforce the notion that BSE, while wholly-owned by NASDAQ OMX, is not solely a commercial enterprise, but rather is an SRO registered pursuant to the Act and subject to the obligations imposed by the Act.

The BSE ROC would be composed of Public Directors, each of whom also would need to qualify as an independent director pursuant to Nasdaq Rule 4200.⁹² The BSE ROC would be responsible for monitoring the adequacy and effectiveness of BSE's regulatory program and assisting the BSE Board in reviewing BSE's regulatory plan and the overall effectiveness of BSE's regulatory functions.⁹³ BSE also would have a Chief Regulatory Officer ("BSE CRO") who would have general supervision of the BSE's regulatory operations, including responsibility for overseeing BSE's surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another SRO to which BSE is a party.⁹⁴ The BSE CRO would have to meet with the BSE ROC in executive session at regularly scheduled meetings of such committee and at any time upon request of the BSE CRO or any

⁹¹ See Section 4.9, BSE By-Laws.

⁹² See Section 4.13(e), BSE By-Laws.

⁹³ Id.

⁹⁴ See Section 5.10, BSE By-Laws.

member of the BSE ROC. The BSE CRO could also serve as the General Counsel of BSE.⁹⁵

In addition, the BSE By-Laws would contain a stipulation that dividends could not be paid to the stockholders using regulatory funds, which are fees, fines, or penalties derived from the regulatory operations of BSE.⁹⁶ This restriction on the use of regulatory funds is intended to preclude BSE from using its authority to raise regulatory funds for the purpose of benefiting its shareholders, or for other non-regulatory purposes, such as executive compensation. Regulatory funds, however, would not be construed to include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of BSE, even if a portion of such revenues are used to pay costs associated with the regulatory operations of BSE.⁹⁷

Section 6(b)(1) of the Act⁹⁸ requires an exchange to be so organized and have the capacity to be able to carry out the purposes of the Act. The Commission believes that BSE's regulatory structure is designed to insulate its regulatory functions from its market and other commercial interests so that it can carry out its regulatory obligations and, therefore, BSE's proposal is consistent with the Act.

⁹⁵ Id. The Commission has previously approved a similar structure. See Nasdaq Exchange Approval Order, supra note 63, 71 FR at 3555, n.103 and accompanying text (order approving application of Nasdaq for registration as a national securities exchange, including the ability of the CRO to serve as General Counsel).

⁹⁶ See Section 9.8, BSE By-Laws. See also Section 1(ii), BSE By-Laws.

⁹⁷ The Commission further notes that the BSX Operating Agreement is being amended to adopt a restriction on distributions of regulatory funds comparable to the restriction proposed for inclusion in the BSE By-Laws. See proposed Section 9.2, BSX Operating Agreement.

⁹⁸ 15 U.S.C. 78f(b)(1).

6. Restrictions on Affiliation between BSE and Its Members: Proposed BSE Chapter XXXIX

a. Limitations on BSE Members' Ownership of NASDAQ OMX

In connection with the transaction, in the BSE Governance Proposal, BSE proposes to add a new Chapter XXXIX, Section 1 to the BSE Rules to prohibit BSE members and persons associated with BSE members from beneficially owning more than 20% of the then-outstanding voting securities of NASDAQ OMX. Members that trade on an exchange traditionally have had ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.⁹⁹ A member that is a controlling shareholder of an exchange or an exchange's holding company might be tempted to exercise that controlling influence by pressuring or directing the exchange to refrain from, or the exchange otherwise may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

In addition, the NASDAQ OMX Certificate imposes limits on direct and indirect changes in control, which are designed to prevent any shareholder from exercising undue control over the operation of its SRO subsidiaries and to ensure that its SRO subsidiaries and the Commission are able to carry out their regulatory obligations under the Act. Specifically, no person who

⁹⁹ See, e.g., Securities Exchange Act Release Nos. 57478 (March 12, 2008), 73 FR 14521, 14523 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) ("NOM Approval Order"); 55389, *supra* note 33, 72 FR at 10578; 55293 (February 14, 2007), 72 FR 8033, 8037 (February 22, 2007) (SR-NYSE-2006-120); 53382, *supra* note 29, 71 FR at 11256; 51149 (February 8, 2005), 70 FR 7531, 7538 (February 14, 2005) (SR-CHX-2004-26); 49718 (May 17, 2004), 69 FR 29611, 29624 (May 24, 2004) (SR-PCX-2004-08); 49098, *supra* note 84, 69 FR at 3986; 49067 (January 13, 2004), 69 FR 2761, 2767 (January 20, 2004) (SR-BSE-2003-19) ("BOX LLC Agreement Order"); and Nasdaq Exchange Approval Order, *supra* note 63, 71 FR at 3552.

beneficially owns shares of common stock, preferred stock, or notes of NASDAQ OMX in excess of 5% of the securities generally entitled to vote may vote shares in excess of 5%.¹⁰⁰ This limitation would mitigate the potential for any NASDAQ OMX shareholder to exercise undue control over the operations of the BSE and facilitate BSE's and the Commission's ability to carry out their regulatory obligations under the Act.

The NASDAQ OMX Board may approve exemptions from the 5% voting limitation for any person that is not a broker-dealer, an affiliate of a broker-dealer, or a person subject to a statutory disqualification under Section 3(a)(39) of the Act,¹⁰¹ provided that the NASDAQ OMX Board also determines that granting such exemption would be consistent with the self-regulatory obligations of Nasdaq.¹⁰² Further, any such exemption from the 5% voting limitation would not be effective until approved by the Commission pursuant to Section 19 of the Act.¹⁰³ The BSE Governance Proposal reflects an amendment to the NASDAQ OMX By-Laws to require the NASDAQ OMX Board, prior to approving any exemption from the 5% voting limitation, to determine that granting such exemptions would also be consistent with BSE's self-regulatory obligations.¹⁰⁴

¹⁰⁰ See Article Fourth.C., NASDAQ OMX Certificate.

¹⁰¹ 15 U.S.C. 78c(a)(39). See Article Fourth.C.6., NASDAQ OMX Certificate.

¹⁰² Specifically, the NASDAQ OMX Board must determine that granting such exemption would (1) not reasonably be expected to diminish the quality of, or public confidence in, NASDAQ OMX or Nasdaq or the other operations of NASDAQ OMX and its subsidiaries, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to an facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. See Article Fourth.C.6, NASDAQ OMX Certificate.

¹⁰³ See Section 12.5, NASDAQ OMX By-Laws.

¹⁰⁴ See Amendment No. 1 to the BSE Governance Proposal, supra note 4. Specifically, the

The Commission finds that the ownership restriction in proposed Chapter XXXIX, Section 1 of the BSE Rules, combined with the voting limitations in Article Fourth.C of Section 12.5 of the NASDAQ OMX Certificate and the NASDAQ OMX By-Laws, is consistent with the Act, including Sections 6(b)(1) and 6(b)(5) of the Act. These limitations should reduce the potential for a BSE member to improperly interfere with or restrict the ability of the Commission or BSE to effectively carry out their respective regulatory oversight responsibilities under the Act.

b. Limitations on Affiliation Between BSE and its Members

BSE also proposes to prohibit BSE or an entity with which it is affiliated from acquiring or maintaining an ownership interest in, or engaging in a business venture¹⁰⁵ with, a BSE member or an affiliate of a BSE member in the absence of an effective filing with the Commission under Section 19(b) of the Act.¹⁰⁶ Further, the proposed rule would prohibit a BSE member from becoming an affiliate¹⁰⁷ of BSE or an affiliate of an entity affiliated with BSE in

NASDAQ OMX Board must determine that granting such exemption would (1) not reasonably be expected to diminish the quality of, or public confidence in, NASDAQ OMX or its SRO Subsidiaries or the other operations of NASDAQ OMX and its subsidiaries, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. See proposed Section 12.5, NASDAQ OMX By-Laws.

¹⁰⁵ Proposed BSE Rule, Chapter XXXIX, Section 2. BSE defines “business venture” as an arrangement under which (1) BSE or an entity with which it is affiliated and (2) a BSE member or an affiliate of a BSE member, engage in joint activities with the expectation of shared profit and a risk of shared loss from common entrepreneurial efforts.

¹⁰⁶ Id. In connection with the Phlx Acquisition, Phlx proposed, and the Commission approved, a similar rule. See Phlx Rule 985(b) and Securities Exchange Act Release No. 58179, supra note 27, 73 FR at 42886-42887.

¹⁰⁷ Id. BSE defines “affiliate” as having the meaning specified in Rule 12b-2 under the Act,

the absence of an effective filing under Section 19(b) of the Act.¹⁰⁸ However, the proposed rule would exclude from this restriction two types of affiliations.

First, a BSE member or an affiliate of a BSE member could acquire or hold an equity interest in NASDAQ OMX that is permitted pursuant to proposed BSE Rules¹⁰⁹ (i.e., less than 20% of the outstanding voting securities) without the need for BSE to file such acquisition or holding under Section 19(b) of the Act.¹¹⁰ Second, BSE or an entity affiliated with BSE could acquire or maintain an ownership interest in, or engage in a business venture with, an affiliate of a BSE member without filing a proposed rule change relating to such affiliation under Section 19(b) of the Act, if there were information barriers between the BSE member and BSE and its facilities. These information barriers would have to prevent the member from having an “informational advantage” concerning the operation of BSE or its facilities or “knowledge in advance of other [BSE] members” of any proposed changes to the operations of BSE or its trading systems. Further, BSE may only notify an affiliated member of any proposed changes to its operations or trading systems in the same manner as it notifies non-affiliated members. BSE and its affiliated member may not share employees, office space, or data bases.¹¹¹ Finally, the BSE ROC must certify annually that BSE has taken all reasonable steps to implement and comply with the rule.¹¹²

17 CFR 240.12b-2, provided, however, that one entity would not be deemed to be an affiliate of another entity solely by reason of having a common director. Id.

¹⁰⁸ 15 U.S.C. 78s(b).

¹⁰⁹ Proposed BSE Rule, Chapter XXXIX, Section 1.

¹¹⁰ Id. As discussed above, the proposed BSE Rules would provide that “[n]o member or person associated with a member shall be the beneficial owner of greater than twenty percent (20%) of the then-outstanding voting securities of [NASDAQ OMX].”

¹¹¹ Proposed BSE Rule, Chapter XXXIX, Section 2(b)(2)(A).

¹¹² Proposed BSE Rule, Chapter XXXIX, Section 2(b)(2)(B).

Proposed BSE Rules Chapter XXXIX is consistent with rules of Nasdaq, which the Commission previously found consistent with the Act.¹¹³ The Commission similarly finds that proposed Chapter XXXIX to the BSE Rules is consistent with the requirements of Section 6(b)(5) of the Act,¹¹⁴ which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.¹¹⁵

The Commission is concerned about the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests that could exist if an exchange were to otherwise become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.¹¹⁶ The Commission believes that the proposed additions to the BSE Rules are designed to mitigate these concerns by requiring that BSE file a proposed rule change in connection with proposed affiliations between BSE and its members, unless such affiliation is due to a member's interest in

¹¹³ See Nasdaq Rules 2130 and 2140. See also Nasdaq Exchange Approval Order, *supra* note 63, 71 FR at 3552, n. 41 and accompanying text, and Securities Exchange Act Release No. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members). Also, in connection with the Phlx Acquisition, Phlx proposed, and the Commission approved, similar rules. See Phlx Rule 985(a) and (b) and Securities Exchange Act Release No. 58179, *supra* note 27, 73 FR at 42886-42887.

¹¹⁴ 15 U.S.C. 78f(b)(5).

¹¹⁵ *Id.*

¹¹⁶ See Securities Exchange Act Release No. 53382, *supra* note 29. See also Securities Exchange Act Release No. 54170, *supra* note 113.

NASDAQ OMX that is permitted under proposed Chapter XXXIX, Section 1 of the BSE Rules or conforms to the specified information barrier requirements.

If BSE entered into an affiliation with a BSE member (or any other party) that resulted in a change to a BSE Rule or the need to establish new BSE Rules, as defined under the Act, then such affiliation would be subject to the rule filing requirements of Section 19(b) of the Act and Rule 19b-4 thereunder.

7. Exceptions to Limitations on Affiliation Between BSE and its Members

NASDAQ OMX currently owns two broker-dealers: (1) NASDAQ Execution Services, LLC (“NES”), and (2) NASDAQ Options Services, LLC (“NOS”). NES and NOS are members of BSE. Absent relief, after the closing of NASDAQ OMX’s acquisition of BSE, NASDAQ OMX’s ownership of NES and NOS would cause NES and NOS to violate the provision in proposed BSE Rules Chapter XXXIX, Section 2 prohibiting BSE members from being affiliated with BSE.

BSE has proposed, in the BSE Governance Proposal, that NES and NOS be permitted to become affiliates of BSE, subject to certain conditions and limitations. First, BSE proposes that NES and NOS would only route orders to BSE that first attempt to access liquidity on Nasdaq.¹¹⁷ Second, NES and NOS would remain facilities of Nasdaq. Under Nasdaq Rules, NES operates

¹¹⁷ NES currently provides to Nasdaq members optional routing services to other market centers, including BSE, as set forth in Nasdaq’s rules. See Nasdaq Rules 4751, 4755, and 4758. NES does not currently route to BSE because BSE currently does not trade equity securities. See infra note 222. NOS provides to Nasdaq members that are Nasdaq Options Market (“NOM”) participants routing services to other market centers. Pursuant to Nasdaq’s rules, NOS: (1) routes orders in options currently trading on NOM, referred to as “System Securities;” and (2) routes orders in options that are not currently trading on NOM (“Non-System Securities”). See NOM Rules, Chapter VI Sections 1(b) and 11. See also NOM Approval Order, supra note 99. With respect to System Securities, NOM participants may designate orders to be routed to another market center when trading interest is not available on NOM or to execute only on NOM. See NOM Rules, Chapter VI, Section 11. See also NOM Approval Order, supra note 99, 73 FR at 14532-14533.

as a facility¹¹⁸ of Nasdaq and routes orders to other market centers as directed by Nasdaq. Similarly, NOS is operated and regulated as a facility of Nasdaq with respect to its routing of System Securities (“NOS facility function”), and, consequently, the operation of NOS in this capacity would be subject to BSE oversight, as well as Commission oversight.¹¹⁹ Nasdaq is responsible for ensuring that NES and NOS are operated consistent with Section 6 of the Act and Nasdaq’s Rules. In addition, Nasdaq must file with the Commission rule changes and fees relating to NES and NOS. Third, use of NES’s and NOS’s routing function by Nasdaq members would continue to be optional. Parties that do not desire to use NES may enter orders into Nasdaq as immediate-or-cancel orders or any other order-type available through Nasdaq that are ineligible for routing.¹²⁰ Similarly, NOM participants are not required to use NOS to route orders, and a NOM participant may route its orders through any available router it selects.¹²¹ In addition, the Commission notes that NES and NOS are members of an SRO unaffiliated with Nasdaq, which serves as their designated examining authority under Rule 17d-1.¹²²

In the past, the Commission has expressed concern that the affiliation of an exchange

¹¹⁸ See Nasdaq Rule 4758(b)(3). See also Securities Exchange Act Release No. 56708 (October 26, 2007), 72 FR 61925 (November 1, 2007) (SR-NASDAQ-2007-078) (“NES Routing Release”). As a facility of Nasdaq, Nasdaq Rule 4758(b) acknowledges that Nasdaq is responsible for filing with the Commission rule changes related to the operation of, and fees for services provided by, NES and that NES is subject to exchange non-discrimination requirements.

¹¹⁹ See NOM Rules, Chapter 11(e). See also NOM Approval Order, *supra* note 99, 73 FR at 14533.

¹²⁰ See Nasdaq Rule 4758(b)(7).

¹²¹ See NOM Rules, Chapter VI, Section 11(a) (allowing Participants to designate orders as available for routing or not available for routing). See also NOM Approval Order, *supra* note 99, 73 FR at 14533, n.91 and accompanying text.

¹²² See Nasdaq Rule 4758(b)(4), and NOM Rules, Chapter 11(e). See also NES Routing Release, *supra* note 118; and NOM Approval Order, *supra* note 99, 73 FR at 14533, n.189 and accompanying text.

with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.¹²³ Although the Commission continues to be concerned about potential unfair competition and conflict of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, the Commission believes that it is appropriate and consistent with the Act to permit NES and NOS to become affiliates of BSE for the limited purpose of providing routing services for Nasdaq for orders that first attempt to access liquidity on Nasdaq's systems before routing to BSE, and in light of the protections afforded by the other conditions described above.

B. BOX

1. BSE Transfer of BOX Interest

The BOX Market is a facility of BSE.¹²⁴ BOXR is BSE's wholly-owned subsidiary,¹²⁵ to which BSE has delegated, pursuant to a delegation plan ("Delegation Plan"),¹²⁶ certain self-regulatory responsibilities related to the BOX Market (BSE together with BOXR with respect to the BOX Market, "Regulatory Authority").¹²⁷

¹²³ See supra note 116 and accompanying text.

¹²⁴ See Securities Exchange Act Release Nos. 49066 (January 13, 2004), 69 FR 2773 (January 20, 2004) (SR-BSE-2003-17); 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (SR-BSE-2003-04) ("BOXR Order"); 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR-BSE-2002-15); and BOX LLC Agreement Order, supra note 99. Section 3(a)(2) of the Act states that "[t]he term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service." 15 U.S.C. 78c(a)(2).

¹²⁵ See BOXR Order, supra note 124.

¹²⁶ See BSE Rules, Chapter XXXVI. See also BOXR Order, supra note 124.

¹²⁷ See Section 1.1, 6th BOX LLC Agreement.

In the BOX Transfer Proposal, BSE proposes to transfer its 21.87% ownership interest in BOX to MX US. Following this transfer, BSE no longer would have any ownership interest in BOX and MX US would have a 53.24% ownership interest.¹²⁸ Because BSE would no longer have an ownership interest, it no longer would be admitted and named as a BOX Member.¹²⁹ The proposed changes to the BOX LLC Agreement reflect this change. However, pursuant to the revised BOX LLC Agreement, the BOX Market would remain a facility of BSE, and BSE would remain the SRO for the BOX Market.¹³⁰ BSE, together with BOXR, would retain regulatory control over the BOX Market and BSE, as the SRO, would remain responsible for ensuring compliance with the federal securities laws and all applicable rules and regulations.¹³¹

Section 8.4(f) of the current BOX LLC Agreement requires that any transfer that results in the acquisition and holding by any person, alone or together with any affiliate of such person, of an aggregate percentage interest which meets or crosses the threshold of 20% or any successive 5% be subject to a rule filing pursuant to Section 19(b)(1).¹³² Section 8.4(f) also requires that any transfer that reduces BSE's aggregate ownership interest in BOX below the

¹²⁸ MX US currently has a 31.37% ownership interest in BOX. See Securities Exchange Act Release No. 57260 (February 1, 2008), 73 FR 7617 (February 8, 2008) (SR-BSE-2008-06).

¹²⁹ "BOX Member" means a person admitted and named as a member on schedules to the 5th BOX LLC Agreement and any person admitted to BOX as an additional or substitute member of BOX, in such person's capacity as a member of BOX. See Section 1.1, 5th BOX LLC Agreement.

¹³⁰ See Section 3.2(a)(i), 6th BOX LLC Agreement ("BSE will provide SEC-approved SRO status for the BOX Market, the Regulatory Authority will provide the regulatory framework for the BOX Market and the Regulatory Authority, together with BOX, will have regulatory responsibility for the activities of the BOX Market."). BSE also proposes that the SRO for the BOX Market may be changed by a vote of the BOX Board and the approval of the Commission. See Section 1.1, 6th BOX LLC Agreement.

¹³¹ See *infra* notes 144-164 and notes 185-199 and accompanying text.

¹³² See Section 8.4(f), 5th BOX LLC Agreement.

20% threshold be subject to a rule filing.¹³³ BSE has filed the proposed transfer of its interest in BOX to MX US in accordance with these provisions of the BOX LLC Agreement.

The Commission believes that BSE's transfer of its 21.87% interest in BOX to MX US is consistent with the Act. MX US is currently a BOX Member and therefore is bound by all the provisions of the current BOX LLC Agreement¹³⁴ and would similarly be bound by the provisions of the revised BOX LLC Agreement.¹³⁵ Further, although BSE no longer would hold ownership interest in BOX, BSE would remain the SRO for the BOX Market. As the Commission has noted in the past, "the Act does not require that an SRO have any ownership interest in the operator of one of its facilities."¹³⁶ Moreover, BOX is obligated under the BOX

¹³³ Id.

¹³⁴ MX, a parent corporation of MX US, has agreed to abide by all of the provisions of the 5th BOX LLC Agreement, including those provisions requiring submission to the jurisdiction of the Commission. See Securities Exchange Act Release No. 57713 (April 25, 2008), 73 FR 24327 (May 2, 2008) (SR-BSE-2008-28).

¹³⁵ These provisions of the BOX LLC Agreement provide that MX US would, among other things, comply with the federal securities laws and the rules and regulations thereunder; cooperate with the Commission and the Regulatory Authority pursuant to their regulatory authority and the provisions of the revised BOX LLC Agreement; and engage in conduct that fosters and does not interfere with BOX's ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism off a free and open market and a national market system; and, in general protect investors and the public interest. See Section 5.3, 6th BOX LLC Agreement. See also BOX LLC Agreement Order, supra note 99, 69 FR at 2765.

¹³⁶ In the BOX LLC Agreement Order, the Commission approved the operating agreement governing the BOX Market. At the time of the BOX LLC Agreement Order, BSE did not hold the largest ownership interest in BOX, but the Commission noted that the Act does not require that an SRO have any ownership interest in the operator of its facility. See BOX LLC Agreement Order, supra note 99, 69 FR at 2764. See also Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) ("ArcaEx Approval Order"). In the ArcaEx Approval Order, the Commission approved the establishment of Archipelago Exchange ("ArcaEx") as a facility of the Pacific Exchange, Inc. ("PCX," n/k/a NYSE Arca, Inc.). ArcaEx was operated by the

LLC Agreement to continue to operate the BOX Market in a manner consistent with the regulatory and oversight responsibilities of BSE and with the Act and rules and regulations thereunder.¹³⁷ As discussed below, BSE will have veto power over planned or proposed changes to BOX or the BOX Market, and if the Regulatory Authority, in its sole discretion, determines that a planned or proposed change to BOX or the BOX Market is not consistent with Regulatory Authority Rules or SEC Rules governing the BOX Market or BOX Participants, the Regulatory Authority could direct BOX to modify the proposal.¹³⁸ Moreover, the books, premises, officers, directors, agents and employees of BOX are deemed to be the books, premises, officers, directors, agents and employees of BSE.¹³⁹ In addition, the Commission has authority to inspect BOX's books and records because BOX is the operator of the BOX Market, a facility of an exchange. Accordingly, the Commission believes that the transfer of BSE's ownership interest in BOX would not impair BSE's or the Commission's ability to discharge their respective regulatory and oversight responsibilities, and is consistent with the Act.

2. BSE Interim Certificate

BSE plans to distribute the net proceeds from the transfer of its interest in BOX to BSE

Archipelago Exchange, L.L.C. ("Arca L.L.C."). At the time of the ArcaEx Approval Order, PCX's ownership interest in Arca L.L.C. consisted solely of a 10% interest in Archipelago Holdings, LLC, the parent company of Arca L.L.C. See also Securities Exchange Act Release Nos. 41210 (March 24, 1999), 64 FR 15857 (April 1, 1999) (SR-Phlx-96-14) (order approving electronic system offering VWAP that was operated as a facility of Phlx, where Phlx had no ownership interest in the operation of the system) and 54538 (September 29, 2006), 71 FR 59184 (October 6, 2006) (SR-Phlx-2006-43) (order approving Phlx's New Equity Trading system and operation of optional outbound router as a facility of Phlx, where Phlx had no ownership interest in the third party operator).

¹³⁷ See infra notes 144-164 and notes 185-199 and accompanying text.

¹³⁸ See infra notes 147-164 and accompanying text.

¹³⁹ See infra note 187 and accompanying text.

member owners.¹⁴⁰ To effectuate this distribution, in the BSE Interim Certificate Proposal, BSE proposes to amend the BSE Certificate to remove a provision that prevents BSE from making distributions and to add a provision that would allow BSE to redeem a portion of each membership in exchange for a pro rata share of the net proceeds from its transfer of BSE's interest in BOX.¹⁴¹

The BSE Certificate as proposed to be amended as just described is referred to as the Interim Certificate and would be effective immediately prior to the transfer of BSE's interest in BOX to MX US.¹⁴² Immediately thereafter, this Interim Certificate would be amended and restated in its entirety in connection with the BSE Acquisition.¹⁴³

The Commission believes that the Interim Certificate is consistent with the Act. The sole purpose of the Interim Certificate is to enable BSE to distribute to BSE member owners the proceeds from the transfer of BSE's interest in BOX to MX US. The Interim Certificate would be in effect only until the BSE Certificate is amended and restated in its entirety, as discussed above, in connection with the BSE Acquisition. The Commission believes that allowing such a distribution would not have any adverse effect on the ability of BSE to fulfill its regulatory obligations in relation to the BOX Market, because funding for the regulation of the BOX Market would be established through a regulatory services agreement between BSE and BOX and not with the proceeds from the transfer of BSE's interest in BOX to MX US.

¹⁴⁰ All BSE members, including lessors but not lessees, and excluding electronic access members, would be entitled to receive their pro rata share of equity interest in BOX based on the outstanding number of such BSE memberships.

¹⁴¹ See Article Fourth, Interim Certificate. The Interim Certificate also would delete obsolete text regarding BSE incorporators.

¹⁴² See BSE Interim Certificate Proposal Notice, supra note 7, 73 FR at 25810.

¹⁴³ See BSE Governance Proposal Notice, supra note 3, 73 FR 26159.

3. BOX LLC Agreement

In conjunction with BSE's divestiture of BOX, BSE also proposes, in the BOX Transfer Proposal, to amend the BOX LLC Agreement to reflect BSE's continuing role as the SRO of its facility, the BOX Market.

a. BSE as the SRO for the BOX Market

The BOX LLC Agreement provides that as long as BSE maintains 8% or greater interest in BOX, BSE would have the right to designate and retain two directors on the BOX board of directors ("BOX Board").¹⁴⁴ BSE no longer would be entitled to maintain two directors on the BOX Board following its transfer of interest to MX US. BSE, therefore, proposes to amend the BOX LLC Agreement to provide that as long as the BOX Market remains a facility of BSE, BSE would have the right to designate and retain one non-voting director ("Regulatory Director") on the BOX Board.¹⁴⁵ The Regulatory Director would have the right to attend all meetings of the BOX Board and committees thereof and receive notice of meetings and copies of the meeting materials provided to other BOX directors.¹⁴⁶

Under the current BOX LLC Agreement, BSE holds veto power over certain "Major Actions," which relate to both commercial and regulatory actions. After the transfer of its ownership interest to MX US, BSE, as the SRO for the facility, would continue to have a regulatory interest in the BOX Market. In connection with the sale of BSE's ownership interest, the BOX LLC Agreement is being amended to eliminate BSE's veto power over Major Actions

¹⁴⁴ See Section 4.1(b), 5th BOX LLC Agreement.

¹⁴⁵ See Section 4.1(a)(i), 6th BOX LLC Agreement. A Regulatory Director is a member of the senior management of the regulation staff of the Regulatory Authority, who is separated from the business operations of BSE via effective information barriers and is not an employee, officer, or director of NASDAQ OMX or its affiliates, other than BSE and BSE's subsidiaries. See Section 1.1, 6th BOX LLC Agreement.

¹⁴⁶ See Section 4.2(d), 6th BOX LLC Agreement.

of BOX, but BSE would continue to hold veto power over all regulatory actions.

Specifically, BSE proposes to amend the BOX LLC Agreement to provide that BSE, with certain exceptions discussed below,¹⁴⁷ would have veto power over planned or proposed changes to BOX or the BOX Market.¹⁴⁸ These amendments to the BOX LLC Agreement would provide that the Regulatory Authority¹⁴⁹ would receive notice of planned or proposed changes to BOX, or the BOX Market pursuant to request for change procedures established by the mutual agreement of the Regulatory Authority and BOX.¹⁵⁰ Moreover, if BSE, in its sole discretion, determines that a Regulatory Deficiency exists, BSE may direct BOX to undertake such modifications as are necessary or appropriate to eliminate the Regulatory Deficiency.¹⁵¹ Prior to implementation, the Regulatory Authority would be required to affirmatively approve such planned or proposed changes.¹⁵² If the Regulatory Authority, in its sole discretion, determines that a proposed or planned change to BOX or the BOX Market is not consistent with Regulatory Authority Rules¹⁵³ or SEC Rules¹⁵⁴ governing the BOX Market or BOX Participants, or impedes

¹⁴⁷ See infra note 159 and accompanying text.

¹⁴⁸ See Section 3.2, 6th BOX LLC Agreement.

¹⁴⁹ See supra text accompanying note 127.

¹⁵⁰ See Section 3.2(a)(ii), 6th BOX LLC Agreement.

¹⁵¹ See Section 3.2(a)(iv), 6th BOX LLC Agreement.

¹⁵² See Section 3.2(a)(ii), 6th BOX LLC Agreement. The Regulatory Authority would also receive notice of any planned or proposed change, pursuant to which the BOX Market would cease to be a facility of BSE. BOX would not be required, however, to obtain consent from the Regulatory Authority for any such planned or proposed change, provided that the Commission has approved such action. The BOX LLC Agreement does not affect BSE's obligations under Section 19 of the Act to file all proposed rule changes with the Commission. Accordingly, if any proposed change would be required to be filed as a proposed rule change under the Act, BOX could not implement such change until such change became effective under the Act.

¹⁵³ "Regulatory Authority Rules" means the rules of the Regulatory Authority, including the BOX Rules that constitute "rules of an exchange" within the meaning of Section 3 of the Act and that pertain to the BOX Market. See Section 1.1, 6th BOX LLC Agreement.

the Regulatory Authority's ability to regulate the BOX Market or BOX Participants or to fulfill its obligations under the Act,¹⁵⁵ the Regulatory Authority, again in its sole discretion, could direct BOX to modify the proposal such that it does not cause a Regulatory Deficiency.¹⁵⁶ BOX would not implement the proposed change until such change, and any required modifications, are approved by the BOXR board of directors ("BOXR Board").¹⁵⁷ Further, in the event that the Regulatory Authority, in its sole discretion, determines that a Regulatory Deficiency could exist or would result from the change as planned, the Regulatory Authority could direct BOX to undertake such modifications to BOX or the BOX Market as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency and allow the Regulatory Authority to perform and fulfill its regulatory responsibilities under the Act.¹⁵⁸

Notice would not be required to be provided to the Regulatory Authority if a proposed change were a "Non-Market Matter."¹⁵⁹ Any planned or proposed change to BOX that has a regulatory component would not fall within the definition of Non-Market Matters.¹⁶⁰ The

¹⁵⁴ "SEC Rules" mean the Act and such statutes, rules, regulations, interpretations, releases, orders, determinations, reports, or statements as are administered, enforced, adopted or promulgated by the Commission. See Section 1.1, 6th BOX LLC Agreement.

¹⁵⁵ The operation of BOX or the BOX Market in such manner would be referred to as a "Regulatory Deficiency." See Section 1.1, 6th BOX LLC Agreement.

¹⁵⁶ See Section 3.2(a)(iii), 6th BOX LLC Agreement.

¹⁵⁷ Id.

¹⁵⁸ The cost of any such modifications must be paid by BOX. See Section 3.2(a)(iv), 6th BOX LLC Agreement.

¹⁵⁹ Non-Market Matters include changes relating solely to one or more of the following: marketing, administrative matters, personnel matters, social or team-building events, meetings of BOX Members, communication with BOX Members, finance, location, and timing of BOX Board meetings, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of the BOX Market, and de minimis items. See Section 3.2(a)(ii), 6th BOX LLC Agreement.

¹⁶⁰ See Section 3.2(a)(ii), 6th BOX LLC Agreement.

presence of a Regulatory Director¹⁶¹ on the BOX Board is designed to help ensure that no matter with a regulatory component is considered a Non-Market Matter by BOX.

These proposed changes to the BOX LLC Agreement, which give the Regulatory Authority notice of changes and the authority to require modification prior to implementation if such changes would cause Regulatory Deficiencies, are designed to replace the current BOX LLC Agreement's provisions that state that, at all times when BSE is a BOX Member, Major Actions of BOX would not be effective unless BSE-designated directors affirmatively vote for such Major Actions.¹⁶² Major Actions of BOX include, among others, merger or consolidation of BOX with any other entity or the sale by BOX of any material portion of its assets, entry by BOX into any line of business other than the business contemplated in the BOX LLC Agreement, and making any fundamental change in the market structure of BOX.¹⁶³ Following BSE's divestiture of BOX, however, BSE would no longer have voting directors on the BOX Board. BSE, therefore, would be unable to affirmatively vote on Major Actions of BOX.

The Commission believes that these proposed changes are consistent with the Act. The revised BOX LLC Agreement reflects BSE's continuing status as the SRO for its facility, the BOX Market, by providing that the Regulatory Authority would receive notice of any planned or proposed changes to BOX or the BOX Market, which would include a wider range of matters than those matters considered Major Actions. Further, BOX would not be able to implement a planned or proposed change if the Regulatory Authority, in its sole discretion, determines that such change could cause a Regulatory Deficiency. In addition, if the Regulatory Authority determines that a Regulatory Deficiency exists or is planned, it may direct BOX to undertake

¹⁶¹ See Section 4.1(a)(i), 6th BOX LLC Agreement.

¹⁶² See Section 4.4(b), 5th BOX LLC Agreement.

¹⁶³ Id.

such modifications to BOX or the BOX Market as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency. As noted above, the Commission has stated that the Act does not require that an SRO have any ownership interest in the operator of one of its facilities.¹⁶⁴

Although BSE would not have an ownership interest in BOX, the Commission believes that the foregoing changes would not limit BSE's role as the SRO for the BOX Market. The Commission, therefore, finds that these proposed changes would allow BSE to carry out its regulatory and oversight responsibilities under the Act.

b. The BOX Committee

In the BOX Transfer Proposal, BSE proposes to adopt resolutions ("Resolutions") to establish a committee of the BSE Board, the BOX Committee.¹⁶⁵ The proposed Resolutions are rules of an exchange because they are stated policies, practices, or interpretations (as defined in Rule 19b-4 under the Act) of BSE, and must therefore be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder. Accordingly, BSE filed the proposed Resolutions with the Commission.¹⁶⁶

Pursuant to the proposed Resolutions, the BSE Board would delegate to the BOX Committee all actions and decisions relating to BSE rules that govern the BOX Market, appeals from regulatory decisions of the BOXR Board, and, except to the extent otherwise delegated to the BSE ROC, regulation of the BOX Market.¹⁶⁷ The proposed Resolutions also would provide

¹⁶⁴ See supra note 136 and accompanying text.

¹⁶⁵ See Section 4.1(f), 6th BOX LLC Agreement.

¹⁶⁶ See Exhibit 3B to the BOX Transfer Proposal Notice.

¹⁶⁷ The BSE ROC would be responsible for monitoring the adequacy and effectiveness of BSE's regulatory program and assisting the BSE Board in reviewing BSE's regulatory plan and the overall effectiveness of BSE's regulatory function. Regulatory actions and decisions delegated to the BSE ROC are not subject to the power and authority of the BOX Committee. See supra note 93 and accompanying text.

that the BOX Committee include a director representing the BOX Participants and four other BSE Directors who do not have a material direct or indirect relationship with NASDAQ OMX, its affiliates (other than service as directors of BSE or BOXR), or any provider of BOX-related regulatory functions outsourced by BSE.¹⁶⁸ Furthermore, the proposed Resolutions would provide that at least 50% of members of the BOX Committee must be Public Directors.¹⁶⁹ The proposed Resolutions also would provide that any resolution or other action that would have the effect of dissolving the BOX Committee or altering, amending, removing, or abridging the Resolutions or the powers of the BOX Committee established thereby must be submitted to the BSE Board, and if the same must be filed with, or filed with and approved by, the Commission under Section 19 of the Act, then it would not be effective until filed with, or filed with and approved by, the Commission.¹⁷⁰

Section 6(b)(3) of the Act provides that the rules of an exchange must assure that its members are fairly represented in the selection of the exchange's directors and in the administration of its affairs.¹⁷¹ This requirement allows members to have a voice in an exchange's use of its self-regulatory authority. Moreover, the Section 6(b)(3) requirement helps to ensure that members are protected from unfair, unfettered actions by an exchange and that, in general, an exchange is administered in a way that is equitable to all those who trade on its

¹⁶⁸ See proposed Resolutions. Material direct or indirect relationship include, without limitation, any of the following: being an affiliate; serving as a board member, employee, officer, consultant, advisor, or any provider of BOX-related regulatory functions outsourced by BSE; being a party to any contractual or other relationship pursuant to which more than \$50,000 is paid; reporting to, controlling, being controlled by or holding an investment greater than 5% in any such person; and being a parent, child, sibling, spouse or in-law of such person. See Section 4.1(f), 6th BOX LLC Agreement.

¹⁶⁹ See proposed Resolutions. See also *infra* note 207 and accompanying text.

¹⁷⁰ See proposed Resolutions.

¹⁷¹ 15 U.S.C. 78f(b)(3).

market or through its facilities. Because under the proposed Resolutions, the BSE Board would delegate to the BOX Committee its actions and decisions over the BOX Market, other than matters delegated to the BSE ROC, the Commission believes that the composition of the BOX Committee must be consistent with the fair representation requirement under Section 6(b)(3) of the Act.¹⁷² In this regard, the proposed Resolutions would require that one director of the five BSE Directors on the BOX Committee represent BOX Participants. Because 20% of the BOX Committee would be composed of directors who represent BOX Participants, the Commission believes that the proposed BOX Committee composition satisfies the Section 6(b)(3) requirement. The Commission previously has found 20% representation to satisfy the Section 6(b)(3) requirement.¹⁷³

c. BSE and BOXR Boards

The BOXR By-Laws require that at least 20% of the BOXR Board (but no fewer than two directors) be composed of directors representing BOX Participants.¹⁷⁴ In addition, the BOXR By-Laws require that at least 50% of the directors on the BOXR Board be public directors (“BOXR Public Directors”).¹⁷⁵ In the BSE Governance Proposal, BSE proposes to revise this definition such that a BOXR Public Director could not also have any material business relationship with an affiliate of BSE, BOX, or BOXR.¹⁷⁶ The Commission finds this proposed change to be consistent with the Act. This change would make BOXR’s definition of

¹⁷² 15 U.S.C. 78f(b)(3).

¹⁷³ See, e.g., Securities Exchange Act Release Nos. 54494 (September 25, 2006), 71 FR 58023 (October 2, 2006) (SR-CHX-2006-23) (order approving amendments to exchange by-laws and other governance changes) and 53382, supra note 29.

¹⁷⁴ See Section 4, BOXR By-Laws.

¹⁷⁵ Currently, a BOXR Public Director is a director who has no material relationship with a broker or dealer, BSE, BOX, or BOXR. See Section 1(p), BOXR By-Laws.

¹⁷⁶ See proposed Section 1(q), BOXR By-Laws.

Public Director substantially similar to the use of such term in BSE's By-Laws,¹⁷⁷ which the Commission is approving as part of this Order, and in Nasdaq's By-Laws,¹⁷⁸ which the Commission previously found consistent with the Act.¹⁷⁹ The Commission has previously stated its belief that the inclusion of public, non-industry representatives on exchange oversight bodies is critical to an exchange's ability to protect the public interest.¹⁸⁰ The Commission believes that public representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. Further, the Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of BOXR to address issues in a nondiscriminatory fashion and foster the integrity of BOXR.

In addition, in the BOX Transfer Proposal, BSE proposes to change the BOX LLC Agreement to require BSE, for so long as the BOX Market remains a facility of BSE, to allow BOX to designate one non-voting participant to the BSE Board and to recommend at least 10%, but no fewer than one, of the BOXR directors to the BOXR Board.¹⁸¹ BSE also would be required to include on the BOXR Board at least two directors representing BOX Participants, but no fewer than 20% of all directors,¹⁸² and at least four directors who do not have a material direct or indirect relationship with NASDAQ OMX, its affiliates, or any provider of BOX-related

¹⁷⁷ See BSE By-Laws, Article I(gg) and supra notes 56 and 78-80 and accompanying text.

¹⁷⁸ See Nasdaq By-Laws, Article I(y).

¹⁷⁹ See Nasdaq Exchange Approval Order, supra note 63, 71 FR at 3553, n.47.

¹⁸⁰ Id. at 3553. See also Securities Exchange Act Release No. 40760, supra note 79.

¹⁸¹ The non-voting participant would have the right to attend all meetings of the BOX Committee and all BOX-related deliberations of the BSE Board and committees thereof and receive equivalent notice and meeting materials as BSE directors. See Section 4.1(f), 6th BOX LLC Agreement.

¹⁸² See Section 4.1(f), 6th BOX LLC Agreement. See also infra note 208 and accompanying text.

regulatory functions outsourced by BSE, other than service as directors of BSE or BOXR.¹⁸³

The proposed changes to the BOX LLC Agreement would further require that the directors on the BOXR Board, any committees thereof, or the BOX Committee, or the directors otherwise engaged in BOX-related meetings not have a material direct or indirect relationship with NASDAQ OMX or its affiliates or any provider of BOX-related regulatory functions outsourced by BSE, other than service as directors of BSE or BOXR.¹⁸⁴ The Commission finds that, with respect to the composition of the BOXR Board, the proposed changes satisfy the requirements of Section 6(b)(3) of the Act because at least 20% of BOXR Board directors must represent BOX Participants. The Commission further finds that the prohibition on BOXR Board directors, committee members, and others from having a material direct or indirect relationship with NASDAQ OMX or its affiliates or any provider of BOX-related regulatory functions outsourced by BSE are designed to preserve the independence of the self-regulatory functions of BSE that have been delegated to BOXR, BSE's wholly-owned subsidiary, and to enable BSE, together with BOXR, to carry out its SRO functions.

d. Oversight of BOX Market

Although BOX does not carry out any regulatory functions, all of its activities must be consistent with the Act. The BOX Market is a facility of BSE and is not solely a commercial

¹⁸³ Id. See also supra note 168.

¹⁸⁴ Id. Moreover, all other persons permitted to attend meetings of the BOXR Board or any committees thereof or the BOX Committee or otherwise engaged in BOX-related meetings could not have a material direct or indirect relationship with NASDAQ OMX or its affiliates or any provider of BOX-related regulatory functions outsourced by BSE unless they are Permitted Recipients (as defined below), BOXR directors, officers, or employees, other parties making presentations to directors of the BSE Board engaged in BOX-related meetings, the BOXR Board, the BOX Committee or the BSE ROC if such parties' participation is only to the extent necessary to make such presentations, or consented to by BOX. See Section 4.1(f), 6th BOX LLC Agreement.

enterprise, and is subject to the Act.¹⁸⁵ Accordingly, the current BOX LLC Agreement¹⁸⁶ has provisions designed to enable BOX to operate in a manner that complies with the federal securities laws, including the objectives and requirements of the Act. Because BOX's obligations endure as long as the BOX Market is a facility of BSE, regardless of the BSE's transfer of its ownership interest in BOX to MX US, BSE does not propose to amend the aforementioned provisions, except as provided below.

In accordance with BSE's obligations as the SRO for the BOX Market, the books, records, premises, officers, directors, agents, and employees of BOX are currently deemed to be the books, premises, officers, directors, agents, and employees of BSE for the purpose of, and subject to, oversight pursuant to the Act.¹⁸⁷ Furthermore, the books and records of BOX are subject at all times to inspection and copying by BSE and the Commission.¹⁸⁸ To this provision, BSE proposes to add in the BOX Transfer Proposal that inspection, copying, and review of the books and records of BOX by the Regulatory Authority at the premises of BOX, and access to any copied books and records removed from the premises of BOX or produced to the Regulatory Authority at its request, would in all cases be conducted by, or limited to, certain individuals (such individuals referred to as, "Permitted Recipients")¹⁸⁹ and directors or employees of

¹⁸⁵ See BOX LLC Agreement Order, *supra* note 99, 69 FR at 2765.

¹⁸⁶ See Sections 4.2, 12.1, 15, 16.5, and 19.6, 5th BOX LLC Agreement.

¹⁸⁷ See Section 12.1, 5th BOX LLC Agreement.

¹⁸⁸ *Id.*

¹⁸⁹ See Section 12.1, 6th BOX LLC Agreement. Permitted Recipients are (i) the BSE CRO and those regulatory staff members responsible for regulatory technology and budget, counsel to BSE CRO, or staff of BSE's internal audit department, (ii) any member of the BSE Board serving on the BOX Committee or BSE ROC, (iii) NASDAQ OMX CRO and staff in the Office of General Counsel, (iv) any member of the NASDAQ OMX Board of Directors serving on the NASDAQ OMX ROC, and (v) any Professional Services provider. "Professional Services" means services performed by outside counsel, consultants, any provider of BOX-related regulatory functions outsourced by BSE, or

BOXR.¹⁹⁰ BSE also proposes that the Regulatory Authority would inspect, copy, and review the books and records of BOX, and would use any information obtained thereby, only for purposes of fulfilling its regulatory obligations and for no other purpose.¹⁹¹ Further, BSE proposes to add language stating that although BOX would not be entitled to refuse the inspection, review, and/or copying its books and records by the Regulatory Authority, it would be entitled to damages in the event that such inspection, review, and/or copying was conducted for any purpose other than to fulfill the Regulatory Authority's regulatory responsibilities.¹⁹²

The Commission finds that these provisions are consistent with the Act. The Commission notes that BSE proposes to delegate to BOXR, together with the BOX Committee, much of its regulatory responsibilities over the BOX Market. Therefore, although BSE proposes that access to books and records would be limited to Permitted Recipients and BOXR directors and employees, within BSE's proposed regulatory framework, this limitation would not exclude any individuals who may need access to BOX books and records. Moreover, the Commission has authority under the Act to inspect BOX's books and records because BOX is the operator of the BOX Market, a facility of an exchange. In addition, the Commission finds it consistent with the Act that BSE proposes to specify that inspection, copying, and review of books and records and the use of any information obtained thereby be for purposes of fulfilling BSE's regulatory obligations. The Commission notes that, because BOX would not be entitled to preclude BSE from inspecting, reviewing, or copying of its books and records, BOX could not rely on the books and records provisions of the revised BOX LLC Agreement to improperly hinder BSE

subcontractors for the benefit of BOX or the BOX Market. See Section 1.1, 6th BOX LLC Agreement.

¹⁹⁰ See Section 12.1, 6th BOX LLC Agreement.

¹⁹¹ Id.

¹⁹² Id.

from carrying out its regulatory and oversight responsibilities under the Act.¹⁹³

In the BOX Transfer Proposal, BSE also proposes to add certain other provisions to the BOX LLC Agreement. Specifically, BSE proposes to provide that all confidential information pertaining to regulatory matters of BOX and the BOX Market (including, but not limited to, disciplinary matters, trading data, trading practices, and audit information) contained in the books and records of BOX would not be made available to any persons other than to those officers, directors, employees, and agents of BOX that have a reasonable need to know the contents thereof and that such confidential information be retained in confidence by BOX and the officers, directors, employees, and agents of BOX and not be used for any commercial purposes.¹⁹⁴ BSE also proposes to add a provision in the BOX LLC Agreement requiring BOX to provide prompt notice to the Regulatory Authority and the Regulatory Director of any amendments, modifications, waivers, or supplements to the BOX LLC Agreement presented to the BOX Board for approval.¹⁹⁵ Any proposed change to the BOX LLC Agreement would be submitted to the BOX Committee and if such change is required under Section 19 of the Act and rules thereunder to be filed with, or filed with and approved by, the Commission before such change may be effective, then such change would not be effective until filed with, or filed with

¹⁹³ See Section 12.1, 6th BOX LLC Agreement. Instead, BSE proposes that BOX would be entitled to damages in the event any inspection, copying, or review of BOX books and records by the Regulatory Authority is, in whole or in part, used by the Regulatory Authority or any of its affiliates for any purpose other than to fulfill the Regulatory Authority's regulatory obligations. See Section 12.1, 6th BOX LLC Agreement.

¹⁹⁴ See Section 16.6, 6th BOX LLC Agreement. BSE also proposes that the provision would not be interpreted to limit or impede the rights of the Commission or the Regulatory Authority to access and examine such confidential information or to limit or impede the ability of any officers, directors, employees, or agents of BOX to disclose such confidential information to the Commission or the Regulatory Authority. Id.

¹⁹⁵ See Section 19.1, 6th BOX LLC Agreement.

and approved by, the Commission, as the case may be.¹⁹⁶

The current BOX LLC Agreement provides that each BOX Member and its officers, directors, agents, and employees must submit to the jurisdiction of the federal courts, the Commission, and BSE for the purposes of any suit, action, or proceeding pursuant to federal securities laws, rules, or regulations thereunder, arising out of, or relating to, BOX activities.¹⁹⁷

BSE proposes to extend this provision such that BOX and its officers, directors, agents, and employees also would submit to the jurisdiction of the U.S. federal courts, the Commission, and the Regulatory Authority.¹⁹⁸

Finally, the current BOX LLC Agreement provides that BSE, as a party to the agreement, and BOX Members would take such action as is necessary to ensure that their officers, directors, and employees consent to the applicability of certain provisions in the BOX LLC Agreement, including the requirement to submit to the jurisdiction of the U.S. federal courts, the Commission, and BSE. BSE proposes to amend this provision such that BOX's officers, directors, and employees would also consent to the same provisions.¹⁹⁹

The Commission believes that the revised provisions to the BOX LLC Agreement are

¹⁹⁶ Id. BOX would not be required to obtain the approval of the Regulatory Authority for any amendment to the revised BOX LLC Agreement pursuant to which the BOX Market would cease to be a facility of BSE, provided that such amendment would be filed with, or filed with and approved by, the Commission, as the case may be, before such amendment may be effective.

¹⁹⁷ As a BOX Member, MX US would be subject to this provision.

¹⁹⁸ See Section 19.6(b), 6th BOX LLC Agreement.

¹⁹⁹ See Section 19.6(c), 6th BOX LLC Agreement. BSE proposes to expand the provisions to which individuals must consent. In addition, MX and the Regulatory Authority would take such action as is necessary to insure that with respect to their BOX related activities, MX's officers, directors and employees consent to the communication of their "personal information" as defined under Canada's Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q.c.P-39.1 ("Private Sector Privacy Act"), by MX to the Commission and the Regulatory Authority and agree to waive the protection of such "personal information" that is provided by the Private Sector Privacy Act.

intended to enhance BSE's ability to fulfill its self-regulatory obligations and assist in administering and complying with the requirements of the Act. Therefore, the Commission finds that these provisions are consistent with the Act.

C. BOXR

As noted above, after the BSE Acquisition, BOXR would continue to be wholly-owned by BSE and would become the indirect, wholly-owned subsidiary of NASDAQ OMX. BOXR is currently governed by a Delegation Plan,²⁰⁰ the BOXR By-Laws, and the applicable BSE Rules, including the BSE Constitution (to be replaced by the BSE By-Laws), and would continue to be so governed after the BSE Acquisition and the transfer of BSE's interest in BOX to MX US.

In addition, BSE now proposes to adopt a written operating agreement for BOXR ("BOXR LLC Agreement") in which BSE would be the sole member. BSE also proposes to amend the BOXR By-Laws to reflect the BSE Acquisition. As discussed above, BSE would continue to delegate certain self-regulatory responsibilities relating to the BOX Market to BOXR, although BSE would retain ultimate responsibility.²⁰¹

1. BOXR LLC Agreement; Changes in Control of BOXR

BSE proposes to adopt the BOXR LLC Agreement.²⁰² The BOXR LLC Agreement would include provisions that reflect BOXR's status as a wholly-owned subsidiary of an SRO and that are designed to preserve the independence of the self-regulatory functions of BSE that have been delegated to BOXR.²⁰³ Also, the BOXR LLC Agreement would preclude BOXR

²⁰⁰ See supra note 126 and accompanying text. See also BOXR Order, supra note 124. No changes to the Delegation Plan are proposed.

²⁰¹ See supra notes 125-127 and accompanying text.

²⁰² See BSE Governance Proposal Notice, supra note 3, 73 FR at 26159.

²⁰³ See Section 7, BOXR LLC Agreement.

from making distributions to BSE using regulatory funds.²⁰⁴

In addition, BSE could not transfer or assign its ownership of BOXR, unless such transfer or assignment is filed with and approved by the Commission pursuant to Section 19 of the Act.²⁰⁵ Moreover, because BOX Participants are BSE members, they are subject to Chapter XXXIX of the BSE Rules, which requires that no member or person associated with a member may own more than 20% of the outstanding voting securities of NASDAQ OMX.²⁰⁶ Together, these ownership and voting restrictions are designed to minimize the potential that a person could improperly interfere with or attempt to restrict the ability of the Commission or BSE to effectively carry out their regulatory oversight responsibilities under the Act. The Commission believes that the proposed BOXR LLC Agreement is consistent with the Act.

2. Amendments to the BOXR By-Laws; BOXR Board; Fair Representation

The BOXR Board would continue to be composed of at least 50% BOXR Public Directors²⁰⁷ and at least 20% (but no fewer than two directors) would continue to be officers or directors of a firm approved as a BOX Participant (“BOXR BOX Participant Directors”).²⁰⁸ The BOXR BOX Participant Directors would be selected pursuant to BOXR’s current procedures for the nomination and election of BOXR BOX Participant Directors by BOX Participants, as would

²⁰⁴ See Section 15, BOXR LLC Agreement. Pursuant to Schedule A of the proposed BOXR LLC Agreement, BOXR regulatory funds means fees, fines, or penalties derived from the regulatory operations of BOXR, but would not include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of BOXR, even if a portion of such revenues are used to pay costs associated with the regulatory operations of BOXR.

²⁰⁵ See Section 20, BOXR LLC Agreement.

²⁰⁶ See supra note 99 and accompanying text.

²⁰⁷ See supra notes 175-176 and accompanying text.

²⁰⁸ See proposed Section 4, BOXR By-Laws.

be the BOX Participant Director candidate for the BSE Board.²⁰⁹ The successful candidates for BOXR Participant Director positions would be submitted to BSE, as the sole member of BOXR, for election.²¹⁰ The successful candidate for the BOX Participant Director position on the BSE Board would be submitted to NASDAQ OMX, as the sole shareholder of BSE, for election.²¹¹ In connection with this process, BSE proposes, in the BSE Governance Proposal, that the BSE By-Laws include a provision that requires BSE's Nominating Committee to give due consideration to the recommendation of the BOXR Nominating Committee in nominating the BOX Participant Director to the BSE Board.²¹²

Although the BSE By-Laws require only due consideration of the recommendation made by the BSE Nominating Committee, BSE states in its proposed rule change that, in nominating

²⁰⁹ See current Section 14(e), BOXR By-Laws, and proposed Section 14(e), proposed BOXR By-Laws. See also BOXR Order, supra note 124, 69 FR 2768, at notes 21-26 and 52-57, and accompanying text, and discussion supra at note 60 accompanying text. The BOXR Nominating Committee would continue to be responsible for nominating the BOXR BOX Participant Director candidates for the two positions on the BOXR Board and the BOX Participant Director candidate for the one position on the BSE Board. See supra note 59 and accompanying text. In addition, BOX Participants would continue to be able to submit additional nominees for each of these positions and vote on and elect from the slate of nominees the candidates to be elected to those positions. See Section 14(e), BOXR By-Laws.

²¹⁰ See proposed Section 14(e)(iii), BOXR By-Laws.

Pursuant to proposed Section 14(e)(iii)(E) of the BOXR By-Laws, the two nominees for the BOXR Participant Director positions receiving the highest number of votes would be declared elected thereto, and the one nominee for the BOX Participant Director position on the BSE Board would be recommended by the BOXR Nominating Committee for election thereto.

Proposed Section 22 of the BOXR LLC Agreement, which otherwise generally provides that the provisions of the BOXR LLC Agreement would not be deemed to create any right in any person not a party to the BOXR LLC Agreement, would make clear that the limitations of Section 22 would not apply to BOX Participants to the extent provided in Section 14 of the BOXR By-Laws.

²¹¹ Id.

²¹² See proposed Section 4.14, BSE By-Laws.

the BOX Participant Director to the BSE Board, the BSE Nominating Committee would adopt the recommendation of the BOXR Nominating Committee, and NASDAQ OMX, as the sole stockholder of BSE, would elect such candidate.²¹³ To reconcile the BSE By-Laws and this representation, BSE states that immediately following the closing of the BSE Acquisition, BSE would propose to the BSE Board an amendment to the BSE By-Laws to make it clear that the candidate nominated by the BOXR Nominating Committee to serve as the BOX Participant Director on the BSE Board would also be nominated by the BSE Nominating Committee and elected by NASDAQ OMX, unless such nominee is not otherwise eligible for service pursuant to BSE By-Laws Section 4.3.²¹⁴ The Commission believes that the proposed petition process, coupled with the right to vote for their representatives, should help to ensure that BOX Participants have the opportunity to be involved in the selection of their representatives for the BOXR Board and the BSE Board. The Commission notes that this proposed process is consistent with the current process for electing BOX Participant Directors previously approved by the Commission.²¹⁵

The Commission finds that the proposed changes are consistent with Sections 6(b)(3) of

²¹³ See BSE Governance Proposal Notice, supra note 3, 73 FR at 26159, n.16, and accompanying text.

²¹⁴ In Amendment No. 1 to the BSE Governance Proposal, BSE states that, after such proposal to the BSE Board: “[BSE] shall promptly file the amendment as a proposed rule change for approval by the Commission. This clarifying change could not be included in this filing because Article XX of [BSE’s] current Constitution, which is being replaced by the proposed [BSE] By-Laws, provides that [BSE’s] members must approved amendments to the [BSE] Constitution. The [BSE] members voted to approve the [BSE] By-Laws as submitted in this filing on December 4, 2007, prior to the submission of this filing to the Commission, and it would have been impracticable and unduly expensive to seek a second member vote for approval of this clarifying change. Following adoption of the new [BSE] By-Laws, the [BSE] Board will have authority to approve [BSE] By-Law amendments.” See Amendment No. 1 to the BSE Governance Proposal, supra note 4.

²¹⁵ See BOXR Order, supra note 124, 69 FR at 2771.

the Act,²¹⁶ which requires BSE to assure a fair representation of its members in the selection of its directors and administration of its affairs because the proposal is designed to ensure that BOX Participants continue to participate in the selection of their representatives to the BOXR and BSE Boards.

3. Disciplining of Affiliated Members

In the BSE Governance Proposal, BSE proposes to amend the BOXR By-Laws to provide that neither the BSE Board nor the BOXR Board would consider appeals of disciplinary actions involving BOX Participants that are affiliates of NASDAQ OMX.²¹⁷ Currently, any BOX Participant “adjudged guilty in any disciplinary proceeding” by the BOXR Hearing Committee²¹⁸ or any panel thereof may appeal such decision to the BOXR Board and subsequently to the BSE Board. Any initial decision that is rendered by the BOXR Hearing Committee regarding the affiliated BOX Participant would instead constitute final disciplinary action of BSE under Rule 19d-1(c)(1) under the Act.²¹⁹ This proposed change is consistent with the process for appeals by affiliated members of Nasdaq under Nasdaq’s rules, which previously was approved by the Commission.²²⁰

²¹⁶ 15 U.S.C. 78f(b)(3).

²¹⁷ See proposed Section 14(f)(i), BOXR By-laws.

²¹⁸ See BOXR By-Laws, Section 14(f). The “BOXR Hearing Committee” is appointed by the Chairman of the BOXR Board and must include one BOX Participant, but may not include members of the BOXR Board or BSE Board. The BOXR Hearing Committee has exclusive jurisdiction to conduct disciplinary proceedings brought by BOXR against any BOX Participant for violation of the Act, the rules and regulations thereunder, the BSE By-Laws, BOX Rules, the BOXR LLC Agreement or By-Laws, or the interpretations and stated policies of either the BSE or BOXR Boards. *Id.* The BOX Committee would hear appeals from regulatory decisions of the BOXR Board. See *supra* note 167 and accompanying text.

²¹⁹ 17 CFR 240.19d-1(c)(1).

²²⁰ See Securities Exchange Act Release No. 54170, *supra* note 113, 71 FR at 42151.

The Commission believes that this proposed change is consistent with the Act, including Section 6(b)(7) thereunder,²²¹ which requires that the rules of an exchange must provide a fair procedure for disciplining members. Specifically, this proposal, which specifies that the BSE Board and the BOXR Board may not be involved in review of disciplinary actions involving affiliated BOX Participants, would mitigate a conflict of interest that could occur as a result of Nasdaq OMX's ownership of BSE.

D. BSX

1. NASDAQ OMX Ownership of BSX

In addition to the BSE Acquisition, NASDAQ OMX would acquire all of the outstanding limited liability company interests in BSX held by investors other than BSE.²²² As a result, NASDAQ OMX would own 46.79% of BSX directly and would own indirectly through BSE the remaining 53.21% of BSX. Following the BSE Acquisition, BSE would remain the SRO and would provide the regulatory framework for BSX,²²³ and BSE expects to operate in the future a facility for the trading of cash equity securities through BSX. BSE would not resume trading of cash equity securities until it has filed a proposed rule change under Section 19(b) of the Act proposing amendments to BSE Rules, and the Commission has approved the new BSE Rules.²²⁴

The current BSX Operating Agreement requires that any transfer that results in the acquisition and holding by any person, alone or together with any affiliate of such person, of an aggregate percentage interest level that meets or crosses the threshold of 20% be subject to a rule

²²¹ 15 U.S.C. 78f(b)(7).

²²² BSX was formed in 2004 as a joint venture between BSE and several investors to operate an electronic trading facility, BeX, for the trading of cash equity securities. BeX ceased its operations in September 2007. See BSE Governance Proposal Notice, supra note 3, 73 FR at 26166.

²²³ See proposed Section 3.2, BSX Operating Agreement.

²²⁴ See BSE Governance Proposal Notice, supra note 3, 73 FR at 26167.

filing pursuant to Section 19(b)(1) of the Act.²²⁵ In accordance with this requirement, BSE proposes in the BSE Governance Proposal that the Commission approve the transfer of ownership interests in BSX to NASDAQ OMX.

The Commission notes that following the transfer of ownership interests in BSX to NASDAQ OMX, BSE and NASDAQ OMX would be the sole members of BSX. In accordance with proposed Section 18.1 of the BSX Operating Agreement, any amendment to the BSX Operating Agreement, including to permit the admission of additional or substitute members, would have to be submitted to the BSE Board for review, and, if any such amendment would be required under Section 19 of the Act and the rules promulgated thereunder, to be filed with, or filed with and approved by, the Commission before such amendment may be effective, then such amendment would not be effective until filed with, or filed with and approved by the Commission.²²⁶ As the operator of a facility of BSE, BSX must continue to be operated in a manner consistent with the regulatory and oversight responsibilities of BSE and with the Act and rules and regulations thereunder. The Commission believes that, because BSE would remain the SRO and would provide the regulatory framework for BSX, the transfer of ownership interests in BSX to NASDAQ OMX would not impair the continued ability of BSE or the Commission to discharge their respective regulatory and oversight responsibilities. The Commission therefore finds that the transfer of ownership interests in BSX to NASDAQ OMX is consistent with the Act.

2. BSX Operating Agreement

In conjunction with the BSE Acquisition, BSE also proposes in the BSE Governance Proposal to amend the BSX Operating Agreement to reflect the sole ownership of BSX by BSE

²²⁵ See current Section 18.1, BSX Operating Agreement.

²²⁶ See proposed Section 8.2(e), BSX Operating Agreement.

and NASDAQ OMX.

a. Transfer, Ownership and Voting Restrictions

The amended BSX Operating Agreement would continue to state that BSX must provide the Commission with written notice ten days prior to the closing date of any acquisition that results in a BSX Member's percentage ownership interest in BSX, alone or with any affiliate, meeting or crossing the 5%, 10%, or 15 % thresholds.²²⁷ In addition, the amended BSX Operating Agreement would continue to provide that any transfer of BSX units that results in the acquisition and holding by any person, alone or together with an affiliate, of an interest that meets or crosses the 20% threshold or any successive 5% threshold (i.e., 25%, 30%, etc.) would trigger the requirement to file an amendment to the BSX Operating Agreement with the Commission under Section 19(b) of the Act.²²⁸

Further, the amended BSX Operating Agreement would continue to provide that any person that acquires a controlling interest (i.e., an interest of 25% or greater) in a BSX Member that holds 20% or more of BSX units would be required to become a party to the BSX Operating Agreement and abide by its terms.²²⁹ The addition of any such indirect controlling party would

²²⁷ See proposed Section 8.2(d), BSX Operating Agreement.

²²⁸ See supra note 225. In addition, the amended BSX Operating Agreement would provide that any transfer of BSX units that would reduce BSE's ownership in BSX below the 20% threshold would require a proposed rule change under Section 19(b) of the Act. Moreover, Commission approval would be required to permit any person, alone or together with any affiliate, to control 20% of the Total Votes. See current Section 8.4(e), BSX Operating Agreement, and proposed Section 8.2(e), BSX Operating Agreement. The Commission notes that proposed Section 18.1 of the BSX Operating Agreement requires the submission of any proposed amendment thereto to the BSE Board for review. If such amendment is required under Section 19 of the Act to be filed with, or filed with and approved by, the Commission, it could not take effect until filed with, or filed with and approved by the Commission.

²²⁹ See proposed Section 8.2(f), BSX Operating Agreement.

also require a filing with the Commission pursuant to Section 19(b) of the Act.²³⁰

In the BSE Governance Proposal, BSE proposes to amend the BSX Operating Agreement to remove provisions that allow BSX Members to exercise rights of first refusal in the event that one member proposes to transfer its ownership interests in BSX to another member or BSX proposes to issue additional units of ownership.²³¹ Because BSX would be 100% owned, directly and indirectly, by NASDAQ OMX, this provision is no longer relevant. In addition, BSE proposes to expand those provisions of the BSX Operating Agreement that currently prohibit BeX Participants and their affiliates from owning or voting more than 20% of BSX to include all BSE members and their affiliates. To make the BSX Operating Agreement consistent with the exception from BSE Rules to permit NES and NOS to become affiliates of BSE,²³² the proposed amendment to the BSX Operating Agreement would state that these ownership and voting restrictions do not limit NASDAQ OMX's or BSE's ownership interests in BSX.²³³

The Commission believes that the proposed changes to provisions in the BSX Operating Agreement on transfer, ownership, and voting restrictions would not affect the ability of BSE to carry out its self-regulatory responsibilities or the ability of the Commission to fulfill its responsibilities under the Act. In particular, the proposal would not change the current percentage thresholds in the transfer, ownership, and voting provisions. The Commission finds that the proposed revisions to the BSX Operating Agreement discussed above are consistent with the Act.

²³⁰

Id.

²³¹

See current Sections 8.2 and 8.3, BSX Operating Agreement.

²³²

See supra notes 117-123 and accompanying text.

²³³

See proposed Sections 8.3 and 8.4, BSX Operating Agreement

b. BSE's Authority over BSX

Although NASDAQ OMX would own directly 46.79% of BSX, BSE would be entitled to designate all of the directors of the BSX board of directors ("BSX Board").²³⁴ In addition, in the BSE Governance Proposal, BSE proposes to delete a provision in the BSX Operating Agreement that currently requires a super-majority of BSX directors' votes, including the affirmative votes of all directors designated by BSE, before BSX could take certain significant actions, such as entering into a new line of business or replacing BSE as BSX's regulatory service provider.²³⁵ Instead, BSE would have the authority to veto or mandate actions that relate to regulatory requirements.²³⁶ Specifically, the proposal sets forth that BSE's affirmative vote would be required with respect to any action, transaction, or aspect of an action or transaction that BSE, in its sole discretion, determines is necessary or appropriate for, or interferes with, the performance or fulfillment of BSE's regulatory functions, its responsibilities under the Act or as specifically required by the Commission.²³⁷ In addition, BSE would have the sole and exclusive right to direct that any required, necessary, or appropriate act be undertaken without regard to the vote, act, or failure to vote or act by any other party in any capacity.²³⁸

Further, the amended BSX Operating Agreement would state that any amendment thereto must be submitted to the BSE Board for review and, if such amendment is required under Section 19(b) of the Act and the rules thereunder to be filed with, or filed with and approved by

²³⁴ See proposed Section 4.1(b), BSX Operating Agreement. In addition, BSE proposes to reduce the number of BSX directors from six to five. See proposed Section 4.1(a), BSX Operating Agreement.

²³⁵ See current Section 4.4, BSX Operating Agreement.

²³⁶ See proposed Section 4.4, BSX Operating Agreement.

²³⁷ Id.

²³⁸ Id.

the Commission, then such amendment would not be effective until filed with, or filed with and approved by the Commission, as the case may be.²³⁹

The Commission believes that these proposals are designed to preserve BSE's regulatory authority over BSX, and any proposed facility for the trading of cash equity securities that BSX may operate, and are consistent with the Act because they would grant BSE the ability to direct BSX to perform any required, necessary, or appropriate act and would allow BSE to veto or mandate actions that relate to regulatory requirements. The Commission notes that BSE could not operate a facility for the trading of cash equity securities until it has filed under Section 19(b) of the Act, and the Commission has approved, the new BSE Rules. In particular, the Commission believes these changes are consistent with Section 6(b)(1) of the Act,²⁴⁰ which requires, among other things, that the national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

c. Confidentiality Provisions

In the BSE Governance Proposal, BSE proposes to amend the BSX Operating Agreement to provide that all confidential information pertaining to the self-regulatory function of BSE or the business of BSE relating to the trading of cash equity securities (including disciplinary matters, trading data, trading practices and audit information) in the books and records of BSX would not be made available to any persons. The proposal would allow such information to be made available to officers, directors, employees and agents of BSX who have a reasonable need to know the contents thereof. However, such confidential information would be required to be

²³⁹ See proposed Section 18.1, BSX Operating Agreement.

²⁴⁰ 15 U.S.C. 78f(b)(1).

retained in confidence by BSX and its officers, directors, employees and agents and not be used for any commercial purposes.²⁴¹ The Commission believes that the revised confidentiality provisions would not impair BSE's self-regulatory obligations with respect to BSX and finds that this provision is consistent with the Act.

d. Jurisdiction

The current BSX Operating Agreement provides that BSX and each BSX Member as well as the officers, directors, agents, and employees of BSX and each BSX Member must submit to the jurisdiction of the federal courts, the Commission, and BSE for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws or the rules or regulations thereunder, arising out of, or relating to BSX's activities.

In the BSE Governance Proposal, BSE proposes to amend Section 18.6(b) of the BSX Operating Agreement to: (1) clarify that the jurisdiction of the U.S. federal courts, the Commission, and BSE over BSX, its members, and their respective officers, directors, agents, and employees is exclusive; (2) require BSX and its members and their respective officers, directors, agents, and employees to agree not to assert lack of personal jurisdiction by the U.S. federal courts or BSE,²⁴² and (3) include a provision regarding the waiver of the defense or application of any foreign secrecy or blocking statutes by BSX and its members and their respective officers, directors, agents, and employees, with respect to BSX's activities or their participation therein.

²⁴¹ See proposed Section 16.7, BSX Operating Agreement. BSE also proposes that the provision would not be interpreted to limit or impede the ability of any officers, directors, employees or agents of the Company to disclose confidential information to the Commission or the BSE.

²⁴² Section 18.6(b) of the BSX Operating Agreement currently requires BSX and its members and their respective officers, directors, agents, and employees, to agree not to assert lack of personal jurisdiction by the Commission.

The Commission believes that these changes, in conjunction with other provisions of the BSX Operating Agreement that would remain unchanged, would enhance BSE's ability to fulfill its self-regulatory obligations and assist in administering and complying with the requirements of the Act. Moreover, BSE is required to enforce compliance with these provisions because they are "rules of the exchange" within the meaning of Section 3(a)(27) of the Act.²⁴³ A failure on the part of BSE to enforce its rules could result in a Commission enforcement action pursuant to Section 19(h)(1) of the Act.²⁴⁴

E. BSECC

As a result of the BSE Acquisition, BSECC, BSE's wholly-owned subsidiary and a registered clearing agency, would become a wholly-owned indirect subsidiary of NASDAQ OMX. As noted above, BSECC ceased processing trades in 2007. In connection with the transaction, BSECC proposes, in the BSECC Governance Proposal, to amend its Articles of Organization ("BSECC Articles of Organization"). BSECC also proposes to update the BSECC Articles of Organization and By-Laws ("BSECC By-Laws") in certain other respects, including, according to BSE, to reflect modern corporate practice for Massachusetts corporations. In addition, BSECC has filed the NASDAQ OMX Certificate and By-Laws as proposed rules.²⁴⁵

In connection with the BSE Acquisition, BSECC proposes to amend the BSECC Articles of Organization such that the total number of shares of each class of stock that BSECC would be authorized to issue is 150 shares of common stock. This amendment would reflect a reduction in the total authorized share capital of BSECC from 1000 shares of common stock to the 150 shares of common stock currently held by BSE. Thus, following the amendment, all of the authorized

²⁴³ 15 U.S.C. 78c(a)(27).

²⁴⁴ 15 U.S.C. 78s(h)(1).

²⁴⁵ See supra note 10 and accompanying text.

shares of common stock of BSECC would be outstanding and would be owned by BSE.²⁴⁶

BSECC also proposes to amend the BSECC Articles of Organization to provide that BSE may not transfer or assign any shares of stock of BSECC unless such transfer or assignment has been filed with and approved by the Commission under Section 19 of the Act.²⁴⁷ These proposed changes are designed to ensure that, absent Commission approval, BSECC would remain a wholly-owned subsidiary of BSE. Further, BSECC proposes to amend the BSECC By-Laws to expressly state that the BSECC By-Laws may be amended only upon approval by the Commission and in accordance with the rules of BSECC.²⁴⁸

BSECC also proposes several other changes to the BSECC Articles of Organization and BSECC By-Laws, which BSECC states are primarily for the purpose of updating those documents in accordance with modern corporate practice for Massachusetts corporations.²⁴⁹ Specifically, BSECC proposes to adopt what it terms “modern provisions” stipulating the conditions under which BSECC may indemnify its officers and directors and the scope of that indemnification. Such provisions provide that directors of BSECC are not personally liable to it for breaches of fiduciary duty, except for breaches involving (1) a breach of the duty of loyalty, (2) acts or omissions not in good faith or that involve intentional misconduct or knowing violation of law, (3) distributions of assets that would render BSECC insolvent, or (4) any transaction from which the director derived an improper personal benefit.²⁵⁰ BSECC also proposes to amend the BSECC By-Laws to clarify the time periods allowed or required for

²⁴⁶ See proposed BSECC Articles of Organization, Article III.

²⁴⁷ See proposed BSECC Articles of Organization, Article V.

²⁴⁸ See proposed BSECC By-Laws Article VI.7. BSECC Rule XII requires notice to clearing members of amendments to the BSECC By-Laws.

²⁴⁹ See BSECC Governance Proposal Notice, *supra* note 9, 73 FR at 27584.

²⁵⁰ See proposed BSECC By-Laws Article VI.

notice to stockholders of meetings, the permissible duration of stockholder proxies, and the setting of a record date, which BSECC states are consistent with Massachusetts law.²⁵¹ BSECC further proposes to remove a provision from its By-Laws allowing close of the transfer books of BSECC, which BSECC states is no longer consistent with Massachusetts law.²⁵²

In addition, BSECC states that its proposed changes would allow stockholders, as well as directors, to fill vacancies on the BSECC Board of Directors (“BSECC Board”) in accordance with Massachusetts law²⁵³ and to clarify that directors of BSECC, if such directors also serve on the BSE Board, must tender resignations from the BSECC Board if they cease to be BSE Directors.²⁵⁴ The proposed changes also would clarify the requirements for action by the BSECC Board and the stockholders to be taken without a meeting.²⁵⁵

The Commission finds that the proposed changes to the BSECC Articles of Organization and BSECC By-Laws are consistent with the requirements of the Act and the rules and regulations thereunder and particularly with the requirements of Section 17A(b)(3)(C) of the Act.²⁵⁶ The Commission notes that the proposed rule change does not amend BSECC’s rules or procedures with respect to the clearance and settlement of securities transactions or the safeguarding of securities and funds which are in BSECC’s control or for which it is responsible.

²⁵¹ See proposed BSECC By-Laws Article I.4, Article I.6, and Article V.3.

²⁵² See BSECC By-Laws Article V.3. BSECC represents that this change would not limit the effectiveness of the change to the Articles of Organization requiring Commission approval of transfers of BSECC’s stock. See BSECC Governance Proposal Notice, *supra* note 9, 73 FR 27583, n.5.

²⁵³ See proposed BSECC By-Laws Article II.4.

²⁵⁴ See proposed BSECC By-Laws Article II.7.

²⁵⁵ BSECC also proposes changes to eliminate the offices of “clerk” and “vice-chairman” from BSECC and to delete references to those offices from the By-Laws and to establish that the officers of BSECC are all appointed by and subject to removal by the BSECC Board. See proposed BSECC By-Laws Article III.1 and III.4.

²⁵⁶ 15 U.S.C. 78q-1(b)(3)(C).

Section 17A(b)(3)(C) of the Act requires that a clearing agency's rules assure the fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs. BSECC would remain a wholly-owned subsidiary of BSE following the acquisition by NASDAQ OMX and the BSECC By-Laws relating to the selection, composition, powers, and duties of the BSECC Board, committees, and officers, except as discussed above, would remain unchanged. Accordingly, the Commission finds that BSECC's rules would continue to assure the fair representation of its shareholders and participants in the selection of BSECC's directors and the administration of BSECC's affairs as required by Section 17A(b)(3)(C).

Furthermore, as discussed above with respect to BSE, BSECC also has filed the Certificate and By-Laws of NASDAQ OMX as proposed rules.²⁵⁷ As noted above, although NASDAQ OMX is not itself an SRO, its activities with respect to the operation of BSECC must be consistent with, and must not interfere with, the self-regulatory obligations of BSECC. NASDAQ OMX's By-Laws would make applicable to all of NASDAQ OMX's SRO subsidiaries, including BSECC (after the BSE Acquisition), certain provisions of NASDAQ OMX's Certificate and NASDAQ OMX's By-Laws that are designed to maintain the independence of each of its SRO subsidiaries' self-regulatory functions, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.²⁵⁸

Additionally, the Commission notes that the NASDAQ OMX By-Laws would provide that the NASDAQ OMX Board, as well as its officers, employees, and agents, may not take any

²⁵⁷ See supra note 38.

²⁵⁸ See Amendment No. 1 to the BSECC Governance Proposal, supra note 10.

action that would interfere with the decisions of the board of directors of any SRO subsidiary relating to its regulatory functions or the market structures or the clearing systems which it regulates or that would interfere with the ability of any SRO subsidiary to carry out its responsibilities under the Act.²⁵⁹ Also, the NASDAQ OMX By-Laws would specifically require the NASDAQ OMX Board to consider BSECC's regulatory obligations as a clearing agency when evaluating any issue,²⁶⁰ including granting any exemption from the NASDAQ OMX voting limitations discussed above.²⁶¹ The Commission believes that the NASDAQ OMX By-Laws, as amended to accommodate the BSE Acquisition, are designed to facilitate BSECC's ability to fulfill its self-regulatory obligations and, accordingly, are consistent with Section 17A of the Act.

²⁵⁹ See proposed Section 12.1(a), NASDAQ OMX By-Laws.

²⁶⁰ The NASDAQ OMX Board would be required to consider, to the extent deemed relevant, when evaluating any issue, whether such would promote the prompt and accurate clearance and settlement of securities transactions (and to the extent applicable, derivative agreements, contracts and transactions), would assure the safeguarding of securities and funds in the custody or control of the SRO subsidiaries that are clearing agencies or securities and funds for which they are responsible, would foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, and would remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. See proposed Section 12.7, NASDAQ OMX By-Laws.

²⁶¹ Specifically, the NASDAQ OMX Board would be required to determine that granting any such exemption would promote the prompt and accurate clearance and settlement of securities transactions (and to the extent applicable, derivative agreements, contracts and transactions), would assure the safeguarding of securities and funds in the custody or control of the SRO subsidiaries that are clearing agencies or securities and funds for which they are responsible, would foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, and would remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. See proposed Section 12.5, NASDAQ OMX By-Laws; and Article Fourth.C.6, NASDAQ OMX Certificate. See also notes 100-104 and accompanying text.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning: (1) Amendment No. 1 to File No. SR-BSE-2008-23 (the BSE Governance Proposal), including whether Amendment No. 1 is consistent with the Act; (2) Amendment No. 1 to File No. SR-BSECC-2008-01 (the BSECC Governance Proposal), including whether Amendment No. 1 is consistent with the Act; and (3) Amendment No. 1 to File No. SR-BSE-2008-25 (the BOX Transfer Proposal), including whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BSE-2008-23, SR-BSECC-2008-01, or SR-BSE-2008-25 as applicable, on the subject line.

Paper comments:

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

All submissions should refer to Amendment No. 1 to File No. SR-BSE-2008-23, Amendment No. 1 to File No. SR-BSECC-2008-01, or Amendment No. 1 to File No. SR-BSE-2008-25, as applicable. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method.

The Commission will post all comments on the Commission's Internet Web site

(<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission

and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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. Copies of such filing also will be available for inspection and copying at the principal office of BSE or BSECC, as applicable. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to Amendment No. 1 to File No. SR-BSE-2008-23, Amendment No. 1 to File No. SR-BSECC-2008-01, or Amendment No. 1 to File No. SR-BSE-2008-25, as applicable, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Accelerated Approval of the BSE Governance Proposal, as Modified by Amendment No. 1, the BSECC Governance Proposal, as Modified by Amendment No. 1, and the BOX Transfer Proposal, as Modified by Amendment No. 1

The Commission finds good cause for approving: (1) the BSE Governance Proposal, as modified by Amendment No. 1, (2) the BSECC Governance Proposal, as modified by Amendment No. 1, and (3) the BOX Transfer Proposal, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of filing of such amendments in the Federal Register.²⁶²

In Amendment No. 1 to the BSE Governance Proposal and Amendment No. 1 to the BSECC Governance Proposal, BSE and BSECC each propose to adopt as rules the NASDAQ OMX Certificate and NASDAQ OMX By-Laws. The NASDAQ OMX Certificate, as filed by

²⁶² 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Act, the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

BSE and BSECC, was previously approved by the Commission as rules of Nasdaq.²⁶³ The NASDAQ OMX By-Laws were similarly approved previously by the Commission.²⁶⁴ As filed by BSE and BSECC, the NASDAQ OMX By-Laws include certain new terminology to reflect the acquisition of BSE and BSECC by NASDAQ OMX. These changes were filed by Nasdaq as a proposed rule change, were published for comment, and were approved by the Commission.²⁶⁵ The changes were also filed by Phlx, and were approved by the Commission, in connection with the Phlx Acquisition.²⁶⁶ The Commission received no comments on the proposed changes to the NASDAQ OMX By-Laws in either instance.²⁶⁷

As discussed more fully above in Sections II.A.1. and II.A.6., and in the NASDAQ OMX By-Law Proposal Notice, certain provisions of NASDAQ OMX's Certificate and By-Laws are designed to facilitate the ability of NASDAQ OMX's SRO subsidiaries, including BSE and BSECC, to maintain the independence of each of the SRO subsidiaries' self-regulatory function, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.²⁶⁸ As stated above, the Commission finds that such

²⁶³ See Nasdaq Exchange Approval Order, supra note 63, 73 FR at 3552-3553.

²⁶⁴ See NASDAQ OMX By-Laws Proposal Notice, supra note 18, 73 FR 26182, and NASDAQ OMX By-Laws Approval Order, supra note 31, 73 FR 42850.

²⁶⁵ Id.

²⁶⁶ See Securities Exchange Act Release No. 58179, supra note 27.

²⁶⁷ In addition, Amendment No. 1 to the BSE Governance Proposal and Amendment No. 1 to the BSECC Governance Proposal incorporate a change to the Nasdaq OMX By-Laws to clarify the definition of Non-Industry Director with respect to issuer representation on the Nasdaq OMX Board of Directors that recently was approved by the Commission. See Securities Exchange Act Release No. 58201 (July 21, 2008), 73 FR 43812 (July 28, 2008) (SR-NASDAQ-2008-043).

²⁶⁸ See supra notes 38-47, 100-104 and accompanying text.

provisions are consistent with the Act.²⁶⁹ Notably, the NASDAQ OMX Certificate and By-Laws are rules of Nasdaq that have been approved previously by the Commission, as noted above, and the changes to the NASDAQ OMX By-Laws were published for notice and comment, as noted above, and the Commission did not receive any comments thereon.

Additionally, in Amendment No. 1 to the BSE Governance Proposal, BSE proposes to amend Section 8.2(f) of the BSX Operating Agreement. Section 8.2(f) currently requires that any person who, alone or together with any affiliate of such person, has 25% or greater interest in a BSX Member who, alone or together with any affiliate of such BSX Member, holds 20% or greater interest in BSX become party to, and abide by all the provisions of, the BSX Operating Agreement. In Amendment No. 1, BSE proposes to clarify that for the Section 8.2(f) requirement to apply, a person, alone or together with any affiliate of such person, must have direct or indirect ownership of 25% or more of the total voting power of all equity securities of a BSX Member, other than voting rights solely with respect to matters affecting the rights, preferences, or privileges of a particular class of equity securities. Notwithstanding the foregoing, BSE proposes to clarify that a person with zero percent direct or indirect interest in a BSX Member would not be required to become party to the BSX Operating Agreement pursuant to the revised Section 8.2(f).

The Commission finds these changes to the BSX Operating Agreement consistent with the Act. Section 8.2(f) of the BSX Operating Agreement is designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission and BSE to effectively carry out their regulatory oversight responsibilities under the Act. The clarifications proposed by BSE do not hinder the intent of Section 8.2(f), because the Commission believes

²⁶⁹

See id.

that a person without voting power in the equity securities of a BSX Member, or a person with no direct or indirect interest in a BSX Member, could not interfere with or restrict the Commission's or the BSE's ability to carry out its regulatory responsibilities.

In Amendment No. 1 to the BOX Transfer Proposal, BSE proposes to amend Section 8.4(g) of the BOX LLC Agreement. Section 8.4(g) currently requires that any person who, alone or together with any affiliate of such person, has 25% or greater interest in a BOX Member who, alone or together with any affiliate of such BOX Member, holds 20% or greater interest in BOX become party to, and abide by all the provisions of, the BOX LLC Agreement. In Amendment No. 1, BSE proposes to clarify that for the Section 8.4(g) requirement to apply, a person, alone or together with any affiliate of such person, must have direct or indirect ownership of 25% or more of the total voting power of all equity securities of a BOX Member, other than voting rights solely with respect to matters affecting the rights, preferences, or privileges of a particular class of equity securities. Notwithstanding the foregoing, BSE proposes to clarify that a person with zero percent direct or indirect interest in a BOX Member would not be required to become party to the BOX LLC Agreement pursuant to the revised Section 8.4(g).

The Commission finds these changes to the BOX LLC Agreement consistent with the Act. Section 8.4(g) of the BOX LLC Agreement is designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission and BSE to effectively carry out their regulatory oversight responsibilities under the Act. The clarifications proposed by BSE do not hinder the intent of Section 8.4(g) because the Commission believes that a person without voting power in the equity securities of a BOX Member, or a person with no direct or indirect interest in a BOX Member, could not interfere with or restrict the Commission's or the BSE's ability to carry out its regulatory responsibilities.

For the reasons described above, the Commission finds good cause for approving each of the following on an accelerated basis, pursuant to Section 19(b)(2) of the Act: (1) the BSE Governance Proposal, as modified by Amendment No. 1; (2) the BSECC Governance Proposal, as modified by Amendment No. 1; and (3) the BOX transfer Proposal, as modified by Amendment No. 1.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁷⁰ that the BSE Interim Certificate Proposal (SR-BSE-2008-02), as modified by Amendment No. 1, be, and hereby is, approved; that the BSE Governance Proposal (SR-BSE-2008-23), as modified by Amendment No.1, be, and hereby is, approved on an accelerated basis; that the BOX Transfer Proposal (SR-BSE-2008-25), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis; and that the BSECC Governance Proposal (SR-BSECC-2008-01), as modified by Amendment No.1 be, and hereby is approved on an accelerated basis.

By the Commission.



Florence E. Harmon
Acting Secretary

²⁷⁰ 15 U.S.C. 78s(b)(2).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 8952 / August 7, 2008

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58329 / August 7, 2008

INVESTMENT COMPANY ACT OF 1940
Rel. No. 28353 / August 7, 2008

Admin. Proc. File No. 3-12626

In the Matter of

THOMAS C. BRIDGE,
JAMES D. EDGE, and
JEFFREY K. ROBLES

c/o Christopher P. Litterio, Esq.
Barry Y. Weiner, Esq.
Michael Duffy, Esq.
Ruberto, Israel & Weiner, PC
100 North Washington Street
Boston, Massachusetts 02114

ORDER GRANTING PARTIAL
PROTECTIVE ORDER

On July 16, 2008, Thomas C. Bridge submitted "private, confidential financial statements and documents," i.e., income tax returns ("the Confidential Information"), in connection with his petition for review of an administrative law judge's initial decision and requested a protective order limiting disclosure of such information. 1/ Under Rule of Practice 322, any party "may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information." 2/ That rule further provides that

1/ Bridge made an earlier request for protective treatment, which we granted. See Thomas C. Bridge, Securities Exchange Act Rel. No. 58064 (June 30, 2008), SEC Docket .

2/ 17 C.F.R. § 201.322(a).

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“[a] motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.” 3/

The documents Bridge has submitted contain sensitive information and, at this stage in the proceeding, the harm resulting from complete disclosure appears to outweigh the benefits. 4/ However, because disclosure of portions of the Confidential Information will be necessary to our consideration of this proceeding, we shall grant the requested protective order subject to certain limitations. 5/

3/ 17 C.F.R. § 201.322(b).

On July 18, 2008, the Division of Enforcement moved for leave to file a sur-reply to Respondents’ reply brief arguing, among other things, that the Confidential Information should be excluded from the record and disregarded because it was untimely filed, although the Division does not appear to oppose Bridge’s request that the Confidential Information be given protective treatment. The Division did not oppose Bridge’s earlier protective order request. We hereby deny the Division’s request for leave to file a sur-reply brief. Commission Rule of Practice 450(a) provides for the filing of three briefs, two for the appealing party and one opposition brief for the party opposing the appeal. 17 C.F.R. § 201.450(a). Our Rules of Practice expressly direct that they “be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.” Rule of Practice 103(a), 17 C.F.R. § 201.103(a). The Division, in making its motion, offers no strong justification for deviating from these directives.

4/ See Bridge, Exchange Act Rel. No. 58064 (June 30, 2008), __ SEC Docket __ (granting request for order protecting personal financial information in connection with petition for review and noting that the “harm resulting from complete disclosure outweighs the benefits”); James D. Edge, Exchange Act Rel. No. 58062 (June 30, 2008), __ SEC Docket __ (same); Jeffrey K. Robles, Exchange Act Rel. No. 58063 (June 30, 2008), __ SEC Docket __ (same); Gregory O. Trautman, Exchange Act Rel. No. 57475 (Mar. 11, 2008), __ SEC Docket __ (same).

5/ See Bridge, Exchange Act Rel. No. 58064 (June 30, 2008), __ SEC Docket __ (determining that disclosure of certain information included in the documents at issue was necessary to the Commission’s consideration of the proceeding); Edge, Exchange Act Rel. No. 58062 (June 30, 2008), __ SEC Docket __ (same); Robles, Exchange Act Rel. No. 58063 (June 30, 2008), __ SEC Docket __ (same); Gregory O. Trautman, Exchange Act Rel. No. 57475 (Mar. 11, 2008), __ SEC Docket __ (same); Kevin Hall, CPA, Exchange Act Rel. No. 56242 (Aug. 13, 2007), 91 SEC Docket 1071, 1072 (same); David Henry Disraeli, Exchange Act Rel. No. 56012 (July 5, 2007), 90 SEC Docket 3175, 3175 (same).

(continued...)

Accordingly, IT IS ORDERED that:

1. Except as otherwise provided in this Order, the Confidential Information shall be disclosed only to the parties to this proceeding, their counsel, the Commission, any staff advising the Commission in its deliberative processes with respect to this proceeding and, in the event of an appeal of the Commission's determination, any staff acting for the Commission in connection with that appeal.
2. All persons who receive access to the Confidential Information shall keep it confidential and, except as provided in this Order, shall not divulge the Confidential Information to any person.
3. No person to whom the Confidential Information is disclosed shall make any copies or otherwise use such Confidential Information, except in connection with this proceeding or any appeal thereof.
4. The Office of the Secretary shall place the Confidential Information in sealed envelopes or other sealed containers marked with the title of this action, identifying each document and marked "CONFIDENTIAL."
5. The requirements of sealing and confidentiality shall not apply to any reference to the existence of the documents or to citation of particular information contained therein in testimony, oral argument, briefs, opinions, or in any other similar use directly connected with this action or any appeal thereof.
6. The Commission expressly reserves the authority to reach a different conclusion regarding the protective status of any portion of the Confidential Information covered by this Order at any time before it determines the issues raised in the proceeding.

By the Commission.



Florence E. Harmon
Acting Secretary

5/ (...continued)

We note that our determination to grant protective status to the Confidential Information should not be construed as a determination to admit such information into the record.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58374 / August 18, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13137

In the Matter of

Heritage American Resource
Corp. (n/k/a St Andrew
Goldfields Ltd.),

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 Heritage American Resource Corp. (n/k/a St Andrew Goldfields Ltd.) ("Heritage" or "Respondent").

II.

In anticipation of the institution of these proceedings, Heritage 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, Heritage 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. Heritage (CIK No. 796544) is an Ontario corporation located in Oakville, Ontario with a class of securities registered with Commission under Exchange Act

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Section 12(g). As of March 13, 2008, the company's common stock (symbol "SASXF") was traded on the over-the-counter market, but had no market makers and was not eligible for the piggyback exception of the Exchange Act Rule 15c2-11(f)(3).

2. Heritage has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-16 thereunder while its securities were registered with the Commission in that it has neither filed an Annual Report on Form 20-F for any fiscal period since the period ended December 31, 1997 nor furnished information required on Form 6-K since the period ended August 12, 1996.

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 Heritage's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Florence E. Harmon
Acting Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

August 18, 2008

IN THE MATTER OF

Pacific Gateway Exchange, Inc.,
Pallet Management Systems, Inc.,
Panaco, Inc.,
Paragon Financial Corp.
(n/k/a NewMarket Latin
America, Inc.), and
Patriot Motorcycle Corp.,

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 Pacific Gateway Exchange, Inc. because it has not filed any periodic reports since the period ended September 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Pallet Management Systems, Inc. because it has not filed any periodic reports since the period ended September 28, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Panaco, Inc. because it has not filed any periodic reports since the period ended March 31, 2002.

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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Paragon Financial Corp. (n/k/a NewMarket Latin America, Inc.) because it has not filed any periodic reports since the period ended December 31, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Patriot Motorcycle Corp. because it has not filed any periodic reports since the period ended December 31, 2005.

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 companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies, including the debt securities of Panaco, Inc., is suspended for the period from 9:30 a.m. EDT on August 18, 2008, through 11:59 p.m. EDT on August 29, 2008.

By the Commission.

Florence E. Harmon
Acting Secretary


By: J. Lynn Taylor
Assistant Secretary

Commissioner Walter
not participating

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58375; File No. 10-182)

August 18, 2008

In the Matter of the Application of
BATS Exchange, Inc.
for Registration as a National Securities Exchange

Findings, Opinion, and Order of the Commission

I. Introduction

On November 8, 2007, BATS Exchange, Inc. ("BATS Exchange" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") a Form 1 application ("Form 1") under the Securities Exchange Act of 1934 ("Act"), seeking registration as a national securities exchange pursuant to Section 6 of the Act.¹ On February 13, 2008, BATS Exchange submitted Amendment No. 1 to its Form 1. Notice of the application, as amended, was published for comment in the Federal Register on February 20, 2008.² The Commission

¹ 15 U.S.C. 78f.

² See Securities Exchange Act Release No. 57322 (February 13, 2008), 73 FR 9370 ("Notice").

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received one comment letter regarding the BATS Exchange Form 1.³ On June 18, 2008, BATS Exchange filed Amendment No. 2 to its Form 1.⁴

II. Statutory Standards

Under Sections 6(b) and 19(a) of the Act,⁵ the Commission shall by order grant a registration as a national securities exchange if it finds that the exchange is so organized and has the capacity to carry out the purposes of the Act and can comply, and can enforce compliance by

³ The commenter expressed support for the BATS Exchange Form 1. See letter from Brian McPartlin dated February 14, 2008.

⁴ In Amendment No. 2, BATS Exchange modified its application by: (1) updating its response to the Form 1 Exhibits to reflect, among other things, certain personnel changes, the existence of a new affiliate, BATS Trading Limited, audited financials for BATS Trading, Inc. ("BATS Trading"), and how BATS Exchange intends to fulfill its regulatory obligations; (2) adding a provision to the BATS Exchange Amended and Restated By-Laws that allows the stockholder of BATS Exchange to appoint the initial Member Representative Directors to the BATS Exchange Board, and amending the definition of "Executive Representative" of a member of BATS Exchange; (3) updating certain provisions of the Investors Rights Agreement; and (4) amending the BATS Holdings Amended and Restated Certificate of Incorporation to reduce the number of authorized shares of stock of BATS Holdings, Inc. ("BATS Holdings"). BATS Exchange also made certain modifications to its proposed rules to: (1) change the start of its pre-opening session from 9:00 a.m. to 8:00 a.m.; (2) remove the ability of a person to submit one membership application with the Financial Industry Regulatory Authority, Inc. ("FINRA"), when applying for membership in both FINRA and BATS Exchange; (3) clarify that the requirement for eligibility for BATS Exchange membership of membership in another SRO applies for continued membership; (4) clarify that the 90-day waive-in period will begin on the date that BATS Exchange's application for registration as a national securities exchange is approved by the Commission; (5) amend the BATS Only Order type to provide that a non-displayed order would get a new timestamp when it becomes displayed; (6) add continuing education requirements for Authorized Traders that are substantially similar to those of FINRA; (7) specify certain BATS Exchange rules and recommended fine amounts for minor rule violations; (8) delete a provision requiring non-clearing members to implement certain procedures of FINRA's Code of Practice; (9) amend its rule relating to failures to deliver/receive to conform to Regulation SHO; and (10) adding a rule to codify the ability of BATS Exchange to enter into an agreement with another self-regulatory organization ("SRO") to provide regulatory services to BATS Exchange. The changes proposed in Amendment No. 2 either are not material or are otherwise responsive to the concerns of the Commission.

⁵ 15 U.S.C. 78f(b) and 78s(a).

its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

As discussed in greater detail below, the Commission finds that BATS Exchange's application for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of BATS Exchange are consistent with Section 6 of the Act in that, among other things, they are designed to: (1) assure fair representation of an exchange's members in the selection of its directors and administration of its affairs and provide that, among other things, one or more directors shall be representative of investors and not be associated with the exchange, or with a broker or dealer; (2) prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system; and (3) protect investors and the public interest. The Commission also believes that the rules of BATS Exchange are consistent with Section 11A of the Act.⁶ Finally, the Commission finds that the proposed rules of BATS Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁷

III. Discussion

A. Corporate Structure

BATS Exchange has applied to the Commission to register as a national securities exchange. BATS Holdings, a Delaware corporation, will wholly own BATS Exchange and BATS Trading. Currently, BATS Trading, a registered broker-dealer, operates the BATS ECN.

⁶ 15 U.S.C. 78k-1.

⁷ 15 U.S.C. 78f(b)(8).

Before operation of BATS Exchange as a national securities exchange, BATS Trading will transfer most of its assets to BATS Exchange. BATS Trading will continue as a broker-dealer with the sole function of providing outbound order routing services to BATS Exchange.⁸

1. Self-Regulatory Function of BATS Exchange; Relationship between BATS Holdings, Inc. and BATS Exchange; Jurisdiction over BATS Holdings, Inc.

Although BATS Holdings will not itself carry out regulatory functions, its activities with respect to the operation of BATS Exchange must be consistent with, and not interfere with, the Exchange's self-regulatory obligations. The proposed BATS Holdings corporate documents include certain provisions that are designed to maintain the independence of the Exchange's self-regulatory function from BATS Holdings, enable the Exchange to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b) and 19(g) of the Act, and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.⁹

For example, BATS Holdings submits to the Commission's jurisdiction with respect to activities relating to BATS Exchange,¹⁰ and agrees to provide the Commission and BATS Exchange with access to its books and records that are related to the operation or administration of BATS Exchange.¹¹ In addition, to the extent they are related to the operation or administration of BATS Exchange, the books, records, premises, officers, directors, agents, and employees of BATS Holdings shall be deemed the books, records, premises, officers, directors, agents, and employees of BATS Exchange for purposes of, and subject to oversight pursuant to,

⁸ See BATS Exchange Rule 2.11. See also *infra* note 151 and accompanying text.

⁹ See BATS Holdings Amended and Restated By-Laws Article XII and Article XIV, Sections 14.01, 14.02, 14.03, 14.04, 14.05, and 14.06.

¹⁰ See BATS Holdings Amended and Restated By-Laws Article XIV, Section 14.05.

¹¹ See BATS Holdings Amended and Restated By-Laws Article XIV, Section 14.03.

the Act.¹² BATS Holdings also agrees to keep confidential non-public information relating to the self-regulatory function¹³ of BATS Exchange and not to use such information for any non-regulatory purpose.¹⁴ In addition, the board of directors of BATS Holdings, as well as its officers, employees, and agents, are required to give due regard to the preservation of the independence of the Exchange's self-regulatory function.¹⁵ Further, BATS Holdings By-Laws require that any changes to the BATS Holdings Certificate of Incorporation and By-Laws be submitted to the Board of Directors of the Exchange ("Exchange Board"), and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.¹⁶ The Commission finds that these provisions are consistent with the Act, and that they will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The Commission also believes that under Section 20(a) of the Act¹⁷ any person with a controlling interest in BATS Exchange would be jointly and severally liable with and to the same extent that BATS Exchange is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the

¹² Id.

¹³ This requirement to keep confidential non-public information relating to the self-regulatory function shall not limit the Commission's ability to access and examine such information or limit the ability of directors, officers, or employees of BATS Holdings to disclose such information to the Commission. See BATS Holdings Amended and Restated By-Laws Article XIV, Section 14.02.

¹⁴ See BATS Holdings Amended and Restated By-Laws Article XIV, Section 14.02.

¹⁵ See BATS Holdings Amended and Restated By-Laws Article XIV, Section 14.01.

¹⁶ See BATS Holdings Amended and Restated Certificate of Incorporation TWELFTH and BATS Holdings Amended and Restated By-Laws Article XII.

¹⁷ 15 U.S.C. 78t(a).

violation or cause of action. In addition, Section 20(e) of the Act¹⁸ creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act¹⁹ authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to BATS Holdings’ dealings with BATS Exchange.

2. Ownership and Voting Limitations; Changes in Control of BATS Exchange

The BATS Holdings proposed Amended and Restated Certificate of Incorporation includes restrictions on the ability to own and vote shares of capital stock of BATS Holdings.²⁰ These limitations are designed to prevent any shareholder from exercising undue control over the operation of BATS Exchange and to assure that the Exchange and the Commission are able to carry out their regulatory obligations under the Act.

Generally, no person, either alone or together with its related persons,²¹ may beneficially own more than forty percent of any class of capital stock of BATS Holdings.²² The BATS Holdings proposed Amended and Restated Certificate of Incorporation prohibits BATS

¹⁸ 15 U.S.C. 78t(e).

¹⁹ 15 U.S.C. 78u-3.

²⁰ These provisions are generally consistent with ownership and voting limits approved by the Commission for other SROs. See e.g., Securities Exchange Act Release Nos. 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR-NSX-2006-03) (“NSX Demutualization Order”); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR-CHX-2004-26) (“CHX Demutualization Order”); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73) (“Phlx Demutualization Order”).

²¹ See BATS Holdings Amended and Restated Certificate of Incorporation FIFTH (a)(ii).

²² See BATS Holdings Amended and Restated Certificate of Incorporation FIFTH (b)(i)(A).

Exchange members, either alone or together with their related persons, from beneficially owning more than twenty percent of shares of any class of capital stock of BATS Holdings.²³ If any stockholder violates these ownership limits, BATS Holdings will redeem the shares in excess of the applicable ownership limit for their fair market value.²⁴ In addition, no person, alone or together with its related persons, may vote or cause the voting of more than twenty percent of the voting power of the then issued and outstanding capital stock of BATS Holdings.²⁵ If any stockholder purports to vote, or cause the voting of, shares that would violate this voting limit, BATS Holdings will not honor such vote in excess of the voting limit.²⁶

The BATS Holdings Board may waive the forty percent ownership limitation applicable to non-BATS Exchange member stockholders and the twenty percent voting limitation, pursuant to a resolution duly adopted by the Board of Directors, if it makes certain findings.

Any such waiver would not be effective until approved by the Commission pursuant to Section 19 of the Act.²⁷ However, as long as BATS Holdings directly or indirectly controls BATS Exchange, the BATS Holdings Board cannot waive the voting and ownership limits above twenty percent for BATS Exchange members and their related persons.²⁸

Members that trade on an exchange traditionally have ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an

²³ See BATS Holdings Amended and Restated Certificate of Incorporation FIFTH (b)(i)(B).

²⁴ See BATS Holdings Amended and Restated Certificate of Incorporation FIFTH (e).

²⁵ See BATS Holdings Amended and Restated Certificate of Incorporation FIFTH (b)(i)(C).

²⁶ See BATS Holdings Amended and Restated Certificate of Incorporation FIFTH (d).

²⁷ See BATS Holdings Amended and Restated Certificate of Incorporation FIFTH (b)(ii)(B).

²⁸ These provisions are generally consistent with waiver of ownership and voting limits approved by the Commission for other SROs. See e.g., NSX Demutualization Order, supra note 20; CHX Demutualization Order, supra note 20; and Securities Exchange Act Release No. 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR-PCX-2004-08).

exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.²⁹ A member that is a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

In addition, as proposed, BATS Exchange will be a wholly-owned subsidiary of BATS Holdings. The BATS Exchange Amended and Restated By-Laws identifies this ownership structure.³⁰ Any changes to the BATS Exchange Amended and Restated By-Laws, including any change in the provision that identifies BATS Holdings as the sole owner, must be filed with and approved by the Commission pursuant to Section 19 of the Act.³¹ Further, pursuant to the BATS Exchange Amended and Restated By-Laws, BATS Holdings may not transfer or assign, in whole or in part, its ownership interest in BATS Exchange.³²

The Commission believes that these provisions are consistent with the Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

3. BATS Exchange

²⁹ See, e.g., Securities Exchange Act Release Nos. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131) ("Nasdaq Exchange Registration Order") and 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) ("NYSE/Archipelago Merger Approval Order").

³⁰ See BATS Exchange Amended and Restated By-Laws Article I(cc).

³¹ See 15 U.S.C. 78s.

³² See BATS Exchange Amended and Restated By-Laws Article IV, Section 7.

BATS Exchange has applied to the Commission to register as a national securities exchange. As part of its exchange application, the Exchange has filed the BATS Exchange Certificate of Incorporation and the proposed Amended and Restated By-Laws of BATS Exchange. In these documents, among other things, BATS Exchange establishes the composition of the Exchange Board and the BATS Exchange committees.

a. The BATS Exchange Board of Directors

The Exchange Board will be the governing body of BATS Exchange and possess all of the powers necessary for the management of the business and affairs of the Exchange and the execution of its responsibilities as an SRO. Under the BATS Exchange Amended and Restated By-Laws:

- The Exchange Board will be composed of ten directors;³³
- One director will be the Chief Executive Officer of BATS Exchange;³⁴
- The number of Non-Industry Directors,³⁵ including at least one Independent Director,³⁶ will equal or exceed the sum of the number of Industry Directors³⁷ and Member Representative Directors,³⁸ and

³³ See BATS Exchange Amended and Restated By-Laws Article III, Section 2(a).

³⁴ See BATS Exchange Amended and Restated By-Laws Article III, Section 2(b).

³⁵ “Non-Industry Director” means a Director who is an Independent Director or any other individual who would not be an Industry Director. See BATS Exchange Amended and Restated By-Laws Article I(v).

³⁶ “Independent Director” means a “Director who has no material relationship with the [Exchange], or any Exchange Member or any affiliate of any such Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of the [Exchange] or its stockholder.” See BATS Exchange Amended and Restated By-Laws Article I(m).

³⁷ Generally, an “Industry Director” is, among other things, a Director that is or has been within the past three years an officer, director, employee, or owner of a broker-dealer. In addition, persons who have a consulting or employment relationship with the Exchange

- At least twenty percent of the directors on the Exchange Board will be Member Representative Directors.³⁹

BATS Holdings will appoint the initial Exchange Board, including the Member Representative Directors, which shall serve until the first annual meeting of stockholders.⁴⁰ The first annual meeting of the stockholders will be held prior to BATS Exchange commencing operations as a national securities exchange.⁴¹ At the first annual meeting of stockholders, a new Exchange Board will be elected pursuant to the BATS Exchange Amended and Restated By-Laws. Therefore, prior to commencing operations as a national securities exchange, BATS Exchange Members will have the opportunity to participate in the selection of Member Representative Directors, and the Exchange Board will be in compliance with the compositional requirements contained in the BATS Exchange Amended and Restated By-Laws.⁴²

and its affiliates, are considered "Industry." See BATS Exchange Amended and Restated By-Laws Article I(o).

³⁸ See BATS Exchange Amended and Restated By-Laws Article III, Section 2(b)(i).

³⁹ See BATS Exchange Amended and Restated By-Laws Article III, Section 2(b)(ii). "Member Representative Director" means a "Director who has been elected by stockholders after having been nominated by the Member Nominating Committee or by an Exchange Member pursuant to these By-Laws and confirmed as the nominee of Exchange Members after majority vote of Exchange Members, if applicable. A Member Representative Director must be an officer, director, employee, or agent of an Exchange member that is not a Stockholder Exchange Member." See BATS Exchange Amended and Restated By-Laws Article I(s). See also BATS Exchange Amended and Restated By-Laws Article III, Section 4(b).

⁴⁰ See BATS Exchange Amended and Restated By-Laws Article I(s) and Article III, Section 4(g); see also Amendment No. 2.

⁴¹ See BATS Exchange Amended and Restated By-Laws Article IV, Section 1(b).

⁴² See BATS Exchange Amended and Restated By-Laws Article III, Section 2.

BATS Holdings will appoint the initial Nominating Committee⁴³ and Member Nominating Committee,⁴⁴ consistent with each committee's compositional requirements,⁴⁵ to nominate candidates for election to the Exchange Board. Each of the Nominating Committee and Member Nominating Committee, after completion of its respective duties for nominating directors for election to the Board for that year, shall nominate candidates to serve on the succeeding year's Nominating Committee or Member Nominating Committee, as applicable. Additional candidates for the Member Nominating Committee may be nominated and elected by BATS Exchange Members pursuant to a petition process.⁴⁶

The Nominating Committee will nominate candidates for each director position other than the Member Representative Directors, and BATS Holdings, as the sole shareholder, will elect those directors. The Member Nominating Committee will nominate candidates for each Member Representative Director position on the Exchange Board.⁴⁷ Additional candidates may be nominated for the Member Representative Director positions by BATS Exchange Members

⁴³ See BATS Exchange Amended and Restated By-Laws Article VI, Section 2. The Nominating Committee will be comprised of at least three directors, and the number of Non-Industry members on the Nominating Committee must equal or exceed the number of Industry members.

⁴⁴ See BATS Exchange Amended and Restated By-Laws Article VI, Section 3. The Member Nominating Committee will be comprised of at least three directors, and each member of the Member Nominating Committee shall be a Member Representative member.

⁴⁵ See BATS Exchange Amended and Restated By-Laws Article VI, Section 1.

⁴⁶ See BATS Exchange Amended and Restated By-Laws Article VI, Section 1.

⁴⁷ The Member Nominating Committee will solicit comments from BATS Exchange Members for the purpose of approving and submitting names of candidates for election to the position of Member Representative Director. See BATS Exchange Amended and Restated By-Laws Article III, Section 4(b).

pursuant to a petition process.⁴⁸ If no candidates are nominated pursuant to a petition process, then the initial nominees of the Member Nominating Committee will be nominated as Member Representative Directors by the Nominating Committee. If a petition process produces additional candidates, then the candidates nominated pursuant to a petition process, together with those nominated by the Member Nominating Committee, will be presented to BATS Exchange Members for election to determine the final nomination of Member Representative Directors.⁴⁹ The candidates who receive the most votes will be nominated as Member Representative Directors by the Nominating Committee.⁵⁰ BATS Holdings, as the sole shareholder, will elect those candidates nominated by the Nominating Committee as Member Representative Directors.⁵¹

The Commission believes that the requirement in the BATS Exchange Amended and Restated By-Laws that twenty percent of the directors be Member Representative Directors and the means by which they are chosen by members provides for the fair representation of members in the selection of directors and the administration of BATS Exchange consistent with the requirement in Section 6(b)(3) of the Act.⁵² As the Commission has previously noted, this

⁴⁸ See BATS Exchange Amended and Restated By-Laws Article III, Section 4(c). The petition must be signed by Executive Representatives of ten percent or more of the Exchange members. No Exchange member, together with its affiliates, may account for more than fifty percent of the signatures endorsing a particular candidate. Id.

⁴⁹ See BATS Exchange Amended and Restated By-Laws Article III, Section 4(e) and (f). Each BATS Exchange Member shall have the right to cast one vote for each available Member Representative Director nomination, provided that any such vote must be cast for a person on the List of Candidates and that no BATS Exchange Member, together with its affiliates, may account for more than twenty percent of the votes cast for a candidate. Id.

⁵⁰ See BATS Exchange Amended and Restated By-Laws Article III, Section 4(f).

⁵¹ Id.

⁵² 15 U.S.C. 78f(b)(3).

requirement helps to ensure that members have a voice in the use of self-regulatory authority, and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.⁵³

The Commission has previously stated its belief that the inclusion of public, non-industry representatives on exchange oversight bodies is critical to an exchange's ability to protect the public interest.⁵⁴ Further, public, non-industry representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of the Exchange Board to address issues in a non-discriminatory fashion and foster the integrity of BATS Exchange.⁵⁵ The Commission believes that the Exchange Board satisfies the requirements in Section 6(b)(3) of the Act,⁵⁶ which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer.⁵⁷

b. BATS Exchange Committees

In the BATS Exchange Amended and Restated By-Laws, BATS Exchange has proposed to establish several committees. Specifically, BATS Exchange has proposed to establish the

⁵³ See Nasdaq Exchange Registration Order and NYSE/Archipelago Merger Approval Order, supra note 29.

⁵⁴ See, e.g., Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) ("Regulation ATS Release").

⁵⁵ See Nasdaq Exchange Registration Order and NYSE/Archipelago Merger Approval Order, supra note 29.

⁵⁶ 15 U.S.C. 78f(b)(3).

⁵⁷ The number of Non-Industry Directors on the Exchange Board must equal or exceed the sum of the Industry and Member Representative Directors, and the Exchange Board must include at least one Independent Director. See BATS Exchange Amended and Restated By-Laws Article III, Section 2(b)(i).

following committees that would be appointed by the Chairman of the Exchange Board, with the approval of the Exchange Board: a Compensation Committee;⁵⁸ Audit Committee;⁵⁹ Regulatory Oversight Committee;⁶⁰ Appeals Committee;⁶¹ Executive Committee;⁶² and Finance Committee.⁶³ In addition, BATS Exchange has proposed to establish a Nominating Committee⁶⁴ and a Member Nominating Committee, which would be elected on an annual basis by vote of stockholders.⁶⁵ For the reasons discussed above, the Commission believes that BATS Exchange's proposed committees should enable BATS Exchange to carry out its responsibilities under the Act and are consistent with the Act.

⁵⁸ See BATS Exchange Amended and Restated By-Laws Article V, Section 6(a). The Compensation Committee will be comprised of at least three people, and each voting member of the Compensation Committee shall be a Non-Industry Director. *Id.*

⁵⁹ See BATS Exchange Amended and Restated By-Laws Article V, Section 6(b). The Audit Committee will be comprised of at least three people, and a majority of the Audit Committee members shall be Non-Industry Directors and a Non-Industry Director shall serve as Chairman of the Audit Committee. *Id.*

⁶⁰ See BATS Exchange Amended and Restated By-Laws Article V, Section 6(e). The Regulatory Oversight Committee will be comprised of at least three people, and each member of the Regulatory Oversight Committee shall be a Non-Industry Director. *Id.*

⁶¹ See BATS Exchange Amended and Restated By-Laws Article V, Section 6(d). The Appeals Committee shall consist of one Independent Director, one Industry Director, and one Member Representative Director. *Id.*

⁶² See BATS Exchange Amended and Restated By-Laws Article V, Section 6(e). The number of Non-Industry Directors on the Executive Committee shall equal or exceed the number of Industry Directors. The percentage of Independent Directors on the Executive Committee shall be at least as great as the percentage of Independent Directors on the whole Exchange Board, and the percentage of Member Representative Directors on the Executive Committee shall be at least as great as the percentage of Member Representative Directors on the whole Exchange Board. *Id.*

⁶³ See BATS Exchange Amended and Restated By-Laws Article V, Section 6(f).

⁶⁴ See BATS Exchange Amended and Restated By-Laws Article VI, Section 2, and *supra* note 43.

⁶⁵ See BATS Exchange Amended and Restated By-Laws Article VI, Section 1, and *supra* note 44. Additional candidates for the Member Nominating Committee may be nominated and elected by BATS Exchange members pursuant to a petition process. See *supra* note 48 and accompanying text.

B. Regulation of BATS Exchange

As a prerequisite for the Commission's approval of an exchange's application for registration, an exchange must be organized and have the capacity to carry out the purposes of the Act.⁶⁶ Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the federal securities laws and the rules of the exchange.⁶⁷

1. Membership

Membership on BATS Exchange will be open to any registered broker or dealer that is a member of another registered national securities exchange or association, or any natural person associated with such a registered broker or dealer.⁶⁸ To remain eligible for membership in BATS Exchange, a BATS Exchange member must be a member of another SRO at all times.⁶⁹

For a temporary 90-day period after approval of BATS Exchange's application, an applicant that is an active member of another SRO and is a current or former subscriber to the BATS ECN will be able to apply through an expedited process to become a BATS Exchange member, and to register with BATS Exchange all of its associated persons whose registrations are active at the time BATS Exchange is approved as a national securities exchange, by submitting a waive-in application form, including membership agreements.⁷⁰ BATS Exchange may request additional documentation in addition to the waive-in application form in order to

⁶⁶ See Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

⁶⁷ Id. See also Section 19(g) of the Act, 15 U.S.C. 78s(g).

⁶⁸ See BATS Exchange Rules 2.3 and 2.5(a)(4) and Amendment No. 2.

⁶⁹ Id.

⁷⁰ See BATS Exchange Rule 2.4.

determine that a waive-in applicant meets BATS Exchange's qualification standards.⁷¹ All of the firm's associated persons who are registered in categories recognized by BATS Exchange rules would become registered persons of a BATS Exchange member firm.⁷²

All other applicants (and after the 90-day period has ended, those that could have waived in through the expedited process) may apply for membership in BATS Exchange by submitting a full membership application to BATS Exchange.⁷³ Applications for association with an Exchange Member shall be submitted to the Exchange on Form U-4 and such other forms as BATS Exchange may prescribe.

BATS Exchange will receive and review all applications for membership in the Exchange. If the Exchange is satisfied that the applicant is qualified for membership, the Exchange will promptly notify the applicant, in writing, of such determination, and the applicant shall be a member of the Exchange.⁷⁴ If the Exchange is not satisfied that the applicant is qualified for membership, the Exchange shall promptly notify the applicant of the grounds for denial.⁷⁵ Once an applicant is a member of the Exchange, it must continue to possess all the qualifications set forth in the BATS Exchange rules. When the Exchange has reason to believe that an Exchange member or associated person of a member fails to meet such qualifications, the Exchange may suspend or revoke such person's membership or association.⁷⁶

⁷¹ Id.

⁷² Id.

⁷³ See BATS Exchange Rule 2.6 and Amendment No. 2.

⁷⁴ See BATS Exchange Rule 2.6(c).

⁷⁵ See BATS Exchange Rule 2.6(d).

⁷⁶ See BATS Exchange Rule 2.7; see also BATS Exchange Rules Chapters VII and VIII.

Appeal of a staff denial, suspension, or termination of membership will be heard by the Appeals Committee.⁷⁷ Decisions of the Appeals Committee will be made in writing and will be sent to the parties to the proceeding. The decisions of the Appeals Committee will be subject to review by the Exchange Board, on its own motion, or upon written request by the aggrieved party or by the Chief Regulatory Officer (“CRO”). The Exchange Board will have sole discretion to grant or deny the request. The Exchange Board will conduct the review of the Appeals Committee’s decision. The Exchange Board may affirm, reverse, or modify the Appeals Committee’s decision. The Exchange Board’s decision is final.⁷⁸

The Commission finds that the BATS Exchange’s membership rules are consistent with Section 6 of the Act,⁷⁹ specifically Section 6(b)(2) of the Act,⁸⁰ which requires that a national securities exchange have rules that provide that any registered broker or dealer or natural person associated with such broker or dealer may become a member and any person may become associated with an exchange member. The Commission notes that pursuant to Section 6(c) of the Act, an exchange must deny membership to any person, other than a natural person, that is not a registered broker or dealer, any natural person that is not, or is not associated with, a registered broker or dealer, and registered broker-dealers that do not satisfy certain standards, such as financial responsibility or operational capacity. As a registered exchange, BATS Exchange must

⁷⁷ See BATS Exchange Rule 10.3; see also BATS Exchange Amended and Restated By-Laws Article V, Section 6(d).

⁷⁸ See BATS Exchange Rule 10.5(b). Membership decisions are subject to review by the Commission. See BATS Exchange Rule 10.7.

⁷⁹ 15 U.S.C. 78f.

⁸⁰ 15 U.S.C. 78f(b)(2).

independently determine if an applicant satisfies the standards set forth in the Act, regardless of whether an applicant is a member of another SRO.⁸¹

2. Regulatory Independence

BATS Exchange has proposed several measures to help ensure the independence of its regulatory function from its market operations and other commercial interests. The regulatory operations of BATS Exchange will be supervised by the CRO and monitored by the Regulatory Oversight Committee. The Regulatory Oversight Committee will consist of three members, each of whom must be a Non-Industry Director.⁸² The Regulatory Oversight Committee will be responsible for monitoring the adequacy and effectiveness of the Exchange's regulatory program, assessing the Exchange's regulatory performance, and assisting the Exchange Board in reviewing the Exchange's regulatory plan and the overall effectiveness of the Exchange's regulatory functions.⁸³ The Regulatory Oversight Committee also will meet with the CRO in executive session at regularly scheduled meetings and at any time upon request of the CRO or any member of the Regulatory Oversight Committee.⁸⁴

BATS Exchange proposes that its CRO have general supervision of the regulatory operations of the Exchange, including overseeing surveillance, examination, and enforcement functions.⁸⁵ The CRO also will administer any regulatory services agreement with another SRO to which BATS Exchange is a party.⁸⁶ The CRO will be an Executive Vice President or Senior

⁸¹ See Nasdaq Exchange Registration Order, supra note 29.

⁸² See BATS Exchange Amended and Restated By-Laws Articles I(v) and V, Section 6(c).

⁸³ See BATS Exchange Amended and Restated By-Laws Article V, Section 6(c).

⁸⁴ See BATS Exchange Amended and Restated By-Laws Article VII, Section 9.

⁸⁵ Id.

⁸⁶ Id.

Vice President that reports directly to the Chief Executive Officer.⁸⁷ The CRO also may serve as BATS Exchange's General Counsel.⁸⁸ In addition, any revenues received by BATS Exchange from fees derived from its regulatory function or regulatory penalties will not be used for non-regulatory purposes.⁸⁹

The Commission is concerned about the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests that could exist if an exchange were to otherwise become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.⁹⁰ BATS Exchange Rule 2.10 provides that without the prior approval of the Commission, BATS Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a BATS Exchange member, and a BATS Exchange member shall not be or become an affiliate of BATS Exchange, or an affiliate of any affiliate of the Exchange.⁹¹ BATS Exchange also has proposed for Commission approval BATS Exchange Rule 2.11, which provides that BATS Trading, a registered broker-dealer, will provide an Outbound Router function as a facility of the Exchange pursuant to certain conditions and limitations.⁹² BATS Trading is an affiliate of BATS Exchange and will become a member of BATS Exchange. This affiliation would not be consistent with proposed Rule 2.10 absent prior

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Id.

88

Id. See Nasdaq Exchange Registration Order, *supra* note 29.

89

See BATS Exchange Amended and Restated By-Laws Article X, Section 4.

90

See, e.g., Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006).

91

See BATS Exchange Rule 2.10.

92

See *infra* Section III.E.

Commission approval. As part of the approval today of BATS Exchange's application for registration as a national securities exchange, the Commission is approving BATS Exchange Rule 2.11.

The Commission believes that the Exchange's proposal is consistent with the Act, particularly with Section 6(b)(1), which requires an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁹³ Although the Commission continues to be concerned about potential unfair competition and conflict of interest between an exchange's self-regulatory obligations and its commercial interests when an exchange is affiliated with one of its members, the Commission believes that it is consistent with the Act to permit BATS Trading to become an affiliate of BATS Exchange for the limited Outbound Router function, in light of the protections afforded by the conditions and limitations imposed in BATS Exchange's rules.⁹⁴

3. Regulatory Contract

Although BATS Exchange will be an SRO with all of the attendant regulatory obligations under the Act, it has entered into a regulatory contract with FINRA ("Regulatory Contract"), under which FINRA will perform certain regulatory functions on BATS Exchange's behalf.⁹⁵ Specifically, BATS Exchange represents that FINRA will assist Exchange staff on registration issues on an as-needed basis, investigate potential violations of BATS Exchange's rules or

⁹³ See 15 U.S.C. 78f(b)(1).

⁹⁴ See *infra* Section III.E. The Commission has approved similar arrangements for other SROs. See, e.g., Securities Exchange Act Release Nos. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004) ("NOM Approval Order") and 54391 (August 31, 2006), 71 FR 52836 (September 7, 2006) (SR-NSX-2006-08) ("NSX Blade Approval Order").

⁹⁵ See BATS Exchange Rule 13.7; see also Amendment No. 2. Pursuant to the applicable provisions of the Freedom of Information Act, 5 U.S.C. 552, and Commission regulations thereunder, 17 CFR 200.83, BATS Exchange has requested confidential treatment for the Regulatory Contract.

federal securities laws related to activity on the Exchange, conduct examinations related to market conduct on the Exchange by Members, assist the Exchange with disciplinary proceedings pursuant to BATS Exchange's Rules, including issuing charges and conducting hearings, and provide dispute resolution services to BATS Exchange Members on behalf of the Exchange, including operation of the Exchange's arbitration program. BATS Exchange represents that FINRA also will provide the Exchange with access to FINRA's WebCRD system, and will assist with programming BATS-specific functionality relating to such system.⁹⁶ Notwithstanding the Regulatory Contract, BATS Exchange will retain ultimate legal responsibility for the regulation of its members and its market.

The Commission believes that it is consistent with the Act to allow BATS Exchange to contract with FINRA to perform examination, enforcement, and disciplinary functions.⁹⁷ These functions are fundamental elements to a regulatory program, and constitute core self-regulatory functions. It is essential to the public interest and the protection of investors that these functions are carried out in an exemplary manner, and the Commission believes that FINRA has the expertise and experience to perform these functions on behalf of BATS Exchange.⁹⁸

⁹⁶ See Amendment No. 2.

⁹⁷ See, e.g., Regulation ATS Release, supra note 54. See also Securities Exchange Act Release 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (SR-Amex-2004-32) (order approving rule that allowed Amex to contract with another SRO for regulatory services) ("Amex Regulatory Services Approval Order"); NOM Approval Order, supra note 94; and Nasdaq Exchange Registration Order, supra note 29.

⁹⁸ See Amex Regulatory Services Approval Order, supra note 97; NOM Approval Order, supra note 94; and Nasdaq Exchange Registration Order, supra note 29. The Commission notes that the Regulatory Contract is not before the Commission and, therefore, the Commission is not acting on it.

At the same time, BATS Exchange, unless relieved by the Commission of its responsibility,⁹⁹ bears the responsibility for self-regulatory conduct and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on the Exchange's behalf. In performing these regulatory functions, however, FINRA may nonetheless bear liability for causing or aiding and abetting the failure of BATS Exchange to perform its regulatory functions.¹⁰⁰ Accordingly, although FINRA will not act on its own behalf under its SRO responsibilities in carrying out these regulatory services for BATS Exchange, FINRA may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by BATS Exchange.¹⁰¹

Although BATS Exchange has entered into the Regulatory Contract, the provisions in the Regulatory Contract that will specify the particular BATS Exchange and Commission rules for which FINRA will provide certain regulatory functions have not been finalized. Accordingly, the Commission is conditioning the operation of BATS Exchange on the execution of the Regulatory Contract and finalization of the provisions in the Regulatory Contract that will

⁹⁹ See Section 17(d)(1) of the Act and Rule 17d-2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. See also *infra* notes 103-110 and accompanying text.

¹⁰⁰ For example, if failings by FINRA have the effect of leaving BATS Exchange in violation of any aspect of BATS Exchange's self-regulatory obligations, BATS Exchange would bear direct liability for the violation, while FINRA may bear liability for causing or aiding and abetting the violation. See Nasdaq Exchange Registration Order, *supra* note 29 and Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10-127) (order approving the International Securities Exchange LLC's application for registration as a national securities exchange).

¹⁰¹ *Id.*

specify the BATS Exchange and Commission rules for which FINRA will provide regulatory functions.¹⁰²

4. 17d-2 Agreement

Section 19(g)(1) of the Act¹⁰³ requires every SRO to examine its members and persons associated with its members and to enforce compliance with the federal securities laws and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) of the Act.¹⁰⁴ Section 17(d) was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication with respect to members of more than one SRO ("common members").¹⁰⁵ Rule 17d-2 of the Act permits SROs to propose joint plans allocating regulatory responsibilities concerning common members.¹⁰⁶ These agreements, which must be filed with and approved by the Commission, generally cover such regulatory functions as personnel registration, branch office examinations, and sales practices. Commission approval of a 17d-2 plan relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.¹⁰⁷ Many existing SROs have entered in to such agreements.¹⁰⁸

¹⁰² Alternatively, BATS Exchange could demonstrate that it has the ability to fulfill its regulatory obligations.

¹⁰³ 15 U.S.C. 78s(g)(1).

¹⁰⁴ 15 U.S.C. 78q(d).

¹⁰⁵ See Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976) ("Rule 17d-2 Adopting Release").

¹⁰⁶ 17 CFR 240.17d-2.

¹⁰⁷ See Rule 17d-2 Adopting Release, *supra* note 105.

¹⁰⁸ See, e.g., Securities Exchange Act Release Nos. 13326 (March 3, 1977), 42 FR 13878 (March 14, 1977) (NYSE/Amex); 13536 (May 12, 1977), 42 FR 26264 (May 23, 1977) (NYSE/BSE); 14152 (November 9, 1977), 42 FR 59339 (November 16, 1977) (NYSE/CSE); 13535 (May 12, 1977), 42 FR 26269 (May 23, 1977) (NYSE/CHX); 13531 (May 12, 1977), 42 FR 26273 (May 23, 1977) (NYSE/PSE); 14093 (October 25, 1977), 42 FR 57199 (November 1, 1977) (NYSE/Phlx); 15191 (September 26, 1978), 43 FR 46093 (October 5, 1978) (NASD/BSE, CSE, CHX and PSE); 16858 (May 30, 1980),

BATS Exchange has represented to the Commission that BATS Exchange and FINRA intend to file a 17d-2 agreement with the Commission covering common members of BATS Exchange and FINRA. This agreement would allocate to FINRA regulatory responsibility, with respect to common members, for the following:

- FINRA will examine common members of BATS Exchange and FINRA for compliance with federal securities laws, rules and regulations, and rules of BATS Exchange that have been certified by BATS Exchange as identical or substantially similar to FINRA rules.
- FINRA will investigate common members of BATS Exchange and FINRA for violations of federal securities laws, rules or regulations, or BATS Exchange rules that has been certified by BATS Exchange as identical or substantially identical to a FINRA rule.
- FINRA will enforce compliance by common members with federal securities laws, rules and regulations, and rules of BATS Exchange that have been certified by BATS Exchange as identical or substantially similar to FINRA rules.

Because BATS Exchange anticipates entering into this 17d-2 agreement, it has not made provision to fulfill the regulatory obligations that would be undertaken by FINRA under this agreement with respect to common members of BATS Exchange and FINRA.¹⁰⁹ Accordingly, the Commission is conditioning the operation of BATS Exchange on approval by the

45 FR 37927 (June 5, 1980) (NASD/BSE, CSE, CHX and PSE); 42815 (May 23, 2000), 65 FR 34762 (May 31, 2000) (NASD/ISE); and 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (NASD/Nasdaq).

¹⁰⁹ The Commission notes that regulation that is to be covered by the 17d-2 agreement for common members will be carried out by FINRA under the Regulatory Contract for BATS Exchange members that are not also members of FINRA.

Commission of a 17d-2 agreement between BATS Exchange and FINRA that allocates the above specified matters to FINRA.¹¹⁰

5. Discipline and Oversight of Members

As noted above, a prerequisite for the Commission approval of an exchange's application for registration, an exchange must be organized and have the capacity to carry out the purposes of the Act. Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with federal securities laws and the rules of the exchange.¹¹¹

As noted above, pursuant to the Regulatory Contract, FINRA will perform many of the initial disciplinary processes on behalf of BATS Exchange.¹¹² For example, FINRA will investigate potential securities laws violations, issue complaints, and conduct hearings pursuant to BATS Exchange rules. Appeals from disciplinary decisions will be heard by the Appeals Committee¹¹³ and the Appeals Committee's decision shall be final. In addition, the Exchange Board may on its own initiative order review of a disciplinary decision.¹¹⁴

The BATS Amended and Restated By-Laws and BATS Exchange rules provide that the Exchange has disciplinary jurisdiction over its members so that it can enforce its members' compliance with its rules and the federal securities laws.¹¹⁵ The Exchange's rules also permit it to sanction members for violations of its rules and violations of the federal securities laws by, among other things, expelling or suspending members, limiting members' activities, functions,

¹¹⁰ Alternatively, BATS Exchange could demonstrate that it has the ability to fulfill its regulatory obligations.

¹¹¹ See 15 U.S.C. 78f(b)(1).

¹¹² See *supra* note 97 and accompanying text.

¹¹³ See BATS Exchange Rule 8.10(b).

¹¹⁴ See BATS Exchange Rule 8.10(c).

¹¹⁵ See generally BATS Exchange Amended and Restated By-Laws Article X and BATS Exchange Rules Chapters II and VIII.

or operations, fining or censuring members, or suspending or barring a person from being associated with a member, or any other fitting sanction.¹¹⁶ BATS Exchange's rules also provide for the imposition of fines for certain minor rule violations in lieu of commencing disciplinary proceedings.¹¹⁷ Accordingly, as a condition to the operation of BATS Exchange, a Minor Rule Violation Plan ("MRVP") filed by BATS Exchange under Act Rule 19d-1(c)(2) must be declared effective by the Commission.¹¹⁸

The Commission finds that the BATS Exchange's Amended and Restated By-Laws and rules concerning its disciplinary and oversight programs are consistent with the requirements of Sections 6(b)(6) and 6(b)(7)¹¹⁹ of the Act in that they provide fair procedures for the disciplining of members and persons associated with members. The Commission further finds that the rules of BATS Exchange provide it with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of BATS Exchange.¹²⁰

C. BATS Exchange Trading System

1. Trading Rules

BATS Exchange will operate a fully automated electronic order book. Exchange members and entities that enter into sponsorship arrangements with Exchange members will have access to the BATS Exchange system (collectively, "Users").¹²¹ Users will be able to

¹¹⁶ See BATS Exchange Rules 2.2 and 8.1(a).

¹¹⁷ See BATS Exchange Rule 8.15 and Amendment No. 2.

¹¹⁸ 17 CFR 240.19d-1(c)(2).

¹¹⁹ 15 U.S.C. 78f(b)(6) and (b)(7).

¹²⁰ See Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

¹²¹ To obtain authorized access to the BATS Exchange System, each User must enter in to a User Agreement with the Exchange. See BATS Exchange Rule 11.3(a).

electronically submit market and various types of limit orders to the Exchange from remote locations. All orders submitted to BATS Exchange will be displayed unless designated otherwise by the BATS Exchange member submitting the order. Displayed orders will be displayed on an anonymous basis at a specified price. Non-displayed orders will not be displayed but will be ranked in the BATS Exchange system at a specified price.¹²² The BATS Exchange system will continuously and automatically match orders pursuant to price/time priority, except that displayed orders will have priority over non-displayed orders at the same price.¹²³

The BATS Exchange system is designed to comply with Rule 611 of Regulation NMS¹²⁴ by requiring that, for any execution to occur on the Exchange during regular trading hours, the price must be equal to, or better than, any “protected quotation” within the meaning of Regulation NMS (“Protected Quotation”), unless an exception to Rule 611 of Regulation NMS applies.¹²⁵ BATS Exchange will direct any orders or portion of orders that cannot be executed in their entirety to away markets for execution through BATS Trading, unless the terms of the orders direct the Exchange not to route such orders away.¹²⁶

BATS Exchange intends to operate as an automated trading center in compliance with Rule 600(b)(4) of Regulation NMS.¹²⁷ BATS Exchange will display automated quotations at all times except in the event that a systems malfunction renders the system incapable of displaying

¹²² BATS Exchange rules do not provide for specialists or market makers.

¹²³ See BATS Exchange Rule 11.8.

¹²⁴ 17 CFR 242.611.

¹²⁵ See BATS Exchange Rule 11.9.

¹²⁶ See BATS Exchange Rule 11.9(a)(2).

¹²⁷ 17 CFR 242.600(b)(4).

automated quotations.¹²⁸ The Exchange has designed its rules relating to orders, modifiers, and order execution to comply with the requirements of Regulation NMS, including an immediate-or-cancel functionality.¹²⁹ These proposed rules include accepting orders marked as intermarket sweep orders, which will allow orders so designated to be automatically matched and executed without reference to Protected Quotations at other trading centers,¹³⁰ and routing orders marked as intermarket sweep orders by a User to a specific trading center for execution.¹³¹ In addition, BATS Exchange rules address locked and crossed markets,¹³² as required by Rule 610(d) of Regulation NMS.¹³³ The Commission believes that BATS Exchange's rules are consistent with the Act, in particular with the requirements of Rule 610(d) and Rule 611 of Regulation NMS.

As stated above, BATS Exchange intends to operate as an automated trading center and have its best bid and best offer be a Protected Quotation.¹³⁴ To meet their regulatory responsibilities under Rule 611(a) of Regulation NMS, market participants must have sufficient notice of new Protected Quotations, as well as all necessary information (such as final technical specifications).¹³⁵ Therefore, the Commission believes that it would be a reasonable policy and procedure under Rule 611(a) for industry participants to begin treating BATS Exchange's best bid and best offer as a Protected Quotation within 90 days after the date of this order, or such later date as BATS Exchange begins operation as a national securities exchange.

¹²⁸ See BATS Exchange Rule 11.9(c); see also 17 CFR 242.600(b)(3).

¹²⁹ See BATS Exchange Rules 11.5 and 11.9; see also 17 CFR 242.600(b)(3).

¹³⁰ See BATS Exchange Rule 11.5(d)(1).

¹³¹ See BATS Exchange Rule 11.5(d)(2).

¹³² See BATS Exchange Rule 11.16.

¹³³ 17 CFR 242.610(d).

¹³⁴ 17 CFR 242.600(b)(58).

¹³⁵ See Securities Exchange Act Release No. 53829 (May 18, 2006), 71 FR 30038, 30041 (May 24, 2006).

2. Section 11 of the Act

Section 11(a)(1) of the Act¹³⁶ prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, “covered accounts”) unless an exception applies. Rule 11a2-2(T)¹³⁷ under the Act, known as the “effect versus execute” rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2-2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with Rule 11a2-2(T)’s conditions, a member: (i) must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;¹³⁸ (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission,¹³⁹ BATS Exchange requested that the Commission concur with BATS Exchange’s conclusion that BATS Exchange members that enter orders into the BATS Exchange system satisfy the requirements of Rule 11a2-2(T). For reasons set forth below, the Commission believes that BATS Exchange members entering orders into the BATS Exchange system would satisfy the conditions of the Rule.

¹³⁶ 15 U.S.C. 78k(a)(1).

¹³⁷ 17 CFR 240.11a2-2(T).

¹³⁸ The member may, however, participate in clearing and settling the transaction.

¹³⁹ See letter to David Shillman, Associate Director, Division of Trading and Markets, Commission, from J. Craig Long, Foley & Lardner LLP, dated June 24, 2008 (“BATS Exchange 11(a) Letter”).

The Rule's first condition is that orders for covered accounts be transmitted from off the exchange floor. The BATS Exchange system receives orders electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.¹⁴⁰ Since the BATS Exchange system receives orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the BATS Exchange system satisfies the off-floor transmission requirement.

Second, the rule requires that the member not participate in the execution of its order. BATS Exchange represented that at no time following the submission of an order is a member able to acquire control or influence over the result or timing of an order's execution.¹⁴¹

¹⁴⁰ See, e.g., Nasdaq Exchange Registration Order, *supra* note 29; and Securities Exchange Act Release Nos. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (order approving the Boston Options Exchange as an options trading facility of the Boston Stock Exchange); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (order approving Archipelago Exchange ("ArcaEx") as electronic trading facility of the Pacific Exchange ("PCX") ("ArcaEx Order")); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility); 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (regarding the American Stock Exchange ("Amex") Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX Communications and Execution System, and the Philadelphia Stock Exchange's ("Phlx") Automated Communications and Execution System ("1979 Release")); and 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (regarding the NYSE's Designated Order Turnaround System ("1978 Release")).

¹⁴¹ See BATS Exchange 11(a) Letter, *supra* note 139. The member may cancel or modify the order, or modify the instructions for executing the order, but only from off the Exchange floor. *Id.* The Commission has stated that the non-participation requirement is satisfied under such circumstances so long as such modifications or cancellations are also transmitted from off the floor. See Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (stating that the "non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after

According to BATS Exchange, the execution of a member's order is determined solely by what orders, bids, or offers are present in the system at the time the member submits the order.

Accordingly, the Commission believes that a BATS Exchange member would not participate in the execution of an order submitted into the BATS Exchange system.

Third, Rule 11a2-2(T) requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this requirement is satisfied when automated exchange facilities, such as the BATS Exchange system, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.¹⁴² BATS Exchange has represented that the design of the BATS Exchange system ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to BATS Exchange.¹⁴³ Based on BATS Exchange's representation, the Commission believes that the BATS Exchange system satisfies this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account

the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor").

¹⁴² In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into the systems. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). See 1979 Release, supra note 140.

¹⁴³ See BATS Exchange 11(a) Letter, supra note 139.

has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2-2(T).¹⁴⁴ BATS Exchange represented that BATS Exchange members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.¹⁴⁵

D. Section 11A of the Act

Section 11A of the Act and the rules thereunder form the basis of our national market system and impose requirements on exchanges to implement its objectives. Specifically, national securities exchanges are required, under Rule 601 of Regulation NMS,¹⁴⁶ to file transaction reporting plans regarding transactions in listed equity and Nasdaq securities that are executed on their facilities. Currently registered exchanges satisfy this requirement by participating in the Consolidated Transaction Association Plan ("CTA Plan") for listed equities and the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis ("Nasdaq UTP Plan") for Nasdaq

¹⁴⁴ 17 CFR 240.11a2-2(T)(a)(2)(iv). In addition, Rule 11a2-2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated person thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. See 17 CFR 240.11a2-2(T)(d). See also 1978 Release, supra note 140 (stating "[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests").

¹⁴⁵ See BATS Exchange 11(a) Letter, supra note 139.

¹⁴⁶ 17 CFR 242.601.

securities.¹⁴⁷ Before BATS Exchange can begin operating as an exchange, it must join these plans as a participant.

National securities exchanges are required, under Rule 602 of Regulation NMS,¹⁴⁸ to collect bids, offers, quotation sizes and aggregate quotation sizes from those members who are responsible broker or dealers. National securities exchanges must then make this information available to vendors at all times when the exchange is open for trading. The current exchanges satisfy this requirement by participating in the Consolidated Quotation System Plan (“CQ Plan”) for listed equity securities and the Nasdaq UTP Plan for Nasdaq securities. Before BATS Exchange can begin operating as an exchange it also must join the CQ Plan as a participant, in addition to the CTA Plan and the Nasdaq UTP Plan.

Finally, national securities exchanges must make available certain order execution information pursuant to Rule 605 of Regulation NMS.¹⁴⁹ Current exchanges have standardized the required disclosure mechanisms by participating in the Order Execution Quality Disclosure Plan.¹⁵⁰ BATS Exchange must join this plan before it begins operations as an exchange.

E. Order Routing

As noted above in Section III. A., BATS Exchange proposes to offer routing services to its Users through its affiliated broker-dealer, BATS Trading. BATS Trading will provide “outbound” routing of orders from the Exchange to other trading centers (such function of BATS

¹⁴⁷ These plans also satisfy the requirement in Rule 603 that national securities exchanges and national securities associations act jointly pursuant to an effective national market system plan to disseminate consolidated information, including a national best bid and offer, and quotations for and transactions in NMS stocks. See 17 CFR 242.603. See also Nasdaq Exchange Registration Order, supra note 29.

¹⁴⁸ 17 CFR 242.602.

¹⁴⁹ 17 CFR 242.605.

¹⁵⁰ See Securities Exchange Act Release No. 44177 (April 12, 2001), 66 FR 19814 (April 17, 2001).

Trading is referred to as the “Outbound Router”), and BATS Trading will engage in no other activities unless approved by the Commission.¹⁵¹ The Outbound Router function of BATS Trading will operate as a facility (as defined in Section 3(a)(2) of the Act) of the Exchange. As such, the Outbound Router function of BATS Trading is subject to the Exchange’s and the Commission’s continuing oversight. In particular, and without limitation, under the Act, the Exchange is responsible for filing with the Commission proposed rule changes and fees relating to the BATS Trading Outbound Router function and BATS Trading Outbound Router function will be subject to exchange non-discrimination requirements.¹⁵²

BATS Trading will be a member of FINRA, an SRO unaffiliated with BATS Exchange or any of its affiliates, that is its designated examining authority.¹⁵³ Also, BATS Exchange will establish and maintain procedures and internal controls reasonably designed to restrict the flow of confidential and proprietary information between BATS Exchange and its facilities, and any other entity, including any affiliate of BATS Trading, and, if BATS Trading or any of its affiliates engages in any other business activities other than the Outbound Router function, between the segment of BATS Trading or its affiliate that provides the other business activities and the Outbound Router function.¹⁵⁴ In addition, the books, records, premises, officers, directors, agents, and employees of BATS Trading, as a facility of the Exchange, will be deemed to be those of the Exchange for purposes of and subject to oversight pursuant to the Act.¹⁵⁵ Further, Users are not required to use the Outbound Router function of BATS Trading to route

¹⁵¹ See BATS Exchange Rule 2.11(a)(4).

¹⁵² See BATS Exchange Rule 2.11(a)(1).

¹⁵³ See BATS Exchange Rule 2.11(a)(2).

¹⁵⁴ See BATS Exchange Rule 2.11(a)(5).

¹⁵⁵ See BATS Exchange Rule 2.11(b).

orders,¹⁵⁶ and a User is free to route its orders to other market centers through alternative means.¹⁵⁷

In light of the protections discussed above, the Commission believes that BATS Exchange rules and procedures regarding use of BATS Trading to route orders to away markets are consistent with the Act.¹⁵⁸

F. Listing Requirements/ Unlisted Trading Privileges

BATS Exchange initially does not intend to list any securities. Accordingly, BATS Exchange has not proposed rules that would allow it to list any securities at this time.¹⁵⁹ Instead, BATS Exchange has proposed to trade securities pursuant to unlisted trading privileges, consistent with Section 12(f) of the Act and Rule 12f-5 thereunder. Rule 12f-5 requires an exchange that extends unlisted trading privileges to securities to have in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges.¹⁶⁰ BATS Exchange's proposed rules require that any security traded on the BATS Exchange be registered under the Act and listed on the New York Stock Exchange LLC,

¹⁵⁶ A User that does not wish to use the Outbound Router function of BATS Trading could submit an Immediate-or-Cancel Order or another order type that is not eligible for order routing pursuant to BATS Exchange rules, such as a BATS Only Order. See BATS Exchange Rule 11.5.

¹⁵⁷ See BATS Exchange Rule 2.11(a)(3).

¹⁵⁸ The Commission has approved similar arrangements for other SROs. See, e.g., NOM Approval Order and NSX Blade Approval Order, supra note 94.

¹⁵⁹ BATS Exchange has incorporated listing standards for certain derivative securities products in its rules. However, BATS Exchange's rules will prohibit BATS Exchange from listing any derivative security product pursuant to these listing standards until BATS Exchange submits a proposed rule change to the Commission to amend its listing standards to comply with Rule 10A-3 under the Act and incorporate qualitative listing criteria. See BATS Exchange Rule 14.1(a).

¹⁶⁰ 17 CFR 240.12f-5. See also Securities Exchange Act Release No. 35737 (April 21, 1995), 60 FR 20891 (April 28, 1995) (adopting Rule 12f-5).

NYSE Arca, the American Stock Exchange LLC, or The NASDAQ Stock Market LLC. BATS Exchange's proposed rules provide for transactions in the class or type of security to which the exchange intends to extend unlisted trading privileges.¹⁶¹ In addition, pursuant to its rules, BATS Exchange will cease trading any equity security admitted to unlisted trading privileges that is no longer listed on one of these exchanges. The Commission finds that these rules are consistent with the Act.¹⁶²

IV. Exemption from Section 19(b) of the Act with Regard to FINRA Rules Incorporated by Reference

BATS Exchange proposes to incorporate by reference certain FINRA rules as Exchange rules. Thus, for certain Exchange rules, Exchange members will comply with an Exchange rule by complying with the FINRA rule referenced.¹⁶³ In connection with its proposal to incorporate FINRA rules by reference, BATS Exchange requested, pursuant to Rule 240.0-12,¹⁶⁴ an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to those BATS Exchange rules that are effected solely by virtue of a change to a cross-referenced FINRA rule.¹⁶⁵ BATS Exchange proposes to incorporate by reference categories of rules (rather than individual rules within a category) that are not trading rules.

¹⁶¹ Id. BATS Exchange's rules currently do not provide for the trading of options, security futures, or other similar instruments.

¹⁶² BATS Exchange has represented to the Commission that it intends to phase-in the trading of securities currently trading on the BATS ECN to BATS Exchange, and that it will provide appropriate advance notice to its members of the phase-in schedule. The Commission believes that this approach is appropriate and should help maintain an orderly transition to the BATS Exchange.

¹⁶³ BATS Exchange proposed to incorporate by reference the 12000 and 13000 Series of FINRA's NASD Manual, the NASD Code of Arbitration Procedure for Customer and Industry Disputes. See BATS Exchange Rule 9.1.

¹⁶⁴ See 17 CFR 240.0-12.

¹⁶⁵ See letter to Nancy Morris, Secretary, Commission, from J. Craig Long, Foley & Lardner, dated June 24, 2008.

BATS Exchange agrees to provide written notice to its members whenever a proposed rule change to a FINRA rule that is incorporated by reference is proposed.¹⁶⁶

Using its authority under Section 36 of the Act,¹⁶⁷ the Commission previously exempted certain SROs from the requirement to file proposed rule changes under Section 19(b) of the Act.¹⁶⁸ Each such exempt SRO agreed to be governed by the incorporated rules, as amended from time to time, but is not required to file a separate proposed rule change with the Commission each time the SRO whose rules are incorporated by reference seeks to modify its rules.

In addition, each such exempt SRO incorporated by reference only regulatory rules (*i.e.*, margin, suitability, arbitration), not trading rules, and incorporated by reference whole categories of rules (*i.e.*, did not “cherry-pick” certain individual rules within a category). Each such exempt SRO had reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of another SRO in order to provide its members with notice of a proposed rule change that affects their interests, so that they would have an opportunity to comment on it.

The Commission is granting BATS Exchange’s request for exemption, pursuant to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that BATS Exchange proposes to incorporate by reference. This exemption is conditioned upon BATS Exchange providing written notice to its members whenever FINRA

¹⁶⁶ BATS Exchange will provide such notice via a posting on the same Web site location where BATS Exchange will post its own rule filings pursuant to Commission Rule 19b-4(l). The posting will include a link to the location on the FINRA Web site where the proposed rule change is posted. *See id.*

¹⁶⁷ 15 U.S.C. 78mm.

¹⁶⁸ *See, e.g.*, Securities Exchange Act Release No. 49260 (February 17, 2004), 69 FR 8500 (February 24, 2004) and Nasdaq Exchange Registration Order, *supra* note 29.

proposes to change a rule that BATS Exchange has incorporated by reference. The Commission believes that this exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission and SRO resources by avoiding duplicative rule filings based on simultaneous changes to identical rules sought by more than one SRO. Consequently, the Commission grants BATS Exchange's exemption request.

V. Conclusion

IT IS ORDERED that the application of BATS Exchange for registration as a national securities exchange be, and hereby is, granted.

IT IS FURTHER ORDERED that operation of BATS Exchange is conditioned on the satisfaction of the requirements below:

A. Participation in National Market System Plans. BATS Exchange must join the CTA Plan, the CQ Plan, the Nasdaq UTP Plan, and the Order Execution Quality Disclosure Plan.

B. Intermarket Surveillance Group. BATS Exchange must join the Intermarket Surveillance Group.

C. Minor Rule Violation Plan. A MRVP filed by BATS Exchange under Rule 19d-1(c)(2) must be declared effective by the Commission.¹⁶⁹

D. 17d-2 Agreement. An agreement pursuant to Rule 17d-2¹⁷⁰ between FINRA and BATS Exchange that allocates to FINRA regulatory responsibility for those matters specified above¹⁷¹ must be approved by the Commission, or BATS Exchange must demonstrate that it independently has the ability to fulfill all of its regulatory obligations.

¹⁶⁹ 17 CFR 240.19d-1(c)(2).

¹⁷⁰ 17 CFR 240.17d-2.

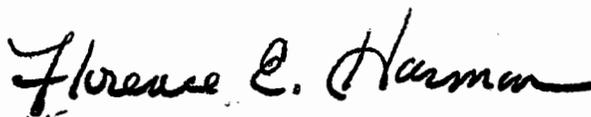
¹⁷¹ See supra notes 103 to 110 and accompanying text.

E. Regulatory Contract. The Regulatory Contract between BATS Exchange and FINRA containing those matters specified above¹⁷² must be executed and the provisions in the Regulatory Contract that will specify the BATS Exchange and Commission rules for which FINRA will provide certain of the regulatory functions under the Regulatory Contract must be finalized, or BATS Exchange must demonstrate that it independently has the ability to fulfill all of its regulatory obligations.

F. Examination by the Commission. BATS Exchange must have, and represent in a letter to the staff in the Commission's Office of Compliance Inspections and Examinations that it has, adequate procedures and programs in place to effectively regulate BATS Exchange.

IT IS FURTHER ORDERED, pursuant to Section 36 of the Act,¹⁷³ that BATS Exchange shall be exempt from the rule filing requirements of Section 19(b) of the Act¹⁷⁴ with respect to the FINRA rules BATS Exchange proposes to incorporate by reference into BATS Exchange's rules, subject to the conditions specified in this Order.

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR, and PAREDES); Commissioner WALTER not participating.



Florence E. Harmon
Acting Secretary

¹⁷² See supra notes 95 to 102 and accompanying text.

¹⁷³ 15 U.S.C 78mm.

¹⁷⁴ 15 U.S.C 78s(b).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 58373 / August 18, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13136

In the Matter of

Ajay Sports, 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 Ajay Sports, Inc. ("Ajay Sports" or "Respondent").

II.

In anticipation of the institution of these proceedings, Ajay Sports 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, Ajay Sports 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. Ajay Sports (CIK No. 854858) is a void Delaware corporation located in Farmington Hills, Michigan with a class of securities registered with the Commission under Exchange Act Section 12(g). As of November 26, 2007, the company's common stock (symbol "AJAYQ") was quoted on the Pink Sheets, had nine market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The Respondent filed a Chapter 11 bankruptcy proceeding on December 27, 2006. On October 18, 2007, this case was converted to a Chapter 7 proceeding and was still pending as of August 15, 2008.

2. Ajay Sports 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, 2006.

IV.

Section 12(j) of the Exchange Act provides as follows:

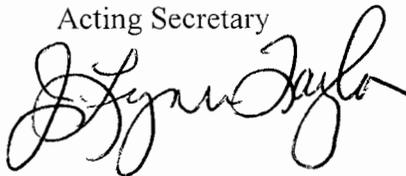
The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice 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 Ajay Sports' securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Florence E. Harmon
Acting Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 18, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13135

In the Matter of

**Pacific Coast Apparel Co., Inc.,
Pacific Gateway Exchange, Inc.,
Pacific International Services Corp.,
Pallet Management Systems, Inc.,
Palm Desert Art, Inc.,
Panaco, Inc.,
Paragon Financial Corp.
(n/k/a NewMarket Latin
America, Inc.), and
Patriot Motorcycle Corp.,**

Respondents.

**ORDER INSTITUTING
PROCEEDINGS AND NOTICE OF
HEARING PURSUANT TO SECTION
12(j) OF THE SECURITIES
EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Pacific Coast Apparel Co., Inc., Pacific Gateway Exchange, Inc., Pacific International Services Corp., Pallet Management Systems, Inc., Palm Desert Art, Inc., Panaco, Inc., Paragon Financial Corp. (n/k/a NewMarket Latin America, Inc.), and Patriot Motorcycle Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Pacific Coast Apparel Co., Inc. ("Pacific Coast") (CIK No. 1005185) is a suspended California corporation located in Kentfield, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g).

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Pacific Coast 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.

2. Pacific Gateway Exchange, Inc. ("Pacific Gateway") (CIK No. 1004967) is a void Delaware corporation located in Burlingame, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Pacific Gateway is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2000, which reported a net loss of over \$143 million for the prior nine months. On December 29, 2000, Pacific Gateway filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of California, and the case was terminated on December 5, 2006. As of August 13, 2008, the company's common stock (symbol "PGEXQ") was quoted on the Pink Sheets of Pink OTC Markets, Inc. ("Pink Sheets"), had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

3. Pacific International Services Corp. ("Pacific International") (CIK No. 727066) is a suspended California corporation located in Honolulu, Hawaii with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Pacific International 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, 1996, which reported a net loss of \$790,235 for the prior three months.

4. Pallet Management Systems, Inc. ("Pallet") (CIK No. 773724) is a Florida corporation located in Coral Springs, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Pallet is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 28, 2002, which reported a net loss of \$19,342 for the prior thirteen weeks. On February 14, 2003, Pallet filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Florida, and the case was terminated on October 24, 2006. As of August 13, 2008, the company's common stock (symbol "PALTQ") was quoted on the Pink Sheets, had eight market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Palm Desert Art, Inc. ("Palm Desert") (CIK No. 849315) is a Delaware corporation located in Palm Desert, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Palm Desert 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 January 31, 2000, which reported a net loss of \$471,513 for the prior nine months.

6. Panaco, Inc. ("Panaco") (CIK No. 882074) is an inactive Delaware corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Panaco 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 March 31, 2002, which reported a net loss of over \$9 million for the prior three months. On July 16, 2002, Panaco filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Texas that is still pending. As of August

13, 2008, the company's common stock (symbol "PNOIQ") was traded on the over-the-counter markets. Panaco also has debt securities.

7. Paragon Financial Corp. ("Paragon") (n/k/a NewMarket Latin America, Inc.) (CIK No. 1089979) is a Delaware corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Paragon is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2005, which reported a net loss of \$100,000 for the prior twelve months. As of August 13, 2008, the company's stock (symbol "NEAI") was quoted on the Pink Sheets, had eleven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

8. Patriot Motorcycle Corp. ("Patriot") (CIK No. 1073949) is a revoked Nevada corporation located in San Clemente, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Patriot is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2005, which reported a net loss of over \$1.9 million for the prior three months. As of August 13, 2008, the company's stock (symbol "PMCY") was quoted on the Pink Sheets, had eleven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

9. 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.

10. 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 and Rule 13a-13 requires issuers to file quarterly reports.

9. 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 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, 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)].

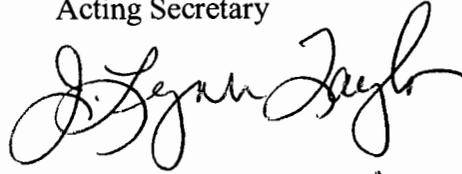
In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in 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.

Attachment

Florence E. Harmon
Acting Secretary

A handwritten signature in cursive script that reads "J. Lynn Taylor".

**By: J. Lynn Taylor
Assistant Secretary**

Appendix 1

Chart of Delinquent Filings *Pacific Coast Apparel Co., Inc., et al.*

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>Pacific Coast Apparel Co., Inc.</i>	<i>10-KSB</i>	09/30/00	12/29/00	Not filed	92
	<i>10-QSB</i>	12/31/00	02/14/01	Not filed	90
	<i>10-QSB</i>	03/31/01	05/15/01	Not filed	87
	<i>10-QSB</i>	06/30/01	08/14/01	Not filed	84
	<i>10-KSB</i>	09/30/01	12/31/01	Not filed	80
	<i>10-QSB</i>	12/31/01	02/14/02	Not filed	78
	<i>10-QSB</i>	03/31/02	05/15/02	Not filed	75
	<i>10-QSB</i>	06/30/02	08/14/02	Not filed	72
	<i>10-KSB</i>	09/30/02	12/30/02	Not filed	68
	<i>10-QSB</i>	12/31/02	02/14/03	Not filed	66
	<i>10-QSB</i>	03/31/03	05/15/03	Not filed	63
	<i>10-QSB</i>	06/30/03	08/14/03	Not filed	60
	<i>10-KSB</i>	09/30/03	12/29/03	Not filed	56
	<i>10-QSB</i>	12/31/03	02/17/04	Not filed	54
	<i>10-QSB</i>	03/31/04	05/17/04	Not filed	51
	<i>10-QSB</i>	06/30/04	08/16/04	Not filed	48
	<i>10-KSB</i>	09/30/04	12/29/04	Not filed	44
	<i>10-QSB</i>	12/31/04	02/14/05	Not filed	42
	<i>10-QSB</i>	03/31/05	05/16/05	Not filed	39
	<i>10-QSB</i>	06/30/05	08/15/05	Not filed	36
	<i>10-KSB</i>	09/30/05	12/29/05	Not filed	32
	<i>10-QSB</i>	12/31/05	02/14/06	Not filed	30
	<i>10-QSB</i>	03/31/06	05/15/06	Not filed	27
	<i>10-QSB</i>	06/30/06	08/14/06	Not filed	24
	<i>10-KSB</i>	09/30/06	12/29/06	Not filed	20
	<i>10-QSB</i>	12/31/06	02/14/07	Not filed	18
	<i>10-QSB</i>	03/31/07	05/15/07	Not filed	15
	<i>10-QSB</i>	06/30/07	08/14/07	Not filed	12
	<i>10-KSB</i>	09/30/07	12/31/07	Not filed	8

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pacific Coast Apparel Co., Inc.	10-QSB	12/31/07	02/14/08	Not filed	6
	10-QSB	03/31/08	05/15/08	Not filed	3
Total Filings Delinquent	31				

Pacific Gateway Exchange, Inc.

10-K	12/31/00	04/02/01	Not filed	88
10-Q	03/31/01	05/15/01	Not filed	87
10-Q	06/30/01	08/14/01	Not filed	84
10-Q	09/30/01	11/14/01	Not filed	81
10-K	12/31/01	04/01/02	Not filed	76
10-Q	03/31/02	05/15/02	Not filed	75
10-Q	06/30/02	08/14/02	Not filed	72
10-Q	09/30/02	11/14/02	Not filed	69
10-K	12/31/02	03/31/03	Not filed	65
10-Q	03/31/03	05/15/03	Not filed	63
10-Q	06/30/03	08/14/03	Not filed	60
10-Q	09/30/03	11/14/03	Not filed	57
10-K	12/31/03	03/30/04	Not filed	53
10-Q	03/31/04	05/17/04	Not filed	51
10-Q	06/30/04	08/16/04	Not filed	48
10-Q	09/30/04	11/15/04	Not filed	45
10-K	12/31/04	03/31/05	Not filed	41
10-Q	03/31/05	05/16/05	Not filed	39
10-Q	06/30/05	08/15/05	Not filed	36
10-Q	09/30/05	11/14/05	Not filed	33
10-K	12/31/05	03/31/06	Not filed	29
10-Q	03/31/06	05/15/06	Not filed	27
10-Q	06/30/06	08/14/06	Not filed	24
10-Q	09/30/06	11/14/06	Not filed	21
10-K	12/31/06	04/02/07	Not filed	16
10-Q	03/31/07	05/15/07	Not filed	15

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pacific Gateway Exchange, Inc.					
	10-Q	06/30/07	08/14/07	Not filed	12
	10-Q	09/30/07	11/14/07	Not filed	9
	10-K	12/31/07	03/31/08	Not filed	5
	10-Q	03/31/08	05/15/08	Not filed	3
Total Filings Delinquent	30				
Pacific International Services Corp.					
	10-Q	09/30/96	11/14/96	Not filed	141
	10-K	12/31/96	03/31/97	Not filed	137
	10-Q	03/31/97	05/15/97	Not filed	135
	10-Q	06/30/97	08/14/97	Not filed	132
	10-Q	09/30/97	11/14/97	Not filed	129
	10-K	12/31/97	03/31/98	Not filed	125
	10-Q	03/31/98	05/15/98	Not filed	123
	10-Q	06/30/98	08/14/98	Not filed	120
	10-Q	09/30/98	11/16/98	Not filed	117
	10-K	12/31/98	03/31/99	Not filed	113
	10-Q	03/31/99	05/17/99	Not filed	111
	10-Q	06/30/99	08/16/99	Not filed	108
	10-Q	09/30/99	11/15/99	Not filed	105
	10-K	12/31/99	03/30/00	Not filed	101
	10-Q	03/31/00	05/15/00	Not filed	99
	10-Q	06/30/00	08/14/00	Not filed	96
	10-Q	09/30/00	11/14/00	Not filed	93
	10-K	12/31/00	04/02/01	Not filed	88
	10-Q	03/31/01	05/15/01	Not filed	87
	10-Q	06/30/01	08/14/01	Not filed	84
	10-Q	09/30/01	11/14/01	Not filed	81
	10-K	12/31/01	04/01/02	Not filed	76
	10-Q	03/31/02	05/15/02	Not filed	75
	10-Q	06/30/02	08/14/02	Not filed	72

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pacific International Services Corp.	10-Q	09/30/02	11/14/02	Not filed	69
	10-K	12/31/02	03/31/03	Not filed	65
	10-Q	03/31/03	05/15/03	Not filed	63
	10-Q	06/30/03	08/14/03	Not filed	60
	10-Q	09/30/03	11/14/03	Not filed	57
	10-K	12/31/03	03/30/04	Not filed	53
	10-Q	03/31/04	05/17/04	Not filed	51
	10-Q	06/30/04	08/16/04	Not filed	48
	10-Q	09/30/04	11/15/04	Not filed	45
	10-K	12/31/04	03/31/05	Not filed	41
	10-Q	03/31/05	05/16/05	Not filed	39
	10-Q	06/30/05	08/15/05	Not filed	36
	10-Q	09/30/05	11/14/05	Not filed	33
	10-K	12/31/05	03/31/06	Not filed	29
	10-Q	03/31/06	05/15/06	Not filed	27
	10-Q	06/30/06	08/14/06	Not filed	24
	10-Q	09/30/06	11/14/06	Not filed	21
	10-K	12/31/06	04/02/07	Not filed	16
	10-Q	03/31/07	05/15/07	Not filed	15
	10-Q	06/30/07	08/14/07	Not filed	12
10-Q	09/30/07	11/14/07	Not filed	9	
10-K	12/31/07	03/31/08	Not filed	5	
10-Q	03/31/08	05/15/08	Not filed	3	
Total Filings Delinquent		47			

Pallet Management Systems, Inc.

10-Q	12/28/02	02/11/03	Not filed	66
10-Q	03/29/03	05/13/03	Not filed	63
10-K	06/28/03	09/26/03	Not filed	59
10-Q	09/27/03	11/11/03	Not filed	57
10-Q	12/27/03	02/10/04	Not filed	54

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pallet Management Systems, Inc.	10-Q	03/27/04	05/11/04	Not filed	51
	10-K	06/26/04	09/24/04	Not filed	47
	10-Q	09/25/04	11/09/04	Not filed	45
	10-Q	12/25/04	02/08/05	Not filed	42
	10-Q	03/26/05	05/10/05	Not filed	39
	10-K	06/25/05	09/23/05	Not filed	35
	10-Q	09/24/05	11/08/05	Not filed	33
	10-Q	12/31/05	02/14/06	Not filed	30
	10-Q	03/25/06	05/09/06	Not filed	27
	10-K	06/24/06	09/22/06	Not filed	23
	10-Q	09/30/06	11/14/06	Not filed	21
	10-Q	12/30/06	02/13/07	Not filed	18
	10-Q	03/31/07	05/15/07	Not filed	15
	10-K	06/30/07	09/28/07	Not filed	11
	10-Q	09/29/07	11/13/07	Not filed	9
	10-Q	12/29/07	02/12/08	Not filed	6
	10-Q	03/29/08	05/13/08	Not filed	3

Total Filings Delinquent 22

Palm Desert Art, Inc.

10-KSB	04/30/00	07/31/00	Not filed	97
10-QSB	07/31/00	09/14/00	Not filed	95
10-QSB	10/31/00	12/15/00	Not filed	92
10-QSB	01/31/01	03/19/01	Not filed	89
10-KSB	04/30/01	07/30/01	Not filed	85
10-QSB	07/31/01	09/14/01	Not filed	83
10-QSB	10/31/01	12/17/01	Not filed	80
10-QSB	01/31/02	03/18/02	Not filed	77
10-KSB	04/30/02	07/29/02	Not filed	73
10-QSB	07/31/02	09/16/02	Not filed	71
10-QSB	10/31/02	12/16/02	Not filed	68
10-QSB	01/31/03	03/17/03	Not filed	65
10-KSB	04/30/03	07/29/03	Not filed	61
10-QSB	07/31/03	09/15/03	Not filed	59
10-QSB	10/31/03	12/15/03	Not filed	56
10-QSB	01/31/04	03/16/04	Not filed	53

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Palm Desert Art, Inc.	10-KSB	04/30/04	07/29/04	Not filed	49
	10-QSB	07/31/04	09/14/04	Not filed	47
	10-QSB	10/31/04	12/15/04	Not filed	44
	10-QSB	01/31/05	03/17/05	Not filed	41
	10-KSB	04/30/05	07/29/05	Not filed	37
	10-QSB	07/31/05	09/14/05	Not filed	35
	10-QSB	10/31/05	12/15/05	Not filed	32
	10-QSB	01/31/06	03/17/06	Not filed	29
	10-KSB	04/30/06	07/31/06	Not filed	25
	10-QSB	07/31/06	09/14/06	Not filed	23
	10-QSB	10/31/06	12/15/06	Not filed	20
	10-QSB	01/31/07	03/19/07	Not filed	17
	10-KSB	04/30/07	07/30/07	Not filed	13
	10-QSB	07/31/07	09/14/07	Not filed	11
	10-QSB	10/31/07	12/17/07	Not filed	8
	10-QSB	01/31/08	03/17/08	Not filed	5
	10-KSB	04/30/08	07/30/08	Not filed	1
	Total Filings Delinquent	33			

Panaco, Inc.

10-Q	06/30/02	08/14/02	Not filed	72
10-Q	09/30/02	11/14/02	Not filed	69
10-K	12/31/02	03/31/03	Not filed	65
10-Q	03/31/03	05/15/03	Not filed	63
10-Q	06/30/03	08/14/03	Not filed	60
10-Q	09/30/03	11/14/03	Not filed	57
10-K	12/31/03	03/30/04	Not filed	53
10-Q	03/31/04	05/17/04	Not filed	51
10-Q	06/30/04	08/16/04	Not filed	48
10-Q	09/30/04	11/15/04	Not filed	45
10-K	12/31/04	03/31/05	Not filed	41
10-Q	03/31/05	05/16/05	Not filed	39
10-Q	06/30/05	08/15/05	Not filed	36
10-Q	09/30/05	11/14/05	Not filed	33
10-K	12/31/05	03/31/06	Not filed	29
10-Q	03/31/06	05/15/06	Not filed	27
10-Q	06/30/06	08/14/06	Not filed	24

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Panaco, Inc.					
	10-Q	09/30/06	11/14/06	Not filed	21
	10-K	12/31/06	04/02/07	Not filed	16
	10-Q	03/31/07	05/15/07	Not filed	15
	10-Q	06/30/07	08/14/07	Not filed	12
	10-Q	09/30/07	11/14/07	Not filed	9
	10-K	12/31/07	03/31/08	Not filed	5
	10-Q	03/31/08	05/15/08	Not filed	3
Total Filings Delinquent		24			
Paragon Financial Corp. (n/k/a NewMarket Latin America, Inc.)					
	10-Q	03/31/06	05/15/06	Not filed	27
	10-Q	06/30/06	08/14/06	Not filed	24
	10-Q	09/30/06	11/14/06	Not filed	21
	10-K	12/31/06	04/02/07	Not filed	16
	10-Q	03/31/07	05/15/07	Not filed	15
	10-Q	06/30/07	08/14/07	Not filed	12
	10-Q	09/30/07	11/14/07	Not filed	9
	10-K	12/31/07	03/31/08	Not filed	5
	10-Q	03/31/08	05/15/08	Not filed	3
Total Filings Delinquent		9			
Patriot Motorcycle Corp.					
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-KSB	09/30/06	12/29/06	Not filed	20
	10-QSB	12/31/06	02/14/07	Not filed	18
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-KSB	09/30/07	12/31/07	Not filed	8

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>Patriot Motorcycle Corp.</i>					
	<i>10-QSB</i>	12/31/07	02/14/08	Not filed	6
	<i>10-QSB</i>	03/31/08	05/15/08	Not filed	3
Total Filings Delinquent					9

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, are in the process of being removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal is taking effect over a transition period that will conclude on March 15, 2009, so by that date, all reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB will be required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than \$75 million in public equity float as of the end of its most recently completed second fiscal quarter) will have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

August 19, 2008

IN THE MATTER OF

Ocean Resources, Inc.,
Officeland, Inc.,
Online Gaming Systems Ltd. (n/k/a
Advanced Resources Group Ltd.),
Open EC Technologies, Inc., and
OVM International Holding Corp.,

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 Ocean Resources, Inc. because it has not filed any periodic reports since the period ended December 31, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Officeland, Inc. because it has not filed any periodic reports since the period ended August 31, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Online Gaming Systems Ltd. (n/k/a Advanced Resources Group Ltd.) because it has not filed any periodic reports since the period ended December 31, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Open EC Technologies, Inc. because it has not filed any periodic reports since the period ended May 31, 2002.

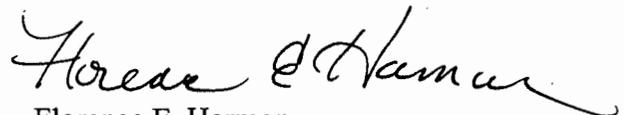
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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of OVM International Holding Corp. because it has not filed any periodic reports since the period ended September 30, 2002.

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 companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on August 19, 2008, through 11:59 p.m. EDT on September 2, 2008.

By the Commission.


Florence E. Harmon
Acting Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 19, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13139

In the Matter of

Ocean Resources, Inc.,
Officeland, Inc.,
Online Gaming Systems Ltd. (n/k/a
Advanced Resources Group Ltd.),
Open EC Technologies, Inc., and
OVM International Holding Corp.,

Respondents.

ORDER INSTITUTING
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Ocean Resources, Inc., Officeland, Inc., Online Gaming Systems Ltd. (n/k/a Advanced Resources Group Ltd.), Open EC Technologies, Inc., and OVM International Holding Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Ocean Resources, Inc. (CIK No. 1114222) is a void Delaware corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Ocean Resources is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2004, which reported a net loss of \$6,631,980 for the prior six months. As of August 14, 2008, the company's common stock (symbol "OCRI") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had twelve market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

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2. Officeland, Inc. (CIK No. 780260) is an Ontario corporation located in Downsview, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Officeland 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 August 31, 2000, which reported a net loss of \$442,791 for the prior nine months. As of August 14, 2008, the company's common stock (symbol "OFLD") was quoted on the Pink Sheets, had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

3. Online Gaming Systems Ltd. (n/k/a Advanced Resources Group Ltd.) (CIK No. 1003739) is a delinquent Delaware corporation located in Saddle Brook, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Online Gaming Systems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed its 10-KSB for the period ended December 31, 2006. As of August 14, 2008, the company's common stock (symbol "AVRG") was quoted on the Pink Sheets, had eleven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

4. Open EC Technologies, Inc. (CIK No. 1108940) is a British Columbia corporation located in North Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Open EC Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended May 31, 2002, which reported a net loss of \$3,273,477 for the prior year. As of August 14, 2008, the company's common stock (symbol "OCEIF") was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. OVM International Holding Corp. (CIK No. 1030916) is a Nevada corporation located in Visalia, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). OVM International Holding 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. As of August 14, 2008, the company's common stock (symbol "OVMI") was quoted on the Pink Sheets, had five market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

7. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16 requires certain foreign private issuers to furnish quarterly and other material reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

8. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 or 13a-16 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 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, 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.



Florence E. Harmon
Acting Secretary

Attachment

Appendix 1

**Chart of Delinquent Filings
In the Matter of Ocean Resources, Inc., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>Ocean Resources, Inc.</i>					
	<i>10-QSB</i>	03/31/05	05/16/05	Not filed	39
	<i>10-KSB</i>	06/30/05	09/28/05	Not filed	35
	<i>10-QSB</i>	09/30/05	11/14/05	Not filed	33
	<i>10-QSB</i>	12/31/05	02/14/06	Not filed	30
	<i>10-QSB</i>	03/31/06	05/15/06	Not filed	27
	<i>10-KSB</i>	06/30/06	09/28/06	Not filed	23
	<i>10-QSB</i>	09/30/06	11/14/06	Not filed	21
	<i>10-QSB</i>	12/31/06	02/14/07	Not filed	18
	<i>10-QSB</i>	03/31/07	05/15/07	Not filed	15
	<i>10-KSB</i>	06/30/07	09/28/07	Not filed	11
	<i>10-QSB</i>	09/30/07	11/14/07	Not filed	9
	<i>10-QSB</i>	12/31/07	02/14/08	Not filed	6
	<i>10-QSB</i>	03/31/08	05/15/08	Not filed	3
Total Filings Delinquent	13				
<i>Officeland, Inc.</i>					
	<i>10-KSB</i>	11/30/00	02/28/01	Not filed	90
	<i>10-QSB</i>	02/28/01	04/16/01	Not filed	88
	<i>10-QSB</i>	05/31/01	07/16/01	Not filed	85
	<i>10-QSB</i>	08/31/01	10/15/01	Not filed	82
	<i>10-KSB</i>	11/30/01	02/28/02	Not filed	78
	<i>10-QSB</i>	02/28/02	04/15/02	Not filed	76
	<i>10-QSB</i>	05/31/02	07/15/02	Not filed	73
	<i>10-QSB</i>	08/31/02	10/15/02	Not filed	70
	<i>10-KSB</i>	11/30/02	02/28/03	Not filed	66
	<i>10-QSB</i>	02/28/03	04/14/03	Not filed	64
	<i>10-QSB</i>	05/31/03	07/15/03	Not filed	61
	<i>10-QSB</i>	08/31/03	10/15/03	Not filed	58
	<i>10-KSB</i>	11/30/03	03/01/04	Not filed	53
	<i>10-QSB</i>	02/28/04	04/14/04	Not filed	52
	<i>10-QSB</i>	05/31/04	07/15/04	Not filed	49

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Officeland, Inc.					
	10-QSB	08/31/04	10/15/04	Not filed	46
	10-KSB	11/30/04	03/01/05	Not filed	41
	10-QSB	02/28/05	04/14/05	Not filed	40
	10-QSB	05/31/05	07/15/05	Not filed	37
	10-QSB	08/31/05	10/17/05	Not filed	34
	10-KSB	11/30/05	02/28/06	Not filed	30
	10-QSB	02/28/06	04/14/06	Not filed	28
	10-QSB	05/31/06	07/17/06	Not filed	25
	10-QSB	08/31/06	10/16/06	Not filed	22
	10-KSB	11/30/06	02/28/07	Not filed	18
	10-QSB	02/28/07	04/16/07	Not filed	16
	10-QSB	05/31/07	07/16/07	Not filed	13
	10-QSB	08/31/07	10/15/07	Not filed	10
	10-KSB	11/30/07	02/28/08	Not filed	6
	10-QSB	02/28/08	04/14/08	Not filed	4
	10-QSB	05/31/08	07/15/08	Not filed	1

Total Filings Delinquent 31

**Online Gaming
Systems Ltd. (n/k/a
Advanced Resources
Group Ltd.)**

10-QSB	03/31/07	05/15/07	Not filed	15
10-QSB	06/30/07	08/14/07	Not filed	12
10-QSB	09/30/07	11/14/07	Not filed	9
10-KSB	12/31/07	03/31/08	Not filed	5
10-Q ¹	03/31/08	05/15/08	Not filed	3
10-Q ¹	06/30/08	08/14/08	Not filed	0

Total Filings Delinquent 5

**Open EC
Technologies, Inc.**

20-F	05/31/03	11/30/03	Not filed	57
20-F	05/31/04	11/30/04	Not filed	45
20-F	05/31/05	11/30/05	Not filed	33

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Open EC Technologies, Inc.					
	20-F	05/31/06	11/30/06	Not filed	21
	20-F	05/31/07	11/30/07	Not filed	9
Total Filings Delinquent	5				

OVM International Holding Corp.

10-KSB	12/31/02	03/31/03	Not filed	65
10-QSB	03/31/03	05/15/03	Not filed	63
10-QSB	06/30/03	08/14/03	Not filed	60
10-QSB	09/30/03	11/14/03	Not filed	57
10-KSB	12/31/03	03/30/04	Not filed	53
10-QSB	03/31/04	05/17/04	Not filed	51
10-QSB	06/30/04	08/16/04	Not filed	48
10-QSB	09/30/04	11/15/04	Not filed	45
10-KSB	12/31/04	03/31/05	Not filed	41
10-QSB	03/31/05	05/16/05	Not filed	39
10-QSB	06/30/05	08/15/05	Not filed	36
10-QSB	09/30/05	11/14/05	Not filed	33
10-KSB	12/31/05	03/31/06	Not filed	29
10-QSB	03/31/06	05/15/06	Not filed	27
10-QSB	06/30/06	08/14/06	Not filed	24
10-QSB	09/30/06	11/14/06	Not filed	21
10-KSB	12/31/06	04/02/07	Not filed	16
10-QSB	03/31/07	05/15/07	Not filed	15
10-QSB	06/30/07	08/14/07	Not filed	12
10-QSB	09/30/07	11/14/07	Not filed	9

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>OVM International Holding Corp.</i>	<i>10-KSB</i>	12/31/07	03/31/08	Not filed	5
	<i>10-Q¹</i>	03/31/08	05/15/08	Not filed	3
	<i>10-Q¹</i>	06/30/08	08/14/08	Not filed	0

Total Filings Delinquent 23

¹Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, are in the process of being removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal is taking effect over a transition period that will conclude on March 15, 2009, so by that date, all reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB will be required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than \$75 million in public equity float as of the end of its most recently completed second fiscal quarter) will have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 20, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13140

In the Matter of

**Birman Managed Care, Inc. (n/k/a Alcar
Chemical Group, Inc.),
Cluster Technology Corp.,
Global Network, Inc.,
Micro-Integration Corp.,
Montt International Corp., and
NewCare Health Corp.,**

Respondents.

**ORDER INSTITUTING
PROCEEDINGS AND NOTICE OF
HEARING PURSUANT TO SECTION
12(j) OF THE SECURITIES
EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Birman Managed Care, Inc. (n/k/a Alcar Chemical Group, Inc.), Cluster Technology Corp., Global Network, Inc., Micro-Integration Corp., Montt International Corp, and NewCare Health Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Birman Managed Care, Inc. (n/k/a Alcar Chemical Group, Inc.) (CIK No. 1009822) is a void Delaware corporation located in Cookeville, Tennessee with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2000, which reported a net loss of \$2.2 million for the prior nine months. As of August 15, 2008, the company's stock (symbol "ACMG") was quoted in the Pink Sheets of Pink

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OTC Markets, Inc. ("Pink Sheets"), had fourteen makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

2. Cluster Technology Corp. (CIK No. 778074) is a forfeited Delaware corporation located in Tampa, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on March 8, 2000, which reported a net loss of \$810,620 for the fiscal year ended September 30, 1999. As of August 15, 2008, the company's stock (symbol "CLTT") was quoted in the Pink Sheets, had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

3. Global Network, Inc. (CIK No. 1093884) is a revoked Nevada corporation located in New York, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company 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, 2003, which reported a net loss of \$598,063 for the prior nine months. As of August 15, 2008, the company's stock (symbol "GLNW") was quoted in the Pink Sheets, had eight market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

4. Micro-Integration Corp. (CIK No. 920863) is a Delaware corporation located in Frostburg, Maryland with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB/A for the period ended December 31, 1999, which reported a net loss of \$534,034 for the prior nine months. As of August 15, 2008, the company's stock (symbol "MINT") was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Montt International Corp. (CIK No. 1106249) is a dissolved New York corporation located in New York, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on February 14, 2000, which reported a net loss of \$771,843 for the nine months ended September 30, 1999. As of August 15, 2008, the company's stock (symbol "MNTT") was quoted in the Pink Sheets, had three market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

6. NewCare Health Corp. (CIK No. 923020) is a Nevada corporation located in Atlanta, Georgia with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company 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 March 31, 1999, which reported a net loss of \$5.4 million for the prior three months. On June 22, 1999, the company filed a Chapter 11 bankruptcy

petition in the U.S. Bankruptcy Court for the District of Massachusetts that is still pending.

B. DELINQUENT PERIODIC FILINGS

7. 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.

8. 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 and Rule 13a-13 requires issuers to file quarterly reports.

9. 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 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, 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.

Florence E. Harmon
Acting Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings

In the Matter of Birman Managed Care, Inc. (n/k/a Alcar Chemical Group, Inc.), et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>Birman Managed Care, Inc. (n/k/a Alcar Chemical Group, Inc.)</i>	<i>10-KSB</i>	06/30/00	09/28/00	Not filed	95
	<i>10-QSB</i>	09/30/00	11/14/00	Not filed	93
	<i>10-QSB</i>	12/31/00	02/14/01	Not filed	90
	<i>10-QSB</i>	03/31/01	05/15/01	Not filed	87
	<i>10-KSB</i>	06/30/01	09/28/01	Not filed	83
	<i>10-QSB</i>	09/30/01	11/14/01	Not filed	81
	<i>10-QSB</i>	12/31/01	02/14/02	Not filed	78
	<i>10-QSB</i>	03/31/02	05/15/02	Not filed	75
	<i>10-KSB</i>	06/30/02	09/30/02	Not filed	71
	<i>10-QSB</i>	09/30/02	11/14/02	Not filed	69
	<i>10-QSB</i>	12/31/02	02/14/03	Not filed	66
	<i>10-QSB</i>	03/31/03	05/15/03	Not filed	63
	<i>10-KSB</i>	06/30/03	09/29/03	Not filed	59
	<i>10-QSB</i>	09/30/03	11/14/03	Not filed	57
	<i>10-QSB</i>	12/31/03	02/17/04	Not filed	54
	<i>10-QSB</i>	03/31/04	05/17/04	Not filed	51
	<i>10-KSB</i>	06/30/04	09/28/04	Not filed	47
	<i>10-QSB</i>	09/30/04	11/15/04	Not filed	45
	<i>10-QSB</i>	12/31/04	02/14/05	Not filed	42
	<i>10-QSB</i>	03/31/05	05/16/05	Not filed	39
	<i>10-KSB</i>	06/30/05	09/28/05	Not filed	35
	<i>10-QSB</i>	09/30/05	11/14/05	Not filed	33
	<i>10-QSB</i>	12/31/05	02/14/06	Not filed	30
	<i>10-QSB</i>	03/31/06	05/15/06	Not filed	27
	<i>10-KSB</i>	06/30/06	09/28/06	Not filed	23
	<i>10-QSB</i>	09/30/06	11/14/06	Not filed	21
	<i>10-QSB</i>	12/31/06	02/14/07	Not filed	18
	<i>10-QSB</i>	03/31/07	05/16/07	Not filed	15
	<i>10-KSB</i>	06/30/07	09/28/07	Not filed	11
	<i>10-QSB</i>	09/30/07	11/14/07	Not filed	9

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Birman Managed Care, Inc. (n/k/a Alcar Chemical Group, Inc.)	10-QSB	12/31/07	02/14/08	Not filed	6
	10-QSB	03/31/08	05/15/08	Not filed	3
Total Filings Delinquent	31				

Cluster Technology Corp.

10-QSB	03/31/00	06/21/00	Not filed	98
10-QSB	06/30/00	08/14/00	Not filed	96
10-KSB	09/30/00	12/29/00	Not filed	92
10-QSB	12/31/00	02/14/01	Not filed	90
10-QSB	03/31/01	05/15/01	Not filed	87
10-QSB	06/30/01	08/14/01	Not filed	84
10-KSB	09/30/01	12/31/01	Not filed	80
10-QSB	12/31/01	02/14/02	Not filed	78
10-QSB	03/31/02	05/15/02	Not filed	75
10-QSB	06/30/02	08/14/02	Not filed	72
10-KSB	09/30/02	12/30/02	Not filed	68
10-QSB	12/31/02	02/14/03	Not filed	66
10-QSB	03/31/03	05/15/03	Not filed	63
10-QSB	06/30/03	08/14/03	Not filed	60
10-KSB	09/30/03	12/29/03	Not filed	56
10-QSB	12/31/03	02/17/04	Not filed	54
10-QSB	03/31/04	05/17/04	Not filed	51
10-QSB	06/30/04	08/16/04	Not filed	48
10-KSB	09/30/04	12/29/04	Not filed	44
10-QSB	12/31/04	02/14/05	Not filed	42
10-QSB	03/31/05	05/16/05	Not filed	39
10-QSB	06/30/05	08/15/05	Not filed	36
10-KSB	09/30/05	12/29/05	Not filed	32
10-QSB	12/31/05	02/14/06	Not filed	30
10-QSB	03/31/06	05/15/06	Not filed	27
10-QSB	06/30/06	08/14/06	Not filed	24
10-KSB	09/30/06	12/29/06	Not filed	20
10-QSB	12/31/06	02/14/07	Not filed	18

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Cluster Technology Corp.					
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-KSB	09/30/07	12/31/07	Not filed	8
	10-QSB	12/31/07	02/14/08	Not filed	6
	10-QSB	03/31/08	05/15/08	Not filed	3
	10-QSB	06/30/08	08/15/08	Not filed	0
Total Filings Delinquent		34			

Global Network, Inc.

10-KSB	12/31/03	03/30/04	Not filed	53
10-QSB	03/31/04	05/17/04	Not filed	51
10-QSB	06/30/04	08/16/04	Not filed	48
10-QSB	09/30/04	11/15/04	Not filed	45
10-KSB	12/31/04	03/31/05	Not filed	41
10-QSB	03/31/05	05/16/05	Not filed	39
10-QSB	06/30/05	08/15/05	Not filed	36
10-QSB	09/30/05	11/14/05	Not filed	33
10-KSB	12/31/05	03/31/06	Not filed	29
10-QSB	03/31/06	05/15/06	Not filed	27
10-QSB	06/30/06	08/14/06	Not filed	24
10-QSB	09/30/06	11/14/06	Not filed	21
10-KSB	12/31/06	04/02/07	Not filed	16
10-QSB	03/31/07	05/15/07	Not filed	15
10-QSB	06/30/07	08/14/07	Not filed	12
10-QSB	09/30/07	11/14/07	Not filed	9
10-KSB	12/31/07	03/31/08	Not filed	5
10-Q*	03/31/08	05/15/08	Not filed	3
10-Q	06/30/08	08/15/08	Not filed	0

Total Filings Delinquent 19

Micro-Integration Corp.

10-KSB	03/31/00	06/29/00	Not filed	98
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Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Micro-Integration Corp.					
	10-QSB	06/30/00	08/14/00	Not filed	96
	10-QSB	09/30/00	11/14/00	Not filed	93
	10-QSB	12/31/00	02/14/01	Not filed	90
	10-KSB	03/31/01	06/29/01	Not filed	86
	10-QSB	06/30/01	08/14/01	Not filed	84
	10-QSB	09/30/01	11/14/01	Not filed	81
	10-QSB	12/31/01	02/14/02	Not filed	78
	10-KSB	03/31/02	07/01/02	Not filed	73
	10-QSB	06/30/02	08/14/02	Not filed	72
	10-QSB	09/30/02	11/14/02	Not filed	69
	10-QSB	12/31/02	02/14/03	Not filed	66
	10-KSB	03/31/03	06/30/03	Not filed	62
	10-QSB	06/30/03	08/14/03	Not filed	60
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-QSB	12/31/03	02/17/04	Not filed	54
	10-KSB	03/31/04	06/29/04	Not filed	50
	10-QSB	06/30/04	08/16/04	Not filed	48
	10-QSB	09/30/04	11/15/04	Not filed	45
	10-QSB	12/31/04	02/14/05	Not filed	42
	10-KSB	03/31/05	06/29/05	Not filed	38
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-QSB	12/31/05	02/14/06	Not filed	30
	10-KSB	03/31/06	06/29/06	Not filed	26
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-QSB	12/31/06	02/14/07	Not filed	18
	10-KSB	03/31/07	06/29/07	Not filed	14
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-QSB	12/31/07	02/14/08	Not filed	6
	10-KSB	03/31/08	06/29/08	Not filed	2

Total Filings Delinquent 33

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Montt International Corp.					
	10-KSB	12/31/99	03/30/00	Not filed	101
	10-QSB	03/31/00	05/15/00	Not filed	99
	10-QSB	06/30/00	08/14/00	Not filed	96
	10-QSB	09/30/00	11/14/00	Not filed	93
	10-KSB	12/31/00	04/02/01	Not filed	88
	10-QSB	03/31/01	05/15/01	Not filed	87
	10-QSB	06/30/01	08/14/01	Not filed	84
	10-QSB	09/30/01	11/14/01	Not filed	81
	10-KSB	12/31/01	04/01/02	Not filed	76
	10-QSB	03/31/02	05/15/02	Not filed	75
	10-QSB	06/30/02	08/14/02	Not filed	72
	10-QSB	09/30/02	11/14/02	Not filed	69
	10-KSB	12/31/02	03/31/03	Not filed	65
	10-QSB	03/31/03	05/15/03	Not filed	63
	10-QSB	06/30/03	08/14/03	Not filed	60
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-KSB	12/31/03	03/30/04	Not filed	53
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-QSB	06/30/04	08/16/04	Not filed	48
	10-QSB	09/30/04	11/15/04	Not filed	45
	10-KSB	12/31/04	03/31/05	Not filed	41
	10-QSB	03/31/05	05/16/05	Not filed	39
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-KSB	12/31/05	03/31/06	Not filed	29
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-KSB	12/31/07	3/31/08	Not filed	5
	10-Q*	03/31/08	05/15/08	Not filed	3
	10-Q	06/30/08	08/15/08	Not filed	0

Total Filings Delinquent 35

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
NewCare Health Corp.	10-Q	06/30/99	08/16/99	Not filed	108
	10-Q	09/30/99	11/15/99	Not filed	105
	10-K	12/31/99	03/30/00	Not filed	101
	10-Q	03/31/00	05/15/00	Not filed	99
	10-Q	06/30/00	08/14/00	Not filed	96
	10-Q	09/30/00	11/14/00	Not filed	93
	10-K	12/31/00	04/02/01	Not filed	88
	10-Q	03/31/01	05/15/01	Not filed	87
	10-Q	06/30/01	08/14/01	Not filed	84
	10-Q	09/30/01	11/14/01	Not filed	81
	10-K	12/31/01	04/01/02	Not filed	76
	10-Q	03/31/02	05/15/02	Not filed	75
	10-Q	06/30/02	08/14/02	Not filed	72
	10-Q	09/30/02	11/14/02	Not filed	69
	10-K	12/31/02	03/31/03	Not filed	65
	10-Q	03/31/03	05/15/03	Not filed	63
	10-Q	06/30/03	08/14/03	Not filed	60
	10-Q	09/30/03	11/14/03	Not filed	57
	10-K	12/31/03	03/30/04	Not filed	53
	10-Q	03/31/04	05/17/04	Not filed	51
	10-Q	06/30/04	08/16/04	Not filed	48
	10-Q	09/30/04	11/15/04	Not filed	45
	10-K	12/31/04	03/31/05	Not filed	41
	10-Q	03/31/05	05/16/05	Not filed	39
	10-Q	06/30/05	08/15/05	Not filed	36
	10-Q	09/30/05	11/14/05	Not filed	33
	10-K	12/31/05	03/31/06	Not filed	29
	10-Q	03/31/06	05/15/06	Not filed	27
	10-Q	06/30/06	08/14/06	Not filed	24
	10-Q	09/30/06	11/14/06	Not filed	21
	10-K	12/31/06	04/02/07	Not filed	16
	10-Q	03/31/07	05/15/07	Not filed	15
	10-Q	06/30/07	08/14/07	Not filed	12
	10-Q	09/30/07	11/14/07	Not filed	9

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>NewCare Health Corp.</i>					
	<i>10-K</i>	12/31/07	3/31/08	Not filed	5
	<i>10-Q</i>	03/31/08	05/15/08	Not filed	3
	<i>10-Q</i>	06/30/08	08/15/08	Not filed	0
Total Filings Delinquent					37

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, are in the process of being removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal is taking effect over a transition period that will conclude on March 15, 2009, so by that date, all reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB will be required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than \$75 million in public equity float as of the end of its most recently completed second fiscal quarter) will have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

August 20, 2008

IN THE MATTER OF

**Birman Managed Care, Inc. (n/k/a Alcar
Chemical Group, Inc.),
Cluster Technology Corp.,
Consolidated Growers and
Processors, Inc.,
Global Network, Inc.,
Micro-Integration Corp.,
Monsoon International Manufacturing
& Distribution, Inc.,
Montt International Corp.,
Pony Express U. S. A., Inc.,
SUMmedia.com, Inc., and
Sunflower USA, Ltd.,**

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 Birman Managed Care, Inc. (n/k/a Alcar Chemical Group, Inc.) because it has not filed any periodic reports since the period ended March 31, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cluster Technology Corp. because it has not filed any periodic reports since March 8, 2000.

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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Consolidated Growers and Processors, Inc. because it has not filed any periodic reports since January 5, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Global Network, Inc. because it has not filed any periodic reports since the period ended September 30, 2003.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Micro-Integration Corp. because it has not filed any periodic reports since December 31, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Monsoon International Manufacturing & Distribution, Inc. because it has not filed any periodic reports since the period ended January 21, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Montt International Corp. because it has not filed any periodic reports since February 14, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Pony Express U. S. A., Inc. because it has not filed any periodic reports since the period ended September 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of SUMmedia.com, Inc. because it has not filed any periodic reports since the period ended September 30, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Sunflower USA, Ltd. because it has not filed any periodic reports since the period ended February 29, 2000.

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 companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on August 20, 2008, through 11:59 p.m. EDT on September 3, 2008.

By the Commission.

Florence E. Harmon
Acting Secretary

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

Commissioner Watter
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58416 / August 22, 2008

Admin. Proc. File No. 3-12889

In the Matter of the Application of

GEOFFREY ORTIZ
29500 Heathercliff Road No. 169
Malibu, California 90265

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violations of Conduct Rules

Forgery of Customers' Initials on Revised Account Applications

Submission of False Information to Employing Member

Submission of False or Misleading Information to NASD

Conduct Inconsistent with Just and Equitable Principles of Trade

Former registered representative of association member forged or caused the forgery of customer initials on account applications to authorize increased fees and submitted forged documents to employer. Former registered representative also submitted false and misleading information to association in connection with its investigation of forgery allegations. Held, association's findings of violations and sanctions it imposed are sustained.

APPEARANCES:

Geoffrey Ortiz, pro se.

Marc Menchel, Alan B. Lawhead, and Jennifer C. Brooks, for FINRA.

Document 13 of 19

Appeal filed: November 14, 2007
Last brief received: March 6, 2008

I.

Geoffrey Ortiz, a former registered representative of NASD member UBS Financial Services Inc. ("UBS"), appeals from NASD disciplinary action. 1/ NASD found that Ortiz forged or caused to be forged the initials of two customers on account applications and submitted the applications to UBS in violation of NASD Conduct Rule 2110 and provided false information to NASD in violation of NASD Conduct Rules 8210 and 2110. 2/ NASD barred Ortiz for the forgery and submission of forged documents to UBS and imposed a separate bar for his violation of NASD Rule 8210. 3/ We base our findings on an independent review of the record.

II.

Ortiz entered the securities industry in 1988, and was employed by UBS in its Beverly Hills branch office at the time of the events at issue. Ortiz was in the lowest quintile of production at the Beverly Hills branch. Dennis Barron began buying municipal bonds through Ortiz in 1995 or 1996. Yuko Barron, Dennis Barron's wife, did not become a customer of Ortiz until 2001.

Between approximately 1996 and 2001, Ortiz repeatedly attempted to convince the Barrons to open a fee-based managed account at UBS. The Barrons declined because they did

1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and the member-regulation, enforcement, and arbitration functions of the New York Stock Exchange. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517 (Aug. 1, 2007). Because NASD instituted the disciplinary action before that date, we continue to use the designation NASD.

2/ NASD Conduct Rule 2110 provides that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." This standard governed Ortiz's conduct when he was an associated person of UBS. NASD General Rule 115 ("Persons associated with a member shall have the same duties and obligations as a member under [NASD] Rules."). NASD Rule 8210 requires persons associated with a member to provide information orally, in writing, or electronically in response to requests from NASD staff in connection with an investigation.

3/ NASD also imposed hearing costs of \$4,778.52.

not want to pay a fee for the services of a professional money manager. By April 2001, however, a decline in the stock market induced Yuko Barron to invest \$250,000 in a managed account offered to her by another broker-dealer, which charged an annual management fee of 1.5%. Yuko Barron thought the 1.5% annual fee was too high, but she agreed to pay it.

In August 2001, the Barrons asked Ortiz for information about UBS's ACCESS managed-account program. The ACCESS program assigned individual accounts with at least \$100,000 in assets to outside money managers chosen by the investor for investment according to a published investment strategy. UBS charged ACCESS account holders a variable annual fee based on the value of the assets in the account. ^{4/} Ortiz persuaded Yuko Barron to open five accounts for herself and her husband. However, Yuko Barron was emphatic that she would not pay more than a 1.5% management fee. Ortiz explained to Yuko Barron that he could probably provide the Barrons the 1.5% fee that she demanded because UBS permitted its representatives to discount the ACCESS program's standard fees. ^{5/} On August 7, 2001, Ortiz gave the Barrons five partially completed ACCESS account application forms with the pre-printed standard fees crossed out and replaced with the hand-written notation "1.5[%]." Ortiz understood at that time that the Barrons were going to open their ACCESS accounts with a total of \$1 million. ^{6/} The Barrons signed and dated the ACCESS applications on August 8, 2001 and asked Ortiz to come to their house to pick them up.

When Ortiz picked up the signed applications on August 9, 2001, he learned that the Barrons were investing a total of \$500,000 through the family trust and planned to invest an additional \$300,000 in the near future, but he did not change the annual fee provision to reflect

^{4/} UBS's variable fee schedule charged a 2.8% fee on accounts worth up to \$500,000. Accounts worth between \$500,000 and \$1 million were charged a blended rate of 2.8% on the first \$500,000 and 2.2% on the remainder between \$500,000 and \$1 million. For accounts worth between \$1 million and \$5 million, UBS charged 2.8% on the first \$500,000, 2.2% on the second \$500,000, and 1.6% on the amount between \$1 million and \$5 million. For accounts worth more than \$5 million, UBS charged an additional 1.4% on the amount over \$5 million.

^{5/} Ortiz had discretion to discount UBS's standard fees down to a prescribed minimum. The minimum fee on amounts up to \$500,000 was 1.75%. Ortiz could reduce the fees at the breakpoints described in note 4, supra, to no less than 1.4%, 0.9%, and 0.75% respectively. Ortiz did not need management permission to give the prescribed discounts, but a manager had to approve the entire application.

^{6/} If they had, the minimum fee Ortiz could have offered them would have been an effective rate of 1.575%, not the 1.5% Ortiz promised them.

the lower-than-expected opening investment. ^{7/} When Ortiz returned to his office, he signed each of the five applications as the Barrons' financial advisor and gave them to his assistant, Vivian Sanders, for handling. After internal processing by the Beverly Hills office, Sanders sent the Barrons' applications to UBS's New Jersey office on August 14, 2001 for final approval.

On August 16, 2001, an employee from UBS's New Jersey home office notified Ortiz that the Barrons' applications would not be approved because the 1.5% fee to which the Barrons agreed was below the minimum fee required for accounts worth \$500,000 or less. That same day, Ortiz received five UBS inter-office communications ("wires") notifying him that each of the Barrons' ACCESS account applications had been rejected because the applications were not accompanied by "managed account trustee cert forms" (which UBS required because the Barrons were opening accounts in the name of a trust); the fees were "below the maximum allowable discount rate"; and the accounts were not fully funded. The wires also informed Ortiz that he would need to open a "star case" (another UBS inter-office communication for resolution of customer service problems) if the accounts were to be "related for fee purposes." Shortly after receiving the wires, Sanders, acting at Ortiz's direction, opened a star case for each of the five account applications and sent the following message to the New Jersey office in connection with each account: "Please update the [b]reakpoint to 1.75 and 1.4. Thank you, Vivian." On the morning of August 17, 2001, Ortiz was told by the New Jersey office that the Barrons needed to initial the changed fees and the revised applications had to be sent back to New Jersey before the accounts would be approved for opening.

On the afternoon of August 17, 2001, Ortiz gave Sanders five ACCESS applications, each of which had the revised fees on it, as well as writing that purported to be the Barrons' initials approving the fee increase. Ortiz directed Sanders to transmit the revised applications to New Jersey. Sanders faxed the applications to Kevin Hong at the New Jersey office with a cover sheet indicating that the transmission contained a total of six pages and that "[the] [b]reakpoint [had been] changed and initialed." The fax time stamp along the top edge of the cover sheet indicates the date and time the revised applications were faxed from the fax machine in the operations department of the Beverly Hills office. The New Jersey office received the faxed applications with the Barrons' purported initials a short time after the Beverly Hills office sent them.

Although the record includes copies of the revised applications that were faxed to the New Jersey office, it does not contain the New Jersey office's copy of the fax cover sheet that accompanied the revisions. The fax cover sheet was the only document found in the Beverly Hills office that pertained to the August 17, 2001 fax to New Jersey. Sanders testified that, normally, she would file a fax cover sheet together with the material faxed under it. Jackie Kaden, the Administrative Branch Manager for the Beverly Hills office, testified that the originals of initialed revisions of applications faxed to New Jersey (such as the documents in

^{7/} The Barrons' UBS account statements for April 2002 show that they deposited an additional \$92,530.43 divided equally between two of their five ACCESS accounts.

question here) would routinely be kept in the responsible sales representative's files at the originating branch office and not in the operations department's files "[u]nless a copy was given also to operations to stick in the file." Kaden testified that no copies of the revised applications were found in the operations department's files. Although it is UBS policy that the originals of the revised ACCESS account applications are to be kept in the sales representative's files, the originals of the Barrons' revised ACCESS applications were not found in the course of UBS's investigation or NASD's. 8/

On August 24, 2001, the Beverly Hills office received notice that three of the Barrons' five ACCESS account applications had been approved. Another of the Barrons' applications was approved on August 26, 2001, and the fifth was approved on August 28, 2001. 9/

In September 2002, the Barrons closed their ACCESS accounts because they had performed poorly. In January 2003, the Barrons noticed, in the course of preparing their income tax return, that the fees UBS had charged them for their ACCESS accounts exceeded 1.5%. On January 5, 2003, the Barrons sent a letter of complaint to Ortiz via fax demanding that UBS reimburse them for the overcharges and pay them interest and a penalty in compensation for the excessive fees.

Ortiz referred the Barrons' complaint letter to management, as required under UBS policy. In the course of the ensuing investigation, Ortiz told Kaden that Ortiz had gone to the Barrons' house after learning that the New Jersey office had rejected their applications and had obtained the Barrons' initials on the revised applications. Kaden reported this information to Dennis Barron, who immediately denied that either he or his wife knew that the fees had been increased, and further denied that they approved the increase. When Kaden provided the Barrons with

8/ John Cannistraci, UBS's regulatory attorney responsible for providing UBS documents in this matter, also testified that the original initialed revisions of ACCESS account applications would be kept in the sales representative's files. In his briefs, Ortiz quotes Sanders' testimony to the effect that the "back office" in Beverly Hills kept copies of the account applications. That testimony, however, referred explicitly to the applications for accounts handled by the Beverly Hills office. Sanders and Kaden both testified that the originals of ACCESS account applications were sent to New Jersey.

9/ The record contains copies of signed but undated trustee certification forms executed by the Barrons in connection with their ACCESS accounts without which the New Jersey office would not have approved the accounts. Although the Barrons have acknowledged their signatures on the forms, neither Dennis nor Yuko Barron can recall signing them. None of the witnesses at the hearing, including Ortiz (from whose files the copies were produced) could explain how, or when, the forms were signed.

copies of the initialed revised applications, 10/ the Barrons stated that their initials had been forged and filed a criminal complaint alleging forgery with the Beverly Hills Police Department. The Beverly Hills Police referred the matter to NASD, which undertook an investigation. 11/

In response to an NASD staff request for information, Ortiz claimed in a May 5, 2003 statement that, after receiving the phone call from the New Jersey office on the morning of August 16, 2001, he "immediately contacted the Barrons and informed them of [UBS's rejection of their applications], and that I would need to meet with them again to confirm these rates." In that statement, Ortiz also reported that he had met with the Barrons "on or about August 17, 2001" at their house during which

I explained the details of the rate structure to the Barrons over their dining room table The Barrons understood the structure that I explained, and although they were not happy about the changes, they agreed to the amended rate structure and signed the agreements consenting to such. This occurred at their home the week after they originally signed the agreements with the incorrect rates reflected on them. The alteration in question was done with the Barrons' authorization after we discussed the issue in detail. Moreover, the Barrons each initialed the change on the agreement in my presence.

In a supplemental written statement submitted to NASD on May 20, 2003, Ortiz said that he could not "say with certainty that the meeting took place on [August 17, 2001] or the early part of the following week since many meetings were re-scheduled by Mr. Barron." However Ortiz reiterated that both the Barrons "were present at the meeting at their home to discuss the details of the rate structure."

In a sworn on-the-record interview conducted by NASD staff on November 26, 2003, Ortiz testified as follows:

As I recall, on the 17th [of August 2001], I contacted the Barrons early that day. And Mr. Barron told me to come on out and see them. And I left the office mid morning and drove to their home and had a short meeting with them at their home at their dining room table. I do recall Mrs. Barron offering me something to drink. I asked for a glass of water. I recall Mr. Barron wasn't pleased about fees at all, discussing fees or the increased fees. Mrs. Barron was much more agreeable. And I recall them both signing in succession, passing the papers back and forth to each other and signing the documents.

10/ Ortiz was not able to provide Kaden with the originals of the revised applications when requested to do so. A short time later, however, Ortiz gave Kaden copies of the revised applications that he obtained from the New Jersey office.

11/ After filing for arbitration of their dispute with UBS, the Barrons settled their claims against UBS on or about January 13, 2004 for \$3,000.

On further questioning, Ortiz reiterated that both Barrons initialed the documents in his presence. Ortiz pinpointed the date by noting that he met with the Barrons on the same day he went to see Eric Clapton in concert, August 17, 2001.

Both Dennis and Yuko Barron denied that Ortiz informed them, by telephone or otherwise, on August 16, 2001, or on any other date, that the 1.5% fees were inadequate and denied further that Ortiz arranged a meeting at the Barrons' house to discuss increasing the account fees. The Barrons provided NASD with copies of airline boarding passes, a hotel bill, and Yuko Barron's invoice for her professional services as a Japanese language interpreter in North Carolina between August 13 and 18, 2001. These documents confirm that Yuko Barron was in North Carolina on a business trip from August 13, 2001 until August 18, 2001. When confronted by this evidence at the hearing, Ortiz stated that "[a]fter everything I have looked at, I am not certain how it [the appearance of the Barron's initials on the applications] happened." When asked if he could provide an alternative explanation for that event he answered only, "I wish I could."

UBS terminated the employment of Ortiz on December 9, 2003. Ortiz is no longer employed in the securities industry.

Both parties introduced expert handwriting testimony at NASD's hearing. The experts agreed that their analyses were hampered by the lack of "ink-on-paper" originals of the revised applications purportedly initialed by the Barrons. NASD's expert concluded that the initials purporting to be the Barrons' on the copies of the revised applications were not written by them, based on the design and construction of the initials, factors that are not affected by copying processes. He could neither identify nor exclude Ortiz as the forger. Ortiz's handwriting expert did not opine as to whether the initials had been signed by the Barrons, but he did conclude that the initials were "probably" not written by Ortiz and were "probably" written by more than one person.

The Hearing Panel found that both Barrons were direct and credible witnesses, but that Ortiz's testimony was "tentative and unconvincing." The Hearing Panel, on that basis, credited the Barrons' versions of events when there was a conflict with Ortiz's version. The Hearing Panel further found NASD's expert to be more persuasive because he based his analysis of the initials on samples of the Barrons' handwriting written before the allegations of forgery were made, while Ortiz's expert used samples of Ortiz's handwriting given for the purpose of the expert's analysis in this proceeding, which could reflect efforts by Ortiz to disguise his handwriting.

The Hearing Panel found that Ortiz had violated Rule 2110 by forging or causing to be forged the Barrons' initials on their revised ACCESS account applications, and by submitting the forged applications to UBS for processing and approval. The Hearing Panel also found that Ortiz had violated NASD Rule 8210 by providing false and misleading information to NASD in response to an information request during the investigation of the forgery allegations. On appeal, the National Adjudicatory Council sustained these findings.

III.

A. We have repeatedly held that forgery is a violation of Rule 2110 when the misconduct defrauds a customer or otherwise benefits the forger. 12/ Ortiz was told on August 16, 2001 that the fees needed to be changed and, on the morning of August 17, 2001, that the Barrons had to initial any revisions to the fee provisions of the applications. On the afternoon of August 17, 2001, Ortiz gave revised and initialed applications to Sanders who faxed them to the New Jersey office, which received them a few minutes later. 13/ The documentary evidence establishes that Yuko Barron was not in Los Angeles on August 16 or 17, 2001, the only days on which the initials could have been obtained. This evidence compels the conclusions that Ortiz's testimony and statements were false, and that Yuko Barron could not have signed her initials on the revised application.

This documentary evidence also gives further weight to the Hearing Panel's finding that the Barrons' denials that they had ever initialed the applications were credible. We give great weight and deference to credibility determinations by a Hearing Panel, 14/ which can only be overcome by substantial record evidence. 15/

Ortiz notes that Dennis Barron testified, mistakenly, that he began doing business with Ortiz in or about 1977. Ortiz testified without contradiction that he was born in 1958 and was in high school in 1977. He argues that this error by Dennis Barron warrants a reversal of the Hearing Panel's credibility finding. Dennis Barron's confusion about this collateral event occurring years before the events at issue does not, however, undermine the testimony he gave with respect to the events of August 2001. Moreover, Dennis Barron's testimony with respect to the events relevant to this proceeding is corroborated by the testimony of Yuko Barron, or

12/ See, e.g., Eliezer Gurfel, 54 S.E.C. 56, 62 (1999) (finding that applicant agreed to split commissions with firm, but instead forged or caused forgery of commission check and deposited the entire check into his own account), petition denied, 205 F.3d 400 (D.C. Cir. 2000); Ramiro Jose Sugranes, 52 S.E.C. 156, 157 (1995) (finding that applicant falsified bank wires to customer to induce customer to open account with applicant); Brian G. Allen, 50 S.E.C. 509, 510 (1991) (finding that applicant forged president's signature on check and deposited it in his own account).

13/ The Hearing Panel questioned Sanders to ascertain whether she might have forged the initialed applications and credited her denial of involvement with the forgery. Ortiz has never suggested otherwise.

14/ Dane S. Faber, 57 S.E.C. 297, 307 (2004).

15/ See Dennis Todd Lloyd Gordon, Exchange Act Rel. No. 57655 (Apr. 11, 2008), ___ SEC Docket ___, 2008 SEC LEXIS 819 at *38.

documents, or both. 16/ The expert testimony further supports the Barrons' denials: NASD's expert concluded that the Barrons did not sign the initials, and Ortiz's expert did not offer contrary evidence.

Ortiz suggests, however, that the absence of the original revised ACCESS applications with the disputed initials undermines NASD's finding that he forged or caused the forgery of the Barrons' initials. He complains that UBS was unable to produce the originals of the revised applications and that only three of the copies of the Barrons' applications in the record have the red stamp that the New Jersey office would have given the documents received in the office. 17/ He argues from this absence that "[i]t is evident that UBS has supplied false documents."

Ortiz offers no reason why UBS would have supplied false documents to NASD, and apparently accepts that the three red-stamped documents are the documents UBS received and acted upon. We also note that both Kaden and John Cannistraci testified that originals of any revisions to ACCESS account applications would be kept in the sales representative's files in the branch office. 18/

More significantly, Ortiz does not dispute that, having learned on August 16th that the Barrons' applications required their consent to the amendments, he submitted revised applications with initials purporting to be those of the Barrons on the afternoon of August 17th. As discussed above, the evidence apart from the disputed copies of the revised applications establishes that the initials on the applications Ortiz gave to Sanders were not those of the Barrons. The record, including the expert testimony, does not establish that Ortiz himself signed the initials, but the evidence supports the conclusion that the Barrons did not.

Ortiz had a motive to forge or cause the forgery of the Barrons' initials: he would improve his production, earn a commission on the opening of the new accounts, and increase the assets under management, another element in his compensation. However, Yuko Barron's insistence on a fee of 1.5% or less made it likely that she would not initial the amended applications. The forgery also defrauded the Barrons by resulting in higher annual fees than Ortiz had represented.

16/ Cf. Kenneth R. Ward, 56 S.E.C. 236, 260-61 (2003) (disregarding credibility determination of hearing panel where testimony credited was self-serving, the only evidence supporting claim, and contradicted by "overwhelming testimonial and documentary evidence in the record").

17/ The copies of the documents in the record which we reviewed are not in color. The "red stamp" documents, however, were submitted as a numbered exhibit separate from other versions of the account applications.

18/ See supra note 8 and accompanying text.

Accordingly, we sustain NASD's findings that Ortiz forged or caused the forgery of the Barrons' initials on the five ACCESS applications in the record and that Ortiz's conduct violated NASD Rule 2110.

B. NASD also found that Ortiz violated Rule 2110 by submitting false information to UBS, his employing member. We have held generally that conduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade. ^{19/} We found above that Ortiz forged or caused the forgery of the revised applications, and Ortiz does not dispute that he directed Sanders to submit them to the New Jersey office for approval where they became part of the firm's records. Since the "entry of accurate information on firm records is a predicate to the NASD's regulatory oversight of its members" ^{20/} and a predicate for any firm's internal compliance program, we sustain NASD's finding that Ortiz's submission of false information to UBS is inconsistent with just and equitable principles of trade.

C. NASD found that Ortiz provided false information to NASD during its investigation of the charges against Ortiz in violation of NASD Rules 8210 and 2110. An associated person who provides false or misleading information to NASD in the course of an investigation violates NASD Rule 8210. ^{21/} An associated person violates Rule 2110 when he or she violates any other NASD rule. ^{22/} Moreover, providing false information to NASD is an independent violation of NASD Rule 2110. ^{23/}

In written statements given to NASD in response to requests for information pursuant to Rule 8210 on May 5 and May 20, 2003, Ortiz stated that the Barrons had each initialed the revised applications in his presence. In sworn testimony given to NASD at an on-the-record

^{19/} See James A. Goetz, 53 S.E.C. 472, 477-78 (1998) (holding that associated person of member firms' conduct in disregarding employer's foundation's rules for securing payment of matching gifts and verifying falsely that he was not benefitting personally from matching gifts constituted conduct inconsistent with just and equitable principles of trade).

^{20/} Charles E. Kautz, 52 S.E.C. 730, 734 (1996).

^{21/} John Montelbano, 56 S.E.C. 76, 78 (2003).

^{22/} Robert E. Strong, Exchange Act Rel. No. 57426 (Mar. 4, 2008), __ SEC Docket __; Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999).

^{23/} Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006) (determining that respondent engaged in conduct contrary to just and equitable principles of trade by providing false information to NASD); Brian L. Gibbons, 52 S.E.C. 791, 795 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (table) (construing predecessor to Rule 2110).

interview on November 26, 2003, Ortiz provided a highly detailed and specific narrative of what he claimed were the events of August 17, 2001, including a statement that both Barrons had signed the revised applications on that day in his presence. As we found above, these statements were false. When confronted at the hearing with the documentary evidence of Yuko Barron's absence, Ortiz stated "[a]fter everything I have looked at, I am not certain how [the appearance of the Barrons' initials on the applications] happened." Ortiz's dishonest conduct during NASD's investigation contradicts his claim on appeal that he cooperated with NASD and testified to the best of his recollection.

As a consequence of our finding that the information provided to NASD by Ortiz in his statements of May 5 and 20, 2003 and his testimony of November 26, 2003 were false, we find that Ortiz violated Rules 8210 and 2110 by providing false information to NASD.

IV.

Section 19(e)(2) of the Exchange Act governs our consideration of the sanctions imposed by NASD. ^{24/} Section 19(e)(2) directs us to sustain NASD's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. ^{25/} Ortiz does not address the sanctions imposed on him by NASD in his briefs to the Commission.

A. NASD imposed a single bar for both the forgery and the submission of false documents to UBS. We begin our analysis with a consideration of NASD's Sanction Guidelines. Although the Commission is not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). ^{26/} NASD's Sanction Guidelines with respect to forgery and falsification of documents suggest that in cases of forgery a fine between \$5,000 and \$100,000 is an appropriate monetary sanction. If there are mitigating factors present, a suspension for up to two years should be considered, but in egregious cases, the decision maker should consider a bar. ^{27/} The Guidelines also suggest that, in assessing the proper sanctions, decision makers should consider two specific factors: the "nature of

^{24/} 15 U.S.C. § 78s(e)(2).

^{25/} Ortiz does not claim, and the record does not show, that NASD's action imposed an unnecessary or inappropriate burden on competition.

^{26/} Perpetual Secs., Inc., Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489, 2506 n.56. NASD promulgated the Sanction Guidelines in an effort to achieve greater consistency, uniformity, and fairness in sanctions. Id. (citing NASD Sanction Guidelines 1 (2006 ed.)).

^{27/} NASD Sanction Guidelines 39 (2006 ed.) (available at <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf>).

document(s) forged or falsified" and "[w]hether respondent had a good faith, but mistaken, belief of express or implied authority" to act as he or she did. 28/

"There can hardly be more serious misconduct in the securities business than forgery" 29/ Ortiz forged or caused the forgery of the Barrons' initials on account applications that purported to authorize an increase in account fees over what they had originally agreed to pay. Ortiz knew that UBS would not open the accounts unless the Barrons approved the increased fees and also knew that the Barrons were very sensitive to the amount of fees charged and were unlikely to approve the increase if asked to do so. Ortiz does not contend that he believed he had authority to initial the applications on behalf of the Barrons. In submitting the falsified documents to UBS, Ortiz evidenced a disregard of his responsibilities to his customers and his employing member and of the basic requirement that associated persons ensure the accuracy of member firm records. 30/ Ortiz never accepted responsibility for his misconduct and continues to blame others for what occurred, even after documentary evidence proved that his version of the events of August 17, 2001 was impossible.

The public interest demands honesty from associated persons of NASD members; anything less is unacceptable. This is especially true with respect to forgery of documents on which NASD members depend to ensure that they act with their customers' consent when such consent is required. As NASD found, Ortiz's use of the forged applications was aggravated by the financial harm caused to his customers and to his firm in the action brought by the Barrons against the firm. Ortiz does not identify any factors that could mitigate his culpability or the seriousness of his misconduct. If customers of NASD members cannot expect to be protected from forgery of documents evidencing their consent, and NASD members cannot trust the documents submitted to them by their associated persons, the industry cannot operate. The industry must be protected from those who would undermine this trust; they cannot be, and have not been, allowed to continue to work in the industry. 31/ The bar also serves the goal of general deterrence by alerting others who may be in a position to forge or cause the forgery of account documents, or submit forged documents to their employers, that forgery is treated as serious misconduct and receives severe sanctions. We find that the bar imposed for the forgery and submission of falsified documents to UBS is not excessive or oppressive.

28/ NASD Sanction Guidelines at 39.

29/ Brian G. Allen, 50 S.E.C. 509, 510 (1991).

30/ Kautz, 52 S.E.C. at 734.

31/ See, e.g., Mark F. Mizenko, Exchange Act Rel. No. 52600 (Oct. 13, 2005), 86 SEC Docket 1515; Gurfel, 54 S.E.C. at 63-64; Donald M. Bickerstaff, 52 S.E.C. 232 (1995); Kautz, 52 S.E.C. at 730.

B. NASD imposed a separate bar for Ortiz's false statements to NASD's staff. NASD Guidelines address failures to respond truthfully, together with failures to respond completely or in part, as actions impeding regulatory investigations. We have observed that the ability to request and obtain information from its members and associated persons is crucial to NASD's performance of its regulatory mission, and that the complete failure to respond to such requests is "fundamentally incompatible" with that mission:

A complete failure to respond to a request for information . . . renders the violator presumptively unfit for employment in the securities industry because the self-regulatory system of securities regulation cannot function without compliance with Rule 8210 requests. "Because of limited Commission resources, Congress has given NASD . . . significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations." 32/

As such, we have stated that the Guidelines' proposal of a bar as the standard sanction for such misconduct reflects the reasonable judgment that, in the absence of mitigating factors warranting a different conclusion, the risk to investors and the markets posed by those who commit such violations justifies barring them from the securities industry. 33/

Just as refusing to respond at all to requests for information undermines NASD's ability to conduct investigations, supplying false information to NASD during an investigation, as Ortiz did here, "mislead[s] NASD and can conceal wrongdoing" and thereby "subvert[s]" NASD's ability to perform its regulatory function and protect the public interest. 34/ Because of the risk of harm to investors and the markets posed by such misconduct, we conclude that the failure to provide truthful responses to requests for information renders the violator presumptively unfit for

32/ PAZ Secs., Inc., Exchange Act Rel. No. 57656 (Apr. 11, 2008), __ SEC Docket __, __ (quoting Charles C. Fawcett, IV, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3157).

33/ PAZ Secs., __ SEC Docket at __ (quoting Fawcett, 91 SEC Docket at 3157).

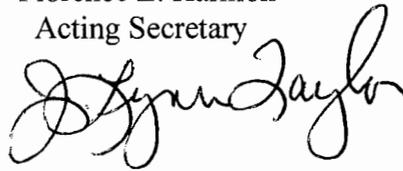
34/ Michael A. Rooms, Exchange Act Rel. No. 51467 (Apr. 1, 2005), 85 SEC Docket 444, 450, aff'd, 444 F.3d 1208 (10th Cir. 2006).

employment in the securities industry. Where, as here, there are no factors mitigating the risk of future harm, a bar is an appropriate remedy. Accordingly, on the facts of this case, we find that the bar NASD imposed on Ortiz for providing false information in response to an information request pursuant to Rule 8210 is neither excessive or oppressive, and we sustain it.

An appropriate order will issue. 35/

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR and PAREDES); Commissioner WALTER not participating.

Florence E. Harmon
Acting Secretary



By: J. Lynn Taylor
Assistant Secretary

35/ We have considered all of the arguments advanced by the parties. 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
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58416 / August 22, 2008

Admin. Proc. File No. 3-12889

In the Matter of the Application of

GEOFFREY ORTIZ
29500 Heathercliff Road No. 169
Malibu, California 90265

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES
ASSOCIATION

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

ORDERED that the disciplinary action taken by FINRA against Geoffrey Ortiz, and
NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Florence E. Harmon
Acting Secretary



By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58415; File No. PCAOB-2008-03)

August 22, 2008

Public Company Accounting Oversight Board; Order Approving Proposed Ethics and Independence Rule 3526, Communication with Audit Committees Concerning Independence, Amendment to Interim Independence Standards, and Amendment to Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles

I. Introduction

On April 24, 2008, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "SEC" or "Commission") proposed rule changes (PCAOB-2008-03) pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), relating to the Board's Ethics and Independence Rules. Notice of the proposed rule changes was published in the Federal Register on July 14, 2008.¹ The Commission received three comment letters relating to the proposed rule changes. For the reasons discussed below, the Commission is granting approval of the proposed rule changes.

II. Description of Proposed Rule Changes

Section 103(a) of the Act directs the PCAOB to establish auditing and related attestation standards, quality control standards, and ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports as required by the Act or the rules of the Commission.

In connection with its standards-setting function, the Board adopted in 2003 on an initial, transitional basis five temporary rules that incorporate the pre-existing professional standards of auditing, attestation, quality control and ethics and

¹ See SEC Release No. 34-58121 (Jul. 9, 2008); 73 FR 40418 (Jul. 14, 2008).

independence (the “interim standards”).² The interim standards include Independence Standards Board Standard No. 1, Independence Discussions with Audit Committees (“ISB No. 1”), ISB Interpretation 00-1, The Applicability of ISB Standard No. 1 When “Secondary Auditors” Are Involved in the Audit of a Registrant, and ISB Interpretation 00-2, The Applicability of ISB Standard No. 1 When “Secondary Auditors” Are Involved in the Audit of a Registrant, An Amendment of Interpretation 00-1.

On April 22, 2008, the PCAOB adopted proposed Ethics and Independence Rule 3526, Communication with Audit Committees Concerning Independence, which supersedes ISB No. 1, ISB Interpretation 00-1 and ISB Interpretation 00-2, and a proposed amendment to Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles, so that it will no longer apply to the provision of tax services to persons in financial reporting oversight roles during the portion of the audit period that precedes the professional engagement period.

Proposed Rule 3526, Communication with Audit Committees Concerning Independence, is intended to build on the communication requirements in interim standard ISB No. 1 and provide audit committees with information that may be important to its determination about whether to hire a registered public accounting firm as the company’s auditor. ISB No. 1 currently provides that, at least annually, an auditor shall: (a) disclose to the audit committee of the company (or the board of directors if there is no audit committee), in writing, all relationships between the auditor and its related entities and the company and its related entities that in the auditor’s professional judgment may reasonably be thought to bear on independence; (b) confirm

² The Commission approved the PCAOB’s adoption of the interim standards in Release No. 34-47745 (April 25, 2003); 68 FR 23335 (May 1, 2003).

in the letter that, in its professional judgment, it is independent of the company within the meaning of the “Securities Acts administered by the” SEC; and (c) discuss the auditor's independence with the audit committee.

Similar to ISB No. 1, the new rule requires a registered firm on at least an annual basis after becoming the issuer’s auditor to make a similar written communication and also affirm to the audit committee of the issuer, in writing, that the firm is independent. The PCAOB adopted this new rule in part because it believed that the accounting firm should discuss with the audit committee before accepting an initial engagement pursuant to the standards of the PCAOB any relationships the accounting firm has with the issuer that may reasonably be thought to bear on its independence. The new rule also includes a new requirement for the firm to document the substance of its discussion with the audit committee.

The PCAOB adopted Ethics and Independence Rules Concerning Independence, Tax Services and Contingent Fees³ on July 26, 2005.⁴ These rules included, among others, Rule 3523, which added to the list of services an audit firm is prohibited from providing its audit clients in order to maintain its independence by prohibiting audit firms from providing any tax service to any person who fills a financial reporting oversight role at an audit client, or an immediate family member of such individual, unless such person is in that role solely because he or she is a member of the board of directors or similar management governing body. The Board adopted certain technical amendments to the

³ PCAOB Release No. 2005-014.

⁴ On August 2, 2005, the PCAOB submitted its proposed rules to the Commission for approval.

rules on November 22, 2005 and adopted an additional amendment, delaying the implementation schedule for Rule 3523,⁵ on March 28, 2006.⁶

Rule 3523, as originally adopted, applies to all tax services performed for persons in a financial reporting oversight role during the “audit and professional engagement period.” The PCAOB’s definition of the term “audit and professional engagement period” is consistent with the Commission’s independence rules. The “audit period” is the period covered by any financial statements being audited or reviewed.⁷ The “professional engagement period” is the period beginning when the accounting firm either signs the initial engagement letter or begins audit procedures, whichever is earlier, and ends when the audit client or the accounting firm notifies the Commission that the client is no longer that firm’s audit client.⁸

Rule 3523 relates to services provided to individuals and not the audit clients. The Board adopted Rule 3523 because “the provision of tax services by the auditor to the senior management responsible for the audit client’s financial reporting creates an unacceptable appearance of the auditor and such senior management having a mutual interest.”⁹ In discussing this concern, however, the Board’s release did not explore whether the provision of these tax services during the audit period but before becoming the auditor of record presents the same appearance issues as the auditor’s provision of such services while serving as the auditor of record. In addition, while the Board received comment on this rule, commenters did not explicitly address this matter. Since

⁵ PCAOB Release No. 2006-001.

⁶ The March 28, 2006 amendment was adopted after the Commission published the proposed rules for comment.

⁷ PCAOB Rule 3501(a)(iii)(1).

⁸ PCAOB Rule 3501(a)(iii)(2).

⁹ PCAOB Release No. 2005-014 .

the PCAOB did not solicit comments relating to this matter, it adopted an amendment to the rule delaying the implementation of this part of the rule and issued a concept release to solicit comments to determine whether restrictions during this period unreasonably limit issuers' ability to change audit firms. On December 14, 2006, the Commission issued a notice of the PCAOB's rule amendment for Rule 3523, as it applies to tax services provided during the period subject to the audit but before the professional engagement period, so that the Board could revisit this aspect of the rule.¹⁰

On April 3, 2007, the Board issued that concept release.¹¹ The Board also adopted a rule amendment further delaying the implementation of Rule 3523 to apply to tax services provided on or before July 31, 2007 when those services are provided during the audit period and are completed before the professional engagement period begins.

On July 24, 2007, the Board proposed an amendment to Rule 3523¹² to exclude the portion of the audit period that precedes the beginning of the professional engagement period, as well as a new ethics and independence rule regarding communication with audit committees. Concurrent with issuing the proposed rule and rule amendment, the Board also adopted a rule amendment to further delay the implementation of Rule 3523 to apply to tax services provided on or before April 30, 2008 when those services are provided during the audit period and are completed before the professional engagement period begins.

On April 22, 2008, the Board adopted the amendment to PCAOB Rule 3523 to exclude the portion of the audit period that precedes the beginning of the professional

¹⁰ PCAOB Release No. 2006-006.

¹¹ PCAOB Release No. 2007-001.

¹² PCAOB Release No. 2007-008.

engagement period and a rule amendment to further delay the implementation date for that portion of Rule 3523 until December 31, 2008.

The proposed amendment to PCAOB Rule 3523 provides that the Board will not apply Rule 3523 to tax services when those services are provided during the audit period and are completed before the professional engagement period begins. Rule 3523 continues to apply to tax services provided during the professional engagement period.

Pursuant to the requirements of Section 107(b) of the Act and Section 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), the Commission published the PCAOB's proposed Ethics and Independence Rule 3526, Communication with Audit Committees Concerning Independence, conforming amendments to its interim standard ISB No. 1 and two related interpretations, and amendment to Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles for public comment in the Federal Register on July 14, 2008.¹³

III. Discussion

The Commission received two comment letters relating to proposed Rule 3526, both of which were generally supportive of the proposed rule.¹⁴ One of the firms, however, expressed concerns relating to the timing of the required communication of Rule 3526 and its effect on an auditor's participation in the activities associated with an initial public offering. The firm also expressed concerns about the difference between the "audit and professional engagement period" referenced in the SEC's independence rules and Rule 3526's requirement to communicate matters that may have existed outside of this time period. The firm requested that the Commission include clarifying commentary

¹³ See SEC Release No. 34-58121 (Jul. 9, 2008); 73 FR 40418 (Jul. 14, 2008).

¹⁴ Ernst & Young LLP and Deloitte & Touche LLP.

in its approval order regarding these matters and urged the PCAOB to issue additional interpretive guidance to aid in the consistent application of the rules.

The PCAOB carefully considered the commenter's concerns before it adopted Rule 3526 and addressed those concerns in its adopting release. We do not believe that any clarifying commentary is necessary at this time. We encourage the PCAOB to carefully monitor the implementation of Rule 3526 and to provide appropriate guidance if it is needed in the future.

The Commission received three comment letters relating to the proposed amendment to Rule 3523. Two of the commenters were supportive of the amendment to Rule 3523.¹⁵ The other commenter¹⁶ expressed concern that Rule 3523 “put[s] a huge burden on smaller companies and larger tax firms” because some companies could have large numbers of employees and chances are that some of those employees could be receiving tax services from potential external auditors. While purportedly outside the scope of the proposed amendment, which in fact limits the scope of the rule to a narrower period of just the professional engagement period, it should also be noted that Rule 3523 applies only to persons in a financial reporting oversight role (FROR). This term is defined in PCAOB Rule 3501 as:

[A] role in which a person is in a position to or does exercise influence over the contents of the financial statements or anyone who prepares them, such as when the person is a member of the board of directors or similar management or governing body, chief executive officer, president, chief financial officer, chief operating officer, general counsel, chief accounting

¹⁵ Ernst & Young LLP and Deloitte & Touche LLP.

¹⁶ Matthew L. Garzia, Student, Business Management, Tappan, New York.

officer, controller, director of internal audit, director of financial reporting, treasurer, or any equivalent position.

Rule 3523 is further limited to exclude persons (i) who are in a FROR only because he or she serves as a member of the board of directors or similar management or governing body of the audit client, (ii) who are in FROR at affiliates if the affiliate's financial statements are immaterial or audited by a different auditor and (iii) who received tax services before being hired or promoted into a FROR if the services are completed on or before 180 days after the hiring or promotion event.

The PCAOB is not proposing to change the persons subject to Rule 3523 in its proposing amendment. The PCAOB gave careful consideration to the issues raised by the commenter prior to Rule 3523's adoption by the Board.

PCAOB Rules 3526 and 3523, including the proposed amendment to Rule 3523 and the conforming amendments to the interim standards, are a reasonable exercise of the Board's rule-making authority under the Act.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the PCAOB's proposed Ethics and Independence Rule 3526, Communication with Audit Committees Concerning Independence, conforming amendments to its interim standard ISB No. 1 and two related interpretations, and amendment to Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles, are consistent with the requirements of the Act and the securities laws and are necessary and appropriate in the public interest and for the protection of investors.

IT IS THEREFORE ORDERED, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that the proposed rule changes (File No. PCAOB-2008-03)

be, and hereby are, approved.

By the Commission.

A handwritten signature in black ink that reads "Florence E. Harmon". The signature is written in a cursive style with a prominent initial "F".

Florence E. Harmon
Acting Secretary

12.3

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

August 27, 2008

IN THE MATTER OF

Markland Technologies, 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 Markland Technologies, Inc. ("Markland") because it has not filed any periodic reports since the period ended September 30, 2005. Markland is quoted on the Pink Sheets OTC Markets, Inc. under the ticker symbol MRKL.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on August 27, 2008, through 11:59 p.m. EDT on September 10, 2008.

By the Commission.

Florence E. Harmon
Acting Secretary

Document 15 of 19 By: *Jill M. Peterson*
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 27, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13147

In the Matter of

Markland Technologies, Inc.,

Respondent.

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**ORDER INSTITUTING
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Markland Technologies, Inc. (CIK No. 1102833) is a Florida corporation currently located in Warwick, Rhode Island. Markland has a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Markland 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, 2005, which reported a net loss of \$4,042,111 for the prior three months. Its securities are quoted on Pink Sheets OTC Markets, Inc. ("Pink Sheets") under the symbol "MRKL."

B. DELINQUENT PERIODIC FILINGS

2. Respondent is delinquent in its periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1). In particular, it has not filed a periodic report with the Commission since 2005.

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3. Respondent did not respond to a delinquency letter sent to it and its registered agent by the Division of Corporation Finance requesting compliance with its periodic filing obligations. The Respondent also did not file any periodic report after being sent the delinquency letters.

4. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act 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), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

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

III.

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

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

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

IV.

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

IT IS HEREBY FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within 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 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.

Florence E. Harmon
Acting Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings for Markland Technologies, Inc.

Form Type	Period Ended	Due Date	Months Delinquent (rounded up)
10-QSB	12/31/05	2/14/06	28
10-QSB	3/31/06	5/15/06	25
10-KSB	6/30/06	9/28/06	21
10-QSB	9/30/06	11/14/06	19
10-QSB	12/31/06	2/14/07	16
10-QSB	3/31/07	5/15/07	13
10-KSB	6/30/07	9/28/07	9
10-QSB	9/30/07	11/14/07	7
10-QSB	12/31/07	2/14/08	4
10-QSB	3/31/08	5/15/08	1

1 / 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58433 / August 27, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2867 / August 27, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13148

In the Matter of
CON-WAY INC.

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 and in the public interest that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Con-way Inc. ("Respondent" or "Con-way").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") that 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

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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

III.

On the basis of this Order and Respondent’s Offer, the Commission finds² that:

Summary

1. This matter involves Con-way’s violations of the books and records, and internal controls provisions of the Foreign Corrupt Practices Act (“FCPA”) through a Philippine-based firm, Emery Transnational. From 2000 to 2003, Emery Transnational made hundreds of small payments totaling at least \$417,000 to Philippine customs officials and to officials of numerous majority foreign state-owned airlines. These payments were made with the purpose and effect of improperly influencing these foreign officials to assist Emery Transnational to obtain or retain business. In connection with these improper payments, Con-way failed to accurately record these payments on the company’s books and records, and knowingly failed to implement or maintain a system of effective internal accounting controls.

Respondent

2. Con-way is a Delaware corporation headquartered in San Mateo, California. Con-way is an international freight transportation and logistics services company that conducts operations in a number of foreign jurisdictions. During the relevant period, the company was named CNF, Inc. The company changed its name to Con-way in April 2006. Con-way’s common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange.

Other Relevant Entities

3. Menlo Worldwide Forwarding, Inc. (“Menlo Forwarding”)³ was a wholly-owned U.S.-based subsidiary of Con-way that Con-way purchased in 1989. During the relevant period, Menlo Forwarding was headquartered in Redwood City, California and had a 55% voting interest in Emery Transnational. Con-way sold Menlo Forwarding to United Parcel Service of America, Inc. (“UPS”) in December 2004.

¹ The Commission has contemporaneously filed a complaint in the United States District Court for the District of Columbia against Con-way alleging violations of Section 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Exchange Act and seeking a civil penalty. Without admitting or denying the Commission’s allegations, Con-way has consented to the entry of a final judgment by the Court that requires the company to pay a \$300,000 civil penalty. See *SEC v. Con-way Inc.*, No. 1:08-cv-01478 (Aug. 27, 2008) (D.D.C).

² The findings herein are made pursuant to Respondent’s Offer and are not binding on any other person or entity in this or any other proceeding.

³ During the relevant period, Menlo Forwarding was named Emery Air Freight Corporation.

4. Emery Transnational was a Manila, Philippines-based firm engaged in shipping and freight operations within the Philippines. Emery Transnational was also sold to UPS in December 2004.

Facts

A. Lack of Oversight Over Emery Transnational

5. During the relevant period, Con-way and Menlo Forwarding engaged in little supervision or oversight over Emery Transnational. Neither Con-way nor Menlo Forwarding took steps to devise or maintain internal accounting controls concerning Emery Transnational, to ensure that it acted in accordance with Con-way's FCPA policies, or to make certain that its books and records were detailed or accurate.

6. During the relevant period, Con-way and Menlo Forwarding required only that Emery Transnational periodically report back to Menlo Forwarding its net profits, from which Emery Transnational then paid Menlo Forwarding a yearly 55% dividend. Menlo Forwarding incorporated the yearly 55% dividend into its financial results, which were then consolidated in Con-way's financial statements. Neither Con-way nor Menlo Forwarding asked for or received any other financial information from Emery Transnational. Accordingly, neither Con-way nor Menlo Forwarding maintained or reviewed any of the books and records of Emery Transnational – including the records of operating expenses, which should have reflected the illicit payments made to foreign officials.

B. Payments to Philippine Customs Officials

7. Emery Transnational made hundreds of small payments to foreign officials at the Philippines Bureau of Customs and the Philippine Economic Zone Area between 2000 and 2003 in order to obtain or retain business. These payments were made to influence the acts and decisions of these foreign officials and to secure a business advantage or economic benefit. By these payments, foreign officials were induced to: (i) violate customs regulations by allowing Emery Transnational to store shipments longer than otherwise permitted, thus saving the company transportation costs related to its inbound shipments; and (ii) improperly settle Emery Transnational's disputes with the Philippines Bureau of Customs, or to reduce or not enforce otherwise legitimate fines for administrative violations.

8. To generate funding for these payments, Emery Transnational employees submitted a Shipment Processing and Clearance Expense Report ("SPACER") to Emery Transnational's finance department. These SPACER reports requested cash advances to complete customs processing. The cash advances were then issued via checks made payable to Emery Transnational employees, who cashed the checks and paid the money to designated foreign officials. Unlike legitimate customs payments, the payments at issue were not supported by receipts from the Philippines Bureau of Customs and the Philippine Economic Zone Area. Emery Transnational did not identify the true nature of these payments in its books and records. During the period 2000 to 2003, these payments total at least \$244,000.

C. Payments to Officials of Majority State-Owned Airlines

9. Emery Transnational, in order to obtain or retain business, also made numerous payments to foreign officials at fourteen state-owned airlines that did business in the Philippines between 2000 and 2003.⁴ These payments were made with the intent of improperly influencing the acts and decisions of these foreign officials and to secure a business advantage or economic benefit. Emery Transnational made two types of payments. The first type were known as “weight shipped” payments, which were made to induce airline officials to improperly reserve space for Emery Transnational on the airplanes. These payments were valued based on the volume of the shipments the airlines carried for Emery Transnational. The second type were known as “gain shares” payments, which were paid to induce airline officials to falsely underweigh shipments and to consolidate multiple shipments into a single shipment, resulting in lower shipping charges. Emery Transnational paid the foreign officials 90% of the reduced shipping costs.

10. Both types of payments to foreign airline officials were paid in cash by members of Emery Transnational’s management team. Checks reflecting the amount of the “weight shipped” and “gain shares” payments were issued to these managers, who cashed the checks and personally distributed the cash payments to the foreign airline officials. Emery Transnational did not characterize these payments in its books and records as bribes. During the period 2000 to 2003, these payments totaled at least \$173,000. Neither Con-way nor Menlo Forwarding requested or received any records of these payments, or any of Emery Transnational’s expenses, during this period.

D. Discovery of Improper Payments and Internal Investigation

11. Con-way discovered potential FCPA issues at Emery Transnational in early 2003. Starting in January 2003, Menlo Forwarding initiated steps to increase Emery Transnational’s internal reporting requirements, including requiring Emery Transnational to begin reporting its income and expenses, in addition to its net profits. As a result, in reviewing Emery Transnational’s records, Menlo Forwarding employees noticed unusually high customs and airline-related expenditures.

12. Menlo Forwarding conducted an internal investigation of the suspicious payments at Emery Transnational and determined that Emery Transnational employees had been making regular cash payments to customs officials and employees of majority state-owned airlines. Based on Menlo Forwarding’s investigation, Con-way conducted a broader review of all of Menlo Forwarding’s foreign businesses and voluntarily disclosed the existence of possible FCPA violations to the staff. After completing its internal investigation, Con-way imposed heightened financial reporting and compliance requirements on Emery Transnational. Menlo Forwarding

⁴ Such payments were made to foreign officials at the following majority state-owned airlines: Air France, Alitalia (Italy), China Airlines, EgyptAir, Emirates (Dubai), Gulf Air (Bahrain, Abu Dhabi, Oman), Kuwait Airways, Malaysian Airlines, Pakistan International Airlines, Royal Brunei Airlines, Saudi Arabian Airlines, SilkAir (Singapore), Singapore Airlines, and Thai Airways International.

terminated a number of the Emery Transnational employees involved in the misconduct, and Con-way provided additional FCPA training and education to its employees and strengthened its regulatory compliance program.

Legal Analysis

13. The FCPA, enacted in 1977, 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 added 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. 15 U.S.C. §§ 78m(b)(2)(A) and 78m(b)(2)(B).

14. As detailed above, Con-way's books, records, and accounts did not properly reflect the illicit payments made by Emery Transnational to Philippine customs officials and to officials of majority state-owned airlines. As a result, Con-way violated Exchange Act Section 13(b)(2)(A).

15. Con-way also failed to devise or maintain sufficient internal controls to ensure that Emery Transnational complied with the FCPA and to ensure that the payments it made to foreign officials were accurately reflected on its books and records. As a result, Con-way violated Exchange Act Section 13(b)(2)(B).

16. Exchange Act Section 13(b)(5), 15 U.S.C. § 78m(b)(5), prohibits any person or company from knowingly circumventing or knowingly failing to implement a system of internal accounting controls as described in Section 13(b)(2)(B), or knowingly falsifying any book, record, or account as described in Section 13(b)(2)(A).

17. By knowingly failing to implement a system of internal accounting controls concerning Emery Transnational, Con-way also violated Exchange Act Section 13(b)(5).

Con-way's Remedial Efforts

In determining to accept the Offer, the Commission considered the remedial acts undertaken by Con-way and cooperation afforded the Commission staff.

IV.

On the basis of the foregoing, the Commission deems it appropriate to accept the Respondent's Offer.

Accordingly, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that Con-way cease and desist from committing or causing any violations and any future violations of Exchange Act Sections 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5).

By the Commission.

Florence E. Harmon
Acting Secretary

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

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58441 / August 29, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2870 / August 29, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13151

In the Matter of	:	ORDER INSTITUTING
	:	ADMINISTRATIVE PROCEEDINGS
JERRY L. BURDICK, CPA,	:	PURSUANT TO RULE 102(e) OF THE
	:	COMMISSION'S RULES OF PRACTICE,
Respondent.	:	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 Jerry L. Burdick ("Respondent" or "Burdick") 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.

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.3. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to 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. Burdick, age 68, is a former director of SeraCare Life Sciences, Inc. ("SeraCare"). He also served as SeraCare's interim chief financial officer from February 2005 through May 2005. Burdick served as a director on SeraCare's board until his resignation in March 2006. Burdick is a certified public accountant licensed in the State of California whose license was obtained in 1964 and which lapsed in 1997.
2. SeraCare is a Delaware corporation currently based in West Bridgewater, Massachusetts. In 2005, SeraCare's principal headquarters were in Oceanside, California and its common stock was registered pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and listed on the Nasdaq National Market. SeraCare operated as a supplier and manufacturer of biological products (such as blood and plasma) for the biotechnology and pharmaceutical industry.
3. On August 14, 2008, a final judgment was entered against Burdick permanently enjoining him from future violations of Section 17(a)(2) and (3) of the Securities Act of 1933 and Rules 13a-14, 13b2-1, and 13b2-2 of the Exchange Act, and aiding and abetting violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder, in the civil action entitled SEC v. Michael F. Crowley and Jerry L. Burdick in the United States District Court for the Southern District of California. The final judgment also ordered Burdick to pay \$25,000. Burdick consented to the entry of the judgment without admitting or denying any of the allegations in the complaint.
4. The Commission's complaint alleged, among other things, that SeraCare, through the misconduct of Burdick, misstated its financial statements by inflating income before taxes for the second and third quarters of fiscal year 2005 by 20% and 17%, respectively. The complaint alleged that Burdick improperly released general inventory reserves that he created following a major acquisition by SeraCare, which caused SeraCare's net income before taxes to be inflated in the second and third quarters of 2005. The complaint further alleged that Burdick caused misrepresentations to be made to SeraCare's auditors by creating a backdated letter that was given to the auditors as support for recognizing revenue on an almost \$1 million sale before the

close of the fiscal year. The complaint further alleged that Burdick also caused misrepresentations to be made to SeraCare's auditors by providing an increased inventory valuation without any documented or verifiable support.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Burdick is suspended from appearing or practicing before the Commission as an accountant.

B. After one year 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;

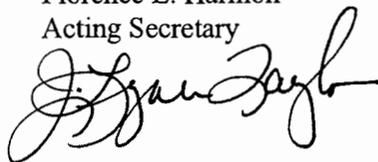
c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

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.

Florence E. Harmon
Acting 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
August 20, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13141

In the Matter of

**Consolidated Growers and Processors, Inc.,
Monsoon International Manufacturing &
Distribution, Inc.,
Pony Express U. S. A., Inc.,
SUMmedia.com, Inc., and
Sunflower USA, Ltd.,**

Respondents.

**ORDER INSTITUTING
PROCEEDINGS AND NOTICE OF
HEARING PURSUANT TO SECTION
12(j) OF THE SECURITIES
EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Consolidated Growers and Processors, Inc., Monsoon International Manufacturing & Distribution, Inc., Pony Express U. S. A., Inc., SUMmedia.com, Inc., and Sunflower USA, Ltd.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Consolidated Growers and Processors, Inc. (CIK No. 1043839) is a void Delaware corporation located in North Hollywood, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB/A registration statement on January 5, 2000, which included financial statements through June 30, 1999 and reported a net loss of \$1.9 million for that year. On March 7, 2000, the company filed a Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Central District of California, and the proceeding terminated on April 30, 2003. As of August 15, 2008, the company's stock

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(symbol "CGPRQ") was quoted in the Pink Sheets, had three market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

2. Monsoon International Manufacturing & Distribution, Inc. (CIK No. 1059978) is a Nevada corporation located in Parlier, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on January 21, 2000, which reported a net loss of \$1 million for the nine months ended September 30, 1999. As of August 15, 2008, the company's stock (symbol "MIMF") was quoted in the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

3. Pony Express U. S. A., Inc. (CIK No. 1037759) is a Nevada corporation located in Phoenix, Arizona with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004, which reported a net loss of \$2 million for the prior nine months. As of August 15, 2008, the company's stock (symbol "PYXP") was quoted in the Pink Sheets, had nine market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

4. SUMmedia.com, Inc. (CIK No. 870751) is a Colorado corporation located in Vancouver, British Columbia, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company 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 \$2.7 million for the prior nine months. As of August 15, 2008, the company's stock (symbol "ISUM") was quoted in the Pink Sheets, had eight market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Sunflower USA, Ltd. (CIK No. 1084211) is a Nevada corporation located in Tukwila, Washington with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). The company is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB/A for the period ended February 29, 2000. As of August 15, 2008, the company's stock (symbol "SFLW") was quoted in the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or,

through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

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

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against 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, 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.

Florence E. Harmon
Acting Secretary

Attachment

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

Appendix 1

**Chart of Delinquent Filings
In the Matter of Consolidated Growers and Processors, Inc., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Consolidated Growers & Processors, Inc.	10-QSB	09/30/99	01/17/00	Not filed	103
	10-QSB	12/31/99	02/14/00	Not filed	102
	10-QSB	03/31/00	05/15/00	Not filed	99
	10-KSB	06/30/00	09/28/00	Not filed	95
	10-QSB	09/30/00	11/14/00	Not filed	93
	10-QSB	12/31/00	02/14/01	Not filed	90
	10-QSB	03/31/01	05/15/01	Not filed	87
	10-KSB	06/30/01	09/28/01	Not filed	83
	10-QSB	09/30/01	11/14/01	Not filed	81
	10-QSB	12/31/01	02/14/02	Not filed	78
	10-QSB	03/31/02	05/15/02	Not filed	75
	10-KSB	06/30/02	09/30/02	Not filed	71
	10-QSB	09/30/02	11/14/02	Not filed	69
	10-QSB	12/31/02	02/14/03	Not filed	66
	10-QSB	03/31/03	05/15/03	Not filed	63
	10-KSB	06/30/03	09/29/03	Not filed	59
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-QSB	12/31/03	02/17/04	Not filed	54
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-KSB	06/30/04	09/28/04	Not filed	47
	10-QSB	09/30/04	11/15/04	Not filed	45
	10-QSB	12/31/04	02/14/05	Not filed	42
	10-QSB	03/31/05	05/16/05	Not filed	39
	10-KSB	06/30/05	09/28/05	Not filed	35
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-QSB	12/31/05	02/14/06	Not filed	30
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-KSB	06/30/06	09/28/06	Not filed	23
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-QSB	12/31/06	02/14/07	Not filed	18
10-QSB	03/31/07	05/16/07	Not filed	15	
10-KSB	06/30/07	09/28/07	Not filed	11	

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Consolidated Growers & Processors, Inc.	10-QSB	09/30/07	11/14/07	Not filed	9
	10-QSB	12/31/07	02/14/08	Not filed	6
	10-QSB	03/31/08	05/15/08	Not filed	3

Total Filings Delinquent 35

Monsoon International Manufacturing & Distribution, Inc.

10-KSB	12/31/99	03/30/00	Not filed	101
10-QSB	03/31/00	05/15/00	Not filed	99
10-QSB	06/30/00	08/14/00	Not filed	96
10-QSB	09/30/00	11/14/00	Not filed	93
10-KSB	12/31/00	04/02/01	Not filed	88
10-QSB	03/31/01	05/15/01	Not filed	87
10-QSB	06/30/01	08/14/01	Not filed	84
10-QSB	09/30/01	11/14/01	Not filed	81
10-KSB	12/31/01	04/01/02	Not filed	76
10-QSB	03/31/02	05/15/02	Not filed	75
10-QSB	06/30/02	08/14/02	Not filed	72
10-QSB	09/30/02	11/14/02	Not filed	69
10-KSB	12/31/02	03/31/03	Not filed	65
10-QSB	03/31/03	05/15/03	Not filed	63
10-QSB	06/30/03	08/14/03	Not filed	60
10-QSB	09/30/03	11/14/03	Not filed	57
10-KSB	12/31/03	03/30/04	Not filed	53
10-QSB	03/31/04	05/17/04	Not filed	51
10-QSB	06/30/04	08/16/04	Not filed	48
10-QSB	09/30/04	11/15/04	Not filed	45
10-KSB	12/31/04	03/31/05	Not filed	41
10-QSB	03/31/05	05/16/05	Not filed	39
10-QSB	06/30/05	08/15/05	Not filed	36
10-QSB	09/30/05	11/14/05	Not filed	33
10-KSB	12/31/05	03/31/06	Not filed	29
10-QSB	03/31/06	05/15/06	Not filed	27
10-QSB	06/30/06	08/14/06	Not filed	24

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Monsoon International Manufacturing & Distribution, Inc.					
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-KSB	12/31/07	3/31/08	Not filed	5
	10-Q*	03/31/08	05/15/08	Not filed	3
	10-Q	06/30/08	08/15/08	Not filed	0
Total Filings Delinquent	35				

Pony Express U. S. A., Inc.

10-KSB	12/31/04	03/31/05	Not filed	41
10-QSB	03/31/05	05/16/05	Not filed	39
10-QSB	06/30/05	08/15/05	Not filed	36
10-QSB	09/30/05	11/14/05	Not filed	33
10-KSB	12/31/05	03/31/06	Not filed	29
10-QSB	03/31/06	05/15/06	Not filed	27
10-QSB	06/30/06	08/14/06	Not filed	24
10-QSB	09/30/06	11/14/06	Not filed	21
10-KSB	12/31/06	04/02/07	Not filed	16
10-QSB	03/31/07	05/15/07	Not filed	15
10-QSB	06/30/07	08/14/07	Not filed	12
10-QSB	09/30/07	11/14/07	Not filed	9
10-KSB	12/31/07	3/31/08	Not filed	5
10-Q*	03/31/08	05/15/08	Not filed	3
10-Q	06/30/08	08/15/08	Not filed	0

Total Filings Delinquent 15

SUMmedia.com, Inc.

10-KSB	12/31/02	03/31/03	Not filed	65
10-QSB	03/31/03	05/15/03	Not filed	63
10-QSB	06/30/03	08/14/03	Not filed	60

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
SUMmedia.com, Inc.					
	10-QSB	09/30/03	11/14/03	Not filed	57
	10-KSB	12/31/03	03/30/04	Not filed	53
	10-QSB	03/31/04	05/17/04	Not filed	51
	10-QSB	06/30/04	08/16/04	Not filed	48
	10-QSB	09/30/04	11/15/04	Not filed	45
	10-KSB	12/31/04	03/31/05	Not filed	41
	10-QSB	03/31/05	05/16/05	Not filed	39
	10-QSB	06/30/05	08/15/05	Not filed	36
	10-QSB	09/30/05	11/14/05	Not filed	33
	10-KSB	12/31/05	03/31/06	Not filed	29
	10-QSB	03/31/06	05/15/06	Not filed	27
	10-QSB	06/30/06	08/14/06	Not filed	24
	10-QSB	09/30/06	11/14/06	Not filed	21
	10-KSB	12/31/06	04/02/07	Not filed	16
	10-QSB	03/31/07	05/15/07	Not filed	15
	10-QSB	06/30/07	08/14/07	Not filed	12
	10-QSB	09/30/07	11/14/07	Not filed	9
	10-KSB	12/31/07	03/31/08	Not filed	5
	10-Q*	03/31/08	05/15/08	Not filed	3
	10-Q	06/30/08	08/15/08	Not filed	0
Total Filings Delinquent	23				

Sunflower USA, Ltd.

10-QSB	08/31/03	10/15/03	Not filed	58
10-QSB	11/30/03	01/14/04	Not filed	55
10-QSB	02/28/04	04/13/04	Not filed	52
10-KSB	05/31/04	08/30/04	Not filed	48
10-QSB	08/31/04	10/15/04	Not filed	46
10-QSB	11/30/04	01/14/05	Not filed	43
10-QSB	02/28/05	04/14/05	Not filed	40
10-KSB	05/31/05	08/29/05	Not filed	36
10-QSB	08/31/05	10/17/05	Not filed	34
10-QSB	11/30/05	01/16/06	Not filed	31
10-QSB	02/28/06	04/14/06	Not filed	28
10-KSB	05/31/06	08/29/06	Not filed	24

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Sunflower USA, Ltd.					
	<i>10-QSB</i>	08/31/06	10/16/06	Not filed	22
	<i>10-QSB</i>	11/30/06	01/15/07	Not filed	19
	<i>10-QSB</i>	08/31/06	10/16/06	Not filed	22
	<i>10-QSB</i>	11/30/06	01/15/07	Not filed	19
	<i>10-QSB</i>	02/28/07	04/16/07	Not filed	16
	<i>10-KSB</i>	05/31/07	08/29/07	Not filed	12
	<i>10-QSB</i>	08/31/07	10/15/07	Not filed	10
	<i>10-QSB</i>	11/30/07	01/14/08	Not filed	7
	<i>10-QSB</i>	02/29/08	04/14/08	Not filed	4

Total Filings Delinquent 21

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, are in the process of being removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal is taking effect over a transition period that will conclude on March 15, 2009, so by that date, all reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB will be required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than \$75 million in public equity float as of the end of its most recently completed second fiscal quarter) will have the option of using new, scaled disclosure requirements that Regulation S-K now includes.