

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for November 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

28 Documents

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58908 / November 6, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13287

In the Matter of

Karnig H. Durgarian, Jr.,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTIONS 15(b) AND
17A(c) 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 Sections 15(b) and 17A(c) of the Securities Exchange Act of 1934 ("Exchange Act") against Karnig H. Durgarian, Jr. ("Respondent" or "Durgarian").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Sections 15(b) and 17A(c) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

1 of 28

III.

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

1. Durgarian is a former senior managing director and chief of operations of Putnam Fiduciary Trust Company, a transfer agent registered with the Commission and under the common control with a broker dealer also registered with the Commission. He is also a former officer of PFTC's corporate parents, Putnam Investment Trust and Putnam LLC, and, from 2002-2004, principal executive officer of certain Putnam mutual funds. Durgarian, age 52, is a resident of Hopkinton, Massachusetts.

2. On October 31, 2008, a final judgment was entered by consent against Durgarian, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 34(b) and 37 of the Investment Company Act of 1940 ("Investment Company Act"), in the civil action entitled Securities and Exchange Commission v. Karnig H. Durgarian, Jr., et al., Civil Action No. 05-12618-NMG, in the United States District Court for the District of Massachusetts.

3. The Commission's complaint alleged that beginning in January 2001, Durgarian and others engaged in a fraudulent scheme to cover up an error that had occurred in the account of a client of their employer, PFTC. Instead of disclosing the error to the client and facing the consequences, Durgarian approved a scheme which operated as a fraud and deceit on investors in which PFTC employees reversed and re-executed certain trades in the client's account and adjusted expense accounting entries in certain Putnam mutual funds in order to transfer the loss arising from the error from one client to others and to conceal the error and the fraudulent transfer from the affected clients and from PFTC's auditors.

IV.

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

Accordingly, it is hereby ORDERED:

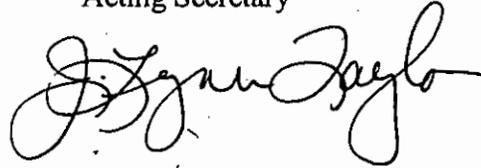
Pursuant to Section 15(b)(6) and 17A(c)(4) of the Exchange Act, Respondent Durgarian be, and hereby is barred from association with any broker, dealer, or transfer agent, with the right to reapply for association after three years to the appropriate self-regulatory organization, or if there is none, 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

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

By: J. Lynn Taylor
Assistant Secretary

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58907 / November 6, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13286

In the Matter of

Ronald B. Hogan,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTIONS 15(b) AND
17A(c) 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 Sections 15(b) and 17A(c) of the Securities Exchange Act of 1934 ("Exchange Act") against Ronald B. Hogan ("Respondent" or "Hogan").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Sections 15(b) and 17A(c) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

2 of 28

III.

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

1. Hogan is a former vice president at Putnam Fiduciary Trust Company ("PFTC"), a transfer agent that is under common control with a broker dealer. Hogan had responsibility for conversion of defined contribution plans from other administrative service companies and new business implementation. Hogan, age 40, is a resident of Saugus, Massachusetts.

2. On October 31, 2008, a final judgment was entered by consent against Hogan, permanently enjoining him from future violations of Section 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 Securities and Exchange Commission v. Karnig H. Durgarian, Jr., et al., Civil Action No. 05-12618-NMG, in the United States District Court for the District of Massachusetts.

3. The Commission's complaint alleges the following facts: Beginning in January 2001, when Hogan was a person associated with a transfer agent and a broker dealer, Hogan and others engaged in a fraudulent scheme to cover up a loss that had occurred in the account of a client of their employer, PFTC. Instead of disclosing the loss to the client and facing the consequences, Hogan and others devised and implemented a fraudulent scheme in which PFTC employees reversed and re-executed certain trades in the client's account and adjusted expense accounting entries in a certain Putnam mutual fund in order to transfer the loss from one client to others and to conceal the error and the fraudulent transfers from the affected clients and from PFTC's auditors.

IV.

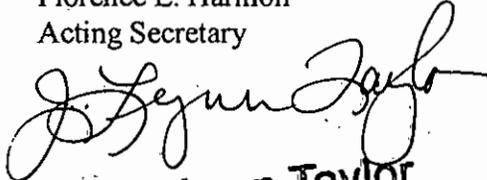
In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Hogan's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Sections 15(b)(6) and 17A(c)(4) of the Exchange Act, Respondent Hogan be, and hereby is suspended from association with any broker, dealer, or transfer agent for twelve months.

By the Commission.

Florence E. Harmon
Acting Secretary


2
By: J. Lynn Taylor
Assistant Secretary

*Commissioner Walter
not participating*

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58904; File No. 4-533)

November 6, 2008

Joint Industry Plan; Order Approving the National Market System Plan for the Selection and Reservation of Securities Symbols Submitted by the Chicago Stock Exchange, Inc., The Nasdaq Stock Market, Inc., National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.), National Stock Exchange, Inc., and Philadelphia Stock Exchange, Inc.

I. Introduction

On July 17, 2007, the Commission published for comment¹ a detailed summary of two proposed plans for the purpose of the selection and reservation of securities symbols: the Five-Characters Plan and the Three-Characters Plan. On January 25, 2008, the Commission published Amendment No. 1 to the Three-Characters Plan for public comment.² The proposed plans were filed jointly by two different groups of self-regulatory organizations ("SROs") pursuant to Rule 608 of Regulation NMS under the Securities Exchange Act of 1934 ("Act") ("Rule 608").³ The Chicago Stock Exchange, Inc. ("CHX"), The Nasdaq Stock Market, Inc. ("Nasdaq"), National Association of Securities Dealers, Inc. ("NASD") (n/k/a Financial Industry Regulatory Authority, Inc. ("FINRA")),⁴ National Stock Exchange, Inc. ("NSX"), and Philadelphia Stock

¹ See Securities Exchange Act Release No. 56037 (July 10, 2007), 72 FR 39096 (File Nos. 4-533 and 4-534) ("Symbology Notice"). The full text of each plan is also available to interested persons on the Commission's Web site at www.sec.gov/rules/sro/nms.shtml#4-534 and www.sec.gov/rules/sro/nms.shtml#4-533, respectively.

² See Securities Exchange Act Release No. 57171 (January 18, 2008), 73 FR 4645.

³ 17 CFR 242.608.

⁴ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (August 1, 2007) (SR-NASD-2007-053).

Exchange, Inc. ("Phlx") filed the Five-Characters Plan.⁵ The American Stock Exchange LLC ("Amex"), Chicago Board Options Exchange, Incorporated ("CBOE"), International Securities Exchange, LLC ("ISE"), the New York Stock Exchange LLC ("NYSE"), and NYSE Arca, Inc. ("NYSE Arca") filed the Three-Characters Plan.⁶

Although the two plans are identical in many respects, they differ on several significant matters. The primary difference between the two plans is their scope. The Three-Characters Plan would only cover one-, two-, and three-character symbols; the Five-Characters Plan would cover one-, two-, three-, four-, and five-character symbols. In addition, the plans differ with regard to the parties that are eligible to join the plan; the reservation rights for perpetual and limited-time reservations; the portability of symbols for issuers that move their listing from one market to another; the allocation of costs relating to the plan; and the process of withdrawing from the plan.

The Commission received 61 comments on the proposed plans from 56 commenters.⁷ Twenty-two commenters generally supported the Three-Characters Plan or aspects thereof,⁸

⁵ FINRA, Nasdaq, NSX, and Phlx filed the Five-Characters Plan with the Commission on March 23, 2007. CHX, FINRA, Nasdaq, NSX, and Phlx filed a Supplement to this proposed plan on April 23, 2007. In the Supplement, CHX joined as a party proposing the Five-Characters Plan.

⁶ On March 23, 2007, Amex, NYSE and NYSE Arca filed the Three-Characters Plan with the Commission. In Amendment No. 1 to the Three-Characters Plan, filed on August 3, 2007, CBOE and ISE joined as parties to the proposed plan.

⁷ Letters to the Commission from Edward F. Tancer, Vice President & General Counsel, FPL Group, Inc., dated March 28, 2007 ("FPL Letter"); Jason Korstange, SVP, Director of Corporate Communications, TCF Financial Corporation, dated March 28, 2007 ("TCF Letter"); Timothy J. O'Donovan, Chairman of the Board, Chief Executive Officer, Wolverine World Wide, Inc., dated March 28, 2007 ("Wolverine Letter"); Leo Liebowitz, Chairman and Chief Executive Officer, Getty Realty Corp., dated March 29, 2007 ("Getty Letter"); Edward W. Moore, Vice President, General Counsel & Secretary, RPM International Inc., dated March 29, 2007 ("RPM Letter"); Cathy Burzik, President and Chief Executive Officer, Kinetic Concepts, Inc., dated March 30, 2007 ("KCI Letter"); Clifton H. Morris, Jr., Chairman, AmeriCredit Corp., dated April 2, 2007

("AmeriCredit Letter"); David M. Brain, President and CEO, Entertainment Properties Trust, dated April 3, 2007 ("Entertainment Properties Letter"); Steven S. Fishman, Chairman, Chief Executive Officer and President, Big Lots, Inc., dated April 4, 2007 ("Big Lots Letter"); Mary J. McGinn, Secretary and Deputy General Counsel, The Allstate Corporation, dated April 5, 2007 ("Allstate Letter"); Eric W. Nodiff, Sr. V.P. and General Counsel, Cantel Medical Corp., dated April 9, 2007 ("Cantel Letter"); James C. Smith, Chairman and CEO, Webster Financial Corporation, dated April 16, 2007 ("Webster Letter"); Michael Tenenbaum, PE, Trustee, Strategic Technologies Employees Pension Fund Trust, dated May 2, 2007 ("Strategic Technologies Letter"); Craig D. Mallick, Corporate Secretary, United States Steel Corporation, dated May 4, 2007 ("U.S. Steel Letter"); Bart J. Ward, Chief Executive Officer, Ward & Company, dated May 8, 2007 ("Ward Letter"); Jack Sennott, Senior Vice President and Chief Financial Officer, Darwin Professional Underwriters, Inc., dated May 8, 2007 ("Darwin Letter"); James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University, dated May 9, 2007 ("Angel Letter I"); M. Farooq Kathwari, Chairman, President and CEO, Ethan Allen Interiors, Inc., dated May 9, 2007 ("Ethan Allen Letter"); Carol Kaufman, Sr. VP Legal Affairs, The Cooper Companies, Inc., dated May 14, 2007 ("Cooper Letter"); Jack R. Hartung, Chief Finance and Development Officer, Chipotle Mexican Grill, Inc., dated May 15, 2007 ("Chipotle Letter"); Larry A. Mizel, Chairman of the Board and Chief Executive Officer, M.D.C. Holdings, Inc., dated May 17, 2007 ("MDC Letter"); Will Matthews, dated May 21, 2007 ("Matthews Letter"); Stephen M. Klein, J.D., Chairman and Chief Executive Officer, Omni National Bank, dated May 21, 2007 ("Omni Letter"); Edward J. Resch, Executive Vice President, Chief Financial Officer and Treasurer, State Street Corporation, dated May 21, 2007 ("State Street Letter"); Faith Pomeroy-Ward, Manager, Investor Relations, Adams Respiratory Therapeutics, dated May 22, 2007 ("Adams Letter"); Shayn Carlson, Director of Investor Relations, G&K Services, dated May 22, 2007 ("G&K Letter"); Alan R. Spachman, dated May 22, 2007 ("Spachman Letter"); Mark L. Heimbouch, Chief Financial Officer and EVP, Jackson Hewitt Tax Service Inc., dated July 10, 2007 ("Jackson Hewitt Letter"); Daniel R. Coker, President & CEO, Amerigon Incorporated, dated July 31, 2007 ("Amerigon Letter"); Betsy Atkins, dated August 2, 2007 ("Atkins Letter"); Eric A. Blanchard, Senior Vice President, General Counsel and Secretary, United Stationers Supply Company, dated August 3, 2007 ("United Stationers Letter"); Albert A. Pimentel, Executive Vice President and Chief Financial Officer, Glu Mobile Inc., dated August 3, 2007 ("Glu Letter"); Ryan Ellis, Executive Director, American Shareholders Association, dated August 3, 2007 ("ASA Letter"); Rick Stewart, CEO, Amarin Corporation plc, dated August 9, 2007 ("Amarin Letter"); Steve Bene, Senior Vice President and General Counsel, Electronic Arts Inc., dated August 9, 2007 ("Electronic Arts Letter"); Bing Yeh, President & CEO, Silicon Storage Technology, Inc., dated August 10, 2007 ("Silicon Storage Letter"); Kathy Lanterman, Senior Vice President and Chief Financial Officer, Silicon Graphics, Inc., dated August 9, 2007 ("SGI Letter"); Paul Jennings, President and CEO, Innospec Inc., dated August 10, 2007 ("Innospec Letter"); Harry W. Kellogg, Jr., Vice Chairman, SVB Financial Group, dated August 10, 2007 ("SVB Letter"); Arlen W. Gelbard, Chief Administrative Officer and General Counsel, E*Trade, dated August 10, 2007 ("E*Trade Letter"); MDS Office, Sobha Developers Ltd, dated August 10, 2007

while 22 commenters generally supported the Five-Characters Plan or aspects thereof.⁹ The remaining 12 commenters did not expressly support one plan or another.¹⁰

("Sobha Letter"); John Ritchie, Chief Financial Officer, Electronics For Imaging, dated August 10, 2007 ("EFI Letter"); Adi Bar-Lev, Director of IR, Top Image Systems Ltd., dated August 13, 2007 ("Top Image Letter"); Lonnie R. Brock, CFO, Double Eagle Petroleum Co., dated August 13, 2007 ("Double Eagle Letter"); Joe Ovsenek, Senior Vice President, Corporate, Silver Standard Resources Inc., dated August 15, 2007 ("Silver Standard Letter"); James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University, dated August 16, 2007 ("Angel Letter II"); Manisha Kimmel, Executive Director, Financial Information Forum, dated August 23, 2007 ("FIF Letter I"); Patrick J. Healy, Issuer Advisory Group, dated September 6, 2007 ("Issuer Advisory Letter"); S. Lee Clifford, President and CEO, SFB Market Systems, dated September 25, 2007 ("SFB Letter"); Joan C. Conley, Senior Vice President and Corporate Secretary, The NASDAQ Stock Market LLC, dated November 2, 2007 ("Nasdaq Letter I"); Barbara Sweeney, Senior Vice President and Corporate Secretary, The Financial Industry Regulatory Authority, Inc., dated November 27, 2007 ("FINRA Letter"); Mary Yeager, Assistant Secretary, New York Stock Exchange, LLC, dated January 15, 2008 ("NYSE Letter"); James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University, dated February 13, 2008 ("Angel Letter III"); Manisha Kimmel, Executive Director, Financial Information Forum, dated February 14, 2008 ("FIF Letter II"); Marianne Brown, Chief Executive Officer, Omgeo, LLC, dated February 15, 2008 ("Omgeo Letter"); Joan Conley, Senior Vice President & Corporate Secretary, The NASDAQ Stock Market LLC, dated February 26, 2008 ("Nasdaq Letter II"); John Panchery, Managing Director, Art Trager, Vice President, and Ann Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated February 28, 2008 ("SIFMA Letter"); Julian Rainero, Partner, Bracewell & Guiliani LLP, dated March 10, 2008 ("Bracewell & Guiliani Letter"); Jamie Shay, Head of SWIFT Standards, Society for Worldwide Interbank Financial Telecommunication, dated March 18, 2008 ("SWIFT Letter"); Scott Atwell, FPL Global Steering Committee Co-Chair, FIX Protocol, dated March 24, 2008 ("FIX Letter"); and Thomas P. Moran, Associate Vice President & Associate General Counsel, Nasdaq, dated March 26, 2008 ("Nasdaq Letter III").

⁸ See FPL Letter, TCF Letter, Wolverine Letter, Getty Letter, Kinetic Concepts Letter, AmeriCredit Letter, Entertainment Properties Letter, Big Lots Letter, Allstate Letter, Candel Letter, Webster Letter, Strategic Technologies Letter, U.S. Steel Letter, Ward Letter, Darwin Letter, Ethan Allen Letter, Cooper Letter, Chipotle Letter, MDC Letter, State Street Letter, Jackson Hewitt Letter, and NYSE Letter.

⁹ See Matthews Letter, Omni Letter, Adams Letter, G&K Letter, Amerigon Letter, Atkins Letter, United Stationers Letter, Glu Letter, ASA Letter, Amarin Letter, Electronic Arts Letter, Silicon Storage Letter, SGI Letter, Innospec Letter, SVB Letter, E*Trade Letter, Sobha Letter, EFI Letter, Top Image Letter Double Eagle Letter, Silver Standard Letter, Nasdaq Letter I, and Nasdaq Letter II.

This order approves the Five-Characters Plan, with changes and subject to conditions as the Commission deems necessary or appropriate, thus authorizing CHX, FINRA, Nasdaq, NSX, and Phlx to act jointly to implement the Five-Characters Plan, as modified herein, as a means of facilitating a national market system in accordance with the requirements of Section 11A of the Act.¹¹ This order also requires, within 60 days of this approval order, that any SRO that chooses to list securities or to designate securities for quoting on a quotation medium to join the Five-Characters Plan, as modified herein, and to act jointly with CHX, FINRA, Nasdaq, NSX, and Phlx to implement the approved plan.¹² The approved Five-Characters Plan is attached here as Appendix A.

II. Background

A. Section 11A of the Act

In 1975, Congress directed the Commission, through the enactment of Section 11A of the Act,¹³ to facilitate the establishment of a national market system to link together the individual markets that trade securities. Congress found the development of a national market system to be in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure fair competition among the exchange markets.¹⁴ Section 11A(a)(3)(B) of the Act directs the Commission, "by rule or order, to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority

¹⁰ See RPM Letter, Angel Letter I, Angel Letter II, Angel Letter III, Spachman Letter, FIF Letter I, FIF Letter II, Issuer Advisory Letter, SFB Letter, FINRA Letter, Omgeo Letter, SIFMA Letter, Bracewell & Guiliani Letter, SWIFT Letter, and FIX Letter.

¹¹ 15 U.S.C. 78k-1. See also 17 CFR 242.608(b)(2).

¹² 15 U.S.C. 78k-1(a)(3)(B).

¹³ 15 U.S.C. 78k-1.

¹⁴ 15 U.S.C. 78k-1(a)(1)(C).

under this title in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities.”¹⁵ The Commission’s approval of a national market system plan is conditioned upon a finding that the proposed plan is “necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national market system, or otherwise in furtherance of the purposes of the Act.”¹⁶

B. Limited Symbol Supply

Pursuant to Rule 601 of Regulation NMS under the Act,¹⁷ all SROs are required to report every trade in listed equity securities¹⁸ and Nasdaq securities¹⁹ made through their facilities, and to make such information public. Each SRO reports every transaction to the ticker tape using the ticker symbol for that security, the volume of the trade, and the price of the trade. Currently, there are three ticker tapes: Tape A reports the stocks that are listed on NYSE, Tape B reports the stocks that are listed on Amex, as well as securities listed on any other national securities exchange (except securities also listed on NYSE and Nasdaq), and Tape C reports the stocks that are listed on Nasdaq. Tapes A and B disseminate market information pursuant to the Consolidated Tape Association Plan (“CTA Plan”), while Tape C disseminates market information pursuant to the Nasdaq Unlisted Trading Privileges Plan.

¹⁵ 15 U.S.C. 78k-1(a)(3)(B).

¹⁶ 17 CFR 242.608(b)(2). See also 15 U.S.C. 78k-1(a).

¹⁷ 17 CFR 242.601.

¹⁸ 17 CFR 242.600(b)(34) defines “listed equity security” as “any equity security listed and registered, or admitted to unlisted trading privileges, on a national securities exchange.”

¹⁹ 17 CFR 242.600(b)(41) defines “Nasdaq security” as “any registered security listed on The Nasdaq Stock Market, Inc.”

Securities symbols are a key element in the operation of a national market system and essential to the dissemination of trade information in a common format. The term "ticker symbol" originates from the ticker tape.²⁰ Prior to the introduction of the ticker, it was customary for messengers to manually disseminate quotations.²¹ In 1867, an employee of the NYSE developed the stock ticker.²² A system of symbols and abbreviations developed as the only practical method for reporting transactions, because the full description of the issuer, security, number of shares sold, the price, and other market data would slow the dissemination of trade information so that the ticker would fall behind the market.²³ In December 1966, the ticker tape was fully automated.²⁴

Recently, concerns about the scarcity of available symbols have highlighted the need for a symbol reservation national market system plan to efficiently and fairly manage symbol supply. As the securities markets have grown over the years, the availability of one-, two-, and three-character symbols has diminished.²⁵ Several factors have been increasing the demand for

²⁰ The ticker tape started in 1867, when all trades made on an exchange were sent out by telegraph and printed on a piece of paper. Although the process is now automated, the securities industry participants continue to refer to the electronic reporting of information as the "tape." See Hal McIntyre, *How the US Securities Industry Works, 194-95* (The Summit Group Press) (2000).

²¹ See S. S. Huebner, Ph.D., Sc.D., *The Stock Market*, 218 (Appleton-Century-Crofts, Inc.) (1934).

²² E.A. Calahan. See George L. Leffler, Ph.D., *The Stock Market*, 162 (The Ronald Press Company) (1951).

²³ See note 21 *supra* at 222. The first ticker was very slow and not practical, until Thomas A. Edison, another employee of the NYSE, improved its speed and efficiency. See note 22 *supra* at 162.

²⁴ See Richard J. Teweles and Edward S. Bradley, *The Stock Market*, 148 (John Wiley & Sons, Inc.) (1998).

²⁵ There are 26 combinations for one-character symbols, 676 combinations for two-character symbols, and 17,576 combinations for three-character symbols, for a total of 18,278 one-, two-, and three-character symbols.

one-, two-, and three-character symbols. In recent years, exchanges have begun listing new and innovative products, such as exchange-traded funds, that are now competing with listed companies for symbols.

In addition, Nasdaq, which when operated as a facility of NASD (n/k/a FINRA)²⁶ only listed securities with four- and five-character symbols, has begun using two- and three-character symbols and has expressed its desire to use one-character symbols as well for Nasdaq-listed issuers. It has been the practice of the NYSE to list companies using one-, two-, and three-character symbols and of other exchanges (including Amex and regional exchanges) to list companies using two- and three-character symbols. Until recently, Nasdaq was the only listing market that did not assign securities one-, two-, or three-character symbols; instead, Nasdaq had assigned securities it listed four- and five-character symbols. In November 2005, however, Nasdaq announced its intention to begin listing companies with one-, two-, and three-character symbols.²⁷ Since that time, Nasdaq has made a series of announcements detailing its plans, and has worked with the industry to test trading systems to ensure the proper functionality for such symbols.²⁸ In March 2007, Nasdaq filed with the Commission a proposed rule change to allow companies transferring their listings to Nasdaq to retain their three-character symbols.²⁹ And, in

²⁶ Nasdaq began operations as a national securities exchange in Nasdaq-listed securities on August 1, 2006, and in non-Nasdaq-listed securities on February 12, 2007. See www.nasdaq.com/about/FAQsExchange.stm. See also Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131).

²⁷ See Head Trader Alert 2005-133 (November 14, 2005), available at www.nasdaqtrader.com.

²⁸ See e.g., Nasdaq Head Trader Alerts 2006-144 (September 29, 2006), 2006-193 (November 16, 2006), 2006-201 (December 6, 2006), and 2007-008 (January 25, 2007), each available at www.nasdaqtrader.com

²⁹ See Securities Exchange Act Release No. 55563 (March 30, 2007), 72 FR 16391 (April 4, 2007) (SR-NASDAQ-2007-031) (notice for the proposal to allow three-character symbol portability for companies transferring their listings to Nasdaq). The

April 2008, Nasdaq filed with the Commission an immediately effective proposed rule change to allow an issuer with a two-character symbol to transfer its listing to Nasdaq and retain its two-character symbol.³⁰

Finally, the proliferation of standardized options has decreased the availability of three-character symbols.³¹ Developing a formal process to reserve, select, and allocate symbols fairly and efficiently among the listing markets should help promote a fair and orderly national market system and protect investors.

C. Weaknesses in the Existing Reservation System

Currently, the listing markets assign securities symbols under an informal understanding among the markets. Under this system, each SRO keeps its own records of reserved symbols. If an SRO wishes to reserve a particular symbol, the SRO will consult its own list of reserved symbols and then, if it believes that the symbol is available, will notify the other SROs that it is reserving that symbol. If no other SRO objects, then the listing SRO has successfully reserved that symbol and each SRO would be responsible for updating its own records of reserved symbols accordingly.

Commission approved this proposal in July 2007. See Securities Exchange Act Release No. 56028 (July 9, 2007), 72 FR 38639 (July 13, 2007) ("Nasdaq Three-Character Portability Order"). See also Securities Exchange Act Release No. 55519 (March 26, 2007), 72 FR 15737 (April 2, 2007) (SR-NASDAQ-2007-025) (allowing a single company, Delta Financial Corp., to retain its three-character symbol upon transferring its listing from Amex to Nasdaq).

³⁰ See Securities Exchange Act Release No. 57696 (April 22, 2008), 73 FR 22987 (April 28, 2008) (SR-NASDAQ-2008-034). The Commission notes that its approval of the Five-Characters Plan, as modified herein, is consistent with this change and with its approval of the Nasdaq Three-Character Portability Order. See id. As discussed further below, see infra notes 105-117 and accompanying text, the approved plan would allow the automatic portability of all one-, two-, three-, four-, and five-character symbols of issuers transferring their listing from one exchange to another.

³¹ The options exchanges have expressed their intention to shift to a different symbology. See <http://www.theocc.com/initiatives/symbology/default.jsp>.

There are several weaknesses in the current informal system. The absence of universal reservation records may lead to confusion about the availability of certain symbols and may result in disputes between listing markets about the availability of particular symbols. Any such confusion or disagreement between the listing markets could disrupt the listing process or raise the potential for symbol duplication and investor confusion.

In addition, under the existing system, listing markets may reserve an excess amount of symbols indefinitely, which could exacerbate the strain on symbol supply. Market fears about supply constraints and competition for listings could drive listing markets to reserve an excess amount of symbols, either to protect their interests in the event of needing such symbols in the future or to give themselves advantages over their competitors in securing future listings. For example, a listing market could use the existing symbol reservation system to withhold unused symbols from their competitors, trade reserved symbols only with certain, allied exchanges, or use their power to withhold desired symbols to compel other listing markets not to trade symbols with their direct competitors.

Finally, the existing system does not universally permit issuers transferring their listing to a new exchange to keep their ticker symbols. Thus, the original listing market and the new listing market for a transferred listing could become embroiled in a dispute over the right to use the issuer's ticker symbol, which could disrupt trading in that security, and such uncertainty could affect an issuer's decision in selecting a listing venue or moving from one venue to another.

Disagreements over the use of securities symbols have arisen in the past. For example, in 1999, NYSE, Amex, and Nasdaq were involved in a dispute regarding the symbol "Q," which Amex and Nasdaq planned to use for the Nasdaq 100 Trust. However, NYSE claimed that it had

reserved that symbol and sued to enjoin the use of that symbol. Amex and Nasdaq eventually agreed to use a different symbol for the Nasdaq 100 Trust.³²

These weaknesses in the existing informal symbol reservation system could potentially have significant market consequences as exchanges compete more aggressively for listings and the supply of available symbols becomes more restricted over time. For this reason, the Commission believes that it is necessary to adopt a national market system plan for reserving and allocating symbols among the SROs to maintain fair and orderly markets. Consistent with the principles of Section 11A of the Act, in February 2005, Commission staff requested the listing markets to commence joint discussions to develop such a national market system plan.³³ A national market system plan for symbology should mitigate confusion or disagreement about the rights to particular securities symbols and should allow symbols to be used in a manner that is efficient and promotes competition between the listing markets.

III. Discussion

In the notice publishing for comment both the Three-Characters Plan and the Five-Characters Plan, the Commission asked for comments on whether it should approve one or two plans. Four commenters provided feedback on this issue and each supported the approval of a single symbology plan.³⁴ One of these commenters stated that having two different plans for short and long tickers adds needless complexity to an already complex market structure and that

³² See, e.g., Big Board Drops its Lawsuit Against Amex, The New York Times, March 10, 1999, Section C, p. 10.

³³ See Letters from Annette L. Nazareth, then Director of the Division of Market Regulation, Commission, to Amex, Boston Stock Exchange ("BSE"), CBOE, CHX, ISE, Nasdaq, NASD, NSX, NYSE, Pacific Exchange (the predecessor to NYSE Arca) and Phlx, dated February 7, 2005 ("February 2005 Letters").

³⁴ See FIF Letter I, FIF Letter II at 1, Angel Letter II at 3, Angel Letter III at 1, Omgeo Letter at 1, and SWIFT Letter.

the additional complexity of two plans would create increased costs for SROs as well as additional costs to the Commission to regulate two plans, which would be borne ultimately by taxpayers and investors.³⁵ The Commission agrees with these commenters that approving two plans for the reservation of symbols would place undue costs and burdens on listing SROs, including new entrants. The Commission also notes that, currently, the proposed plans both establish a process for the selection and reservation of one-, two-, and three-character securities symbols. Therefore, approval of both plans would establish two competing, inconsistent systems for selecting and reserving one-, two-, and three-character symbols, which the Commission believes would not be in furtherance of the purposes of the Act. The Commission finds that approving a single plan, rather than both plans, is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of a national market system and is in furtherance of the purposes of the Act because a single plan would promote the smooth and orderly operation of the marketplace.

After carefully considering the proposed plans and the issues raised by the comment letters, the Commission has determined to approve, pursuant to Section 11A(a)(3)(B) of the Act³⁶ and Rule 608,³⁷ the Five-Characters Plan, with changes and subject to conditions set forth herein as the Commission has deemed necessary or appropriate.³⁸ As discussed in detail below,

³⁵ See Angel Letter II at 3 and Angel Letter III at 2.

³⁶ 15 U.S.C. 78k-1(a)(3)(B).

³⁷ 17 CFR 242.608.

³⁸ The Commission has modified the proposed Five-Characters Plan to make the following changes: (i) to modify the plan to state that, 90 days following the Commission's approval, it will be the exclusive means of allocating and using symbols of one-, two-, three-, four-, and five-characters in length and to specify that there is no difference between capital and lowercase letters (see infra note 41 and accompanying text); (ii) to

in approving the Five-Characters Plan, the Commission finds that the Five-Characters Plan is necessary and appropriate in the public interest and in furtherance of the purposes of the Act. The Five-Characters Plan is more comprehensive than the Three-Characters Plan because it covers one-, two-, three-, four-, and five-character symbols. The Commission also believes it would better promote fair competition among exchanges that list securities because it does not constrain the portability of symbols (as the Three-Characters Plan does), but instead makes all symbols automatically portable when a listed issuer transfers its listing to another exchange. This portability would enable issuers to make listing decisions based on factors that relate to the quality of the listing markets such as trading quality, costs, and branding, rather than on considerations of symbol portability. In summary, the Five-Characters Plan provides a system for reserving and allocating securities symbols that should provide clarity and order to the symbol reservation process, mitigate the current constraints on symbol supply, and promote fair competition between the various SROs.

This order authorizes CHX, FINRA, Nasdaq, NSX, and Phlx to act jointly to implement the Five-Characters Plan, as modified herein, as a means of facilitating a national market system in accordance with the requirements of Section 11A of the Act.³⁹ This order also requires any SRO that chooses to list securities on its market or to designate securities for quoting on a

modify the start date for the initial reservation process from upon Commission approval of the plan to 60 days following the Commission's approval (see infra notes 141-143 and 190-191 and accompanying text); (iii) to limit the use of one-, two-, and three-character symbols for securities listed on a national securities exchange and to restrict securities trading over-the-counter to using only four- or five-character symbols (see infra notes 85-89 and accompanying text); and (iv) to clarify that securities that de-list and trade on the over-the-counter market would not have portability rights for the original listing symbol (see infra notes 168-172 and accompanying text).

³⁹

15 U.S.C. 78k-1.

quotation medium to join the Five-Characters Plan and to act jointly with other parties to the plan to implement the approved plan.⁴⁰

In connection with requiring SROs that list, or designate for quoting, securities, the Commission is also modifying the plan to provide that, 90 days from the date of this Order, the Five-Characters Plan shall be the exclusive means of allocating and using symbols of one-, two-, three-, four-, or five-characters in length. In addition, for clarity, the Commission is specifying that there will be no difference between capital letters and lowercase letters, thus limiting the choices of letters to 26. The Commission believes these changes are necessary and appropriate for the dissemination of trade information in a common format.⁴¹

A. Five-Characters Plan's Consistency with Section 11A of the Act

Many of the provisions of the proposed Five-Characters Plan are similar or identical to parallel provisions in the proposed Three-Characters Plan. Particularly, the plans would establish the Intermarket Symbol Reservation Authority ("ISRA") composed of plan participants and set forth how it would be administered. Both plans also have the same provisions regarding the use of a third-party processor and a symbol reservation database, the general process of reserving perpetual and limited-time reservations, the use of a waiting list, the right to reuse a symbol, the ability to request the release of a symbol, the terms of confidentiality, the non-transferability of rights under the plan, and the process of amending the plan.⁴² Despite these

⁴⁰ 15 U.S.C. 78k-1(a)(3)(B). The Commission did not receive any comments regarding whether it should require SROs to join an approved plan.

⁴¹ The Commission notes that, while the proposed plans were silent on these points, this clarification is necessary to avoid the possibility of confusion regarding the scope of the approved plan.

⁴² See discussion infra Part III(B) for a discussion of these provisions.

significant areas of consensus, however, there are several important differences between the proposed plans.

Many of the commenters that favored the proposed Five-Characters Plan asserted that it would enhance competition among markets by putting all exchanges on a fair and level playing field and would reduce the potential for investor confusion by allowing a fair framework for symbol portability.⁴³ Several commenters stated that the proposed Five-Characters Plan would give all exchanges equal rights under the proposal.⁴⁴ Some of these commenters also stated that the proposed Five-Characters Plan would provide greater choice for public companies and cause less confusion for investors.⁴⁵ One commenter asserted that the proposed Five-Characters Plan is inherently more fair and reasonable than the proposed Three-Characters Plan.⁴⁶

The Commission agrees with the commenters supporting the Five-Characters Plan and finds that, as discussed in greater detail below, the Five-Characters Plan, as modified herein, is consistent with Section 11A of the Act, and is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets.

1. Scope of Plan

One primary difference between the two proposed plans relates to scope: the proposed Three-Characters Plan would only cover one-, two-, and three-character symbols; the Five-Characters Plan, on the other hand, would cover the reservation and allocation of all one-, two-,

⁴³ See Amerigon Letter, United Stationers Letter, Glu Letter, Electronic Arts Letter, Silicon Storage Letter, Silicon Graphics Letter, Innospec Letter, SVB Letter, E*Trade Letter, EFI Letter, Top Image Letter, Double Eagle Letter, and Silver Standard Letter.

⁴⁴ See Adams Letter, Atkins Letter, and Sobha Letter. See also ASA Letter, which stated that fair and equal competition is the core of the Five-Characters Plan.

⁴⁵ See Amerigon Letter, United Stationers Letter, Glu Letter, Amarin Letter, Electronic Arts Letter, Silicon Graphics Letter, SVB Letter, E*Trade Letter, Top Image Letter, Double Eagle Letter, and Silver Standard Letter.

three-, four-, and five-character symbols. Both of the proposed plans would cover only root symbols, without any suffix or special conditional identifier.⁴⁷

The Commission believes that the Five-Characters Plan, which would establish a uniform system for the selection and reservation of symbols ("Symbol Reservation System") of one-, two-, three-, four-, or five-character securities symbols,⁴⁸ is more comprehensive, and therefore offers a more efficient and effective mechanism for allocating symbols than the Three-Characters Plan.⁴⁹ The Three-Characters Plan would leave unanswered the appropriate methodology for allocating four- and five-character symbols.

Although Nasdaq is currently the primary listing exchange for issuers using four- and five-character symbols,⁵⁰ the Commission believes that it will further the purposes of the Act to approve a plan for the reservation and allocation of symbols with one-, two-, three-, four-, and five-character symbols in order to permit all exchanges to begin utilizing such symbols, particularly in light of the limited availability of one-, two-, and three-character symbols.

⁴⁶ See Matthews Letter.

⁴⁷ See Section IV(a) of the proposed plans.

⁴⁸ See Section I(b) of the Five-Characters Plan. The Five-Characters Plan would cover only root symbols (i.e., without any suffix or special conditional identifier) that are NMS securities as currently defined in Rule 600(a)(46) of Regulation NMS under Act and any other equity securities quoted, traded, and/or trade reported through an SRO facility. See Preamble and Sections I(b) and IV(a) of the Five-Characters Plan. The Three-Characters Plan would cover only root symbols of one-, two- or three-characters for Network A and Network B Eligible Securities (as defined in the CTA Plan) and listed options reported to OPRA. The Three-Characters Plan states that, for listed equity securities, no such symbols would be allocated or used other than for Network A or Network B Eligible Securities. See Sections I(b) and IV(a) of the Three-Characters Plan.

⁴⁹ As discussed below, one commenter suggested expanding the length of securities symbols to 10 or 12 characters. See Angel Letter III at 3. Currently, the markets only use root symbols of one- through five-characters in length.

⁵⁰ The Commission notes that NYSE Arca currently lists an issuer with a four-character security symbol, namely Golden Cycle Gold Corporation (ticker symbol: GCGC).

Indeed, the Commission believes that allowing all exchanges to list four- and five-character securities symbols should help ensure that the supply of available securities symbols does not become constrained.

Some commenters urged a broader scope than that proposed in either plan. Seven commenters advocated the adoption of a national market system plan that provides a single suffix symbology across all SROs.⁵¹ In response, Nasdaq had initially commented that the plan should only cover root symbols because the use of symbol suffixes is unique to individual markets.⁵² Subsequently, however, Nasdaq urged that the Commission commence a process for adopting a uniform inter-market equity symbol suffix plan.⁵³ The Commission is supportive of considering such an initiative. To avoid a delay in the implementation of a symbology national market system plan for root symbols, however, the Commission believes it is appropriate to consider any such initiative separately following the approval of the Five-Characters Plan.

Accordingly, the Commission finds the scope of the Five-Characters Plan in its focus on root symbols is appropriate in the public interest and that it will further the purposes of the Act.

⁵¹ See FIF Letter I, FIF Letter II at 1, Angel Letter II at 3, Angel Letter III at 1, Omgeo Letter at 1, SIFMA Letter, Bracewell & Guiliani Letter, SWIFT Letter, and FIX Letter. One commenter also noted that current inconsistencies in suffix symbology and condition identifiers make it difficult for data vendors to pass through accurate data, which can cause confusion and loss for investors. See Angel Letter I at 8 and Angel Letter III at 1. This commenter also believed that the plan should cover, in addition to equity securities, options, futures, securities futures, mutual funds, and indices and that it should incorporate representation from the derivatives exchanges, issuers, investors, and brokers. See Angel Letter I at 10, Angel Letter II at 4, and Angel Letter III at 1. In addition, this commenter urged the development of a new symbology plan in what he anticipates will be a global trading environment. See Angel Letter III at 2.

⁵² See Nasdaq Letter II at 3.

⁵³ See Nasdaq Letter III. See also Head Trader Alert 2008-36 (March 27, 2008), available at www.nasdaqtrader.com.

2. Parties to the Plan

The proposed plans have different criteria for determining the eligibility for parties to join their plan. The proposed Three-Characters Plan would only allow an SRO to join the plan if it maintains a market for the listing and trading of securities that are identified by one-, two-, or three-character symbols and if their listed equity securities are also "Network A" or "Network B" "Eligible Securities" as those terms are defined in the CTA Plan.⁵⁴

The Five-Characters Plan, on the other hand, would allow any SRO to join the plan as long as it maintains a market for the listing and trading of securities that are identified by one-, two-, three-, four-, or five-character symbols.⁵⁵ A party would also be required to have the actual technical and physical capability through its facilities to immediately quote and report trades in securities either using one-, two-, or three-character symbols, if it seeks to reserve symbols of one-, two-, or three-characters in length, or using four- or five-character symbols, if it seeks to reserve symbols of four- or five-characters in length.⁵⁶ In addition, this plan would require, as conditions to becoming a new participant, that an SRO pay a proportionate share of the aggregate development costs and sign a current copy of the plan.⁵⁷

⁵⁴ The CTA Plan defines "Network A Eligible Securities" to mean Eligible Securities listed on NYSE and "Network B Eligible Securities" to mean, in relevant part, Eligible Securities listed on the Amex, BSE, CBOE, CHX, ISE, NSX, NYSE Arca, Phlx or on any other exchange other than Nasdaq, but not also listed on NYSE.

⁵⁵ See also supra note 48.

⁵⁶ See Section I(b) of the Five-Characters Plan.

⁵⁷ See Section I(c) of the Five-Characters Plan. For additional discussion regarding the plan's provision relating to costs, see discussion infra notes 118-124 and accompanying text.

Many commenters argued that Nasdaq should not be allowed to list one-, two-, and three-character symbols because such symbols are indicative of an NYSE listing.⁵⁸ Some of these commenters argued that an issuer's use of a one-, two-, or three-character symbol signaled the NYSE brand and "companies listed on NYSE meet the highest corporate governance and financial standards in the world;"⁵⁹ consequently, some stated, the Nasdaq issuers' use of such symbols could lead to investor confusion.⁶⁰ One such commenter, a trustee and portfolio manager of a small pension fund, stated that it relies on the use of one-, two-, and three-character symbols to identify NYSE securities and makes investment decisions based on such reliance, citing the financial reporting requirements and stability of earnings of NYSE securities; this commenter further stated that it generally performs "an extra level of scrutiny in view of the longevity of firms that have been listed in the over the counter market" because it presumes that those securities are not NYSE-listed securities.⁶¹ NYSE also argued that Nasdaq's attempt to use three-character symbols exacerbates the existing supply problems without justification.⁶²

⁵⁸ See FPL Letter, TCF Letter, Wolverine Letter, Getty Letter, KCI Letter, AmeriCredit Letter, Entertainment Properties Letter, Big Lots Letter, Allstate Letter, Cantel Letter, Webster Letter, Strategic Technologies Letter, U.S. Steel Letter, Ward Letter, Darwin Letter, Ethan Allen Letter, Cooper Letter, Chipotle Letter, State Street Letter, and Jackson Hewitt Letter. See also NYSE Letter at 2.

⁵⁹ See Allstate Letter; see also, e.g., FPL Letter, TCF Letter, Wolverine Letter, Getty Letter, KCI Letter, AmeriCredit Letter, Entertainment Properties Letter, Big Lots Letter, Cantel Letter, Webster Letter, Strategic Technologies Letter, U.S. Steel Letter, Darwin Letter, Ethan Allen Letter, Cooper Letter, Chipotle Letter, State Street Letter, and Jackson Hewitt Letter. See also NYSE Letter at 4.

⁶⁰ See TCF Letter, Wolverine Letter, Big Lots Letter, Ward Letter. See also NYSE Letter at 3.

⁶¹ See Strategic Technologies Letter. The NYSE Letter also argued that investors, securities issuers, and the public rely on the different symbol lengths to distinguish NYSE and Nasdaq securities. See NYSE Letter at 2.

⁶² See NYSE Letter at 5.

Many other commenters, however, challenged these assertions and argued that Nasdaq should have the same rights to list one-, two-, or three-character symbols as NYSE and any other exchange.⁶³ One commenter noted that one-, two-, and three-character ticker symbols have previously been used by Amex and other regional exchanges and that commenters implying that one-, two-, and three-character symbols are associated only with NYSE ignore current practice and the historical record.⁶⁴ Another commenter stated that, due to the fact that markets can no longer claim a majority share of the trading in their listed securities, the correlation of the number of letters in a ticker symbol and its listing on a particular exchange is an increasingly obsolete consideration.⁶⁵ One commenter also noted that NYSE and Amex issuers, similarly, should have the flexibility to use longer ticker symbols that may be more readily identifiable with their company.⁶⁶

The Commission believes that any SRO with the capacity to maintain a market for the listing of securities that are identified by one-, two-, three-, four-, or five-character symbols should be able to reserve those symbols.⁶⁷ As noted above, the Five-Characters Plan would

⁶³ See G&K Letter, Amerigon Letter, United Stationers Letter, Glu Letter, Electronic Arts Letter, Silicon Graphics Letter, E*Trade Letter, Silicon Storage Letter, Innospec Letter, EFI Letter, and Nasdaq Letter I. See also SVB Letter, Top Image Letter, and Double Eagle Letter, which state that all exchanges and issuers should be able to list three- or fewer character symbols.

⁶⁴ This commenter stated that Amex, BSE, and other regional exchanges have used one- or two-character ticker symbols in the past. See Angel Letter I at 6, Angel Letter II at 2, and Angel Letter III at 2. This commenter also argued that shorter ticker symbols should go to the most actively-traded stocks, some of which are Nasdaq-listed, because the reduced typing and remembering effort required for such symbols would make it a more economically efficient solution. See Angel Letter I at 5.

⁶⁵ See Issuer Advisory Letter at 2. See also Angel Letter I at 4.

⁶⁶ See Angel Letter II at 3.

⁶⁷ The Commission notes that Nasdaq is no longer a facility of a national securities association and is now a national securities exchange. See *supra* note 26.

permit any SRO that maintains a market for the listing and trading of plan securities to become a party to the plan.⁶⁸ The Commission believes that SROs that have listing standards for plan securities, though they may not be actively listing such securities, and that maintain a market for the trading of plan securities would satisfy this requirement and would be permitted, though not required, to become parties to the plan. Joining the plan would enable such SROs to reserve symbols in anticipation of beginning a listings business.⁶⁹ In addition, the Commission is requiring any SRO that chooses to list securities on its market or to designate securities for quoting on a quotation medium to join the approved plan.⁷⁰

The Commission does not agree with commenters who believe that the use of one-, two- or three-character symbols by Nasdaq issuers will “blur and diminish the financial and other significant achievements commonly associated with NYSE listed companies”⁷¹ or confuse investors who today purportedly identify such symbols as associated with NYSE. Many issuers not listed on NYSE utilize such symbols and have for a significant period of time and, therefore, any automatic association of such symbols with NYSE’s listing standards or brand is mistaken.⁷² Therefore, the Commission finds that the provision on eligible parties in the proposed Five-Characters Plan is preferable and is necessary and appropriate in the public interest, for the

⁶⁸ See Section I(c) of the Five-Characters Plan.

⁶⁹ Parties to the plan are entitled to place up to 20 symbols on each of its perpetual reservation lists for one-, two-, or three-character symbols and four- or five-character symbols, respectively. See *infra* notes 90 and 93-95 and accompanying text. The Commission notes that, for limited-time reservations, the plan requires a party to have a reasonable basis for using a limited-time reservation within a 24-month period. See *infra* notes 91-92 and accompanying text.

⁷⁰ See *infra* notes 192 and 197-198 and accompanying text.

⁷¹ See Big Lots Letter.

⁷² See *supra* note 64 and accompanying text.

protection of investors and the maintenance of fair and orderly markets, and that it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C)(ii) of the Act.⁷³

The Commission also believes that the Five-Characters Plan will further the purposes of the Act because it promotes competition among listing markets, including potential new listing markets. As described in further detail below, and unlike the Three-Characters Plan, the Five-Characters Plan provides each party to the plan with an equal allotment of perpetual and limited-time reservations.⁷⁴ The Five-Characters Plan also permits the portability of an issuer's symbol from one SRO to another, allowing competing listing venues to attract transferred listings without requiring issuers to change their ticker symbol.⁷⁵ In addition, the Five-Characters Plan would allocate to any new party joining the plan a pro-rata portion of the initial development costs based upon the number of symbols initially reserved by such new party during its first twelve months as a party to the plan.⁷⁶

3. Reservation and Use of Symbols

⁷³ See 15 U.S.C. 78k-1(a)(1)(C)(ii).

One commenter also argued that rights to ticker symbols should be allocated directly to issuers, rather than to the SROs. See Issuer Advisory Letter at 3. See also Angel Letter I at 3 and Angel Letter III at 4, arguing that issuers have stronger claims to symbols than their exchanges. The Commission believes, however, that developing a symbol reservation plan directly among the issuers would present significant challenges—including implementation and administrative challenges, and believes that continuing to allow listing markets to reserve and then allocate those symbols to qualified issuers is more workable and efficient.

Because the Five-Characters Plan, as filed, listed the name of all SROs, including those that were not signatories to the plan, the Commission has deleted the names of SROs listed in Section I(a) of the Five-Characters Plan who are not signatories to the plan at this time.

⁷⁴ See discussion infra notes 77-104 and accompanying text.

⁷⁵ See discussion infra notes 105-117 and accompanying text.

⁷⁶ See discussion infra notes 118-124 and accompanying text.

Both proposed plans have provisions allowing parties to the plan to reserve symbols in perpetuity (“perpetual reservations”) and for a limited time (“limited-time reservations”).

Specifically, both proposed plans provide that, within 30 days of Commission approval of the plan (unless such time is extended by the Policy Committee),⁷⁷ parties may submit to the Processor⁷⁸ requests for initial reservation of symbols.⁷⁹ The proposed plans’ differ as follows: (1) how reservation rights are allocated among the individual parties; (2) the number of symbols that may be reserved on the perpetual reservation and limited-time reservation lists, respectively; and (3) how limited-time reservations may be secured. These differences and the reasons the Commission finds that the Five-Characters Plan’s provisions on reservation rights, as modified herein, are appropriate in the public interest for the maintenance of fair and orderly markets and fair competition between the markets, consistent with the Section 11A(a)(1)(C) of the Act,⁸⁰ are discussed below.

a. Allocation of Reservation Rights Among Parties

The proposed Three-Characters Plan awards greater reservation rights to NYSE and Amex than to the other parties to the plan. Specifically, the proposed Three-Characters Plan would allow NYSE and Amex each to reserve 200 symbols as perpetual reservations and 1,500

⁷⁷ ISRA will be administered by a Policy Committee, which will consist of one voting member and one alternate voting member representing each party. See Section II(a) and (c) of the Five-Characters Plan. See also Section II(a) and (c) of the Three-Characters Plan, which is identical to the corresponding provision of the Five-Characters Plan.

⁷⁸ The Processor will be an independent third party to which ISRA will delegate the operation of the Symbol Reservation System. See Section III of the Five-Characters Plan. See also Section III of the Three-Characters Plan, which is identical to the Five-Characters Plan.

⁷⁹ The Commission is modifying the Five-Characters Plan’s provision on the timing for the initial reservation process. See infra notes 77-104 and accompanying text for the discussion of this modification.

⁸⁰ 15 U.S.C. 78k-1(a)(1)(C).

symbols as limited-time reservations, while other parties to the plan could only reserve 40 symbols as perpetual reservations and up to 500 limited-time reservations.⁸¹ The Five-Characters Plan, on the other hand, awards equal reservation rights among all the parties – any eligible party to the plan could reserve 20 perpetual reservations and 1,500 limited-time reservations of one-, two-, and three-character symbols and 20 perpetual reservations and 1,500 limited-time reservations of four- and five-character symbols.⁸² The Five-Characters Plan also requires a party intending to include a symbol on its limited-time reservations lists to have a reasonable basis for using such symbol within 24 months.

With respect to these provisions on reservation rights, the Commission finds that the Five-Characters Plan will further the purposes of the Act. The Five-Characters Plan allocates all reservation rights equally among all parties to the plan, consistent with fair competition principles. NYSE argued that the proposed Three-Characters Plan reservation provisions reflect the reality of its own likelihood to list a greater number of securities than the other markets.⁸³ Nasdaq, however, disputed this assertion and stated that the allocation of reservations in this provision of the Three-Characters Plan is out of proportion to historic symbol usage.⁸⁴ Nasdaq also argued that this provision would be discriminatory and that such discrimination is not compelled by market needs and is inconsistent with the equal regulation and pro-competition mandates of the Act. While the Commission recognizes that currently NYSE and Amex markets

⁸¹ The proposed Three-Characters Plan, as amended, provided that NYSE Arca and CBOE each may have 500 limited-time reservations and that ISE may have 200 limited-time reservations. The plan would leave the precise number of limited-time reservations for other SROs to be decided when such SROs join the proposed plan.

⁸² See Section IV(b)(1)(A) and (B) of the Five-Characters Plan. The Commission notes that the reservation lists do not apply to securities symbols already in use, but rather relate to unused ticker symbols.

⁸³ See NYSE Letter at 6.

encompass the overwhelming majority of primary listings for issuers with one-, two-, and three-character symbols, the Commission does not believe that the dominance of any particular market should be enshrined in a national market system plan. Moreover, the Commission believes that the Five-Characters Plan's proposed allotments would permit active listing markets to reserve more than enough securities symbols for their listing business. The Five-Characters Plan, in contrast to the proposed Three-Characters Plan, would promote fair competition among the markets by providing all participants with the same number of reservations. Such equal reservation rights make it easier for an existing SRO or new entrant to compete on an equal basis with primary listing markets.

One commenter stated that OTC Bulletin Board ("OTCBB")⁸⁵ and Pink Sheet⁸⁶ issuers should not have the same rights to use securities symbols as issuers listed on national securities exchanges.⁸⁷ The commenter noted that, in the past, if a Nasdaq-listed firm desired to use a ticker symbol that was in use by an OTCBB or Pink Sheet issuer, it could usually get such a symbol. In addition, the commenter noted that such issuers have not paid any listing fees to be traded on those markets and that many of them are shell companies with no operations or defunct companies. The commenter believed that only "legitimate" SEC registrants that meet the listing standards of the exchanges should be able to establish rights to ticker symbols.

⁸⁴ See Nasdaq Letter II at 2.

⁸⁵ The OTCBB is a quotation service for over-the-counter equity securities run by FINRA, a national securities association.

⁸⁶ Pink Sheets is an interdealer electronic quotation system that displays quotes from market makers for many over-the-counter securities. To be quoted on the Pink Sheets, an issuer need only find one market maker to quote its shares, and Pink Sheets-traded issuers need not have audited financial statements. See www.pinksheets.com.

⁸⁷ See Angel Letter I at 10.

The Commission agrees and believes that significant investor confusion and harm could occur if such securities, which currently trade using four- or five-character symbols, were to begin trading with one-, two-, or three-character symbols. The Commission believes that it is important to distinguish between securities trading only on over-the-counter trading venues and those listed on national securities exchanges. Exchange listing standards are approved by the Commission and must include corporate governance requirements that comply with Rule 10A-3 under the Act.⁸⁸ Issuers traded on over-the-counter equity venues (including the OTCBB and Pink Sheets) are not subject to such listing standards. Therefore, such securities can be substantially different from those listed on a national securities exchange. The Commission does not believe any similar distinction exists among the national securities exchanges. Accordingly, the Commission believes that it is appropriate to limit securities not listed on a national securities exchange to using four- or five-character symbols, whereas it is not appropriate to similarly distinguish between exchange-listed securities. The Commission believes that issuers trading solely on the OTCBB, Pink Sheets, and any other over-the-counter venue should be limited to using four- and five-character symbols, as they do today, as any change from this current practice would unnecessarily confuse investors and could lead to investor harm. The Commission finds that it is necessary and appropriate in the public interest, and for the protection of investors and the maintenance of fair and orderly markets, that only issuers listed on a national securities exchange be allowed to use one-, two-, and three-character symbols.⁸⁹ Therefore, the Commission is modifying the Five-Characters Plan to prohibit an SRO from reserving or using one-, two-, and three-character symbols for any issuer not listed on a national securities exchange.

⁸⁸ 17 CFR 240.10A-3.

b. Number of Perpetual and Limited-Time Reservations

The Three-Characters Plan contemplates allocating some SROs as many as 200 perpetual reservations. In contrast, the Five-Characters Plan would allow no more than 40 perpetual reservations for each party.⁹⁰ The Commission believes that, because the Five-Characters Plan allows the overwhelming majority of unused symbols remain available for future use, exchanges would not be able to hold securities symbols in a manner that stifles or burdens competition. In this regard, the Commission believes that the perpetual reservation provisions of the Five-Characters Plan are more favorable to new entrants. The Commission also believes that the Five-Characters Plan's allotment of 1,500 limited-time reservations for one-, two-, and three-character symbols and 1,500 limited-time reservations for four- and five-character symbols should adequately offset the low number of permitted perpetual reservations, and allow SROs to reserve a sufficient number of symbols in the short-term for any pending use.

Both proposed plans permit limited-time reservations for a period of 24 months, after which time the Processor would release such symbols to be available for reservation by parties on the waiting list for a given symbol or, in the absence of a waiting list, for general availability.⁹¹ The Five-Characters Plan requires a party to have a reasonable basis for using a limited-time reservation within such 24-month period while the Three-Characters Plan has no such comparable requirement.⁹² Under the Five-Characters Plan, if a party does not use a

⁸⁹ 17 CFR 242.608.

⁹⁰ The Five-Characters Plan would allow each party to place 20 symbols on each of its perpetual reservation lists for one-, two-, or three-character symbols and four- or five-character symbols, respectively.

⁹¹ See Sections IV(b)(1)(B) and IV(b)(5) of the proposed plans.

⁹² Because "reasonable basis" was not defined in the Five-Characters Plan, the Commission requested comment about it in the Symbology Notice. No commenters specifically responded to this request. The Commission believes that it is necessary and appropriate

limited-time reservation within the 24-month reservation period and no party reserves the symbol after the Processor releases it, then the original party would be able to subsequently reserve the symbol for an additional 24-month period, once again subject to the requirement that it has a reasonable basis for doing so. The Commission does not view the "reasonable basis" requirement in the Five-Characters Plan as mandating the usage of a symbol within 24 months, but believes that this requirement should help prevent the arbitrary reservation of symbols, particularly in an anti-competitive manner.

One commenter argued that there should be no perpetual reservations because having a perpetual reservation would allow an exchange to exclude others from ever using a symbol.⁹³ The Commission notes that, though they disagreed on the precise number of perpetual reservations each party should be able to reserve, the signatory SROs to both proposed plans agreed to the availability of perpetual reservations,⁹⁴ and believes that perpetual reservations are not inconsistent with Rule 608 under the Act, which requires that the plan be necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act. Nonetheless, the Commission believes that the number of such perpetual reservations should be kept to a minimum and believes that the Five-Characters Plan's allocation of 40 perpetual reservations to each party is

in the public interest to have the Policy Committee determine the appropriate interpretation and application of terms used in the plan, such as the term "reasonable basis." To the extent that any of the parties to the plan are aggrieved by the determination of the Policy Committee in this regard, the Commission notes that it has the authority to hear appeals by such parties. See Rule 608(d), 17 CFR 242.608(d); see also supra notes 133-137 and accompanying text.

⁹³ See Angel Letter I at 6, 9 and Angel Letter II at 3, and Angel Letter III at 4.

⁹⁴ See Section IV(b)(1)(A) of the proposed plans.

appropriate. The Commission acknowledges that new entrants that join the plan after the initial reservation process would have fewer options for selecting their perpetual reservations, as compared to the parties participating in the initial reservation process. But the Commission believes that, given the relatively low number of perpetual reservations allowed under the Five-Characters Plan (particularly as compared to the Three-Characters Plan), such new entrants would still have access to an adequate number of symbols and notes that they would also have the same right to have 40 perpetual reservations each. In addition, the Commission notes that, once an SRO assigns a symbol from its perpetual reservation list to an issuer, that symbol becomes portable to other listing markets if the issuer using the symbol were to transfer its listing to another SRO.⁹⁵ Because the Five-Characters Plan would limit each party to no more than 40 perpetual reservations and because an issuer using such a symbol could transfer its listing to another SRO if it chose to do so, the Commission finds that the Five-Characters Plan's provisions with respect to perpetual reservations are not anticompetitive and are appropriate in the public interest.

Finally, one commenter also stated that symbols should be allocated on a "first-come, first-served" basis with a "use it or lose it" feature.⁹⁶ The Commission believes that the Five-Characters Plan's provisions relating to processing symbol requests for limited-time reservations incorporate this very principle.

c. Legacy Reservations

Under both proposed plans, during the initial reservation process, a party in reserving a symbol that it claims was properly reserved under the current informal system prior to the

⁹⁵ See Section IV(f) of the Five-Characters Plan.

⁹⁶ See Angel Letter I at 9 and Angel Letter III at 4.

effective date of the plan would have priority over other parties also reserving such symbol.⁹⁷

Under the Five-Characters Plan, however, such party would have priority over other SROs to retain reservation of that symbol (a “legacy reservation”) only if the party represents that it has a reasonable basis⁹⁸ to believe that it would utilize such symbol within the next six months.

Moreover, such reservation would not count towards the party’s perpetual reservations or limited-time reservations, but instead be reserved as a separate, additional legacy reservation.⁹⁹

If the party does not use such symbol within the allotted six-month period, it would lose the reservation unless the party requests an extension for an additional six-month period. In

requesting such an extension, the party would have to have a reasonable basis to believe that it would utilize such symbol within the additional six-month period. If the symbol has not been used within the additional six-month period, the symbol would be released by the Processor.¹⁰⁰

The Three-Characters Plan also assigns priority for symbol reservations to parties that claim to have properly reserved such symbols under the current informal system prior to the effective date of the plan, but it does not place such reservations on a separate “legacy reservation” list nor does it establish a separate process for using such symbols.¹⁰¹

One commenter suggested establishing a 90-day remaining life to all symbols currently reserved by the exchanges, after which all symbol reservations by exchanges will cease to exist.¹⁰² Another commenter endorsed an approach similar to that in the Five-Characters Plan, proposing a transitional provision allowing for an exchange to assert a legacy reservation for up

⁹⁷ See Section IV(b)(2)(A) of the proposed plans.

⁹⁸ See *supra* note 92.

⁹⁹ See Section IV(b)(2)(A) of the proposed plans.

¹⁰⁰ See *id.*

¹⁰¹ See Section IV(b)(2)(A) of the Three-Characters Plan.

to 12 months for a pending use.¹⁰³ The Commission finds that the legacy reservation provision in the Five-Characters Plan is in the public interest, consistent with Section 11A(a)(1)(C) of the Act, because it provides an appropriate transition period for symbol reservations held prior to the Commission's approval of the Five-Characters Plan.¹⁰⁴

4. Portability of Symbols

Another key difference between the two proposed plans relates to the portability of symbols. In Amendment No. 1 to the proposed Three-Characters Plan, that plan was amended to allow for the automatic portability of three-character symbols (i.e., allowing an issuer with a three-character ticker symbol to automatically continue to use that symbol upon transferring its listing to another SRO).¹⁰⁵ Nonetheless, the proposed Three-Characters Plan maintains that one- and two-character symbols would not be automatically portable if a listed issuer moves to another exchange. Under that proposed plan, the rights to a one- or two-character symbol of the issuer transferring to another exchange would remain with the former SRO unless the former SRO consents to the transfer of the symbol to the new SRO. The only exception would be, in the case of two-character symbols, if the new SRO demonstrates that it has a compelling business need that substantially outweighs the business needs of the former SRO. This determination

¹⁰² See Issuer Advisory Letter at 3.

¹⁰³ See Sobha Letter.

¹⁰⁴ 15 U.S.C. 78k-1(a)(1)(C).

¹⁰⁵ Two commenters expressed concerns that an earlier proposed rule change of Nasdaq to allow the transfer of issuers with three-character symbols to Nasdaq (SR-NASDAQ-2007-031) could circumvent efforts to develop a national market system plan for symbology. See RPM Letter and MDC Letter. In the Nasdaq Three-Character Portability Order, see supra note 29, the Commission addressed this concern and noted that its approval of that proposed rule change was independent of its consideration of the proposed NMS plans. As the Commission stated then, "[p]articipants in any such plan would be required to comply with its requirements, which could necessitate changes to SRO rules." See Nasdaq Three-Character Portability Order at 38641.

would be made by the Processor and would be final. Under the proposed Three-Characters Plan, this exception would not apply to one-character symbols, which could not be transferred to a new SRO without the consent of the former SRO, even if the new SRO was able to demonstrate a compelling business need that substantially outweighed the business needs of the former SRO. In contrast, the Five-Characters Plan would provide the automatic portability of any symbol in the event that an issuer transfers its listing to another exchange (i.e., without requiring the consent of the former SRO).¹⁰⁶

Many commenters have supported the portability provision of the Five-Characters Plan.¹⁰⁷ Some commenters argued that the portability provision of the proposed Three-Characters Plan would create artificial restrictions on symbol use and portability that would not benefit listed companies or the investing public.¹⁰⁸ One commenter stated that disallowing symbol portability is an anti-competitive and unfair practice.¹⁰⁹ Another commenter argued that the inconvenience and transition costs involved with requiring a company to change its ticker symbol upon transferring from the NYSE to another exchange amount to an unfair restraint of

¹⁰⁶ See Section IV(f) of the Five-Characters Plan.

¹⁰⁷ See Omni Letter, Adams Letter, Amerigon Letter, Atkins Letter, United Stationers Letter, Glu Letter, ASA Letter, Electronic Arts Letter, Silicon Storage Letter, Silicon Graphics Letter, E*Trade Letter, Innospec Letter, SVB Letter, EFI Letter, Top Image Letter, and Double Eagle Letter, and Nasdaq Letter II at 3.

¹⁰⁸ See Amerigon Letter, United Stationers Letter, Glu Letter, Electronic Arts Letter, Silicon Storage Letter, Silicon Graphics Letter, Innospec Letter, E*Trade Letter, EFI Letter, Top Image Letter, Double Eagle Letter.

¹⁰⁹ See Issuer Advisory Letter at 2.

trade.¹¹⁰ Two commenters also likened securities symbols to telephone numbers and argued that they should belong to the issuer and be fully portable.¹¹¹

One commenter noted that issuers expend more effort and resources to associate a particular symbol with their company than anyone else, and therefore should be allowed to take their symbol with them when they move to another exchange.¹¹² This commenter also stated that, over time, investors tend to associate a particular ticker symbol far more with a company than with a particular exchange and that, therefore, in terms of reducing investors' search and transaction costs, it makes sense to award the rights to a particular ticker symbol to the issuer that has been using the ticker symbol, rather than the exchange where it originally listed.¹¹³ Furthermore, this commenter stated that changing an issuer's ticker symbol can result in confusion for investors and researchers and be the source of costly investment mistakes, noting that data vendors often do not catch a symbol change on time.¹¹⁴ One issuer cited its own experience with transferring its listing from NYSE to Nasdaq and consequently changing its symbol; though it ultimately decided to switch listing venues, the issuer stated the need to change its ticker symbol was a negative factor because of the time and resources it had to expend to make sure its investors were aware of the symbol change.¹¹⁵ Finally, one commenter also noted that allowing symbol portability would strengthen competition between markets.¹¹⁶

¹¹⁰ See ASA Letter.

¹¹¹ See Spachman Letter, Angel Letter I at 5-6, Angel Letter II at 2, and Angel Letter III at 3 and 4.

¹¹² See Angel Letter I at 4.

¹¹³ Id.

¹¹⁴ See Angel Letter I at 5. See also Nasdaq Letter II at 3.

¹¹⁵ See E*Trade Letter. See also Nasdaq Letter II at 3.

¹¹⁶ See Angel Letter II at 2.

The Commission finds that allowing the automatic portability of a symbol in the event that an issuer transfers its listing to another exchange will further the purposes of the Act and should reduce investor confusion by allowing the symbol already associated with the issuer to continue to be used by the issuer on the new exchange. The Commission also finds that allowing automatic symbol portability would remove a burden on competition among markets not necessary or appropriate in furtherance of the purposes of the Act by making it easier for listed issuers to transfer their listings to another exchange, thereby enhancing competition among exchanges in the business of providing a listing venue. Eliminating the costs and administrative efforts associated with acquiring a new symbol for transferred listings should allow listed issuers to make decisions about listing based on factors such as listing costs and the quality of markets. The Commission believes that automatic symbol portability is preferable to allowing an issuer's former listing exchange to retain the rights to a symbol once a listed issuer has transferred to another market, particularly as the former market likely would not reuse the symbol in the near term without causing undue investor confusion. Therefore, the Commission finds that the automatic symbol portability provision in the Five-Characters Plan is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets, and assures fair competition among exchange markets, consistent with the Section 11A(a)(1)(C) of the Act.¹¹⁷

5. Allocation of Plan Costs

The two proposed plans also differ with respect to the allocation of the initial development costs and ongoing costs of the plan. The proposed Three-Characters Plan would have all initial and ongoing costs shared equally among all the parties.

¹¹⁷ 15 U.S.C. 78k-1(a)(1)(C).

The Five-Characters Plan provides that the parties would share the initial development costs pro-rata based on the number of symbols initially reserved by each party. Any new party that joins the plan would also be responsible for a pro-rata portion of the initial development costs based upon the number of symbols initially reserved by such new party during the first twelve months of the new party's membership in the plan.¹¹⁸ The Five-Characters Plan also provides that the continuing costs and expenses of ISRA would be shared among the parties pro-rata based on the number of additional symbols reserved in each calendar year, estimated quarterly.¹¹⁹ In addition, under the Five-Characters Plan, the Policy Committee¹²⁰ may develop alternative cost-allocation methodologies for special development projects outside the initial development period. One commenter expressed support for this provision in the Five-Characters Plan as it would require exchanges to bear the costs of the system only to the extent they reserve and use symbols.¹²¹

The Commission finds that the Five-Characters Plan's provision for the allocation of costs will further the purposes of the Act in that it establishes an equitable means of allocating costs among the plan parties.¹²² The SROs supportive of the Three-Characters Plan anticipate that certain SROs, such as NYSE and Amex, would likely use the reservation system more than

¹¹⁸ See Section V(a) of the Five-Characters Plan.

¹¹⁹ See Section V(b) of the Five-Characters Plan.

¹²⁰ See *infra* notes 125-137 and accompanying text.

¹²¹ See Adams Letter.

¹²² One commenter argued, based on its belief that the issuers have rights to the symbols, that issuers should pay for the plan in accordance with the Regulation NMS market data revenue formula. See Angel Letter II at 3. The Commission notes, however, that the listing markets charge initial and ongoing listing fees to issuers listed on their markets, and therefore issuers are likely to pay indirectly.

other SROs.¹²³ It is the proposed Five-Characters Plan, however, that recognized this likelihood by allocating costs based on an SRO's use of the reservation system. Moreover, the parties' usage of the system will likely vary as markets compete for listings. Under the Five-Characters Plan, the cost allocation will similarly vary with any changes in use of the reservations. Therefore, the Commission finds that the cost allocation provision of the Five-Characters Plan is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets, and assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.¹²⁴

B. Similar Provisions Among the Proposed Plans

Other than the areas of substantive differences between the proposed plans discussed above, the remaining provisions of the Five-Characters Plan are substantially similar or identical to parallel provisions in the proposed Three-Characters Plan. The Commission believes that such similarities evidence a broad consensus among the SROs as to the overall framework and most of the main provisions of the Five-Characters Plan, a result of the collaboration by and negotiations between the SROs following the issuance of the February 2005 Letters to discuss the terms of an appropriate national market system plan for the reservation and allocation of securities symbols. Therefore, the Commission believes that these aspects of the Five-Characters Plan represent a fair and workable symbol reservation system for the prospective parties to the plan.

The following section discusses the remaining provisions of the Five-Characters Plan, which are substantially similar or identical to provisions in the proposed Three-Characters Plan.

¹²³ This expectation is the basis for the proposed Three-Characters Plan providing more reservations to NYSE and Amex than the other SROs. See NYSE Letter at 6.

¹²⁴ 15 U.S.C. 78k-1(a)(1)(C).

1. Administration of ISRA

The Five-Characters Plan would establish a body composed of the signatory SROs called the Intermarket Symbols Reservation Authority.¹²⁵ A Policy Committee, consisting of representatives of each of the signatory SROs, would administer the ISRA and, unless expressly provided otherwise in the plan, would make all policy decisions on behalf of the ISRA in furtherance of the functions and objectives of the ISRA under the Act and the plan. Specifically, the Policy Committee would: (1) oversee the operation of the Symbol Reservation System; (2) make all determinations pertaining to contracts with parties to the plan and persons who provide goods or services to the ISRA; and (3) determine all other questions pertaining to the planning, developing, and operating of the ISRA, including those pertaining to budgetary or financial matters.¹²⁶

One voting member and one alternate voting member representing each party would compose the Policy Committee.¹²⁷ Each party would have one vote on all matters voted upon by the Policy Committee and actions of the ISRA under each plan would be authorized by a majority vote of the Policy Committee members, subject to Commission approval when required by applicable securities law.¹²⁸ Authorized actions under the plan would be binding upon all the parties. However, an aggrieved party may present contrary views to any regulatory body or in any other appropriate forum.¹²⁹ A meeting of the Policy Committee would be held at least

¹²⁵ See Section II(a) of the Five-Characters Plan.

¹²⁶ See Section II(b) of the Five-Characters Plan.

¹²⁷ See Section II(c) of the Five-Characters Plan.

¹²⁸ See Section II(d) of the Five-Characters Plan.

¹²⁹ Id.

annually and other meetings would be held as determined by the Policy Committee, subject to the notice provisions for regular and special meetings and the organization of the meetings.¹³⁰

The Commission finds that the provisions of the Five-Characters Plan relating to the establishment of the ISRA and the administration of the ISRA by the Policy Committee will further the purposes of the Act and should assure fair competition between exchange markets, consistent with Section 11A(a)(1)(C) of the Act.¹³¹ The Commission believes that, because the Policy Committee is composed of one voting member representing each party, the each party would be limited in its ability to act in an anti-competitive manner.¹³²

Two commenters have recommended the adoption of a formal dispute resolution mechanism for the plan.¹³³ The Commission notes that Section 11A of the Act and Rule 608 require national market system plans to describe, to the extent applicable, the method by which disputes in connection with the operation of the plan will be resolved.¹³⁴ The Five-Characters Plan specifies a dispute resolution mechanism with respect to the initial reservation of securities symbols, where disagreements are most likely to arise.¹³⁵ With regard to the operation of the plan following the initial reservation period, the Commission believes that the likelihood of disputes among the parties arising under the plan is minimal because the plan specifies the methods relating to submitting reservation requests, requesting releases of symbols, the operation of waiting lists, the reuse of symbols, and all other aspects of reserving and allocating

¹³⁰ See Section II(e) of the Five-Characters Plan.

¹³¹ 15 U.S.C. 78k-1(a)(1)(C).

¹³² See Section II(c) of the Five-Characters Plan.

¹³³ See Angel Letter I at 11. See also Issuer Advisory Letter at 3.

¹³⁴ See 17 CFR 242.608(a)(5)(iv).

¹³⁵ See Section IV(b)(2) of the Five-Characters Plan.

symbols.¹³⁶ To the extent that disputes nonetheless arise and the parties are not able to resolve them, the Commission notes that under Rule 608(d) under the Act, the Commission has broad discretion to review, either on its own motion or upon the application of any person aggrieved thereby, actions taken (or failures to act) by any person in connection with an effective national market system plan.¹³⁷ Therefore, the Commission finds that the Five-Characters Plan's provision on dispute resolution is appropriate in the public interest.

2. The Processor for the Symbol Reservation System

Under the Five-Characters Plan, the ISRA would delegate the operation of the Symbol Reservation System to an independent third party (the "Processor") and would enter into contracts with the Processor relating to the operation of the Symbol Reservation System.¹³⁸ The Processor would receive reservation requests from the parties and reserve and allocate symbols among the parties in accordance with the terms of the plan.¹³⁹ To this end, the Processor would create and maintain a symbol reservation database.¹⁴⁰ Parties to the Five-Characters Plan would determine the method and frequency of the evaluation of the Processor at a later time.

The Commission finds that provisions of the Five-Characters Plan relating to the Processor promote the maintenance of fair and orderly markets by ensuring that a symbol is used for only one security. The capacity and capability of the Processor to completely maintain

¹³⁶ See Sections IV(b)(6), IV(c), and IV(d), respectfully, of the Five-Characters Plan.

¹³⁷ See Rule 608(d)(1).

¹³⁸ See Section III of the Five-Characters Plan.

¹³⁹ One commenter suggested that the Commission could assign the rights to unused ticker symbols directly to issuers by auction. See Angel Letter III at 4-5. The Commission believes that the proposed allocation of symbol reservation rights using the Processor under the Five-Characters Plan is in furtherance of the purposes of the Act.

¹⁴⁰ See *infra* notes 175-178 and accompanying text for further discussion of the plan provisions on the database.

processes and systems for the reservation and allocation of symbols under the plan is integral to this plan's effective implementation. Accordingly, the Commission expects the parties to the Five-Characters Plan to regularly evaluate the Processor's performance.

3. Symbol Reservation System

The Five-Character Plan provides that, within 30 days of the Commission's approval of the Five-Characters Plan (unless such time is extended by the Policy Committee), a participant in the plan may submit to the Processor requests for the initial reservation of symbols.¹⁴¹ A party may reserve symbols for: (i) the listing of common stock or any other security, including options; (ii) with respect to four- and five-character symbols,¹⁴² the trading of any over-the-counter security; (iii) the dissemination of a securities index or other index information; or (iv) any other purpose authorized by a majority vote.

To provide sufficient time for SROs to join the plan and for the plan participants and the Processor to implement the Symbol Reservation System, the Commission is modifying Section IV(b)(1) of the plan to provide that the initial symbol reservation process will begin 60 days after the Commission's approval of the plan and will ensue for a 30-day period.¹⁴³

¹⁴¹ See Section IV(b)(1) of the Five-Characters Plan.

¹⁴² See discussion *supra* notes 85-89 and accompanying text relating to limiting the use of securities symbols by issuers traded other than on national securities exchanges to four- and five-character symbols.

¹⁴³ To conform to the Commission's modification of the initial reservation process, the Commission is also modifying Section IV(c)(1) of the Five-Characters Plan to clarify that the waiting list procedure applies during the initial reservation period rather than within 30 days of the effective date of the plan.

a. Perpetual and Limited-Time Reservations

As noted earlier, under the Five-Characters Plan, a party may reserve a limited number of symbols in perpetuity.¹⁴⁴ There would be two perpetual reservation lists for each party—one list for one-, two-, and three-character symbols and one list for four- and five-character symbols. Each party could reserve up to 20 one-, two-, or three-character symbols as perpetual reservations, and up to 20 four- or five-character symbols as perpetual reservations.

A party that requests perpetual reservations for more symbols than permitted would be required to place its symbols requests in priority ranking. A party could not add symbols to its perpetual reservation list after the initial reservation process, except when reserving a symbol for reuse.¹⁴⁵

Symbols could also be reserved for a limited-time period of 24 months.¹⁴⁶ Each party would have two limited-time reservation lists—one list for one-, two-, and three-character symbols and one list for four- and five-character symbols. Each party could reserve up to 1,500 symbols under the one-, two-, or three-character limited-time reservations list and up to 1,500 symbols under the four- or five-character limited-time reservations list. A party may not make a limited-time reservation with respect to a particular symbol unless the party has a reasonable basis to utilize the symbol within the next 24 months.

As with perpetual reservation requests, a party that requests limited-time reservations for more symbols than permitted would be required to place its symbols requests in priority ranking.

¹⁴⁴ See Section IV(b)(1)(A) of the Five-Characters Plan.

¹⁴⁵ See *infra* notes 166-174 and accompanying text for discussion of the plan provision on reusing a symbol.

¹⁴⁶ See Section IV(b)(1)(B) of the Five-Characters Plan.

b. Processing Reservation Requests

If there is only one party that claims a legacy reservation, such party would have priority over other SROs to retain its reservation of that symbol.¹⁴⁷ If more than one party lays claim to a single legacy reservation, the Five-Characters Plan provides a process for resolving such claims.¹⁴⁸ This process is as follows: First, the Processor would notify all such parties of the conflicting claims. Then the parties would have five business days to reach a mutually acceptable agreement as to which party would be permitted to reserve the symbol. In the absence of an agreement, the Policy Committee would resolve the issue by a majority vote of the parties not claiming the symbol. Where there is no agreement but the Policy Committee is able to determine which party has the earliest proper claim to such symbol, the plan would require it to resolve the disagreement in favor of such party. In the event of a tie vote, the Policy Committee would establish a random order of the parties to determine which party may reserve the symbol.¹⁴⁹ The Commission believes that the plan provisions with respect to resolving legacy reservation claims are consistent with Rule 608 under the Act which requires the plan be

¹⁴⁷ See supra notes 97-104 and accompanying text for a discussion of the legacy reservation process.

¹⁴⁸ See Section IV(b)(2)(B) of the Five-Characters Plan.

¹⁴⁹ See id. Because the "random order" process was not described in the proposed plans, the Commission requested comment about it in the Symbology Notice. No commenters specifically responded to this request. The Commission believes that it is necessary and appropriate in the public interest to have the Policy Committee determine the appropriate interpretation and application of the plan provisions relating to the "random order" process. However, the Commission believes that the Policy Committee must establish a random order process that will not be susceptible to gaming by parties to the plan. For example, the Policy Committee should not use a system which would allow SROs to know ahead of time if they are the party next in line to reserve a given symbol. To the extent that any of the parties to the plan are aggrieved by the determination of the Policy Committee in this regard, the Commission notes that it has the authority to hear appeals by such parties. See Rule 608(d), 17 CFR 242.608(d); see also supra notes 133-137 and accompanying text.

necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

For the reservation of symbols other than legacy reservations, if only one party seeks to reserve a symbol, then the Processor would reserve such symbol for that party.¹⁵⁰ If multiple parties seek to reserve a symbol, the Processor would reserve the symbol based on a random ordering established by the Policy Committee.¹⁵¹ If a symbol is not available for reservation, the Processor would place the requesting party on a wait list.¹⁵² The Processor would process a party's symbol reservation requests by first reserving symbols up to the party's limit for its perpetual reservations list and then reserving the remaining requested symbols up to the limit for its limited-time reservations.¹⁵³

After the initial reservation process, if a party submits to the Processor a request for a limited-time reservation and the symbol is available, the Processor would reserve such symbol, provided that the party has not already reached its maximum number of allowed limited-time reservations.¹⁵⁴ If a symbol requested is not available, the Processor would place the requesting party on the waiting list for such symbol.¹⁵⁵

¹⁵⁰ See Section IV(b)(2)(C) of the Five-Characters Plan.

¹⁵¹ See Section IV(b)(2)(D) of the Five-Characters Plan. See also *supra* note 149.

¹⁵² See Section IV(b)(2)(E) of the Five-Characters Plan. See also *infra* notes 162-165 and accompanying text for a discussion on the waiting list plan provision.

¹⁵³ See Section IV(b)(2)(F) of the Five-Characters Plan.

¹⁵⁴ See Section IV(b)(3)(A) of the Five-Characters Plan.

¹⁵⁵ See Section IV(b)(3)(B) of the Five-Characters Plan.

c. Non-Use or Release of Symbols Within Time Period

The Processor would release any limited-time reservation symbols not used within the 24-month time period.¹⁵⁶ A party could also voluntarily release a reserved symbol. In either case, upon the release of a symbol, the Processor would notify the parties on the waiting list, if any, of the symbol's availability. If there is no waiting list or if no party on the waiting list elects to reserve such symbol, the Processor would notify all parties to the plan of the availability of the symbol. Then, if more than one party requests the reservation of such symbol within two business days of the notice, the Processor would assign the symbol to one party and place the other parties on the waiting list pursuant to a random order of priority established by the Policy Committee.¹⁵⁷

d. Request for Release of a Symbol

If a party has an immediate need to use a symbol that another party has reserved, the requesting party would ask the party that reserved the symbol and any other parties on the waiting list whether such parties would be willing to release the reserved symbol.¹⁵⁸ If the parties do not agree to release the symbol, the requesting party would not obtain the reserved symbol. If the parties do agree to release the symbol, the requesting party could include such symbol as one of its limited-time reservations. If the requesting party does not use a released symbol within the 24-month period, absent the consent of all parties initially required to be

¹⁵⁶ See Section IV(b)(5) of the Five-Characters Plan.

¹⁵⁷ See *supra* note 149.

¹⁵⁸ See Section IV(b)(6) of the Five-Characters Plan.

contacted, the reservation and waiting list priority in effect when the requesting party first made its request for the release of the symbol would again be in effect.¹⁵⁹

e. Reserving Symbols after Reaching Maximum Number of Permitted Reservations

Paragraph (5) of Section IV(b) of the proposed plans states that a party may “redesignate” a security in certain situations. Specifically, following the initial reservation process, if a party wishes to add a symbol to its limited-time reservations and such party already has the maximum number of reservations permitted, such party “must voluntarily release or redesignate a symbol, as described in subparagraph (3)(A) above, before it can reserve the assigned symbol.”¹⁶⁰

Similarly, if a party has an immediate need to use a symbol that another party has reserved, the requesting party would ask the party that reserved the symbol, and any other parties on the waiting list, whether such parties would be willing to release the reserved symbol.¹⁶¹ Then, under paragraph (6) of Section IV(b) of the Five-Characters Plan, if the requesting party is already at the maximum number of limited-time reservations, the party could either surrender or redesignate a symbol as described in subparagraph (3)(A) of the Plan, before it can reserve the assigned symbol.

The Commission requested comment as to the meaning of “redesignating” a symbol when a party is at the maximum number of limited-time reservations, but did not receive any comments. Because subparagraph (3)(A) of Section IV(b) of either plan does not discuss redesignating symbols, the Commission finds it is necessary and appropriate in the public

¹⁵⁹ See *infra* notes 160-161 and accompanying text for a discussion of “redesignation” relating to requests for release of symbols under Section IV(b)(6) of the Five-Characters Plan, which the Commission is modifying.

¹⁶⁰ See Section IV(b)(5) of the proposed plans.

¹⁶¹ See Section IV(b)(6) of the Five-Characters Plan.

interest to remove the reference to “redesignate” in paragraphs (5) and (6) of Section IV(b) of the Five-Characters Plan. Thus, if a requesting party is already at the maximum number of limited-time reservations when reserving a requested symbol, such party would have to surrender another symbol in order to reserve the requested symbol.

f. Waiting Lists

When one or more parties request to reserve a symbol that another party has reserved, the Processor would place such parties on the waiting list for that symbol.¹⁶² The waiting list would be based on time priority—that is, the earliest request would have precedence. However, as proposed, the Five-Characters Plans states that, if more than one party seeks to use a symbol already in use within either 30 days of the effective date of the plan or two business days of notice of a symbol’s availability, the Policy Committee would establish a random order of such parties to determine priority on the waiting list.¹⁶³

When a symbol becomes available, the Processor would notify the party with priority on the waiting list.¹⁶⁴ Such party would then have two business days to reserve that symbol; otherwise, the Processor would repeat the process as necessary with all parties on the waiting list, in order of priority. The maximum number of symbols for which a party may be on the waiting list at any time would be 100 symbols.¹⁶⁵

¹⁶² See Section IV(c)(1) of the Five-Characters Plan.

¹⁶³ To ensure consistency with the Commission’s modification of the initial reservation process timeline (see discussion supra notes 141-143 and accompanying text), the Commission is also modifying Section IV(c)(1) of the Five-Characters Plan to clarify that the waiting list procedure applies during the initial reservation process.

¹⁶⁴ See Section IV(c)(2) of the Five-Characters Plan.

¹⁶⁵ See Section IV(c)(3) of the Five-Characters Plan.

g. Reuse of a Symbol and Portability of Symbols in Use

If a party ceases to use a symbol, such party automatically reserves that symbol, notwithstanding any other limits on the number of reserved symbols under the plan.¹⁶⁶

However, there is an exception to this automatic reservation right when an issuer transfers its listing from one SRO to another. In this case, the SRO to which a listing is transferred would have the rights to that issuer's symbol.¹⁶⁷ One commenter, FINRA, noted that Section (IV)(f) of the Five-Characters Plan allows the portability of a symbol only when an issuer "lists" on a new SRO.¹⁶⁸ FINRA noted that this language may create some ambiguity in the case when a security delists from an exchange and is traded on an SRO's OTC equity market. A strict interpretation of the text of Section (IV)(f) of the Five-Characters, as proposed, could lead to the conclusion that an issuer that delists from an exchange and trades on an OTC market would lose its rights to its original symbol. FINRA asked that this provision of the Five-Characters Plan be amended to explicitly provide that the portability rights for an issuer transferring its listing to another exchange also be extended to issuers that delist from an exchange and trade on an OTC equity market.

NYSE, however, argued that securities have always lost their listed symbols after delisting for failure to meet continue listing standards, and that this practice is desirable because it alerts investors as to the failure of the issuer to meet those standards.¹⁶⁹ NYSE noted that, otherwise, investors might mistake the delisted security for a security that continues to meet exchange listing standards. The Commission agrees with NYSE's comments with respect to the

¹⁶⁶ See Section IV(d) of the Five-Characters Plan.

¹⁶⁷ See Section IV(f) of the Five-Characters Plan.

¹⁶⁸ See FINRA Letter at 2.

¹⁶⁹ See NYSE Letter at 7.

potential for investor confusion and hereby clarifies that issuers that delist from an exchange and trade on an OTC equity market shall not have portability rights for their original symbol.¹⁷⁰ In such cases, Section IV(d) of the Five-Characters Plan would apply and the SRO from which the issuer delisted would automatically have such symbol reserved. At the same time, the Commission believes that the near-term reuse of a delisted security's original symbol while the delisted security trades on an OTC equity market could cause investor confusion.¹⁷¹ A symbol could not be reused by a party to identify a new security unless the party reasonably determines that such use would not cause investor confusion.¹⁷²

A symbol being reused pursuant to this provision could be reserved as a perpetual reservation if the party has not yet reserved the full number of perpetual reservations available to

¹⁷⁰ As discussed above, see supra notes 85-89 and accompanying text, securities that trade solely over-the-counter, which are not subject to listing standards approved by the Commission, should be clearly distinguished from exchange-listed securities. The Commission believes that a change to an issuer's symbol following delisting is desirable to inform investors of the change in status of the issuer. Therefore, the Commission believes that it is appropriate to prohibit symbol portability rights for delisted issuers that trade on an OTC equity market with security symbols of any length, including symbols with four- or five-characters.

¹⁷¹ See Section IV(d) of the Five-Characters Plan (providing that a symbol may not be reused by a party to the plan to identify a new security, other than the security that has been trading under such symbol, unless the party reasonably determines that such use would not cause investor confusion).

¹⁷² See Section IV(d) of the Five-Characters Plan. One commenter stated that symbols should not be reassigned until six months after an issuer ceases to use such symbol in order to avoid customer confusion. See Angel Letter I at 9. The Commission notes that this plan provision, without providing a specific timeframe, prohibits an exchange from assigning a reused symbol at any time if doing so would cause investor confusion. The Commission does not believe that specifying a six-month timeframe to be appropriate as such a time period may, in some cases, be too short and the reuse of a security symbol in such cases may still cause investor confusion. Although the passage of time is one key factor, other factors may need to be considered as well. For example, whether the original issuer's securities are traded over-the-counter or have ceased trading altogether is another factor in evaluating the potential for confusion with regards to the original listing symbol.

it.¹⁷³ Otherwise, such symbol would be reserved as a limited-time reservation and the additional symbol could exceed the limit of the maximum number of limited-time reservations permitted to a party under the plan.

The Commission finds that the foregoing symbol reservation system provisions of the Five-Characters Plan will further the purposes of the Act and that, in particular, they should maintain fair and orderly markets to assure fair competition between exchange markets, consistent with Section 11A(a)(1)(C) of the Act.¹⁷⁴

4. Database

Under the Five-Characters Plan, the Processor would create and maintain a symbol reservation database.¹⁷⁵ The database would show all symbols currently in use and the party using such symbols.¹⁷⁶ A party would be required to notify the Processor when the party begins using a reserved symbol. In addition, the database would show all symbols reserved on the perpetual reservations and limited-time reservations lists, including the reserving party and the expiration date for limited-time reservations.¹⁷⁷ The database would also show the waiting list and the priority order of the waiting list for each symbol.¹⁷⁸

The Commission finds that the provisions of the Five-Characters Plan relating to the

¹⁷³ Section IV(d) of the Five-Characters Plan also provides that a party could move a symbol from its perpetual reservations list to its limited-time reservations list in order to place the symbol being reused on its perpetual reservations list.

¹⁷⁴ 15 U.S.C. 78k-1(a)(1)(C).

¹⁷⁵ See Section IV(e) of the Five-Characters Plan. One commenter has expressed an interest in acting as the Processor for the adopted plan. See SFB Letter. Another commenter suggested that FINRA be the Processor. See Issuer Advisory Letter at 3.

¹⁷⁶ See Section IV(e)(1) of the Five-Characters Plan.

¹⁷⁷ See Section IV(e)(2) of the Five-Characters Plan.

¹⁷⁸ See Section IV(e)(3) of the Five-Characters Plan.

symbols database will further the purposes of the Act because the database of symbols is essential to ensure that a symbol is used to identify only one security and therefore will help in the maintenance of fair and orderly markets.

5. Confidentiality

The Processor would maintain all information received from the parties in strictest confidence and the only information that the Processor would make available to the parties is the symbol reservation database.¹⁷⁹ The Processor would not make the symbol reservation database available to any person except the Commission or the parties, unless otherwise required by applicable law.

One commenter questioned the need for confidentiality of the information in this database, arguing that issuers may want to know if a symbol is available to reserve it in advance.¹⁸⁰ The Commission does not believe that the Act imposes any requirement to make this information available publicly.¹⁸¹ Therefore, the Commission finds that the confidentiality provisions of the Five-Characters Plan are appropriate in the public interest.

6. Term of Plan Withdrawal – Non-transferability of Rights under the Plan

A party wishing to withdraw from the plan would be required to provide at least six months prior written notice to the other parties.¹⁸² The withdrawing party would remain liable for its proportionate share of costs and expenses during the time it was a party to the plan, but

¹⁷⁹ See Section VI of the Five-Characters Plan.

¹⁸⁰ See Angel Letter II at 5.

¹⁸¹ The Commission also notes that the confidentiality requirement under the plan applies only to the Processor, and that nothing under the plan requires confidentiality on the part of the parties. Therefore, to the extent an issuer wants to know if a symbol is available, it could request such information from one of the parties.

¹⁸² See Section VII of the Five-Characters Plan.

would have no further obligations after the withdrawal.

In addition, an SRO would cease to be a party to the plan when it ceases to maintain a facility for the quoting and trade reporting of securities transactions or ceases to use symbols subject to the plan, except upon the agreement of the remaining parties.¹⁸³ To be approved as a continuing party, the plan would require a majority vote of the remaining parties.

The right of a party to participate in the Symbol Reservation System under the plan is not transferable without the consent of the other parties.¹⁸⁴ However, if a party is subject to a merger, combination, or other reorganization or the sale of all or substantially all of its assets, including its registration as an SRO, the surviving entity would automatically become subject to the plan and could use the Symbol Reservation System.

The Commission finds that the provisions of the Five-Characters Plan relating to a party withdrawing from the plan will further the purposes of the Act because, by specifying a party's terms of withdrawal, the plan helps to ensure a fair and orderly market.

7. Amendments to the Plan

The plan may be amended from time to time when authorized by the affirmative vote of all the parties, subject to any required approval of the Commission.¹⁸⁵ One commenter questioned the efficacy of requiring unanimous approval for plan changes.¹⁸⁶ Although the Commission agrees that the plan's unanimity provision with respect to amendments may, in some cases, not be the most efficient method, the Commission notes that the signatory SROs to

¹⁸³ See Section I(d) of the Five-Characters Plan.

¹⁸⁴ See Section VII of the Five-Characters Plan.

¹⁸⁵ See Section VIII of the Five-Characters Plan.

¹⁸⁶ See Angel Letter II at 4. The Commission notes, however, that other national market system plans have similar provisions (see, e.g., the Options Linkage Plan at www.optionsclearing.com/initiatives/ola/ola.jsp).

both proposed plans agreed to this required voting methodology and the Commission is reluctant to require a different voting methodology for plan amendments at this time.

The Commission finds that the provision of the Five-Characters Plan relating to amendments to the plan is in furtherance of the purposes of the Act in that it specifies the method by which the plan may be amended. The Commission will monitor this process to determine whether the unanimity provision is used for anti-competitive purposes or for any other purpose not consistent with the Act. The Commission notes that SROs proposing an amendment to a national market system plan must file such amendment with the Commission pursuant to Rule 608 under the Act.¹⁸⁷ The Commission also notes that it has the authority to amend any effective national market system plan under Rule 608 under the Act.¹⁸⁸

8. Development and Implementation Phases of the Plan

The Five-Characters Plan states that it would be implemented upon the Commission's approval. Although the letters accompanying both proposed plans state that the parties will determine the development and implementation phase later or in accordance to a timetable to which the parties and the Processor will agree,¹⁸⁹ the plans as submitted to the Commission both provided that the parties would commence the initial reservation process upon Commission approval.¹⁹⁰ As discussed above, however, the Commission has modified the Five-Characters Plan to commence the initial reservation process 60 days from the Commission's approval of the plan.¹⁹¹ The Commission has made this modification in order to give the SROs that are not

¹⁸⁷ See 17 CFR 242.608(a).

¹⁸⁸ See 17 CFR 242.608(a)(2) and (b)(2).

¹⁸⁹ See Paragraph 4 of the letters accompanying each proposed plan.

¹⁹⁰ See Sections IV(b)(1) of both proposed plans.

¹⁹¹ See discussion supra notes 141-143 and accompanying text.

signatories to the Five-Characters Plan time to obtain the necessary approvals to join the approved plan. The Commission believes 60 days is a reasonable period of time to obtain such approval. The Commission notes that this approval order only requires SROs that choose to list securities or designate securities for quoting on a quotation medium to join the plan (and all such SROs were party to one of the two submitted plans); those SROs that do not intend to list or designate securities for quoting are not required to join the plan.¹⁹²

The Commission finds that the modified implementation provision of the Five-Characters Plan will further the purposes of the Act because it allots additional time for non-signatory SROs to join the approved plan.

9. Terms and Conditions of Access

Any SRO that meets the eligibility standards of the plan may become a party thereto by signing a current copy of the plan and paying to the other parties a share of the aggregate development costs previously paid by such parties to the Processor.

The Commission finds that this provision of the Five-Characters Plan will further the purposes of the Act in that it should assure fair competition among exchange markets, in particular new SROs, consistent with Section 11A(a)(1)(C)(ii) of the Act.¹⁹³

IV. Conclusion

IT IS HEREBY ORDERED, that pursuant to Section 11A(a)(3)(B) of the Act¹⁹⁴ and Rule 608,¹⁹⁵ that the Five-Characters Plan submitted by CHX, FINRA, Nasdaq, NSX, and Phlx, as

¹⁹² See supra notes 68-70 and accompanying text.

¹⁹³ 15 U.S.C. 78k-1(a)(1)(C)(ii).

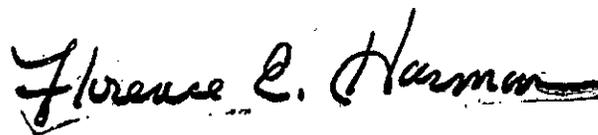
¹⁹⁴ 15 U.S.C. 78k-1(a)(3)(B).

¹⁹⁵ 17 CFR 242.608.

modified herein, is approved and declared effective,¹⁹⁶ and that CHX, FINRA, Nasdaq, NSX, and Phlx are authorized to act jointly to implement the Five-Characters Plan as a means of facilitating a national market system:

IT IS HEREBY FURTHER ORDERED, that, within 60 days from the date of this approval order, any SRO that chooses to list securities on its market or to designate securities for quoting on a quotation medium must join the Five-Characters Plan, as modified herein,¹⁹⁷ and act jointly with other parties to the plan to implement the approved Five-Characters Plan.¹⁹⁸

By the Commission.



Florence E. Harmon
Acting Secretary

¹⁹⁶ The approved plan is attached here as Appendix A.

¹⁹⁷ Id.

¹⁹⁸ See 17 CFR 242.608(b)(2).

APPENDIX A

NATIONAL MARKET SYSTEM PLAN FOR THE SELECTION AND RESERVATION OF SECURITIES SYMBOLS

The self-regulatory organizations ("SROs") named below as the parties to this Plan (as defined below), and any other SROs that may subsequently become parties to this Plan, maintain facilities for the quoting and trade reporting of securities that: (i) are NMS securities as currently defined in Rule 600(a)(46) under the Securities Exchange Act of 1934; and (ii) any other equity securities quoted, traded and/or trade reported through an SRO facility (collectively, "Plan Securities"). These SROs have determined that in order to enhance the effectiveness and efficiency of the national market system and to provide for the fair competition between the SROs, they should establish a uniform system for the selection and reservation of securities symbols (the "Symbol Reservation System"). These SROs therefore have jointly developed and agreed upon the following Plan for this purpose, and have agreed to file it with the Securities and Exchange Commission ("Commission") as a national market system plan in accordance with and subject to Rule 608 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The term "Plan" as used herein shall mean this plan as from time to time amended in accordance with the provisions hereof. As of 90 days from the Commission's approval of this Plan, this Plan will be the exclusive means of allocating and using symbols of 1, 2, 3, 4, or 5 characters in length, and there will be no difference between capital and lowercase letters under this Plan.

The Intermarket Symbols Reservation Authority ("ISRA") shall mean the parties to the Plan acting jointly pursuant to the terms of the Plan. Pursuant to Section 11A(a)(3)(B) of the Exchange Act, the Commission's approval of the Plan and any amendments thereto shall authorize and require the parties to the Plan to act jointly with respect to matters as to which they share authority hereunder in planning, developing and operating the systems and facilities used for this purpose, provided that such joint action shall be limited to circumstances in which it is necessary in order to fulfill the purposes and objectives as stated in the Plan.

I. Parties

(a) The parties to the Plan are the following SROs:

Chicago Stock Exchange, Inc. ("CHX"), registered as a national securities exchange under the Exchange Act and having its principal place of business at 440 South LaSalle Street, Chicago, IL 60605.

Financial Industry Regulatory Authority, Inc., registered as a national securities association under the Exchange Act and having its principal place of business at 1735 K Street, N.W., Washington, D.C. 20006.

The Nasdaq Stock Market LLC ("NASDAQ") registered as a national securities exchange under the Exchange Act and having its principal place of business at One Liberty Plaza, New York, N.Y., 10006.

National Stock Exchange, Inc. ("NSX"), registered as a national securities exchange under the Exchange Act and having its principal place of business at 440 South LaSalle Street, Suite 2600, Chicago, IL 60605.

Philadelphia Stock Exchange, Inc. ("PHLX"), registered as a national securities exchange under the Exchange Act and having its principal place of business at 1900 Market Street, Philadelphia, Pennsylvania 19103.

(b) Each of the parties represents to the other parties that (i) at any time it seeks to reserve symbols using 1, 2 or 3 characters, it will have the actual technical and physical capability through its facilities to immediately quote and trade report in Plan Securities using 1, 2 or 3 characters, and (ii) at any time it seeks to reserve symbols using 4 or 5 letter characters, it will have the actual technical and physical capability through its facilities to immediately quote and trade report trades in Plan Securities using 4 or 5 characters. This Plan shall not apply in any respect to any suffix or special conditional identifier that may follow a "root" symbol of 1, 2, 3, 4 or 5 characters in length.

(c) Any other SRO that maintains a market for the listing or trading of Plan Securities, in accordance with rules approved by the Commission, which securities are identified by one, two or three character symbols, on the one hand, or four or five character symbols, on the other hand, in each case prior to any suffix or special conditional identifier ("Applicant"), may become a party to the Plan. An Applicant may become a party to the Plan by signing a current copy of the Plan and paying to the other parties a proportionate share of the aggregate development costs previously paid by such parties to the Processor (as defined in Section III below), which aggregate development costs totaled \$[amount to be determined after Plan effectiveness and implementation, and filed with the Commission as an amendment to the Plan].

(d) Subject to Section VII below concerning the continuing liability of former parties for certain obligations under the Plan, an SRO that is a party to the Plan shall cease to be a party at such time as it ceases to maintain a facility for the quoting and trade reporting of securities transactions or ceases to use symbols subject to the Plan, unless such SRO asks to continue as a party and the other parties to the Plan, by a majority vote, approve such SRO to continue as a party.

II. Administration of ISRA

(a) ISRA Policy Committee. ISRA shall be administered by a Policy Committee, which shall be constituted as provided in paragraph II(c), below.

(b) Authority of Policy Committee. Except as otherwise expressly provided in the Plan, the ISRA Policy Committee shall make all policy decisions on behalf of ISRA in furtherance of the functions and objectives of ISRA under the Exchange Act and under the Plan, including but not limited to the following:

(1) overseeing the operation of the Symbol Reservation System and making all administrative decisions necessary with respect to the operation of the system in accordance with the Plan;

(2) making all determinations pertaining to contracts with parties to the Plan or with other persons who provide goods or services to ISRA;

(3) determining all other questions pertaining to the planning, developing and operating of ISRA, including those pertaining to budgetary or financial matters.

(c) Composition and Selection of Policy Committee. The Policy Committee shall consist of one voting member representing each party and one alternate voting member representing each party, with each alternate having a right to vote only in the absence of that party's voting member. Each of the voting and alternate voting members of the Policy Committee shall be appointed by the party that he or she represents, and shall serve at the will of the party appointing such member.

(d) Action of Policy Committee. Each of the parties shall have one vote on all matters voted upon by the Policy Committee and, except as otherwise provided herein, action of ISRA under the Plan shall be authorized by the affirmative vote of a majority of the members of the Policy Committee, subject to the approval of the Commission whenever such approval is required under applicable provisions of the Exchange Act and the rules of the Commission thereunder. Action authorized in accordance with the Plan shall be binding upon all of the parties, without prejudice to the rights of any party to present contrary views to any regulatory body or in any other appropriate forum.

(e) Meetings of the Policy Committee. Regular meetings of the Policy Committee may be attended by each party's voting representative or alternate voting representative, by one or more nonvoting representatives of the parties, and by such other persons that the Committee may invite to attend. Meetings of the Policy Committee shall be held at least annually and at such other times as shall from time to time be determined by the Policy Committee, on not less than ten (10) business days' notice. Special meetings of the Policy Committee may be called upon the request of two or more parties on not less than two (2) business days' notice. At each meeting of the Policy Committee, the Committee shall designate one of the representatives of the parties to preside as Chairman of the meeting and shall designate a person in attendance to act as Secretary to record the minutes thereof. The location of the regular and special meetings of the Policy Committee shall be determined by the Committee. Members of the Policy Committee may be present at a meeting by conference telephone or other electronic means that enables each of them to hear and be heard by all others present at the meeting, and action may be taken without a meeting if all of the members entitled to vote consent thereto in writing.

III. Performance of Functions

As determined by its Policy Committee, ISRA will delegate the operation of the Symbol Reservation System to an independent third party (the "Processor"), and will enter into contracts with such party describing the functions to be performed by it and the service levels and other

terms related thereto. The Processor shall be required to agree that any nonpublic information that becomes known to it shall be held in confidence, except as it may be shared with the Commission or other appropriate governmental regulatory authorities or as otherwise required by applicable law.

IV. The Symbol Reservation System

(a) Scope of the Symbol Reservation System. The Symbol Reservation System shall cover the allocation of all symbols used to identify Plan Securities. This Plan covers only the "root" symbol to be disseminated, which is the one through five character symbol, in each case prior to any suffix or special conditional identifier.

(b) Reservation and Use of Symbols.

(1) Submission of Initial Reservation Requests. Beginning 60 days after the Commission's approval of this Plan, for a period of 30 days, with respect to symbols for which a party meets the requirements of Section I.(b) at the time of approval, and within 45 days after a party meets the requirements of Section I.(b) with respect to other symbols (unless such time is extended by the Policy Committee), such party may submit to the Processor requests for the initial reservation of symbols as follows. A party may request a symbol for: (i) the listing of common stock or any other security, including options; (ii) with respect to four- and five-character symbols, the trading of any security over-the-counter; (iii) the dissemination of a securities index or other index information; or (iv) any other purpose authorized by a majority vote of the parties. However, no party may reserve or use a 1, 2 or 3 character symbol for a security not listed on a national securities exchange. All initial symbol requests must specify whether the party believes that it had "reserved" a requested symbol in the system in use prior to the Commission's approval of this Plan. Initial requests may be for perpetual as well as limited-time reservations as specified below.

(A) Perpetual Reservations. A requesting party may request to reserve a limited number of symbols without any time or other limitations or restrictions. A perpetual reservation is a "List A reservation." A separate List A shall be maintained for symbols using one, two or three characters, on the one hand, and symbols using four or five characters, on the other hand, and this Plan shall be applied separately to each List A. For the avoidance of doubt, symbols under the List A for one, two or three characters and symbols under the List A for four or five characters are not interchangeable with one another for any purpose under this Plan. Subject to paragraph (d) below, a party may not add symbols to a given List A after the initial reservation process for that given list A. With respect to symbols using one, two or three characters, a party may not have more than 20 List A reservations. With respect to symbols using four or five characters, a party may not have more than 20 List A reservations. A party requesting to reserve more symbols than permitted pursuant to this paragraph must place its List A reservation requests in priority ranking.

(B) Limited-Time Reservations. In addition to List A reservations, a party may submit requests to reserve symbols for a limited time period ("List B reservations"). A separate List B shall be maintained for symbols using one, two or three characters, on the one hand, and symbols using four or five characters, on the other hand, and this Plan shall be applied separately to each List B. Symbols under the two lists are not interchangeable for any purpose under this Plan. With respect to symbols using one, two or three characters each party may have a total of up to 1500 List B reservations at any given time. With respect to symbols using four or five characters, each party may have up to a total of 1,500 List B reservations. A party's permitted List B reservations shall be for 24 months. A party requesting to reserve more symbols than permitted pursuant to this paragraph must place its List B reservation requests in priority ranking. Notwithstanding anything else herein this sub-paragraph (B), no party shall make a List B reservation request with respect to a particular symbol unless said party has a reasonable basis to believe it will utilize such symbol within the next 24 months.

(2) The Processing of Initial Reservation Requests.

(A) If only one party claims that it had a symbol properly "reserved" prior to the effective date of this Plan (A "Legacy Reservation"), the Processor shall reserve such symbol for that party, provided that party represents it has a reasonable basis to believe it will utilize such symbol within the next six (6) months. Legacy Reservations shall not be counted as List A or List B reservations for the purposes of sub-paragraphs (1)(A) and (1)(B) of this Section. Should the relevant party not use a symbol that is the subject of a Legacy Reservation within the six (6) month period, said symbol shall be released by the Processor pursuant to paragraph 5 below, provided that a party may request an extension of a Legacy Reservation for an additional six (6) month period provided said party has a reasonable basis to believe it will utilize such symbol within that period. If not so used within that period, said symbol shall be released by the Processor pursuant to paragraph 5 below.

(B) If multiple parties meeting the requirements of sub-paragraph (A) above claim to have properly reserved a symbol prior to the Commission's approval of this Plan, the Processor shall notify all parties making such claims of that fact, whereupon such parties shall have five business days in which to reach a mutually acceptable agreement as to which party shall be permitted to reserve such symbol. If the parties fail to reach agreement during such period, then the Policy Committee shall resolve such conflicting claims (in favor of the party with the earliest proper claim to such symbol, if that fact can be determined) by a majority vote of the parties not claiming such symbol, it being understood that proper reservation of a symbol includes reservation under the reservation system in effect prior to the adoption of this Plan. The Policy Committee shall provide each such party the opportunity to provide evidence of how and when it reserved such symbol, and the members of the Policy Committee who vote in these matters

shall in good faith consider such evidence in reaching their decision. In the event of a tie vote, the Policy Committee shall establish a random order of the parties to determine which party may reserve the symbol.

(C) If only one party seeks to reserve a symbol that no party has properly reserved prior to the Commission's approval of this Plan, then the Processor shall reserve that symbol for that party.

(D) If multiple parties seek to reserve a symbol, but no such party claims to have properly reserved the symbol prior to the Commission's approval of this Plan, then the Processor shall reserve such symbol pursuant to a random ordering of the parties that the Policy Committee shall establish.

(E) If a party requests a symbol that is not available because the symbol is in use or has properly been reserved by another party, the Processor will place all such parties on a waiting list for the symbol pursuant to paragraph (c) below.

(F) Using this methodology, the Processor will reserve for a party all requested symbols up to the limits specified above for List A and List B based on the requesting party's priority ranking. Once a party has reached its limit on the number of permitted List A reservations, the Processor will process all such party's remaining requests for List A symbols as List B requests before processing that party's requests for List B reservations.

(3) Subsequent Reservations. At any time following the initial allocation of symbols pursuant to paragraphs (1) and (2) above, a party may submit to the Processor a request for a List B reservation of one or more symbols as follows:

(A) If a requested symbol is available the Processor will reserve the symbol for the requesting party if at that time it does not hold the maximum number of List B reservations available to it. If necessary to stay within the maximum number of reservations permitted under subparagraph (1)(B) above, the party must provide the Processor with a List B symbol to release upon reservation of the new symbol.

(B) If a requested symbol is not available either because it is in use or because another party has reserved the symbol, the Processor will place the party on the waiting list pursuant to paragraph (c) below.

(4) Notice of Use of Reserved Symbols. A party shall notify the Processor when it begins to use a reserved symbol.

(5) Non-Use or Release of Symbols Within Time Period. If a symbol reserved on List B is not used within the specified 24 month time limit, the Processor shall release the symbol. In addition, a party at any time may voluntarily release a

reserved symbol by so notifying the Processor. In either case, the Processor shall make the symbol available for reservation to those parties on the waiting list pursuant to subparagraph (c)(2) below. If there is no waiting list for the symbol, or if no party on such list decides to reserve the symbol, the Processor shall give reasonable notice to all parties of the availability of the symbol, and any party may request the reservation of such symbol. If more than one party requests the reservation of such symbol within two business days of such notice, the Processor shall assign the symbol to one such party and shall place the other parties on the waiting list pursuant to a random order of priority that the Policy Committee shall establish. If necessary to stay within the maximum number of reservations permitted under subparagraph (1)(B) above, the requesting party must voluntarily release a symbol, as described in subparagraph (3)(A) above, before it can reserve the assigned symbol.

(6) Request for Release of a Symbol. If a party has an immediate need to use a symbol that another party reserved, it can ask (i) the party that has the symbol reserved and (ii) any other parties on the waiting list with priority over the requesting party whether such parties are willing to release such symbols. If any such party does not agree to the release, the then-current reservation and waiting list priority shall remain unchanged. If all such parties agree to the release, then the requesting party may include such symbol as one of its List B reservations for 24 months. If necessary to stay within the maximum number of reservations permitted under subparagraph (1)(B) above, the requesting party must voluntarily release a symbol, as detailed in subparagraph (3)(A) above, before it can reserve the requested symbol. If the requesting party does not use the symbol within 24 months, absent the consent of all the parties initially required to be contacted, the reservation and waiting list priority in effect when the requesting party first made its request shall again be in force.

(c) Waiting List.

(1) Placing a Party on a Waiting List. Pursuant to subparagraphs (2)(D) and (3)(B) above, if one or more parties request to reserve a symbol that another party has under reservation, the Processor shall place such parties on a waiting list for such symbol. The Processor shall prioritize parties on the waiting list based on the earliest time that each requested the reservation from the Processor; provided, however, that if more than one party seeks to use a symbol already in use either (A) during the initial reservation period or (B) within two business days of notice of a symbol's availability under subparagraph (b)(5) above, the Policy Committee shall establish a random order of those parties to determine priority on the waiting list.

(2) Availability of Symbols. Subject to paragraph (d) below, if a symbol becomes available for any reason, the Processor shall provide the party with time priority on the waiting list as to that symbol with notice of such availability. Such party shall have two business days to reserve the symbol. If the party with priority does not reserve the symbol, the Processor shall repeat this process as needed with all parties on the waiting in the order of their priority. If necessary to stay within the maximum number of reservations permitted under subparagraph (b)(1)(B) above, the reserving party must

voluntarily release or redesignate a symbol, as detailed in subparagraph (b)(3)(A) above, before it can reserve the requested symbol.

(3) Waiting List Limits. No party may be on the waiting list for more than 100 symbols at any given time.

(d) Reuse of a Symbol. Subject to paragraph (f) below, if a party ceases to use a symbol (due, for example, but not limited to, the delisting of a security through merger or otherwise), such party automatically shall have that symbol reserved for a period of 24 months, notwithstanding any other limits on the number of reserved symbols specified in this Plan. If at the time it ceases to use a symbol that party does not then have reserved on List A the full number of symbols initially available to it pursuant to subparagraph (b)(1)(A) above, the party may place such symbol on List A. If the party has reserved on List A the full number of symbols available to it, that party may move a List A symbol to List B in order to place the symbol to be reused on List A, notwithstanding the fact that the party may then have the maximum number of symbols reserved on List B. If the party does not place the symbol on List A, and if the party does not use the symbol within 24 months, the symbol shall be released for use pursuant to subparagraph (b)(5) above. A symbol may not be reused by a party to identify a new security (other than the security that has been trading under such symbol), unless the party reasonably determines that such use would not cause investor confusion.

(e) Database. The Processor shall create and maintain a symbol reservation database ("Database"). All parties and the Commission (but no other person) shall have access to the Database except to the extent required by applicable law. The Database shall show:

(1) All symbols that are currently in use, identifying the party using a symbol;

(2) All symbols that are reserved on Lists A and B (separately for symbols using one, two or three characters on the one hand, and four or five characters on the other hand), including the party reserving each symbol and the date on which List B reservations will lapse if the symbol is not used; and

(3) Whether there is a waiting list for a symbol, and if so, the identities and priorities of the parties on the waiting list.

(f) Portability of Symbols in Use. If an SRO (a "New SRO") lists a security or product that previously was listed on another SRO (a "Former SRO"), the New SRO shall have the rights to that symbol unless, in its discretion, it consents to the symbol being retained by the Former SRO.

V. Financial Matters.

(a) Initial Development Costs. The parties will share the initial development costs pro-rata based on the number of symbols initially reserved by each party pursuant to Section IV, paragraph B(1) hereof. Any new party that joins plan shall be liable for a pro-rata portion of the

initial development costs based upon the number of symbols reserved by said party during the first twelve (12) months of such party's membership.

(b) Continuing Costs. Costs and expenses of ISRA (other than development costs) will be shared among the parties pro-rata based on the number of additional symbols reserved in each calendar year, estimated quarterly. Notwithstanding the foregoing, the Policy Committee may devise alternative cost-allocation methodology with respect to special non-initial development projects.

VI. Confidentiality

The Processor will maintain in the strictest confidence all of the information it receives from the parties. The only information the Processor will make available to the parties is the Database. The Processor will not make the Database available to any person other than the parties or the Commission, except to the extent required by applicable law.

VII. Term of Plan Withdrawal; Non-transferability of Rights Under the Plan

The Plan shall remain in effect so long as there are two or more parties to the Plan. Any party may withdraw from the Plan at any time on not less than six months prior written notice to each of the other parties. Any party withdrawing from the Plan shall remain liable for its proportionate share of costs and expenses allocated to it pursuant to Section V above for the period during which it was a party, but it shall have no further obligations under the Plan or to any of the other parties with respect to the period following the effectiveness of its withdrawal. The right of a party to participate in the Symbol Reservation System under the Plan shall not be transferable without the consent of the other parties, provided, however, that if a party is subject to a merger, combination or other reorganization or the sale of all or substantially all of its assets, including its registration as an SRO, the surviving or acquiring entity shall automatically become subject to the Plan and may use the Symbol Reservation System in the stead of the prior party and with its rights and subject to its liabilities under the Plan.

VIII. Amendments to the Plan

The Plan may be amended from time to time when authorized by the affirmative vote of all of the parties subject to any required approval of the Commission.

IX. Applicability of Exchange Act

The rights and obligations of the parties to the Plan shall at all times be subject to any applicable provisions of the Exchange Act and any rules and regulations promulgated hereunder.

X. Notices

Any notice given to any of the parties or to ISRA for purposes of the Plan shall be via electronic mail. All notices shall be deemed given immediately, unless the sender receives notification of a failure to deliver the electronic mail. Alternatively, a party may give notice in

writing, and shall be deemed given 48 hours after being sent if sent by prepaid registered or certified United States mail, return receipt requested (if available), or by overnight mail with a nationally recognized overnight mail courier, addressed to the party at its address indicated below in the case of notice to one or more parties, or addressed to all of the parties at their addresses listed in Section I above.

XI. Counterparts and Signatures

The Plan may be executed in any number of counterparts, no one of which need contain all signatures of all Participants, and as many of such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

IN WITNESS WHEREOF, this Plan has been executed as of the ___ day of _____ by each of the parties hereto.

CHICAGO STOCK EXCHANGE, INC.

By: _____

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.

By: _____

THE NASDAQ STOCK MARKET, LLC

By: _____

NATIONAL STOCK EXCHANGE, INC.

By: _____

PHILADELPHIA STOCK EXCHANGE, INC.

By: _____

F
*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58919 / November 7, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13288

In the Matter of

CARMINE J. BUA,

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 Carmine J. Bua ("Respondent" or "Bua") 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 finding contained in Section III.2 below, which is admitted, Respondent

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.

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. Bua is a corporate and securities attorney licensed to practice law in the State of California. Bua, 69, is a resident of San Diego, California.

2. On May 28, 2008, a judgment was entered by consent against Bua, permanently enjoining him from future violations of Section 5 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. Global Development & Environmental Resources, Inc., et al., Civil Action Number 8:08-cv-00993-JDW-MAP, in the United States District Court for the Middle District of Florida.

3. The Commission's complaint alleged that Bua drafted numerous legal documents in furtherance of a fraudulent scheme to illegally issue free-trading shares of Global Development & Environmental Resources, Inc. ("Global"), including an attorney opinion letter that directed Global's transfer agent to improperly issue nearly 2.7 million shares to three foreign entities that sold their shares to the investing public during a fraudulent promotional campaign.

IV.

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

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

By the Commission.

Florence E. Harmon
Acting Secretary

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

Commissioner Walter
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58917 / November 7, 2008

Admin. Proc. File No. 3-12260r

In the Matter of the Application of

VINCENT M. UBERTI
10901 San Leon Avenue
Fountain Valley, California 92708

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Sanctions for Anti-Fraud and Association Rule Violations

On remand to registered securities association for reconsideration of sanctions for violations by former associated person of antifraud provisions, public communications rule, and just and equitable principles of trade, association reaffirmed sanctions it had imposed for some violations and imposed sanctions it had assessed but not imposed for other violations. Held, association's sanctions imposed sustained in part.

APPEARANCES:

Vincent M. Uberti, pro se.

Marc Menchel, Alan B. Lawhead, and Carla Carloni, for FINRA.

Appeal filed: February 5, 2008
Last brief received: May 29, 2008

5 of 28

Applicant Vincent M. Uberti, a former registered representative of former NASD member Donner Corporation International ("Donner") and subsequently of former NASD member Lloyd, Scott, and Valenti, appeals from disciplinary action taken by FINRA on remand from our decision of February 20, 2007 ("Commission 2007 Decision"). 1/

The Commission 2007 Decision sustained NASD's findings that Uberti was liable for the preparation and dissemination of twenty-two research reports issued by Donner and two research reports issued by Lincoln Equity Research, LLC ("Lincoln") containing material misstatements and omitting material information, in violation of Section 10(b) of the Securities Exchange Act of 1934, 2/ Exchange Act Rule 10b-5, 3/ and NASD Rules 2120, 2210, and 2110. 4/ The Commission 2007 Decision also found that Uberti violated NASD Rule 2110 by failing to disclose, in violation of Section 17(b) of the Securities Act of 1933, the compensation received by Donner in exchange for issuing research reports covering forty-three issuers. 5/

1/ Donner Corp. Int'l., Securities Exchange Act Rel. No. 55313 (Feb. 20, 2007), 90 SEC Docket 11. 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/ 15 U.S.C. § 78j.

3/ 17 C.F.R. § 240.10b-5.

4/ NASD Rule 2120 prohibits inducing the purchase or sale of a security by means of "any manipulative, deceptive or other fraudulent device or contrivance." Rule 2210 requires that public communications, including research reports, "be based on principles of fair dealing and good faith," "be fair and balanced," and "provide a sound basis" for evaluating a security. The rule prohibits making "any false, exaggerated, unwarranted or misleading statement or claim" in a research report or omitting "any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communications to be misleading." Rule 2110 requires members to "observe high standards of commercial honor and just and equitable principles of trade."

5/ 15 U.S.C. § 77q(b). Any violation of a statute or Commission rule by a registered person is also a violation of NASD Rule 2110. See, e.g., Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999).

We found, however, that we could not determine from NASD's decision whether the bar imposed by NASD for the Donner violations was excessive or oppressive. We vacated and remanded for reconsideration of the sanctions. We also noted that NASD had determined not to impose on Uberti the six-month suspension, \$20,000 fine, and requirement that he requalify as a general securities representative and principal because of the bar imposed for the Donner violations. We asked NASD to consider whether imposition of such sanctions was warranted.

NASD's January 8, 2008 amended decision ("NASD Remand Decision") again barred Uberti for the Donner violations and imposed the six-month suspension, fined him \$20,000, and required him to requalify as a general securities representative and principal for the Lincoln violations. 6/ This appeal followed.

II.

In our review, we rely on the findings of fact and conclusions of law set out in the Commission 2007 Decision, which we summarize here to provide context for our discussion of the NASD Remand Decision.

A. The Donner Disclosure Violations

Uberti first registered with NASD in 1995 and joined Donner in 1998. Donner issued research reports on companies whose stock traded below \$5 per share. Under a typical agreement, Donner received an initial retainer fee of \$2,500, \$2,000 per month for services provided (including publication of Donner's report on Donner's website), and \$2 to \$3 for each investor package mailed to potential investors. Jeffrey Baclet was Donner's president and sole owner. 7/ For the companies Baclet assigned Uberti "to handle," Uberti received fifty percent of the amounts "generated by [Donner's] relationship with the company."

Baclet retained Richard Merrell, an independent contractor, to prepare draft research reports for Donner. Merrell had no background in the securities industry, was not registered with NASD, had no experience conducting research on publicly traded companies, and did not know enough about finance to form his own opinions on the companies he researched. Merrell admitted that he was not "expert enough to know what was negative information" and did not understand the significance of a going-concern qualification in a company's audited financial statements. Donner did not train Merrell. Baclet provided Merrell with a template with a

6/ NASD also imposed hearing costs of \$5,090.12 and appeal costs of \$931.61.

7/ NASD also expelled Donner and barred Jeffrey Baclet, Donner's president, sole owner, financial and operations principal, and options principal and suspended Paul A. Runyon, a former Donner registered representative and co-owner of Lincoln, fined him \$20,000, and required him to requalify as a general securities principal and representative. The Commission 2007 Decision sustained these disciplinary actions.

"generally positive" tone to use in preparing his drafts. Merrell's reports followed the template and described the covered companies in consistently positive terms, even though Merrell did not know whether those descriptions were accurate. Merrell limited his research to information provided by the covered company, the Yahoo Finance website, and, "as a last resort," information obtained from the covered company's public filings; Merrell verified none of this information.

Merrell testified that Uberti was his primary contact at Donner. Uberti checked Merrell's drafts for the accuracy of the financial data on the first page of the draft, asked Merrell to add information about recent developments, and edited Merrell's language. At the hearing, Uberti admitted that he "look[ed] at financial information" generally from the issuer's press releases or Forms 10-K and 10-Q and "read audited financial statements or going concern opinion statements." Uberti acknowledged that, if a report contained "something that was not accurate then it would be my obligation to point that out." In his sworn investigative testimony taken by NASD staff, Uberti stated that a going-concern qualification should "definitely" be disclosed in a research report "so the investor knows the financial status of the company before they make an investment decision." Uberti also stated that a research report should disclose negative earnings, pending lawsuits, and accumulated losses. According to Uberti's investigative testimony, "all negative information, as far as financial, needs to be disclosed."

Uberti oversaw the preparation of twenty-two Donner research reports issued between March 22, 1999 and June 27, 2001 that contained material misstatements and made material omissions. Statements that companies were "undervalued," "well positioned," or "poised for growth," or had "superior potential for appreciation," or "significant upside potential," featured frequently and prominently in each of the reports. These statements were not supported by the issuers' periodic filings. Every one of the twenty-two companies at issue was subject to a going-concern qualification, but none of the reports disclosed that information. Moreover, as described in greater detail in the Commission 2007 Decision, the companies variously faced financial and operational issues, including net losses, inadequate working capital, defaults on payment obligations, accumulated deficits, reliance on short-term borrowing, lawsuits, and significant competition. These Donner reports were misleading and fraudulent in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rules 2120, 2210, and 2110.

Baclet also testified that "if a [r]esearch [r]eport was put together, it would go through Mike Uberti before it was published." Paul Runyon testified that Uberti "probably had his hands on the research reports more than anyone else in the compilation and coordination of putting the report together." As we observed in the Commission 2007 Decision, Uberti read the Donner draft research reports that contained positive statements about the issuers, reviewed the public filings pertaining to the issuers that included negative material information, and knew that this negative information was not included in the reports. We found that Uberti's failure to include in the research reports material negative financial and operations information, despite knowing that the companies' public filings contained such negative information, involved an extreme departure from the standards of ordinary care, which presented an obvious danger of misleading buyers or sellers.

Uberti sent the draft reports he had reviewed to Baclet. Baclet testified that he "look[ed] at" the draft reports, but he also stated that he "wouldn't read them." Uberti acknowledged that he did not know whether Baclet read the reports in depth. Uberti also testified that research reports "went through a compliance and through a legal department," but that "[w]hat they did specifically, I don't know." In the Commission 2007 Decision, we concluded that "Uberti did not reasonably rely on Baclet or the compliance or legal department to correct the material misstatements and omissions he failed to correct."

B. The Donner Touting Violations

Between March 22, 1999 and April 24, 2000, Uberti oversaw the preparation of Donner-issued research reports on forty-three companies. The reports stated that Donner "may from time to time perform investment banking, corporate finance, [or] provide services for" the issuer, sometimes adding that Donner might perform these services "for a fee." Uberti provided this disclosure language to Merrell for inclusion in the draft reports and checked the drafts to ensure that it had been included. The reports did not disclose that Donner, in fact, received compensation in exchange for writing and publishing the research reports or the type or amount of compensation. Uberti knew that Donner received compensation for issuing reports, and he shared in that compensation. After reviewing the relevant rules and regulations when NASD issued its complaint in this matter, Uberti admitted that the disclosures that he provided to Merrell were inadequate. We found in the Commission 2007 Decision that the Donner reports violated Securities Act 17(b) and, consequently, Uberti violated NASD Rule 2110.

C. The Lincoln Violations

In 2001, Uberti left Donner and with Runyon began Lincoln for the purpose of preparing research reports for small publicly traded companies in the same way that they had done at Donner. As at Donner, Uberti hired Merrell to draft positive research reports for which the covered companies would compensate Lincoln. Uberti told Merrell to follow the same format he used in drafting reports for Donner, and the two Lincoln reports at issue in this proceeding resembled Donner's in form and content. As described in the Commission 2007 Decision, the reports represented that the companies had "significant upside potential" or were "well positioned for growth." The reports failed to disclose going-concern qualifications and adverse financial and operational information. As at Donner, Uberti reviewed the reports Merrell prepared for Lincoln and reviewed the covered companies' financial filings, which included this negative information. Nonetheless, Uberti recklessly failed to revise those reports to reflect that negative information. We previously found that Uberti was responsible for the Lincoln reports being omissive, misleading, and fraudulent in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rules 2120, 2210, and 2110.

III.

The Commission 2007 Decision directed NASD on remand to consider certain matters addressed by the Hearing Panel. The Hearing Panel had suspended Uberti for two years and fined him \$20,000 for the Donner violations. The Hearing Panel had concluded based on findings discussed below that Uberti was less culpable for the Donner violations than Baclet. As noted, NASD's National Adjudicatory Council ("NAC") determined to bar Uberti; however, the NAC did not address directly the Hearing Panel's findings. ^{8/} We directed NASD to consider whether the bar was excessive or oppressive in light of these factors considered in mitigation by the Hearing Panel.

As an initial matter, Uberti takes issue with NASD's construction of the Commission 2007 Decision. Uberti argues that NASD's February 28, 2007 letter setting the briefing schedule on remand ("Briefing Schedule") "does not mention significant factors the Commission identified [in the Commission 2007 Decision]." Specifically, Uberti challenges the Briefing Schedule's reference to Uberti's "claimed" reliance on Baclet, his "purported" belief that Baclet had cleared the format of the reports, and whether Uberti's expressions of remorse were credible. Uberti notes that the Briefing Schedule states "**NASD's consideration of this matter on remand therefore will be confined exclusively to the issue of whether a bar of Uberti in all capacities is excessive or oppressive for Uberti's Donner-related misconduct, the findings of which the Commission confirmed in their entirety.**" (bold in Briefing Schedule). Uberti contrasts this language with the statement in the Commission 2007 Decision, after listing the factors found by the Hearing Panel to be mitigating, that "[u]nder the circumstances, we find it appropriate to remand this matter to NASD so that it may consider whether a bar is excessive or [o]ppressive, **in light of this evidence.**" (emphasis in Uberti's brief).

The purport of Uberti's argument is unclear. NASD correctly stated in the Briefing Schedule that the Commission 2007 Decision both sustained its findings of Donner-related misconduct in their entirety and remanded, with respect to Donner, only the issue of the appropriate sanction. We did not suggest that NASD needed to re-open the findings on the merits or that it was required to accept the Hearing Panel's findings of mitigation.

Rather, we asked NASD to explain its choice of sanctions in light of the Hearing Panel's findings. We also recognize that NASD Rules 9348 and 9349 grant the NAC plenary authority in reviewing Hearing Panel decisions. As provided in NASD Rules 9348 and 9349, the NAC

^{8/} Compare PAZ Sec., v. SEC, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (remanding matter to the Commission and stating that "the Commission must be particularly careful to address potentially mitigating factors before it affirms an [NASD] order . . . barring an individual from associating with an NASD member firm . . .").

"may affirm, dismiss, modify, or reverse" Hearing Panel findings. ^{9/} The NAC also "may affirm, modify, reverse, increase, or reduce" any sanctions imposed by a Hearing Panel. ^{10/} Accordingly, we remanded to allow the NAC to discuss the Hearing Panel's findings and make whatever determinations with respect to them were permissible under NASD Rules 9348 and 9349 and warranted by the record. As explained in more detail below, we believe NAC appropriately performed this function on remand.

The NASD Remand Decision found no "appreciable difference" in Uberti's and Baclet's culpability. The NASD Remand Decision concluded that Uberti's conduct in overseeing research reports that contained misstatements and omissions that were "egregious in nature and materiality" made his actions equivalent to Baclet's. The NASD Remand Decision also noted that Uberti's conduct continued at Lincoln.

The Hearing Panel had found that Uberti reasonably relied on Baclet's review of the research reports for conformity with securities laws and NASD rules because Baclet had more industry experience than Uberti, Baclet was the sole principal involved in the review process, and Baclet appeared to review the reports. The NASD Remand Decision concluded, unlike the Hearing Panel, that Uberti's reliance on Baclet's review of the research reports was not reasonable. The NASD Remand Decision found that Baclet's experience in the industry and status as a registered principal was not significantly greater than Uberti's. Uberti had been registered for more than four years when the majority of the misleading reports were issued. Regardless of his experience, as a general securities representative assigned to review Donner's reports, Uberti had an independent obligation to make sure that those reports complied with regulatory requirements, and he cannot excuse himself from that obligation by reliance on a firm principal, Baclet. ^{11/} Uberti admitted that, if a report contained "something that was not accurate

^{9/} NASD Rule 9348. All NASD rules are available at <http://www.finra.org/RulesRegulation/FINRARules/index.htm>. The opening page of the internet site on which FINRA makes its rules available states that members of the former NASD remain subject to NASD rules. See <http://www.finra.org/RulesRegulation/FINRARules/index.htm>.

^{10/} NASD Rule 9348.

^{11/} Jeffrey D. Field, 51 S.E.C. 1074, 1076 (1994) (finding that "participants in the industry must take responsibility for their compliance [with applicable regulatory requirements] and cannot be excused for lack of knowledge, understanding, or appreciation of those requirements") (quoting Kirk A. Knapp, 51 S.E.C. 115, 139 (1992)); Thomas C. Kocherhans, 52 S.E.C. 528, 531 (1995) (holding that participants in the securities industry are responsible for regulatory compliance and cannot excuse their conduct by lack of knowledge or understanding of the rules or by reliance on a supervisor); Gluckman, 54 S.E.C. at 184 (finding that a registered person cannot shift responsibility for compliance to a supervisor); see also East/West Sec. Co., 54 S.E.C. 947, 951 n.13

then it would be my obligation to point that out," and that "all negative information, as far as financial, needs to be disclosed," and going-concern qualifications "definitely" need to be disclosed. Notwithstanding his expressed understanding and his admitted concentration on financial information in his review of draft research reports, Uberti did not correct research reports that "omitted material negative financial information about the recommended companies and misleadingly portrayed the companies as undervalued, poised for growth, and having significant potential for appreciation." 12/

Although the Hearing Panel found that Baclet appeared to review the reports, Uberti's admission that he did not know the scope of Baclet's review is inconsistent with the Hearing Panel's finding that Uberti acted reasonably in relying on Baclet's review. The NASD Remand Decision recognizes that Baclet failed as Uberti's supervisor but concludes that Uberti failed in his duty to review the research reports. Given Uberti's review and awareness of the financial and operational difficulties of the subject issuers and his review of the resulting research reports, NASD concluded that Uberti's asserted reliance on Baclet to review the reports did not justify mitigating the sanctions. The record supports NASD's conclusion, and we sustain it.

Uberti disputes the NASD Remand Decision's findings that Uberti had been associated with Donner since 1998 as a vice president and was "not a novice" in the securities industry. Uberti passed his Series 7 license examination in 1995. It is unclear whether Uberti commenced his employment with Donner as a vice-president, although the record supports the conclusion that he held himself out as a vice-president in firm marketing materials and on his business card. His work from 1995 until he joined Donner in 1998 included "raising capital on a private placement," which supports NASD's conclusion that Uberti was "not a novice."

The Hearing Panel also found that Uberti believed that Donner had received regulatory clearance for the reports' format. The NASD Remand Decision found that any such approval was irrelevant to the violations charged. As the Commission 2007 Decision found, it was the substance of the reports that constituted the violations, not their format. 13/ Consequently, whether Donner submitted a template to a regulator and had received approval is not relevant. In any event, NASD also found that the record did not support a finding that Uberti had a basis to believe that a regulator had approved the template. Uberti testified that, although Donner sent a draft research report to NASD for comment, NASD staff "didn't comment on what you need to put in there or what you don't need to put in there." He also testified that Donner staff made occasional inquiries of NASD staff concerning advertising requirements and other compliance

11/ (...continued)
(2000) (finding that participants in the industry have substantial responsibilities that they cannot avoid by reliance on regulators).

12/ Donner, 90 SEC Docket at 40.

13/ Id. at 30.

issues, but offered no evidence that any of these inquiries resulted in NASD approval of Donner's research report format. The record supports NASD's conclusion, and we sustain it.

Finally, the Hearing Panel found that Uberti's expressions of remorse for his misconduct and his statements that he intended to avoid such mistakes in the future were credible and treated them as a mitigating factor in its determination not to bar Uberti. The NASD Remand Decision, while acknowledging that credibility determinations by a Hearing Panel receive great weight and deference, 14/ nonetheless reversed the Hearing Panel's finding and determined that Uberti's statements were not credible and should not be considered mitigating. In reaching this conclusion, NASD noted that credibility findings can only be overcome by substantial record evidence, 15/ and focused on Uberti's persistent arguments that his duties at Donner were administrative and did not implicate his duties as a registered person, that a "reasonable investor" would not rely solely on a research report, and (contradicting his own pre-hearing testimony) that a going-concern qualification is not material for purposes of a research report. NASD found that Uberti's contentions evidenced a "buyer beware" view of his duties as a registered person that "is contrary to every idea espoused in the securities law" and demonstrated that Uberti "cannot be trusted to deal fairly with public customers."

We agree with NASD that this evidence is "particularly troubling." Although we question whether these arguments prove that Uberti's expressions of remorse and assurances against future wrongdoing were not sincere when given, we agree that Uberti's perceptions of his obligations as a securities professional and of his duties towards his customers are "misguided" and that he cannot be trusted "to deal fairly with public customers." Accordingly, we believe that the risk that he will not be able to honor his assurances of future compliance outweighs any mitigation in the Hearing Panel's findings of credibility. The securities industry presents continual opportunities for dishonesty and abuse and depends heavily on the integrity of its participants and on investors' confidence. 16/ Consequently, we find that Uberti's expression of remorse and assurances against future violations, accepting that they were sincerely made before the Hearing Panel, do not outweigh the future threat discussed below that Uberti could present if he returned to the securities industry.

14/ Dane S. Faber, 57 S.E.C. 297, 307 (2004).

15/ See Dennis Todd Lloyd Gordon, Securities Exchange Act Rel. No. 57655 (Apr. 11, 2008), ___ SEC Docket ___ [2008 SEC LEXIS 819 at *38].

16/ See Conrad P. Seghers, Investment Advisers Act Rel. No. 2656 (Sep. 26, 2007), 91 SEC Docket 2293, 2304 & n.42, appeal filed, No. 07-1478 (D.C. Cir. Nov. 27, 2007); Paul K. Grassi, Exchange Act Rel. No. 52858 (Nov. 30, 2005), 86 SEC Docket 2494, 2498; Frank Kufrovich, 55 S.E.C. 616, 627 (2002); Philip S. Wilson, 48 S.E.C. 511, 517 (1986); Walter H.T. Seager, 47 S.E.C. 1040, 1043 (1984).

IV.

NASD addressed the factors the Hearing Panel considered as mitigating and again imposed sanctions. Pursuant to Exchange Act Section 19(e), we must 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. 17/ In our analysis we consider 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). 18/

The NASD Sanction Guideline for intentional or reckless misrepresentations or omissions of material fact recommends suspending an individual for up to two years or, in egregious cases, barring the individual. 19/ The guideline for intentional or reckless use of misleading communications with the public recommends suspending the individual for up to two years, or, in the case of numerous acts of intentional or reckless conduct over an extended period of time, barring the individual. 20/ The Sanction Guidelines also provide "Principal Considerations in Determining Sanctions," which apply to sanctions for any violation. 21/ The Principal Considerations applicable to all violations identify several factors to be weighed: whether the respondent engaged in numerous acts or a pattern of misconduct; whether the respondent engaged in misconduct over an extended period; whether the respondent acted recklessly; and whether the respondent's misconduct resulted in the potential for monetary gain. 22/ The Principal Considerations specifically applicable to the use of misleading public communications require adjudicators to weigh whether the research reports were widely circulated. 23/ The Sanction Guidelines also provide in their "General Principles Applicable to All Sanction Determinations" that "[a]djudicators should tailor sanctions to respond to the

17/ 15 U.S.C. § 78s(e). Applicant does not claim, nor does the record show, that NASD's sanctions impose an unnecessary or inappropriate burden on competition.

18/ Perpetual Sec., 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.)).

19/ NASD Sanction Guidelines 96 (2001 ed.).

20/ Id. at 89.

21/ Id. at 9 - 10.

22/ Id.

23/ Id. at 88.

misconduct at issue." 24/ The General Principles direct that "[a]djudicators must always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case." 25/

Uberti's Donner violations encompassed the release, over a two-year period, of twenty-two fraudulently misleading research reports and research reports covering forty-three issuers that failed to disclose that Donner received compensation for preparing the reports. Conduct that violates the anti-fraud provisions "is especially serious and subject to the severest of sanctions." 26/ Uberti's misconduct was reckless and motivated by economic gain. The misconduct occurred over two years, and Donner's reports were accessible to the general public on the Donner website. As discussed above, NASD appropriately rejected the factors found to be mitigating by the Hearing Panel. Uberti's conduct at Donner was so serious and presented, and continues to present, such a threat to the public interest that we find that the bar imposed by NASD for that misconduct is not excessive or oppressive, and we sustain it.

In its 2006 Decision, NASD had determined that a six-month suspension in all capacities, a \$20,000 fine, and a requirement that Uberti requalify as a general securities representative and principal would constitute an appropriate sanction for Uberti's misconduct at Lincoln. As noted, because NASD had barred Uberti for his Donner misconduct, NASD did not impose any sanction with respect to the Lincoln violations.

In the Commission 2007 Decision, we directed NASD to consider on remand whether it was appropriate, in light of its action with respect to the remanded Donner sanctions, to impose the sanctions that it had found appropriate for the Lincoln violations but decided not to impose. The NASD Remand Decision imposed the sanctions for the Lincoln conduct.

However, the Briefing Schedule stated that NASD's consideration on remand would "be confined exclusively to the issue of whether a bar of Uberti in all capacities is excessive or oppressive for Uberti's Donner-related misconduct" (emphasis in original) and that the parties would have the opportunity to file opening and response briefs "confined to the issue of whether the bar imposed on Uberti for his Donner-related misconduct is excessive or oppressive."

24/ Id. at 4.

25/ Id. at 5.

26/ Marshall E. Melton, 56 S.E.C. 695, 713 (2003).

Sections 15A(b)(8) and 15A(h)(1) of the Exchange Act require NASD to provide fair procedures for its disciplinary proceedings. 27/ NASD Rules provide for appropriate notice to respondents at every stage of disciplinary proceedings. 28/ Indeed, notice of the issues to be litigated is a minimal requirement of procedural fairness. 29/ We find that NASD was required to provide notice and an opportunity to address the imposition of the sanctions that had been assessed for the Lincoln-related violations prior to imposing them and that the Briefing Schedule did not provide Uberti with such notice or opportunity. Accordingly, we dismiss the sanctions imposed on him for that conduct.

An appropriate order will issue. 30/

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR and PAREDES); Commissioner WALTER not participating.

Florence E. Harmon
Acting Secretary

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

27/ 15 U.S.C. §§ 78o-3(b)(8) and (h)(1); see Robert J. Prager, Exchange Act Rel. No. 51974 (July 6, 2005),), 85 SEC Docket 3413, 3433 n.54 (NASD Rules must provide fair disciplinary procedures).

28/ See e.g. NASD Procedural Rule 9212 (providing that initial complaints must give reasonable notice of alleged violative conduct and rules violated) and NASD Procedural Rule 9312 (providing for notice of, and opportunity to submit briefs on, any issue to be considered by the NAC when it calls a case for review).

29/ Cf. Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (finding that "minimum requirements of due process . . . include . . . written notice of the claimed violations . . .")

30/ 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. 58917 / November 7, 2008

Admin. Proc. File No. 3-12260r

In the Matter of the Application of

VINCENT M. UBERTI
10901 San Leon Avenue
Fountain Valley, California 92708

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART DISCIPLINARY SANCTIONS IMPOSED BY
REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the bar imposed by FINRA on Vincent M. Uberti for violations of Section 10(b) of the Exchange Act of 1934, Exchange Act Rule 10b-5, Section 17(b) of the Securities Act of 1933, and NASD Rules 2120, 2210, and 2110 in connection with Donner Corporation International, and FINRA's assessment of costs, be, and they hereby are, sustained; and it is further

ORDERED that the six-month suspension, \$20,000 fine, and requalification requirements imposed by FINRA on Vincent M. Uberti for violations of Section 10(b) of the Exchange Act of 1934, Exchange Act Rule 10b-5, and NASD Rules 2120, 2210, and 2110 in connection with Lincoln Equity Research, LLC be, and they hereby are, set aside.

By the Commission.


Florence E. Harmon
Acting Secretary

By: Jill M. Peterson
Assistant Secretary

Commissioner Natter
not participating

F
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58916 / November 7, 2008

Admin. Proc. File No. 3-12926

In the Matter of the Applications of

JAMES W. BROWNE

and

KEVIN CALANDRO

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Alleged Failure to Provide Written Notice to, and Obtain Prior Approval from,
Member Firm Employer Regarding Private Securities Transactions

General securities representatives of member firms of registered securities association charged with engaging in private securities transactions without giving prior notification to, or obtaining prior approval from, members. Held, association's findings of violation and sanctions imposed are set aside.

APPEARANCES:

Brian L. Rubin and Shanyn L. Gillespie, of Sutherland, Asbill & Brennan LLP, and Christopher Bebel, for James W. Browne.

E. Steve Watson, for Kevin Calandro.

Marc Menchel, Alan Lawhead, and Andrew J. Love, for NASD.

6 of 28

Appeal filed: January 14, 2008
Last brief received: April 23, 2008

I.

James W. Browne and Kevin Calandro, general securities representatives associated with NASD member firms, appeal from NASD disciplinary action. 1/ NASD found that Browne and Calandro (together, "Applicants") engaged in private securities transactions involving the securities of e2 Communications, Inc. ("e2") 2/ without prior notice to, and prior written approval from, their member firms, in violation of NASD Conduct Rules 3040 and 2110. 3/ For these violations, NASD imposed upon Browne a six-month suspension and \$25,000 fine and imposed upon Calandro a three-month suspension and \$5,000 fine. 4/ We base our findings on an independent review of the record and, as explained more fully below, have determined to set aside NASD's findings of violation and the sanctions imposed.

II.

Browne has been a registered representative since 1983, Calandro since 1988. In 1994, while working at broker-dealer Kidder, Peabody & Co., Inc. ("Kidder"), Browne and Calandro became partners and served clients under a joint broker number. Shortly after Browne and Calandro partnered, Kidder was acquired by PaineWebber, Inc. ("PaineWebber").

-
- 1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 Fed. Reg. 42,190 (Aug. 1, 2007) (SR-NASD-2007-053). Because NASD instituted the disciplinary action before that date, we continue to use the designation NASD.
- 2/ e2 was originally known as e2 Software Corporation, but changed its name in April 2000.
- 3/ NASD Conduct Rule 3040 prohibits involvement in a private securities transaction outside the regular course or scope of employment without providing prior written notice to the member firm. NASD Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade; NASD General Rule 115 extends the applicability of NASD rules governing members to their associated persons.
- 4/ Respondents were also ordered to pay, jointly and severally, \$9,930.30 in costs.

Initial Contacts with e2

While at PaineWebber, Browne and Calandro brought in as their first joint client Jeff Farris, an entrepreneur who had become wealthy from the 1995 sale of a software company he founded. Farris invested about \$20 million from that sale with PaineWebber in accounts that Browne and Calandro managed.

In October 1997, Farris founded e2, whose business was to develop and sell software designed to help companies market their products and services through e-mail. Farris asked Browne, known to be very technologically savvy, to review the e2 business plan. Browne was impressed with the plan and forwarded the document to his friend and client Ian Bonner, who was a vice president at IBM and, as described by Browne, "one of the world leaders in technology and marketing." Bonner testified that he was "intrigued with the technology," so much so that Bonner was instrumental in establishing a marketing relationship between IBM and e2 and eventually became a full director of the company.

In late 1997 and early 1998 Applicants also introduced three others to e2. Browne introduced his longtime friend Myles Kelley, a commercial real estate broker, "to assist [e2] in finding office space." Browne and Calandro introduced their joint client Barry McCook, a vice president of sales at computer retailer CompUSA, to e2 in hopes that, like the large retailer JC Penney, CompUSA would become an e2 customer. Browne stated in a response to NASD's requests for information that McCook "became aware of e2 when the Company solicited CompUSA to become a customer of e2" and that "I do not recall whether it was Mr. Calandro or I who told Mr. Farris to contact Mr. McCook about CompUSA becoming a customer of e2." ^{5/} Browne and Calandro also introduced David Galinet to Farris. Galinet, a joint client of Browne and Calandro, was the largest reseller of Hewlett Packard computer and office equipment in the southwestern United States. Galinet became a supplier of computer and office equipment for e2 and later became a reseller of e2's software.

e2's 1998 Common Stock Offering

In the spring of 1998, e2 initiated a private offering of common shares. ^{6/} McCook and Galinet purchased e2 common shares in the summer of 1998.

^{5/} McCook signed a letter in April 2003 stating that neither Browne nor Calandro "directly or indirectly solicited in any way the undersigned to subscribe for or invest in e2 . . . stock." As with Browne's statements about investor Kelley, NASD offers no evidence to refute applicants' statements that McCook was introduced to e2 for purposes other than investing.

^{6/} NASD did not charge Applicants with any violations in connection with the 1998 common stock offering.

Browne and Calandro also sought to purchase common shares for their own portfolios. In May 1998, Browne consulted his manager, Charles Eldemire, about the PaineWebber approvals necessary for him to purchase e2 shares. Eldemire advised Browne to submit a written request to buy the shares, which Browne immediately completed. When Browne became concerned that e2 would close its common stock offering before PaineWebber would respond to his request for approval, Eldemire suggested that, if Browne's wife purchased the shares in her name, no approval from PaineWebber would be necessary. Browne's wife purchased \$50,000 (44,445 shares) ^{7/} and Calandro's wife purchased \$15,187.50 (13,500 shares) of e2 common stock in June 1998.

As a result of Browne's inquiries, Eldemire wanted to purchase e2 stock for himself because, he testified, internet stocks were a "hot area." Eldemire testified that he asked Browne for e2's contact information and then called the company. On May 26, 1998, Eldemire purchased \$33,750 (30,000 shares) of e2 common stock.

Browne and Calandro told several people about the company and about their wives' 1998 purchases of e2 common stock. Calandro spoke to his brother (John Calandro) and stepfather (Leonard Ciokajlo) about e2, and mentioned to them that Calandro's wife had purchased e2 shares. ^{8/} Calandro testified, however, that he did not refer his brother to Farris and that he did not arrange for his stepfather to meet Farris. Browne noted in a written response to an NASD request for information that Browne "disclosed my investment in e2" to his father, Robert Browne Sr., and "gave his name to the Company." John Calandro, Ciokajlo, and Browne Sr. purchased e2 common shares in June 1998.

In late 1998 or early 1999, Browne spoke about e2 to his client, J. Robert Carter. Browne testified that Carter co-owned an insurance company with a partner; this partner "independently prospected e2 for all their insurance business." Browne explained in a written response to an NASD request for information that Carter "is also a friend and neighbor of mine and I did disclose to him my investment in e2." ^{9/} Carter purchased e2 common shares in January 1999; Browne's wife also purchased more e2 common shares at this time.

In November 1999, Browne sought permission from PaineWebber to become an advisory director of e2. In December 1999, PaineWebber responded to Browne's request by approving him to serve as a full director of e2 on condition that, among other things, Browne would not "discuss the investment merits of this entity with any PaineWebber client or PaineWebber

^{7/} PaineWebber ultimately approved Browne to purchase shares of e2 himself, but because Browne's wife made the purchase, Browne considered the approval moot.

^{8/} Calandro's brother is a registered representative and investment advisor.

^{9/} The record does not indicate whether Browne had any role in Carter's company becoming e2's insurer.

Financial Advisor." 10/ An unexecuted copy of a directorship agreement between Browne and e2 stated that Browne would "perform such duties as the Company's management may request from time to time, including, without limitation, providing the Company with advice pertaining to strategic planning and management" 11/ Browne explained in a response to NASD's request for information that, as advisory director, he "engage[d] in a wide range of networking activities [including] introductions to potential suppliers, customers, employees, and investors." 12/

The Series B Offering

In late 1999, e2 initiated another round of financing, the Series B Preferred. In support of that effort, in September 1999 and again in November 1999, e2 sent letters directly to investors who had purchased common shares in 1998 and early 1999 soliciting them to participate in the company's issuance of Series B Preferred stock. Eldemire, Galinet, McCook, Carter, John Calandro, Ciokajlo, and Browne Sr., all of whom had purchased e2 common stock in 1998 or early 1999, also purchased Series B shares. NASD points to no additional evidence in the record with respect to Applicants' involvement with these particular transactions.

Browne sent e2's business plan to the investment banking group within PaineWebber in hopes that the firm would underwrite a potential e2 initial public offering. 13/ Browne contacted a regional manager at Morgan Stanley named William Vogel. Browne testified that he had known Vogel for years and contacted him "in an effort to get Morgan Stanley's investment banking department to look at e2" so that e2 would have several opportunities to find an underwriter. Vogel purchased Series B Preferred shares.

10/ The record is unclear whether Browne sought permission from PaineWebber before beginning his term as director. Documents in the record place Browne's start date as advisory director on either April 15, 1999 or September 25, 2000. We need not resolve this factual discrepancy because NASD has not charged Browne with failing to comply with NASD Conduct Rule 3030 by promptly notifying his firm of an outside business activity.

11/ This unexecuted copy is the only version of this agreement in the record.

12/ Browne was granted options to purchase 25,000 shares of e2 common stock when he assumed his directorship, which he never exercised.

13/ Browne testified that he began promoting e2 to PaineWebber's investment banking group in the spring of 1998. PaineWebber appears to have taken seriously Browne's enthusiasm, as it performed due diligence on the company and, in the spring of 2000, produced a proposal for a \$20 million private placement and an initial public offering of \$75-100 million.

Browne disclosed in a written response to an NASD request for information that he "referred" his father-in-law, Sam Fullerton, to e2. There is no further elaboration in his responses about what Browne did or said regarding e2, and there is no testimony from Fullerton or Browne on the matter. 14/ Browne further stated that he had some involvement with the investment in e2 made by Sudershan Shaunak, a venture capitalist and longtime friend of Browne's father. Browne noted, "My father actually told Mr. Shaunak about his investment in and my involvement with e2 Communications. My father informed me of Mr. Shaunak's interest in the Company and I requested that the Company contact him." During the hearing Browne reiterated that it was not he but his father who "told Mr. Shaunak about e2 Software and e2 Communications." 15/

Three PaineWebber brokers who worked with Browne purchased Series B shares in early 2000. Pat McLochlin testified that many brokers were looking for available investments in the booming internet sector and that there was "a lot of talk about e2" generally and in the office. McLochlin and fellow broker Myron Bond asked Browne if e2 needed investors, and Browne replied that it did. McLochlin and Bond purchased Series B shares without any further involvement from Browne. Broker Glenn Duphorne, who discussed e2, among other internet companies, with Browne, asked Browne if he could invest in e2. Browne gave e2 Duphorne's telephone number. Duphorne purchased Series B shares without further involvement from Browne.

Calandro also discussed e2 with two persons who purchased Series B shares. There is limited evidence in the record about these discussions, however. Calandro testified that he spoke about e2 with his long-time friend Alex Lucido, who had an account with Calandro at PaineWebber. Calandro said that, during a conversation about people who had recently made money investing in internet stocks, Calandro mentioned to Lucido his wife's investment in e2. When Lucido asked if e2 needed more capital, Calandro "probably said at some point they might." According to Lucido's January 3, 2006 affidavit, Lucido, "[m]otivated by [his] own interests, . . . searched for e2 on the internet, found the company's website and directly contacted e2" Lucido purchased Series B shares in March 2000. Lucido further stated in his affidavit that Calandro "did not participate in any manner or in any part of the decision-making or investment process. I only informed Kevin Calandro that I had made the investment in e2 after the fact." Lucido had also signed a letter in April 2003 stating that neither Browne nor Calandro "directly or indirectly solicited in any way the undersigned to subscribe for or invest in e2 . . . stock."

14/ Fullerton was not called as a witness; Browne testified but was not asked about Fullerton.

15/ Shaunak was not called as a witness. Although Browne testified briefly about Shaunak during his direct testimony, NASD did not question him about his involvement with Shaunak's transaction.

The other person with whom Calandro discussed e2 was his client Dale Taylor. Calandro testified that he told Taylor, who published a newsletter about the computer industry and with whom Calandro often discussed internet stocks generally, that his wife had purchased shares of e2. Calandro testified that he "thought that [he] possibly had passed along" Taylor's name to e2. Taylor did not purchase shares of e2, but a Taylor/Good Partnership purchased Series B Preferred shares in March 2000. Although Calandro states in his brief that he was "aware that Mr. Taylor made an investment in the e2 Series B Preferred Stock through the Taylor/Good Partnership," the Taylor/Good Partnership was not Calandro's client, and the record does not contain evidence about its structure. Calandro testified, "The Good side of the partnership I don't know anything about. In fact, I don't know anything about the Taylor/Good partnership, per se." Like Lucido, Taylor signed a letter to Calandro's attorney in April 2003 stating that Calandro did not solicit him "in any way" to purchase e2 stock.

On March 11, 2000, e2 closed its issuance of Series B Preferred stock. Browne, in his own name, purchased 7,143 Series B Preferred shares, and Calandro's wife purchased 2,000 shares. Bonner and Kelley, whom Browne introduced to e2 in late 1997, also purchased Series B shares in 2000; however, there is no evidence in the record that Browne or Calandro was involved in these transactions.

On April 11, 2000, e2's attorney sent a Unanimous Written Consent ("UWC") for signature to Bennie Bray, who at the time served as e2's only other board member with Farris. The UWC bears an "effective date" of March 11, 2000 and states that e2 "agreed to pay finders' fees" to Browne and Calandro "in connection with the private placement of 750,000 shares of Series B Convertible Preferred Stock." Noting that Browne had "requested that the shares of Common Stock to be issued to him instead be issued to his wife Priscilla F. Browne," the UWC states that e2 "authorize[d] the issuance" of 10,177 e2 common shares to Browne's wife and 3,137 common shares to Calandro.

Sometime thereafter, in the spring of 2000, Browne's wife received 10,177 shares of e2 common stock in the mail from e2 and Calandro received 3,137 shares. Neither Browne nor Calandro paid for the shares, and no cover letter accompanied them. Browne and Calandro both assert that they did not learn of the existence of the UWC until approximately May 2003, during the course of NASD's investigation, and that they were not expecting to be paid finders' fees. Browne stated in response to an NASD request for information that "in or about March 2000," Farris had advised Browne that "he wished to have the company issue common stock in recognition of my services as an Advisory Director," and that Farris "suggested that these shares be issued in my wife's name because she had previously purchased shares in 1998 and 1999 and this would lower her average price." Browne further stated that he "understood that the shares were provided to my wife in recognition of all of my services as an Advisory Director and that they were not compensation for the solicitation or sale of e2 shares." Calandro testified that he received the shares in the mail in "May or June of 2000" with no explanation or cover letter, prompting him to telephone Browne, who told him the shares were "for the overall contribution of what we had done." It is undisputed that Browne and Calandro did not report their receipt of these shares to PaineWebber.

Subsequent Events

Browne and Calandro left PaineWebber to join Lehman in September 2000. 16/ When Browne joined Lehman, he disclosed his e2 advisory directorship to the firm, his receipt of options in connection with the directorship, and all holdings of e2 stock in his own and his wife's names. 17/ Browne "did not receive written instructions from Lehman but [he] did understand that [his] activities were to comply with NASD Rule 3040." Browne began almost immediately to encourage Lehman to invest in e2, 18/ communicating with several of Lehman's investment bankers and venture capitalists in an attempt to secure Lehman's participation in e2's Series C Preferred round of financing in early 2001. 19/

By 2001, e2 was experiencing financial difficulties. In February 2002, due in significant part to Browne's efforts to recover his own and other shareholders' investments, e2 consented to the filing of an involuntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code. e2 shareholders who opted to participate in the litigation trust established with Browne's assistance had received over \$1 million in distributions from e2's bankruptcy estate as of the hearing in 2006.

Subsequent to e2's bankruptcy filing, NASD's Department of Enforcement ("Enforcement") filed a complaint alleging violations of Rule 3040 by Browne and Calandro. Cause One of the complaint alleged, "During the period from December 1999 through March 2000, Browne solicited and/or referred 24 investors to e2, all as more fully detailed on Exhibit 'A,' attached hereto." Cause Three of the complaint alleged similarly that, "[d]uring the period from January 2000 through March 2000, Calandro "solicited and/or referred nine investors to e2,

16/ There is no evidence in the record that their departures from PaineWebber were related to their dealings with e2. To the contrary, Browne testified without dispute that a manager at Lehman encouraged Calandro and Browne, who was one of PaineWebber's top producers, to move to Lehman. A May 1999 letter from this Lehman manager to Browne stressing the firm's success in recent private equity deals and encouraging Browne to visit the firm's Dallas office supports Browne's testimony.

17/ The disclosure of his holdings was given as a single number representing the total value of all Browne's and his wife's holdings, including the 10,177 shares issued in March 2000.

18/ Lehman performed due diligence on e2, and, although Lehman decided against a direct investment in e2, it proposed a merger between e2 and another e-mail marketing company in which Lehman had already invested significant capital. This merger never materialized.

19/ See discussion infra, Section IV, regarding Browne's involvement in the Series C round.

as more fully detailed on Exhibit 'A,' attached hereto." ^{20/} Exhibit A is a spreadsheet that lists the names of seventy-five purchasers of e2's Series B Preferred Stock. On this spreadsheet, a column titled "source" lists Browne or Calandro's name next to some of the investors. The complaint also alleged that Browne and Calandro were compensated for these activities.

Browne and Calandro filed motions with the NASD hearing officer objecting that the complaint did not state with sufficient particularity the conduct Applicants were alleged to have engaged in that violated Rule 3040. The hearing officer ordered Enforcement to file a bill of particulars. There, Enforcement alleged that Browne and Calandro participated in private securities transactions by engaging in "one or more" of a list of activities with respect to "transactions of the investors listed on Exhibit A," and "by receiving and accepting shares of e2 as a finder's fee in exchange for their participation." With respect to certain transactions related to Calandro, including his stepfather Ciokajlo's purchase, the bill of particulars alleged that his participation "consisted of receiving and accepting shares of e2 for these transactions after the customers purchased shares of e2 as a result of learning of the investment opportunity from other customers of Calandro." Enforcement further clarified its theory of liability during the hearing, stating that "the receipt of selling compensation alone constitutes participation in the transactions for purposes of Rule 3040."

The NASD Hearing Panel ultimately rejected Exhibit A as "not reliable," noting that the document was "not an e2 corporate record, and none of the Parties presented credible evidence of the document's origin." The panel concluded nonetheless that Browne participated in securities transactions involving the purchase of e2's Series B Preferred shares by nine investors listed on Exhibit A: Bonner, Kelley, Galinet, McCook, Fullerton, Browne Sr., Shaunak, Carter, and Vogel. However, the panel "determined that Browne did not participate in the transactions made by other brokers in his office" whose names were listed on Exhibit A, namely Eldemire, McLochlin, Bond, and Duphorne. The panel found that "there was no evidence that [Browne] had any involvement with [Eldemire's] transaction whatsoever," that Browne's conduct did not constitute "participation in any manner" with respect to the McLochlin and Duphorne purchases, and that there was "insufficient evidence" to prove that Browne participated in Bond's purchase. The panel concluded that Calandro participated in the Series B transactions of six investors listed on Exhibit A: Galinet, John Calandro, Ciokajlo, Lucido, and Taylor, as well as Calandro's brother-in-law, Richard Cieszowski. The panel found that Browne and Calandro were paid finders' fees in connection with these transactions "as authorized by the March 2000 UWC."

On appeal, NASD's National Adjudicatory Council ("NAC") affirmed the Hearing Panel's finding that Browne participated in private securities transactions involving the purchase of e2's Series B Preferred shares by the same nine investors and that Calandro participated in Series B

^{20/} Cause Two of the complaint dealt with Browne's involvement with certain transactions related to e2's Series C Preferred stock issuance in 2001, which we address in Section IV of this opinion.

transactions involving Galinet, John Calandro, Ciokajlo, Lucido, and Taylor. 21/ Relying on the UWC, the NAC also found that the 10,177 and 3,137 shares that Browne and Calandro received, respectively, in the spring of 2000 were selling compensation "in connection with the introduction of investors to e2 Communications and their investments in e2 Communications."

III.

Exchange Act Section 19(e) provides that, in reviewing a disciplinary proceeding by a self-regulatory organization ("SRO"), we shall determine whether the associated person engaged in the conduct found by the SRO, whether the conduct violated the SRO rules at issue, and whether those rules were applied in a manner consistent with the purposes of the Exchange Act. 22/ In conducting our review, we apply a preponderance-of-the-evidence standard to determine whether the record supports NASD's findings that the conduct of Browne and Calandro violated this rule. 23/

NASD Conduct Rule 3040 provides that "[n]o person associated with a member shall participate in any manner in a private securities transaction" unless he or she provides prior written notice to the member and, if the person has received or may receive selling compensation, receives written permission to engage in the transaction.

Our cases have consistently affirmed a broad interpretation of the Rule and its operative phrase, "participate in any manner." 24/ For example, we held a broker liable in Gilbert M. Hair when he referred a customer to a specific investment instrument (certain promissory notes issued

21/ The NAC rejected the panel's finding that Calandro participated in Cieszowski's purchase, stating that "the record does not support a finding that Calandro had any conversations with or played any role in [Cieszowski's] purchase." We do not discuss Cieszowski's transaction in this opinion, therefore, because the issue of whether Calandro participated in this transaction is not before us.

22/ 15 U.S.C. § 78s(e).

23/ See Seaton v. SEC, 670 F.2d 309 (D.C. Cir. 1982) (upholding preponderance of evidence standard in NASD disciplinary proceeding).

24/ See, e.g., Mark H. Love, 57 S.E.C. 315, 319 (2004) (emphasizing that the phrase "participates in any manner" "should be read broadly"); See also Joseph Abbondante, Exchange Act Rel. No. 53066 (Jan.6, 2006), 87 SEC Docket 203, 215 (noting that "Conduct Rule 3040 is broad in scope"), aff'd, 209 Fed. Appx. 6 (2d Cir. 2006); Stephen J. Gluckman, 54 S.E.C. 175, 182-83 (1999) (stating that "[t]he reach of Conduct Rule 3040 is very broad").

by an investment banker) and then received a commission for the sale. 25/ In Stephen J. Gluckman, we found a broker liable under Rule 3040 when he informed an investor that an issuer was seeking funds, provided the investor's contact information to the issuer, helped prepare the purchase agreements, received investor funds, and received a referral fee. 26/ In John P. Goldsworthy, a broker violated Rule 3040 by signing the investment instruments, making arrangements to sell them, receiving investor checks made payable to him, and accepting funds from the proceeds of sales of the instruments. 27/ We held in Mark H. Love that a broker may violate Rule 3040 when he specifically recommends an investment to customers and then facilitates the mechanics of the transaction by, among other things, assisting the customers with transferring funds and liquidating their firm accounts to purchase the recommended investments. 28/

The scope of Rule 3040 is not without some limitation, however. Moreover, the parameters of the rule must be sufficiently clear so that associated persons have fair notice of what conduct is proscribed. 29/ Our precedent described above, while describing a wide range of conduct that may be considered violative of Rule 3040, delineates those parameters. We have found participation where the applicant took specific actions to effect the particular transaction or profited from specific involvement in a particular transaction. Hair referred a customer to a particular instrument and received a commission for that sale. Gluckman not only provided buyer contact information to the issuer but also assisted in completing the transactions and received a fee for his assistance with those particular transactions. Goldsworthy signed, sold, and collected payment for investments and then received proceeds from the transactions. Love recommended a specific investment and then assisted customers in funding their purchases of the security.

In contrast, the record before us does not establish by a preponderance of the evidence such a factual nexus between the conduct of Browne or Calandro and the specific Series B

25/ 51 S.E.C. 374, 375 (1993).

26/ 54 S.E.C. at 182.

27/ 55 S.E.C. 817, 835 (2002).

28/ 57 S.E.C. at 320-21.

29/ Cf. Jay Alan Ochanpaugh, Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2661 (setting aside NASD disciplinary action where NASD decision broadly interpreted the scope of Rule 8210 without offering legal or analytical support for its interpretation and requiring a "fuller exploration of the appropriate scope" of the rule); cf. Rock of Ages Corp. v. Sec'y of Labor, 170 F.3d 148, 156 (2d Cir. 1999) (holding that regulations satisfy due process as long as a "reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, has fair warning of what the regulations require").

purchases at issue. With respect to Bonner, Galinet, Kelley, McCook, and Vogel, the record does not establish a connection between Browne's introductions of these persons to e2 and those persons' purchases of Series B shares in 2000. Browne, in Rule 8210 responses and in testimony, stated that he introduced these persons to e2 for non-investment purposes. Browne introduced Bonner, an IBM executive, to e2 in 1997. Bonner helped establish a partnership between e2 and IBM, among other contributions to e2. 30/ Browne introduced Galinet, Kelley, and McCook to e2 in 1997 or 1998. Galinet was a provider of computer and office equipment; Kelley was expected to help e2 find office space; McCook was an executive at a software retail chain which became a customer of e2. Browne hoped that Vogel would interest Morgan Stanley in funding an e2 public offering. There is a considerable (or, in the case of Vogel, simply unknown) amount of time that elapsed between the introduction of these customers and the Series B purchases at issue. Nothing in the record contradicts Browne's assertions that his purpose in introducing these individuals to e2 was unrelated to investing. Nothing in the record suggests that Browne was otherwise involved in these purchases.

For some investors, there is both a lapse of time and intervening events between Applicants' introduction and the investor's eventual purchase of Series B shares. NASD found that Browne and Calandro were liable for having introduced to e2 six persons who purchased common shares in 1998 and then purchased Series B shares in 2000 (Galinet 31/ and McCook, as discussed above, and Browne Sr., Carter, J. Calandro, and Ciokajlo). NASD did not charge Browne or Calandro with having participated in the 1998 transactions. The record demonstrates that e2 itself solicited these common stockholders to buy Series B shares by sending letters to all participants in the 1998 offering asking for additional investments. NASD points to no evidence that Applicants were involved in these investors' Series B purchases.

NASD instead presents a new theory of liability under Rule 3040. NASD suggests that "[i]t is common knowledge that start-ups often seek funding from their advisors, suppliers, consultants, and other individuals involved with the company, and under the facts and circumstances Calandro and Browne should have known that their introductions [in 1998] would

30/ We note that, in any event, Browne was not charged with having participated in Bonner's purchase of Series B shares, raising an issue as to whether Browne received sufficient notice that he needed to defend against a Rule 3040 violation stemming from his introduction of Bonner to e2.

31/ We note that the complaint and bill of particulars allege that Browne, but not Calandro, participated in Galinet's purchase of Series B shares. No motion was made to amend the complaint to include a charge against Calandro with respect to Galinet's purchase. Nevertheless, both the Hearing Panel and NAC found Calandro liable for it. Because only Browne was charged with this transaction, Calandro was not afforded an opportunity during the hearing to present any evidence or witnesses in his defense regarding this transaction. We therefore dismiss the finding of liability for Galinet's purchase with respect to Calandro on this additional basis.

lead to investments in e2 Communications [in 2000]." NASD states that Browne and Calandro "were or should have been aware that e2 Communications, as a start-up technology company, would have ongoing capital needs and would likely initiate a number of rounds of private placements." Thus, NASD appears to have found that Browne and Calandro "participated" in these transactions because they "should have been aware" that their earlier referrals to e2 would eventually result in subsequent purchases of Series B stock. NASD's theory encompasses a much broader range of conduct than contemplated by the accepted definition of "participate" 32/ or by our earlier cases, which required a reasonably close factual nexus between the participatory conduct and a specific securities transaction. We believe that NASD has created a novel interpretation of Rule 3040. However, NASD has provided no prior notice to Applicants of the applicability of this new theory of liability to the proceeding against them. This lack of notice alone raises concerns sufficient to warrant dismissal of the charges against Browne and Calandro.

Aside from the notice question, NASD fails to establish a connection between Applicants' referrals and the complained-of Series B transactions. 33/ We explained in Love that a broker does not violate Rule 3040 when the broker "does nothing more than refer a customer to another investment opportunity." 34/ Although one might reasonably conclude that wealthy individuals with liquid assets have the wherewithal to invest in a company, it does not necessarily follow that they will invest in every company to which they are introduced. We also cannot conclude that, once that investor buys stock in a particular company, he or she will necessarily do so again. We do not understand why the NASD Hearing Panel found that Browne and Calandro "should have been aware" that certain individuals would invest in e2 based on an introduction to the company, while declining to find that they participated in the purchases by the four PaineWebber brokers, such as Eldemire, who purchased e2 shares under similar circumstances. When Browne and Calandro raised this argument on appeal, the NAC stated without explanation or analysis that the panel's decision contained "no such inconsistency."

NASD argues that Browne and Calandro received selling compensation from e2, and that this selling compensation serves as evidence of their participation in investors' purchases of Series B shares. NASD cites the UWC, which purported to issue 10,177 and 3,137 shares to Browne's wife and Calandro, respectively, in the spring of 2000. NASD argues that the UWC

32/ See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.) (defining "participate" as "to take part in something" or "to share in something").

33/ Compare Ronald J. Gogul, 52 S.E.C. 307, 310 (1995) (finding associated persons liable under Rule 3040's predecessor Rule 40 for referring clients "for the purpose of investing" in certain securities and being compensated therefor) and Terry Don Wamsganz, 48 S.E.C. 257, 258 (1985) (finding broker violated Rule 3040's predecessor Rule 40 when he referred two clients "who wanted to acquire control of a business" to a company seeking additional capital and then received a finder's fee).

34/ Love, 57 S.E.C. at 321.

"unambiguously states that these shares were finders' fees earned by Calandro and Browne in connection with the Series B Preferred offering" However, Rule 3040 defines "selling compensation" as "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security." ^{35/} The UWC does not link the shares given to Browne and Calandro to the particular Series B "purchase or sale" of any of the thirteen investors for whose purchases Browne and Calandro were charged and found liable.

Although the record contains a May 2000, internal e2 email from e2's CFO characterizing the share issuance as "payment for Pref. B round," the email was not discussed in any detail at the hearing and does not identify the transactions or services for which the shares purport to be "payment." Similarly unhelpful are a letter Bray wrote to NASD in 2003 and Bray's hearing testimony about the letter. That letter can reasonably be read to support Applicants' contention that the shares were issued in recognition of their overall efforts in support of e2 and not tied to any of the specific transactions at issue in this case. Based on the ambiguity of the UWC and the lack of other reliable record evidence demonstrating that Browne and Calandro received shares from e2 as compensation for participation in the specific Series B share purchases charged, rather than as a general reward for their support of e2, we cannot conclude that Applicants' receipt of the shares covered by the UWC provides meaningful evidence that they participated in private securities transactions as prohibited by Rule 3040.

We also find that the evidence is insufficient to find Applicants liable under Rule 3040 for participating in the purchases of Fullerton, Shaunak, Lucido, and the Taylor/Good Partnership. The record as to these transactions is limited to referrals. ^{36/} With respect to Fullerton, the only information available about Browne's connection to Fullerton's purchase of Series B shares is Browne's own response to NASD's request for information in which Browne simply included Fullerton's name in a list of persons Browne "referred to e2, who invested in e2." Browne was not asked about Fullerton's purchases during the hearing, and Fullerton himself did not testify. With respect to Shaunak, the record demonstrates only, according to unopposed testimony from Browne and his own brief response to NASD's request for information, that Browne requested that e2 contact Shaunak after Shaunak learned of the company from other sources and had decided to invest.

With respect to Lucido, Calandro testified without opposition that, in the context of general discussions about internet stocks, he told Lucido that his wife had purchased e2 shares. Calandro also told Lucido, in response to direct questioning about whether e2 would need more capital, that Calandro "probably said at some point they might." Lucido's affidavit supports the conclusion that Lucido pursued this investment on his own initiative. The record does not indicate that Calandro had any further involvement with Lucido's purchases.

^{35/} NASD Rule 3040(e)(2).

^{36/} See Love, 57 S.E.C. at 321.

We also find that the evidence does not establish that Calandro participated in the Series B purchase of the "Taylor/Good Partnership." The only evidence presented with respect to this purchase was testimony by Calandro regarding discussions about e2 that he had with his client Charles Taylor. No evidence was adduced regarding Taylor's relationship to the Taylor/Good Partnership or whether Taylor or Calandro had any role in the purchase, or in the decision to purchase, by the partnership. We therefore dismiss this finding of liability because it was not proven as charged.

* * *

For the reasons explained above, we dismiss NASD's findings of liability with respect to the Series B purchases by the thirteen investors at issue.

IV.

Exchange Act Section 15A(h)(1) ensures fairness in NASD proceedings by requiring that specific charges be brought, that notice be given of such charges, that an opportunity to defend against such charges be given, and that a record be kept. ^{37/} Count Two of the complaint alleged that Browne participated in certain purchases of e2 common shares and Series C Preferred shares by Steve Flory. Flory testified that, although he did purchase some e2 common stock himself, a limited partnership he assertedly managed, CBI-Eastchase, was the purchaser of the remaining shares at issue. Flory also testified that he was not the majority owner of CBI-Eastchase, and that the majority owner lent the partnership most of the funds it used to buy those shares. Thus, at the hearing, there arose an issue as to whether Flory could properly be deemed the "purchaser" of all e2 stock as alleged in Cause Two of the complaint.

During the hearing, Browne objected repeatedly to this apparent disparity between the complaint and the evidence with respect to these transactions, and Enforcement responded by moving to "conform the pleadings to the evidence." However, the hearing officer never issued a ruling on the motion, leaving the scope of Cause Two's allegations unclear.

We believe the hearing officer's failure to rule on Enforcement's motion introduced confusion into an already unclear theory of the case. Browne's continuing objections, unresolved by the hearing officer, suggested that Browne had not "understood the issue" and was not

^{37/} 15 U.S.C. § 78o-3(h)(1). See also James L. Owsley, 51 S.E.C. 524, 527-28 (1993) (dismissing "findings of misconduct on matters that have not been charged and which respondents [did not have] a fair chance to rebut"); Paulson Investment Co., Inc., 47 S.E.C. 886, 890 (1983) (setting aside NASD findings of violation where the complaint did not charge applicants with the deficiencies at issue and where the Commission was unable, on the basis of its review of the record, to "conclude that applicants were subsequently given adequate notice of these additional allegations, or a proper opportunity to defend themselves against them").

"afforded full opportunity' to justify [his] conduct during the course of litigation." 38/ We cannot know how Browne's defense of Cause Two might have changed or been augmented if Enforcement had given Browne notice with more specific charges of the reasons Browne allegedly participated in the purchases by CBI-Eastchase. 39/ We therefore dismiss this finding of liability.

V.

In sum, we conclude that the record in this case provides insufficient support for a finding that Browne or Calandro participated in private securities transactions with respect to investor purchases of e2 Series B shares in violation of NASD Rule 3040 and dismiss those charges. We also dismiss the findings of liability based on Flory's and CBI-Eastchase's purchases of e2 common and/or Series C stock. 40/

An appropriate order will issue. 41/

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR, and PAREDES; Commissioner WALTER not participating).

Florence E. Harmon
Acting Secretary

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

38/ Wanda P. Sears, Exchange Act Rel. No. 58075 (July 1, 2008), __ SEC Docket __, __ (quoting Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 262 (D.C. Cir. 1979) (quoting NLRB v. McKay Radio & Tel. Co., 304 U.S. 333, 350 (1938))).

39/ See Owsley, 51 S.E.C. at 527-28. Compare Nicholas A. Codispoti, 48 S.E.C. 842, 845 n.14 (1987) (rejecting applicant's claim of prejudice and noting that "the record reflects that [applicant] had sufficient opportunity to introduce evidence with respect to" certain securities at issue in the case).

40/ We note that, in affirming the sanctions upon Browne and Calandro, the NAC considered it an aggravating factor that "Browne's misconduct resulted in claims against PaineWebber." The "claim" against PaineWebber involved a settled arbitration proceeding brought by an e2 investor about which there is scant information in the record. NASD elected not to charge Browne with having participated in this investor's purchase of e2 shares. We would find it inappropriate to consider as aggravating information about an arbitration settled by a person's former firm that has not been adequately developed in the record.

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 58916 / November 7, 2008

Admin. Proc. File No. 3-12926

In the Matter of the Applications of

JAMES W. BROWNE

and

KEVIN CALANDRO

For Review of Disciplinary Action Taken by

NASD

ORDER SETTING ASIDE DISCIPLINARY ACTION TAKEN BY REGISTERED
SECURITIES ASSOCIATION

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

ORDERED that the sanctions and costs imposed by NASD against James W. Browne and Kevin Calandro be, and they hereby are, set aside.

By the Commission.

Florence E. Harmon
Acting Secretary

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

27

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 58922 / November 10, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13289

In the Matter of

INPHONIC, INC.
(n/k/a INP Liquidation, Corp.),

Respondent.

ORDER INSTITUTING PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against InPhonic, Inc. (n/k/a INP Liquidation, Corp.) ("InPhonic" 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 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.

7 of 28

III.

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

A. InPhonic (CIK No. 1133324) is a Delaware corporation formerly headquartered in Washington, D.C., that, prior to its bankruptcy filing, was engaged in the business of marketing wireless telephone and satellite television services and related equipment and support services. From November 15, 2004 until July 31, 2006, InPhonic's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and traded on the NASDAQ National Market. After July 31, 2006, InPhonic's common stock was registered with the Commission pursuant to Section 12(b) and listed on the NASDAQ Global Market. InPhonic's stock was delisted as of December 22, 2007, causing InPhonic's Section 12(b) registration to be terminated and its Section 12(g) registration to be revived as of March 11, 2008. InPhonic is currently quoted by the Pink OTC Markets, Inc. under ticker symbol "INPC." Respondent filed a Chapter 11 bankruptcy proceeding on November 8, 2007.

B. InPhonic has failed to comply with Section 13(a) of the Exchange Act 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 ending June 30, 2007.

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 of 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 finds that it is necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

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.

Accordingly, it is hereby ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of Respondent's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Florence E. Harmon
Acting Secretary

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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34-58938]

DELEGATION OF AUTHORITY TO THE DIRECTOR OF THE OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS AND THE SECRETARY OF THE COMMISSION

AGENCY: Securities and Exchange Commission.

ACTION: Final Rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is amending Rules 30-18¹ and 30-7² to delegate to the Director of the Office of Compliance Inspections and Examinations (“OCIE”) and the Secretary of the Commission, respectively, functions currently delegated to the Associate Executive Director of the Office of Filings and Information Services (“OFIS”). This re-delegation reflects the transfer to OCIE and the Office of the Secretary of functions previously performed by OFIS, which was fully dissolved in May 2007. The Commission is delegating to the Director of OCIE functions relating to, among other things, the granting and cancellation of the registrations of brokers, dealers, municipal securities dealers, government securities brokers or government securities dealers for which the Commission is the appropriate regulatory agency, transfer agents, and investment advisers. The Commission is delegating to the Secretary of the Commission the function of authenticating all Commission documents produced for administrative and judicial proceedings.

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

¹ 17 C.F.R. § 200.30-18: Delegation of Authority to Director of the Office of Compliance Inspections and Examinations.

² 17 C.F.R § 200.30-7: Delegation of Authority to Secretary of the Commission.

FOR FURTHER INFORMATION CONTACT: For information regarding the delegation of authority to the Director of OCIE, contact John Walsh, Associate Director - Chief Counsel, at (202) 551-6460, or Nancy Hansbrough, Assistant Chief Counsel, at (202) 551-6475. For information regarding the delegation of authority to the Secretary of the Commission, contact Florence Harmon, Acting Secretary, at (202) 551-5604.

SUPPLEMENTARY INFORMATION:

I. Discussion

The advent of the Commission's Electronic Data Gathering and Retrieval ("EDGAR") system in the 1980s diminished the need for the processing of paper filings (formerly the primary function of OFIS and its predecessor offices) and, as a result, the number of staff to handle the filings. In recognition of this diminished need, OFIS was dissolved fully in May 2007, with its functions allocated among other divisions and offices within the Commission in order to achieve greater efficiencies. Certain of these functions are now performed by OCIE and the Office of the Secretary of the Commission.³

The Commission today is amending Rule 30-18⁴ and Rule 30-7,⁵ which specify the functions delegated to the Director of OCIE and the Secretary of the Commission, respectively, to include functions currently delegated to the Associate Executive Director of OFIS in Rule 30-11.⁶ The functions that are being delegated to the Director of OCIE include, among other things, the granting and cancellation of the registrations of brokers, dealers, municipal securities dealers,

³ See 17 C.F.R. § 200.30-11: Delegation of Authority to Associate Executive Director of the Office of Filings and Information Services.

⁴ 17 C.F.R. § 200.30-18.

⁵ 17 C.F.R. § 200.30-7.

⁶ 17 C.F.R. § 200.30-11: Delegation of authority to Associate Executive Director of the Office of Filings and Information Services.

transfer agents, investment advisers, and government securities brokers or government securities dealers for which the Commission is the appropriate regulatory agency.⁷ They also include the functions of notifying a broker or dealer that has failed to comply with certain requirements of the Securities Investor Protection Act of 1970 that it is unlawful to engage in business as a broker or dealer, and of authorizing a broker or dealer to resume business upon compliance.⁸ The function that is being delegated to the Secretary of the Commission is to authenticate all Commission documents produced for administrative and judicial proceedings.⁹ As a result of these re-delegations, Rule 30-11 is being removed and reserved.

II. Administrative Procedures Act and Other Administrative Laws

The Commission has determined that these amendments to its rules relate solely to the agency's organization, procedure or practice. Therefore, the provisions of the Administrative Procedures Act ("APA") regarding notice of proposed rulemaking and opportunities for public participation are not applicable.¹⁰ For the same reason, and because these amendments do not substantially affect the rights or obligations of non-agency parties, the provisions of the Small Business Regulatory Enforcement Fairness Act are not applicable.¹¹ In addition, the provisions of the Regulatory Flexibility Act, which apply only when notice and comment are required by the APA or other law, are not applicable.¹² Finally, these amendments do not contain any

⁷ See 17 C.F.R. § 200.30-11(a)-(b).

⁸ See 17 C.F.R. § 200.30-11(c).

⁹ See 17 C.F.R. § 200.30-11(e).

¹⁰ 5 U.S.C. 533.

¹¹ 5 U.S.C. 804.

¹² 5 U.S.C. 601-12.

collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.¹³

III. Cost Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The rule amendments the Commission is adopting today re-delegate functions from the Associate Executive Director of OFIS to the Director of OCIE and the Secretary of the Commission to reflect the transfer of OFIS's responsibilities to OCIE and the Office of the Secretary. The re-delegation will update the Commission's rules to accurately reflect that OCIE and the Office of the Secretary are performing functions previously performed by OFIS. The Commission does not believe that the rule amendments will impose any costs on non-agency parties, or that if there are costs, they are negligible.

IV. Consideration of Burden on Competition

Section 23(a)(2) of the Securities Exchange Act of 1934 ("Exchange Act") requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition. The Commission does not believe that the amendments that the Commission is adopting today will have any impact on competition.

V. Statutory Basis

The amendments to the Commission's delegations are being adopted pursuant to statutory authority granted to the Commission, including Section 4A of the Exchange Act.

VI. Text of Final Amendments

List of Subjects in 17 CFR Part 200

¹³ 44 U.S.C. 3501-20.

Administrative practices and procedures, Authority delegations (Government agencies).

For the reasons set out in the preamble; Title 17, Chapter II of the Code of Federal

Regulations is amended as follows:

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

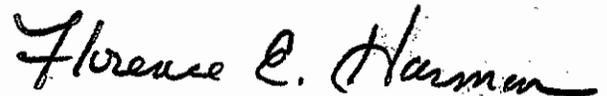
1. The authority citation for part 200, subpart A continues to read in part as follows:

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

* * * * *

2. Amend § 200.30-7 by redesignating paragraph (c) as paragraph (d).
3. Section 200.30-11(e) is redesignated as § 200.30-7(c).
4. Amend § 200.30-18 by redesignating paragraph (j) as paragraph (m).
5. Section 200.30-11 paragraphs (a), (b), and (c) are redesignated as § 200.30-18 paragraphs (j), (k), and (l).
6. Remove and reserve § 200.30-11.

By the Commission.



Florence E. Harmon
Acting Secretary

Date: November 13, 2008

Commissioner Walter
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58951 / November 14, 2008

Admin. Proc. File No. 3-11953r

In the Matter of the Application of

ALVIN W. GEBHART, JR.
and
DONNA T. GEBHART

c/o Charles F. Goria
Goria, Weber & Jarvis
1011 Camino Del Rio South, Suite 210
San Diego, CA 92108

For Review of Disciplinary Action Taken by
NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Redetermination of Liability on Remand for Fraudulent Sale of Securities

The Ninth Circuit Court of Appeals affirmed the Commission's finding that registered representatives of member firm of registered securities association engaged in private securities transactions without giving prior written notification to, or obtaining prior approval from, member. The Court remanded for further findings on whether representatives violated antifraud provisions with the requisite scienter when they made material misrepresentations and omissions in the sale of securities. Held, representatives recklessly made material misrepresentations and omissions, and association's findings of liability and the sanctions imposed therefor are sustained.

9 of 28

APPEARANCES:

Charles F. Gorja, of Gorja, Weber & Jarvis, for Alvin W. Gebhart, Jr. and Donna T. Gebhart.

Marc Menchel, James S. Wrona, and Michael J. Garawski, for Financial Industry Regulatory Authority, Inc., Department of Enforcement, for NASD.

Case remanded: January 15, 2008

Last brief received: June 13, 2008

I.

This proceeding is before us on remand from the United States Court of Appeals for the Ninth Circuit (the "Court"). On January 18, 2006, we issued an opinion and order (the "2006 Opinion") sustaining NASD disciplinary action against Alvin W. Gebhart, Jr., and Donna T. Gebhart, registered representatives formerly associated with Mutual Service Corporation, an NASD member firm. ^{1/} NASD found that the Gebharts, in offering and selling over \$2 million in unregistered promissory notes from 1997 through early 2000, violated the registration and antifraud provisions of the federal securities laws as well as several NASD rules. NASD found that, because the promissory notes were securities, no registration statement was in effect as to the notes, and no exemption applied, the Gebharts' sales violated Section 5 of the Securities Act of 1933 ^{2/} and NASD Conduct Rule 2110. ^{3/} NASD found further that the Gebharts had not obtained prior written permission from their firm to engage in the sale of the notes, thereby

^{1/} Alvin W. Gebhart, Jr., and Donna T. Gebhart, Securities Exchange Act Rel. No. 53,136 (Jan. 18, 2006), 87 SEC Docket 437, remanded, Gebhart v. SEC, 255 Fed. Appx. 254 (9th Cir. Nov. 21, 2007).

On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member-firm regulatory functions of NASD and NYSE Regulation, Inc. See Exchange Act Rel. No. 56,146 (July 26, 2007), 72 Fed. Reg. 42,190 (Aug. 1, 2007). Because the disciplinary action here was taken before that date, we continue to use the designation NASD in this opinion.

^{2/} 15 U.S.C. § 77e.

^{3/} NASD Conduct Rule 2110 requires adherence to just and equitable principles of trade.

violating NASD Conduct Rules 3040 and 2110. 4/ NASD also found that the Gebharts violated several antifraud provisions: Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and NASD Conduct Rule 2120, in connection with their offer and sale of the notes. 5/

For selling unregistered securities and engaging in securities transactions without permission from their firm, NASD barred Alvin Gebhart and suspended Donna Gebhart for one year and fined her \$5,000. For their violations of the antifraud provisions, Alvin Gebhart received another bar, and Donna Gebhart received a second one-year suspension (to be served concurrently with her first suspension) and a \$10,000 fine. We sustained both NASD's findings of violation and the sanctions imposed.

Following issuance of the 2006 Opinion, the Gebharts appealed those portions of the decision that found the Gebharts liable for selling securities without their firm's permission and for engaging in fraud. 6/ On November 21, 2007, the Court of Appeals affirmed the findings of liability with respect to the Gebharts' selling of securities without firm permission. 7/ However, the Court reversed the findings that the Gebharts had engaged in fraud, vacated the sanctions based thereon, and remanded the matter "for further findings on the factually intensive question of whether the Gebharts acted with the requisite scienter" to support the findings of fraud. 8/ In this opinion we address the Court's concerns, focusing on whether the Gebharts acted recklessly when they offered and sold the securities at issue in this case. 9/ We find that the Gebharts'

4/ NASD Conduct Rule 3040, titled "Private Securities Transactions of Associated Persons," prohibits involvement by associated persons of member firms in a transaction outside the regular course or scope of employment without providing prior written notice to the member firm.

5/ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. NASD Conduct Rule 2120 prohibits fraud in the offer and sale of securities.

6/ The Gebharts did not contest, in their appeal to the Court, the finding that the promissory notes in question were securities and that the Gebharts violated Securities Act Section 5 and NASD Rule 2110 by offering and selling the unregistered notes. Those findings are therefore final.

7/ Gebhart v. SEC, 255 Fed. Appx. at 256.

8/ Id.

9/ In reaching our decision, we have considered the arguments of the parties in briefs submitted pursuant to a scheduling order issued on February 6, 2008 as well as an order issued May 29, 2008 granting a request by the Gebharts to submit supplemental briefing

(continued...)

conduct did, in fact, satisfy the Court's definition of recklessness, for the reasons explained below.

II.

For purposes of this opinion, the pertinent facts are as follows. The Gebharts were securities salespersons with Mutual Service Corporation ("MSC"), a broker-dealer and member of NASD. From 1997 to 2000, the Gebharts offered and sold to their clients nearly \$2.4 million in unregistered promissory notes ("Notes") issued by MHP Conversions, LLC ("MHP"). MHP sold the Notes purportedly to finance the conversion of mobile home parks to resident ownership. MHP's sales literature represented that a related company, Community Service Group ("CSG"), would purchase the parks from the owner and then assist the park's residents with legal and financial arrangements so that they could ultimately purchase the property themselves.

Gebhart, who has been in the securities industry since 1983, learned about the Notes in late 1995, while working at Mutual of New York ("MONY"), from another MONY salesman named Jack Archer. Gebhart thought highly of Archer, an ex-Marine and Vietnam veteran with more experience selling securities than Gebhart. Archer had a short discussion with Gebhart in which Archer briefly described the MHP trailer park program and asked if Gebhart would be interested in it. Gebhart referred three of his clients to Archer; all three invested funds with Archer, who paid Gebhart a finder's fee. ^{10/} According to the Gebharts, the fact that these clients did not complain about their investments later served as a basis for their recommendation of the Notes to others:

The Gebharts understood that MHP was created to issue the Notes that were sold to individual investors to raise the funds necessary for CSG's purchase of the parks. However, the record is unclear as to these entities' actual roles in any transactions related to the ownership interests in the parks, and the Gebharts' own understanding of the mechanics of these transactions was vague. For example, asked why the Notes were issued by MHP, Gebhart testified, "Because

^{9/} (...continued)

on the relevance of a recent decision of the United States District Court for the Southern District of California, SEC v. Platforms Wireless Int'l Corp., 559 F.Supp.2d 1091, 1096-97 (S.D. Cal. 2008) (defining recklessness in the context of fraud as "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it" and noting that "recklessness only satisfies scienter under § 10(b) to the extent that it reflects some degree of intentional or conscious misconduct" (quoting Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990) and In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970, 977 (9th Cir. 1999))).

^{10/} Neither NASD nor we based any findings of liability on these three referrals.

of the fact that the parks – when they were trying to do a park [Archer] would tell us, 'I have this park that's going through a conversion.' We would get the name of the park to be done and get the check made out to that name and then it wouldn't work for some apparent reason and the check would be given back to the client. This is an easier way of facilitating the process, is what he explained to me." The Gebharts made no effort to understand or investigate why their clients were being sold second (and not first) deeds of trust, nor did they know or inquire about the identities of the first trust deed holders or the amounts of those outstanding first trust deeds. When asked to explain the process MHP used to issue and secure trust deeds on trailer parks it was converting, Donna Gebhart was unable to describe it, testifying, "I wish I could explain it more. I wish I would have known more."

The MHP Notes had one-year terms with fixed interest rates of 18% for new investments and 14% on reinvested funds. Each Note stated that it would "ultimately be secured by a deed of trust" on the particular park to be purchased with the funds, but that "[u]ntil such time as said deed of trust is recorded, the sole asset of [the issuer] will be a deed of trust for the property known as Eastern Trailer Park . . . in the amount of \$100,000."

In late January 1996, Gebhart left MONY to join MSC; his wife soon thereafter became a registered representative and joined him in selling insurance and mutual funds and providing financial planning services in their California branch office. On October 2, 1996, at Archer's suggestion, the Gebharts themselves invested \$7,000 in the Notes. 11/ On October 23, 1996, Archer asked the Gebharts if they were interested in selling Notes directly to their clients. The Gebharts had a lengthy discussion with him about the Note program. Archer represented that he had done his own due diligence and had received permission from his own firm to sell the Notes. In fact, Archer did not receive permission from his firm to sell the Notes. 12/ Archer also told the Gebharts that "all of the governmental agencies were involved," "the parks were in good shape," "had a lot of equity in them," and were only "45 to 55 percent leveraged." The Gebharts had also received from Archer a packet of marketing materials prepared by the issuer. 13/

11/ The Gebharts eventually purchased nearly \$70,000 in Notes, though some portion of this amount represents reinvestment of funds from matured Notes. As noted infra, the Gebharts had about half this amount invested in Notes when MHP eventually collapsed in the spring of 2000.

12/ Archer was a named respondent in the proceedings before NASD, but he defaulted and was barred by NASD from associating with any member firm.

13/ This included a sample promissory note, a "brochure" that featured a printout from CSG's Web site describing its park-conversion business, several local newspaper articles that reported successful park conversions, several one-page descriptions of converted parks, and "pro forma" financial information for one park conversion that provided a brief projected cash flow analysis and an investment summary that sketched the outlines of

(continued...)

The Gebharts discussed the MHP Note program with their firm, MSC, in a single phone call soon after their conversation with Archer. Alvin Gebhart testified that, during this call, he had a relatively lengthy conversation with the compliance director at MSC, during which Gebhart explained the program in detail, disclosed that he would be receiving commissions on the sales, and answered "a lot" of questions. The MSC compliance officer testified that the call was "a casual five-minute conversation" in which Gebhart told him "very little" about the Notes. However, the parties agree that MSC did not give permission to the Gebharts to sell the Notes during that telephone call. The Gebharts forwarded a copy of the MHP marketing materials by courier to MSC but never received a response. Nevertheless, the Gebharts began offering and selling MHP Notes to their clients a few months later, in early 1997.

In addition to having contacted MSC for permission to sell the Notes (permission they never received), the Gebharts made available to MSC auditors in November 1997 and February 1999 their transaction logs and client files that contained some evidence of MHP Note purchases. The auditors did not raise any objections to the Note program. Although the Gebharts appear to have made no attempt to hide from the MSC auditors information about the MHP Notes, it is unclear whether the auditors actually saw any of the evidence of the purchases.

The Gebharts' administrative assistant also contacted MSC's operations department in September 1998 to inquire whether funds held in a retirement account could be used to purchase an MHP Note, and MSC's operations department faxed its approval of the MHP Notes for holding in a 403(b) account. The Gebharts' office assistant testified in a deposition in a related civil case that this communication with MSC about the Notes was limited solely to finding out what administrative steps the client needed to take to hold an MHP Note in her 403(b) account. Ultimately, two Note purchases were made with 403(b) funds, and the paperwork for these purchases cleared MSC's operations department without comment. It is undisputed, however, that MSC's compliance department, which was responsible for approving outside business activities, did not review these transactions.

Nevertheless, Gebhart testified that he had done "the proper due diligence" by talking to Archer, contacting MSC, and visiting two of the trailer parks to be converted. Other than these

13/ (...continued)

CSG's plan to borrow funds to convert the park. MHP was mentioned in these materials only in that the company's name appeared on the cover of the brochure along with CSG's.

two site visits, the value of which was questionable, 14/ the Gebharts made no attempt to gather information on the individual parks in which their clients would be investing through MHP.

The Gebharts concluded that the Note program was a successful venture because they "didn't hear any complaints" from early investors. The Gebharts neither sought nor possessed any information about the management or financial health of MHP, apparently considering it irrelevant. Gebhart testified that he never imparted any information about MHP to clients because his clients "were, as I saw, lending money to a mobile home park itself." According to Donna Gebhart, "[i]t was always our understanding that [MHP] wouldn't have done a conversion on a park that wasn't – that didn't have good cash flow and that would be a deal worth them doing." Donna Gebhart did not explain what parameters she believed MHP used to determine if a deal was "worth doing," but testified that she simply "had faith with everybody that was involved that it was a good program."

In selling the Notes to their clients, the Gebharts presented the MHP program as an option for investors who needed a substantial, fixed monthly income. For example, investor Maribeth Trogdon, a recent widow with two dependent children whose only income was from a part-time teaching job, testified about her discussions with the Gebharts in a deposition in a civil case brought against Gebhart and MSC by clients who bought MHP Notes. 15/ Trogdon testified that the Gebharts recommended that she invest a large portion (more than a third) of the life insurance

14/ Gebhart testified in a civil deposition in a related case that these site visits consisted of the following:

What we did is I went up to the Flinn Springs trailer park, drove in, looked around to see the quality of it, to see if it's there, if it's a bona fide piece of real estate, there were mobile homes on it, people living in those mobile homes, whether it was upkept – kept up. Same thing in Aviation. I drove in, looked around, see if there's people living there, if mobile homes were there. In fact, they were.

In this connection, we note that the Gebharts' clients eventually invested in several other parks in addition to the two that Gebhart visited.

15/ NASD declined to base findings on depositions from Trogdon and other customers given in related civil proceedings brought by Note purchasers against Archer, the Gebharts, and their firms (the "Noteholder suit"). However, we see no reason not to consider this evidence. The Gebharts' lawyer was present during these depositions, and never objected to their inclusion in the record below (nor have the Gebharts objected subsequently). Moreover, the testimony appears credible in that the customers make similar assertions about what they were told by the Gebharts. See Frank J. Custable, Jr., 51 S.E.C. 643, 648 (1993) (finding that "similarities in each customer's [challenged] testimony regarding [the salesperson's] behavior and treatment of them" strengthened finding of credibility). The testimony is also consistent with that of the Gebharts themselves.

proceeds from her husband's death into MHP Notes to replace her husband's income. Notes that Trogdon made in preparation for the deposition state that "[t]he investment was presented to me as a proven, long term way for me to receive a substantial monthly income." 16/ Trogdon also testified during the deposition that, when she asked the Gebharts how she could be sure the money she was putting toward the MHP Note "isn't being sent to Tahiti," the Gebharts replied that MSC "looks at all our business . . . and would tell them if there was anything incorrect by law." 17/

Investors testified that the Gebharts told them that the Gebharts had invested their own money in the Notes and that the program had so far been successful. Investor Donald Townsend, a retiree looking to supplement his retirement income "to take care of the bills," testified that Gebhart represented that MHP was "basically solvent and steadily growing[,] obtaining more parks[,] and had been paying the monthly interest with no problems." At the hearing, Gebhart confirmed that he believed the trailer park program was a successful venture because he "didn't hear any complaints" from the three clients he had referred to Archer in early 1996.

Investors also testified that the Gebharts informed them that the MHP Notes would be secured by recorded deeds of trust, and that the parks would serve as sufficient collateral to secure all investments in the event of default. For example, Townsend testified, "I was told that [MHP] would purchase the mobile home parks with the money that's being loaned to them and that they would eventually secure the property with trust deeds" 18/ Investor Larry Tickel, a disabled former Wal-Mart store manager, testified that the Gebharts assured him that "there was no risk because [the Note] was secured by a deed of trust and then that [the parks] would not be overbought. So that way, if they had to sell the place, we would still get our money back." Following up, the NASD attorney asked Tickel, "Is that what Mr. Gebhart told you, that there was no risk?" Tickel responded, "Right." 19/

Similarly, Sylvia Kerr, a disabled former court reporter who made a total of four investments in MHP Notes, testified in a deposition in the Noteholder suit that she "didn't want

16/ Trogdon invested \$160,000 in an MHP Note in March 1999. Trogdon, and all other investors whose testimony is cited in this opinion, represented in a signed proof of claim submitted to the district court handling MHP's bankruptcy that MHP failed to record a trust deed securing their promissory notes, and there is no evidence in the record that refutes the investors' claims.

17/ The Gebharts corresponded with their customers using letterhead that stated "Securities offered by Mutual Service Corporation."

18/ Townsend invested \$40,000 in an MHP Note in June 1998; he re-invested those funds in another Note and added another \$2,200 to his investment in June 1999.

19/ Tickel invested \$20,000 in an MHP Note in August 1999.

to have any risk" with the money she wanted to invest, and she "remembered us laughing and them [i.e., the Gebharts] saying, 'Well, if you don't want to take any risk, this would be the place to put your money again.'" 20/

The Gebharts' recollection of their representations to their clients is consistent with the clients' testimony. Gebhart testified that he told clients, "If they invested into [an MHP Note] they would get a recorded deed of trust. If the worst case scenario came down they would be part owners of that park." Donna Gebhart similarly testified, "If [clients] asked us about it, either [Gebhart] or I would say the type of thing it is; they are mobile home park conversions. We would give them the knowledge we had about them and we would tell them that they would own a piece of the park [I]f it was like worst case scenario, if something happened and the park were to default, we all would own a portion and we could be able to sell the park and we would all get cashed out."

However, MHP did not provide copies of the deeds of trust supposedly securing the Notes unless an investor requested one, and very few investors made such a request. The Gebharts recalled seeing one client's trust deed, but did not recall seeing any recording information. The Gebharts never asked for, nor received, a copy of the deeds of trust purportedly securing their own Notes. Indeed, the Gebharts point to only one trust deed contained in the record before us that was recorded; however, that recordation occurred in 1995, well before the Gebharts began selling Notes to their clients. Aside from the ambiguity of the recording status of the deeds purportedly securing their clients' Note purchases, the Gebharts did not have any information about the value of the properties that were intended to serve as collateral and did not know how many of these deeds of trust were supposedly filed against each property or the extent to which the properties were otherwise encumbered.

The Gebharts had essentially no contact with the issuer. Archer handled all the paperwork for the Gebharts' clients who bought MHP Notes and told the Gebharts not to contact MHP or CSG directly. Gebhart testified that he spoke to the principal of MHP once about an "administrative matter," but on the few other occasions the Gebharts tried to contact the company, the staff "kept referring [the Gebharts] back to Archer." Archer shared his commissions with the Gebharts, paying them checks drawn on his personal bank account. 21/ They were paid 6-7% for new purchases and 3-4% for reinvested funds. By early 2000, the Gebharts had sold over \$2.4 million in MHP Notes to more than forty clients, for which they received over \$110,000 in commissions.

20/ Kerr invested \$10,000 in an MHP Note in January 1998; she re-invested those funds in new Notes in February 1999 and February 2000. In September 1999 Kerr made an additional Note purchase in the amount of \$11,000.

21/ Archer testified in a deposition in the Noteholder suit that the commissions he earned on MHP Note sales represented more than half of his income in 1998 and 1999.

In April 2000, MHP stopped making interest payments on the Notes. By this time, clients of the Gebharts had over \$1.5 million invested in the securities; the Gebharts themselves had about \$36,000 invested. On May 3, 2000, MHP sent a letter to Noteholders explaining that an illness of the company's owner was causing "cash flow problems." MHP claimed that approximately \$605,000 worth of Notes had been secured by recorded deeds of trust but revealed that MHP owed nearly \$3.7 million to holders of its promissory notes. 22/

The Gebharts reported in a May 2000 letter to their firm describing the collapse of the MHP Note program that "all of the mobile home parks appear[ed] to be substantially overencumbered," and that they had "no way of knowing this until May 11th of this year, when Mr. Archer showed us his note obligations." By their own admission, the Gebharts had been unaware that, by May 2000, Archer's clients had invested over \$2 million in the same parks in which the Gebharts' own clients had invested over \$1.5 million. By October 2000, the Gebharts had learned that MHP and related entities owned only "\$500,000 - \$700,000 in net assets" plus an insurance policy on the life of MHP's owner in the amount of \$1 million. After the Gebharts notified MSC of MHP's collapse, MSC investigated the matter and, on August 11, 2000, terminated the Gebharts' association with the firm.

Following MHP's collapse, the Gebharts took steps to recover the money that they and their clients had invested, including filing a petition for involuntary bankruptcy against MHP. Purchasers of MHP Notes sued Archer, Gebhart, MONY, and MSC. When the Gebharts' liability insurer refused to indemnify Gebhart, the Gebharts sued the insurer to force it to pay for Gebhart's defense and any damages awarded to the Noteholders. The Gebharts' clients ultimately recovered approximately 84% of their investments.

III.

Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rule 2120 prohibit fraudulent and deceptive acts and practices in connection with the offer, purchase, or sale of a security. Violations of these provisions may be established by a showing that persons acting with scienter misrepresented material facts or "engage[d] in deceit" in connection with securities transactions. 23/

The 2006 Opinion found that the Gebharts made misrepresentations and omitted to state facts necessary to make other statements not misleading in connection with their offer and sale of

22/ It is unclear whether MHP's representation that \$605,000 worth of Notes had been secured by recorded deeds of trust is accurate. Even if true, however, the Gebharts point to no evidence, and we have found none, that any of their own clients' trust deeds were recorded.

23/ Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); Rule 10b-5(c), 17 CFR § 240.10b-5.

over \$2.4 million in MHP Notes to their customers. The Gebharts testified that they told customers that investments in the Notes would be secured – and therefore risk-free – because second deeds of trust on the properties purchased with client funds would be recorded, and because, in the event of a default on the MHP Notes, clients could recover their investments by foreclosing on the properties and liquidating the collateral. These statements were false: second deeds of trust purportedly securing the MHP Notes purchased by the Gebharts' clients in 1999 and 2000 were not recorded and, even had they been recorded, the properties would have been substantially overencumbered. 24/

The Gebharts also failed to tell their clients throughout the relevant period that their recommendation of the Notes as a sound investment was not based on a thorough investigation but on statements made in MHP's marketing materials, representations by Archer, site visits the Gebharts made to two parks that confirmed nothing but that these particular parks existed, the absence of complaints from other customers, and the silence of MSC and other entities. We found that these misrepresentations and misleading omissions were material, 25/ and the Court of Appeals did not disturb that finding.

We turn now to the question of whether the Gebharts acted with scienter in misleading their clients. As the Court of Appeals stated, "[s]cienter may be established by a showing that the [respondent] acted recklessly." Citing the definition of recklessness articulated in Sundstrand Corp. v. Sun Chem. Corp., the Court explained that "[r]ecklessness in this context is 'a highly

24/ The Gebharts argue that there is insufficient evidence to determine whether any of the deeds of trust of customers who were purportedly defrauded were properly recorded. Thus, they assert that there is no basis for finding that the Gebharts misrepresented that status to customers.

We disagree. The Gebharts admitted more than once during the hearing that they generally told clients who purchased MHP Notes that their investments would be secured by recorded deeds of trust, as discussed infra. Moreover, NASD specifically asked Gebhart whether he told all the clients named on a stipulated list of all forty-five Gebhart clients who purchased Notes "that the trailer parks were secured by a recorded deed of trust." Gebhart replied, "As best I recall, yes." Although the record does not show whether deeds securing Notes purchased before 1999 were recorded, all of the forty-five Gebhart clients who purchased Notes in 1999 and 2000 represented in court filings in MHP's bankruptcy that MHP failed to record a trust deed securing their promissory notes. The Gebharts introduced no evidence, and we are aware of no evidence, that contradicts those client representations.

25/ A fact is material if there is a substantial likelihood that a reasonable investor would have considered the fact important in making an investment decision, and disclosure of the omitted fact would have significantly altered the total mix of information available. Basic, 485 U.S. at 231-32.

unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." ^{26/} The Court then described objective and subjective components of recklessness. The objective component asks what a reasonably prudent securities professional under the circumstances would have done, while the subjective component looks at an actor's actual state of mind at the time of the relevant conduct. As examples of situations in which a defendant would escape liability under the subjective component, the court in Sundstrand identified cases in which "a defendant genuinely forgot to disclose information" or where the omitted information "never came to his mind." ^{27/} The Court also asked us to address the situation in which a respondent seeks to establish a good faith defense to scienter.

After further review of the record in light of the Court's remand opinion, we remain convinced that the Gebharts' conduct satisfies this definition of recklessness. The Gebharts made critical representations – those related to the safety of the Notes as an investment – without having performed any meaningful investigation into the actual securitization of the Notes. This created the substantial risk – which would have been obvious to any reasonable person and which must have been obvious to the Gebharts – that their representations were not true. Evidence from the Gebharts about their subjective belief is not sufficient to overcome these conclusions.

The Gebharts admit that they told clients who invested in MHP Notes that they "would get a recorded deed of trust" and that the "worst case scenario" was that the investors could sell the park and all investors would "get cashed out." Yet the Gebharts knew they had no direct knowledge of the truth or falsity of these statements. The Gebharts testified that they remembered seeing only one client's trust deed but did not recall any recording information for that single deed. They never even saw, or requested to see, the trust deeds purportedly securing their own Note purchases. The Gebharts made no effort to investigate or understand why their clients were being sold second (and not first) deeds of trust; no effort to identify the first trust deed holders or the amounts of those outstanding first trust deeds; and no effort to ensure their clients' investments were actually being secured by recorded trust deeds.

Nor did the Gebharts have any direct knowledge about the value of collateral supposedly securing the Notes. Although Archer claimed that no park would have more than ten investors and that the parks would be only 45-55% leveraged, aside from Archer's assertion, the Gebharts

^{26/} Gebhart v. SEC, 255 Fed. Appx. at 255 (quoting Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990) (quoting Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977))). The Seventh Circuit recently observed with respect to the Sundstrand recklessness standard: "When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk." Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 704 (7th Cir. 2008).

^{27/} Sundstrand, 553 F.2d at 1045 n.20.

had no way of knowing if those statements were true because the Gebharts admit they made no effort to confirm them. Indeed, the Gebharts testified that they did not keep track of the number or amount of investments their own clients made in each park and did not know or ask how many of Archer's clients were investing in those same parks; nor did they know how many investors, referred perhaps by other representatives or other intermediaries like Archer, might also have been purchasing Notes. 28/ The Gebharts admitted they never sought or examined any information or documents that normally help to estimate the value of real property, such as an appraisal, prior sale history, title report, or the like. They simply made no effort to confirm that the parks had sufficient assets to pay for the return of their clients' investments after any necessary payments to other lienholders.

Instead of making any effort to confirm the truth of their statements to clients, the Gebharts claim to have substituted reliance on the vague and conclusory statements made in the issuer's marketing materials, the uncorroborated representations of Archer, site visits the Gebharts made to two parks, the silence – interpreted without question, confirmation, or follow-up by the Gebharts as comprehensive approval – of MONY, MSC, and other entities, and the absence of complaints from the customers to whom they had already sold Notes. 29/ As Donna Gebhart put it, they simply "had faith with everybody that was involved that it was a good program."

28/ Although the record indicates that Archer and the Gebharts were the only representatives selling MHP Notes, the Gebharts do not appear to have been aware of this fact at the time they were selling the Notes.

29/ The Gebharts claim that they relied in part on due diligence they believed was being performed by First Regional Bank, where certain of their customers maintained custodial accounts. They argue that the bank represented, in its investment authorization form, that when a customer wished to purchase a deed of trust with custodial funds, the bank was required to review escrow instructions, which "would reflect . . . the trust deed to be recorded." The fact that the bank would review trust deeds securing Notes purchased with custodial funds supposedly gave comfort to the Gebharts that their clients' investments were secured.

However, the bank's form notes only that, as part of its review for "administrative feasibility," the bank expected to review the "proposed" promissory note before disbursing funds. The form states that the investor must forward to the bank "original documents" such as a "recorded mortgage/deed of trust," and specifically disavows responsibility "for obtaining these documents or verifying the position of the investment, e.g., first or second mortgage/deed of trust." The record does not demonstrate that the Gebharts had any relationship with the bank that would have permitted them to conclude that the bank's internal review processes precluded any need for their own due diligence. Moreover, if the Gebharts considered it to be MHP's responsibility to eventually provide recorded deeds of trust to the bank, they made no effort to ensure MHP (or anyone else) was doing so.

The Gebharts' misplaced "faith" does not overcome our finding of recklessness given the obvious warning signs that some investigation was necessary. For example, the Gebharts were effectively precluded from having any direct contact with MHP, which was purportedly responsible for securing the Notes, and were paid their commissions by Archer, through his own personal account, not by MHP. 30/ Moreover, the Notes explicitly stated that each Note would be collateralized by only a single (never-changing) asset purportedly worth \$100,000 until the Notes would be "eventually" secured by recorded deeds of trust, with the result that when a particular park attracted more than \$100,000 worth of Note purchases, those investments would be insufficiently collateralized, by the very terms of the Note program, unless and until second trust deeds securing the Notes were recorded. Further, the Gebharts' investors, as second trust deed holders, were by definition subordinate to holders of first trusts should the parks' creditors need to foreclose, making it even more critical that the Gebharts confirm their clients' chances of recovering their investments. 31/ Yet the Gebharts ignored these facts, performed no investigation, and asserted the truth of critical matters with no objective, independent basis for doing so. This constitutes reckless conduct, and the Gebharts are legally bound as knowing of the risk of misleading their clients. 32/

30/ See Jay Houston Meadows, 52 S.E.C. 778, 785 (1996) (finding that salesman of a registered broker-dealer made misrepresentations that were reckless, based in part on a denial of unrestricted access to the issuer's records even though salesman claimed "not to have been troubled by this development"), aff'd, 119 F.3d 1219 (5th Cir. 1997).

31/ It is also unclear whether there may have been other second trust holders who, by virtue of having recorded their interests first in time, would have priority over MHP Note purchasers. There is no evidence that the Gebharts considered or investigated this possibility.

32/ As explained by the Sundstrand court:

Under this definition [of recklessness], the danger of misleading buyers must be actually known or so obvious that any reasonable man would be legally bound as knowing, and the omission must derive from something more egregious than even "white heart/empty head" good faith. While this definition might not be the conceptual equivalent of intent as a matter of general philosophy, it does serve as a proper legally functional equivalent for intent, because it measures conduct against an external standard which, under the circumstances of a given case, results in the conclusion that the reckless man should bear the risk of his omission. When measured against this external standard, it may be said that such a reckless man "has use[d] or employ[ed] a deceptive device" within Section 10(b).

553 F.2d at 1045 (citations omitted). See also McLean v. Alexander, 599 F.2d 1120, 1198 (3d Cir. 1979) ("[F]raud includes the pretense of knowledge when knowledge there

(continued...)

The Gebharts nevertheless argue that they should not be found liable for fraud because they acted in good faith, and therefore without the requisite state of mind. They contend that, as found by the NASD Hearing Panel, the Gebharts "truly believed that they had fulfilled their responsibilities to assure that MHP and CSG were appropriate investments" The Hearing Panel decision on this point was overturned by NASD's National Adjudicatory Council ("NAC"), which found that the Gebharts were reckless and concluded that the four factors identified by the Hearing Panel provided "scant reasons for the Gebharts to believe they had fulfilled their duty to investigate." The NAC decision is NASD's final action. ^{33/}

The Court of Appeals in its remand opinion identified subjective and objective components in an analysis of recklessness, and we acknowledge the Gebharts' assertions that they believed they had done enough to confirm the truthfulness of their statements to clients. We consider evidence of good faith to be relevant to a determination of whether a respondent acted with the requisite state of mind. That evidence must be considered with all other evidence of knowledge or recklessness because the reasonableness and, therefore, the credibility of that claim of good faith must be evaluated in light of the circumstances of each case and in light of the conduct expected from a reasonable person.

The Court questioned whether the 2006 Opinion should be interpreted as holding that good faith cannot be a defense to a finding of scienter whenever the evidence indicates that the respondents lacked a "reasonable basis for recommending the [securities], because they failed to discharge [their] duty to investigate before making the recommendations." ^{34/} The Court seems concerned that our view is that a good faith belief founded on negligent actions satisfies the recklessness prong of scienter. We take this opportunity to reiterate our adherence to the recklessness standard as an extreme departure from the standards of ordinary care and our view that negligence does not qualify as scienter.

Thus, the evidence the Gebharts forward to demonstrate their good faith beliefs is and should be part of the complete mix of facts bearing on an evaluation of their state of mind, but, in

^{32/} (...continued)

is none.") (citing Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 179 (Ct. App. N.Y. 1931)); Oliver Wendell Holmes, Jr., THE COMMON LAW 135-36 (1881).

^{33/} See Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17, appeal filed, No. 07-15736 (11th Cir. Dec. 13, 2007); Chris Dinh Hartley, 57 S.E.C. 767, 776 (2004) ("[I]t is the NAC's conclusions that are before us for review, not those of the Hearing Panel."); NASD Code of Procedure Rule 9349(c) (providing that the NAC decision constitutes the final disciplinary action that is subject to review by the Commission). For the reasons given in the 2006 Opinion, we agree with the NAC's rejection of the Hearing Panel's finding.

^{34/} Gebhart v. SEC, 255 Fed. Appx. at 256 (alterations in original).

the end, a respondent's belief that he acted in good faith must be tested by reference to objective criteria; *i.e.*, the applicable standard of conduct is determined in accordance with the degree to which the respondent had acted extremely unreasonably. A respondent's asserted good faith belief is not plausible if he ignores facts that place him on notice of a risk of misleading clients. The Court in remanding this proceeding recognized this when it said: "When warranted, the SEC is entitled to infer from circumstantial evidence that a defendant must have been cognizant of an extreme and obvious risk and reject as implausible testimony to the contrary." ^{35/} The Sundstrand court also emphasized the need to refer to external standards when it originally defined recklessness, ^{36/} and other courts have similarly identified the ultimate importance of objective measures in securities fraud cases. ^{37/}

Unlike the examples given by the Sundstrand court in which the subjective component would preclude liability for objectively reckless misconduct, the Gebharts do not claim that they "genuinely forgot" to disclose material information, *i.e.*, that their statements had no basis in fact. Rather, their claim is that they were not reckless because, even though they knew their representations were based primarily on Archer's assertions and the silence of others, they nonetheless thought that they had done enough. The Gebharts similarly argue that they were truly and completely unaware of the fraud that the principals of MHP were perpetrating, that they were

^{35/} Gebhart v. SEC, 255 Fed. Appx. at 255; see also Sundstrand, 553 F.2d at 1047-48 (rejecting "as a matter of law" defendant's argument that he "genuinely forgot" to disclose material information based on circumstantial evidence that defendant "must have consciously decided not to disclose (and did not disclose)" the omitted information).

^{36/} 553 F.2d at 1045.

^{37/} See Makor Issues, 513 F.3d at 704 ("[A] popular definition of recklessness in this context [proof of scienter in a securities fraud case] is 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.' This looks like two different criteria – knowledge of the risk and how big the risk is – but as a practical matter it is only one because knowledge is inferable from gravity ('the danger was either known to the defendant or so obvious that the defendant must have been aware of it'). When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk.") (alterations in original); SEC v. Infinity Group Co., 212 F.3d 180, 192 (3d Cir. 2000) ("The SEC argues that scienter is evidenced by [the issuer's] guarantees of high rates of return that were unsupported by any honest due diligence. The defendants, on the other hand, contend that their actions 'were entirely consistent with the fact that they believed their representations . . . [to be] true.' However, good faith, without more, does not necessarily preclude a finding of recklessness. Therefore, even if the defendants believed [the] investments were sound, they may still be liable for securities fraud if their belief was based upon nothing more than a reckless disregard of the truth.").

victims themselves of that fraud, and that they therefore lacked scienter. As the Gebharts assert, "It is simply implausible to suggest that the Gebharts knew or suspected that MHP would be unable to repay these loans while, at the same time, loaning it money."

These arguments are insufficient. As discussed above, the Gebharts made no meaningful attempts to confirm the validity of their assertions to clients that the Notes would be fully secured. They made these unsupported representations to clients despite not knowing whether they were true or false and despite having several and varied reasons to doubt the truth of their own statements. Our de novo review of the evidence in this case therefore leads us to conclude that, contrary to the Gebharts' assertions, they must have known when they made their misrepresentations that their actions presented an unacceptable danger of misleading their clients.

Moreover, accepting arguendo that the Gebharts were unaware of MHP's fraud, this does not alter our conclusion: the Gebharts face liability not because they knew of or failed to discover MHP's fraud, but because they made specific representations to clients about the security of the Notes without taking any basic steps to verify the truthfulness of those representations. Even if the Gebharts were unaware of MHP's actual fraud, we conclude that they still must have known of the risk of misleading their clients given their extreme departure from the standards of ordinary care. The Gebharts are legally bound as knowing that the representations were false. 38/

We therefore conclude that the Gebharts made material misrepresentations during the offer and sale of the MHP Notes. We also conclude that the Gebharts – who ignored obvious risks, failed to make obviously necessary inquiries, and were aware that their recommendations were based primarily on Archer's statements and a failure of other parties, particularly their firm, to alert them to problems – acted recklessly and therefore with scienter. Their conduct was an extreme departure from the standard of care that presented a danger of misleading buyers of which the Gebharts must have been aware. We therefore sustain NASD's finding that the Gebharts thereby violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110. 39/

38/ Cf. W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 741-42 (5th ed. 1984) (noting that, in context of tort of intentional misrepresentation, sufficient intent is found where the defendant made the statement knowing it to be false, without any belief as to its truth, with reckless disregard whether it be true or false, knowing he had no sufficient basis of information to justify the statement and conscious ignorance of the truth.); RESTATEMENT (SECOND) OF TORTS § 526 (1977).

39/ Misrepresentations and omissions are inconsistent with just and equitable principles of trade and therefore violate NASD Conduct Rule 2110. Robert Tretiak, Exchange Act Rel. No. 47534 (Mar. 19, 2003), 79 SEC Docket 3166, 3180.

IV.

Exchange Act Section 19(e)(2) directs our review of the sanctions NASD imposed. We may reduce or set aside sanctions imposed by NASD if 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 burden on competition. ^{40/} NASD imposed two associational bars upon Gebhart: one for having sold unregistered securities and having engaged in private securities transactions, and another for having committed fraud. Donna Gebhart received a one-year suspension and a \$5,000 fine for selling unregistered securities and engaging in private securities transactions as well as a separate one-year suspension and a \$10,000 fine for the fraud. In the 2006 Opinion, we found that "the sanctions NASD imposed against the Gebharts are neither excessive nor oppressive, and we sustain NASD's findings of violation and imposition of sanctions." The Court of Appeals vacated only those sanctions related to the fraud: ^{41/} Therefore, Gebhart is already subject to a bar, and Donna Gebhart was already subject to a one-year suspension as well as a fine. We consider only whether NASD's imposition of additional sanctions for the fraud is excessive or oppressive. For the reasons below, we find that it is not, and we sustain NASD's decision in this regard.

For reckless or intentional misrepresentations or omissions of material fact, the NASD Sanction Guidelines recommend a fine between \$10,000 and \$100,000 and a suspension between ten business days and two years; in egregious cases, the Guidelines recommend a bar. ^{42/} NASD found that Gebhart's conduct was egregious in light of its analysis of the general principles applicable to all sanctions determinations under the Guidelines; however, NASD found that Donna Gebhart "played a less substantial role" and did not find her conduct to be egregious. In making its sanctions determination, NASD found it aggravating that the Notes were unregistered securities, that the Gebharts created the impression that their firm sanctioned their sales of MHP Notes, that the Gebharts' conduct resulted in monetary gain, and that the sales resulted in injury to investors.

NASD also considered several factors that the Gebharts argue should serve to mitigate sanctions. NASD accepted that "the preponderance of the evidence does not demonstrate that the respondents concealed their activities" from their firm. NASD also considered the Gebharts' efforts to help their customers reclaim a large portion of their investments and concluded those efforts were only "slightly mitigating," given that "the Gebharts' remedial efforts occurred only

^{40/} 15 U.S.C. § 78s(e)(2). The Gebharts do not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

^{41/} The Court "reverse[d] the SEC's scienter determinations with respect to Section 10(b), Rule 10b-5 and NASD Conduct Rule 2120 [and] vacate[d] the sanctions based thereon" Gebhart v. SEC, 255 Fed. Appx. at 256.

^{42/} NASD Sanction Guidelines 96 (2001 ed.).

after MHP collapsed, which we view as the functional equivalent of detection, and therefore were not purely voluntary on their part." NASD also noted that part of the investors' recovery was funded by pursuing litigation against the Gebharts, which "is not what we consider to be remedial conduct." NASD also gave only little mitigative value to the Gebharts' professed remorse, which NASD found to be "dampened" by the Gebharts' attempts to shift blame to others involved, and to evidence of the Gebharts' cooperation with NASD's investigation, which NASD determined was "not substantial enough to be mitigating." 43/

We conclude that NASD appropriately weighed the aggravating and mitigating factors relevant to imposing sanctions for fraud under its Sanction Guidelines. The Gebharts sold over \$2 million in MHP Notes to numerous customers over an extended period based on reckless misrepresentations. The Notes were unregistered and, at least in later years, were unsecured. The Gebharts earned over \$100,000 in commissions from these sales, while their customers incurred losses.

Moreover, we can find no fault with NASD's conclusion that the mitigating factors identified by the Gebharts do not outweigh the aggravating circumstances present in this case. 44/ As we noted in the 2006 Opinion, efforts to help defrauded customers recover their losses are acknowledged and encouraged, but those efforts do not always justify a reduction in sanctions. 45/ The sincerity of the Gebharts' contrition is lessened considerably by their continued objection that "it is simply unfair and unjust to lay at the Gebharts' doorstep the entirety of the misconduct of others that directly and more profoundly contributed to the resulting losses to the Gebharts' clients." 46/ Although we recognize that the Gebharts' disciplinary record was "unblemished" before these proceedings, we have consistently held that lack of disciplinary history is not a

43/ The Gebharts point to no evidence that contradicts the NAC's finding that their cooperation was not substantial enough to be mitigating.

44/ See, e.g., Michael A. Rooms, 85 S.E.C. Docket 444, 450 (Apr. 1, 2005) (upholding bar notwithstanding arguments, among others, that applicant lacked disciplinary history and customer complaints, cooperated with investigation, and assertedly served as an "unwitting pawn" of another applicant involved in fraud), aff'd, 444 F.3d 1208, 1214-15 (10th Cir. 2006).

45/ See Hartley, 83 SEC Docket at 1247 ("We do not consider that [respondent] is deserving of a reduction in sanctions because his clients may be able to recover some of their losses.").

46/ Mike K. Lulla, 51 S.E.C. 1036, 1040 (1994) (upholding bar because "the fact that others also might have been remiss in their duties does not mitigate [respondent's] responsibility"); see also Castle Securities Corp., Exchange Act Rel. No. 52580 (Oct. 11, 2005), 86 SEC Docket 1466, 1472 (barring applicant based in part on finding that applicant "sought to shift the blame" for its violations on others "instead of accepting responsibility for its violations").

mitigating factor because "an associated person should not be rewarded for acting in accordance with his duties as a securities professional." 47/

As NASD noted in its decision, "[d]isciplinary sanctions are remedial in nature and are designed to deter future misconduct and improve overall business standards in the securities industry." The risk posed to the investing public by associated persons who engage in fraud is profound and obvious. As we noted in the 2006 Opinion, "conduct that violate[s] the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws." 48/ Under these circumstances, we concur in NASD's determination that Gebhart's misconduct demonstrates that he poses too great a risk to the investing public to be permitted to remain in the securities industry.

Although we recognize that Gebhart is already subject to a bar for having engaged in other violations of the securities laws and NASD rules, the additional bar for fraud is meaningful because Gebhart may eventually apply for reinstatement, and the basis for his disqualification from association will be relevant to his application. 49/ Moreover, the bar NASD imposed upon Gebhart is appropriate because it will serve as a deterrent to others who may be inclined to wholly abdicate their responsibilities to investors, thereby protecting the investing public by encouraging associated persons to make representations about, and recommendations of, securities to their clients only when they have a reasonable basis for doing so. 50/

47/ Dennis Todd Lloyd Gordon, Exchange Act Rel. No. 57655 (Apr. 11, 2008), 93 SEC Docket 5055, 5116 (citing Keyes, 89 SEC Docket at 801 n.20).

48/ Marshall E. Melton, 56 S.E.C. 695, 713 (2003).

49/ Under NASD's By-Laws, art. III, § 3(d), an NASD member firm may apply to NASD for permission to employ a representative subject to an associational bar. The By-Laws state that, in deciding whether to approve the application, NASD's Board of Governors may conduct an "inquiry or investigation into the relevant facts and circumstances," which may include "the background and circumstances giving rise to the failure to qualify or disqualification." See also Exchange Act Section 15A(g)(2), 15 U.S.C. § 78o-3(g)(2) (authorizing the Commission to direct NASD to "deny membership to any registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification" where doing so is "necessary or appropriate in the public interest or for the protection of investors").

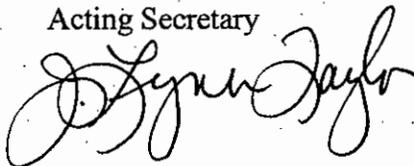
50/ In making this determination, we are mindful that although "general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry." PAZ Secs., 494 F.3d at 1066 (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir.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

For similar reasons, we believe the sanctions NASD imposed upon Donna Gebhart also serve an important remedial purpose without being punitive. NASD found that a one-year suspension and a \$10,000 fine was appropriate given Donna Gebhart's "less substantial role" in the conduct at issue. These sanctions are well within the range provided for reckless misrepresentations in the Sanction Guidelines and will encourage Donna Gebhart and other representatives to consider more seriously their obligations to customers. We conclude, therefore, that the sanctions imposed by NASD to redress the risk posed by the Gebharts serve the public interest and are neither excessive nor oppressive.

We therefore sustain NASD's findings of violation and imposition of sanctions. 51/ An appropriate order will issue.

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

51/ We have considered all of the arguments of the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 58951 / November 14, 2008

Admin. Proc. File No. 3-11953r

In the Matter of the Application of

ALVIN W. GEBHART, JR.

and

DONNA T. GEBHART

c/o Charles F. Goria
Goria, Weber & Jarvis
1011 Camino Del Rio South, Suite 210
San Diego, CA 92108

For Review of Disciplinary Action Taken by

NASD

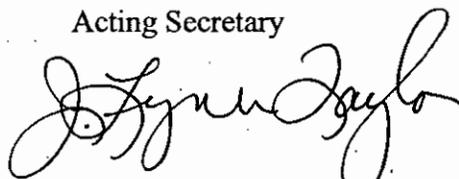
ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action by NASD against Alvin W. Gebhart, Jr. and Donna T. Gebhart, 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

Commissioner Walter
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58950 / November 14, 2008

Admin. Proc. File No. 3-12393r

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Reconsideration of Sanction Pursuant to Remand

Upon motion of Commission, Court of Appeals remanded Commission determination sustaining registered securities association's sanction against former associated person of member firm for Commission to consider (1) whether certain facts mitigated misconduct of former associated person and (2) whether the sanction served a remedial purpose. Held, sanction imposed by association is sustained.

APPEARANCES:

Andrew T. Solomon, of Sullivan & Worcester LLP, for Howard Brett Berger.

Marc Menchel, Alan Lawhead, and Michael J. Garawski, for NASD.

Case remanded: November 14, 2007
Last brief received: January 25, 2008

10 of 28

This proceeding is here on our motion to the United States Court of Appeals for the Second Circuit for remand. On May 4, 2007, we issued an opinion and order sustaining NASD's 1/ findings that Howard Brett Berger, an individual who applied for registration with an NASD member firm, failed to appear and provide information at two on-the-record interviews ("OTRs"), in violation of NASD Rule 8210 and Conduct Rule 2110. 2/ We found the sanction imposed by NASD – barring Berger from associating with any NASD member in any capacity – neither excessive nor oppressive. 3/

Berger subsequently appealed our determination to the Second Circuit. On August 29, 2007, we moved the Second Circuit to remand the matter to the Commission for the sole purpose of reconsidering the sanction portion of our opinion in light of the recent ruling of the United States Court of Appeals for the District of Columbia Circuit in PAZ Sec., Inc. v. SEC. 4/ On September 13, 2007, the Second Circuit granted our motion and remanded the Berger matter to the Commission for further proceedings. 5/

-
- 1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was taken before the consolidation, we continue to use the designation NASD.
- 2/ Howard Brett Berger, Exchange Act Rel. No. 55706 (May 4, 2007), 90 SEC Docket 1766, remanded, Howard Brett Berger v. SEC, No. 07-2692 (2d Cir. Sept. 13, 2007) (remand order). NASD Rule 8210 requires members and associated persons to provide information if requested by NASD staff as part of an investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires members to adhere to "high standards of commercial honor and just and equitable principles of trade." A violation of another NASD rule, such as Rule 8210, constitutes a violation of Conduct Rule 2110. Perpetual Sec., Inc., Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489, 2504 n.50; Stephen J. Gluckman, 54 S.E.C. 175, 185 & n.31 (1999).
- 3/ NASD also assessed costs.
- 4/ 494 F.3d 1059 (D.C. Cir. 2007) (holding that the Commission abused its discretion by failing to address certain mitigating factors raised by the petitioners and by failing to identify any remedial purpose for the sanctions it approved).
- 5/ Berger v. SEC, No. 07-2692 (2d Cir. Sept. 13, 2007). The Second Circuit issued its mandate on November 14, 2007, and in December 2007 the Commission requested further briefing by the parties.

II.

Neither the factual findings that establish the violations nor the findings of violations themselves are at issue on remand. With this opinion, we nonetheless expressly affirm those determinations. We summarize some of the findings here to provide the necessary background for our discussion of sanctions. Our reconsideration of the sanction portion of this case is informed by the D.C. Circuit's PAZ decision. ^{6/} PAZ also involved the failure to respond to NASD requests for information. In remanding PAZ to the Commission, the D.C. Circuit instructed us to reconsider, among other things, whether the sanctions were excessive or oppressive "in light of the factors raised in mitigation and to consider . . . whether the sanctions serve[d] a remedial purpose" as required by the Securities Exchange Act of 1934. ^{7/} In this opinion, we reconsider these factors insofar as they pertain to Berger.

Berger was registered with NASD from December 1, 1992 until April 19, 2001, when he relinquished his securities industry registration. During that period, he worked for several member firms in various capacities, including as a general securities representative and general securities principal, and also as an associate compliance director and compliance officer. In his capacity as associate compliance director and compliance officer at two member firms, Berger was responsible for, among other things, filing applications for securities industry registration. For nearly two years afterward, Berger was unregistered and not associated with any member firm while he worked at a financial software company and at Professional Traders Fund, LLC ("PTF"), a hedge fund.

Under NASD rules, securities licenses do not lapse until two years after registration has terminated. ^{8/} After they lapse, a person must retake the licensing examinations to become registered again. ^{9/} As the two-year renewal deadline for his securities licenses approached, Berger sought to renew his securities industry registration because he wanted to avoid retaking the licensing examinations and also to capture some of the commissions that his hedge fund was paying to Millennium Brokerage, LLC ("Millennium"). On April 15, 2003, four days before his securities licenses were due to expire, Berger applied for securities industry registration through

^{6/} PAZ, 494 F.3d 1059.

^{7/} Id. at 1061.

^{8/} NASD asserts jurisdiction over, and has the ability to obtain information from, a person whose association with a member has been terminated or whose registration has been canceled, for two years following the date of that person's termination of registration. NASD By-Laws, Article V, Section 4.

^{9/} NASD Membership and Registration Rules 1021(c) and 1031(c) require any formerly registered person who has been unregistered for a period of at least two years immediately preceding the receipt by NASD of a new application for registration to pass an examination in order to renew his registration.

Millennium by submitting a Form U4. Although Berger applied for registration, his application required several amendments because the information supplied, relating primarily to Berger's disciplinary history, was incomplete. Ultimately, those deficiencies were never resolved and on August 13, 2003, Millennium terminated Berger's association without registration.

Five months later, on January 14, 2004, NASD requested Berger's appearance at an OTR scheduled for January 27, 2004 in connection with NASD's investigation of potential circumvention of day-trading rules and noncompliance with certain credit provisions by Millennium's day-trading clients, with the possible involvement and awareness of Millennium principals and personnel. An NASD staff supervisor involved in the investigation testified at Berger's disciplinary hearing that NASD staff had been inquiring into PTF's role in day-trading at Millennium in April 2003, when Berger was applying for registration. The supervisor also testified that Millennium's filing of Berger's Forms U4 coincided with the suspected activities at Millennium and that NASD staff had received information that Berger had access to a back-office system (otherwise limited to Millennium's own principals and representatives) that enabled Berger to "look at" at least 125 PTF accounts and "see the trading levels, the buying power," and "the profit and loss in the accounts." ^{10/} NASD's written request, which was sent by first class and certified mail, advised Berger that he was "obligated to appear at the date and time specified in [the] letter" and included an addendum warning that, if he did not appear, he might be subject to "an NASD disciplinary action, and the imposition of disciplinary sanctions, including a bar from the securities industry, suspension, censure and/or fine." Berger did not challenge NASD's jurisdiction at that time. He failed to appear, but his then-current counsel ("Initial Counsel") contacted NASD after the scheduled time for the OTR had elapsed. NASD agreed to accommodate Berger by scheduling a second OTR for a later date.

Prior to the rescheduled OTR, however, Berger changed attorneys, replacing his Initial Counsel with another attorney from a different law firm ("Second Counsel"). On January 30, 2004, Second Counsel sent a letter to NASD announcing his appearance and stating that, prior to the rescheduled date, "we will determine whether the NASD has jurisdiction over Mr. Berger and will notify you of our intention as to whether or not Mr. Berger will testify on that date." On February 2, 2004, NASD sent Berger another letter by first class and certified mail, with a copy to his attorney, confirming the rescheduled date and advising Berger that "failure to appear may result in a recommendation . . . that a disciplinary action be instituted against you which may result in the imposition of sanctions such as censure, fine, suspension, or bar." On February 11, 2004, Second Counsel responded to NASD with a letter advising NASD that Berger "will not appear" for the second OTR and stating without explanation that "[t]he grounds for his decision not to appear are based on our view that the NASD does not have jurisdiction over him." Berger subsequently failed to appear at that second OTR.

^{10/} Although NASD counsel sought at the hearing to provide further background on the investigation, Berger's counsel objected repeatedly to the introduction of such information.

NASD By-Law Article I(dd)(1) defines a "person associated with a member" as "a natural person who is registered or has applied for registration." NASD Notice to Members 99-95 states that "any person who signs and submits a Form U4 is an associated person." ^{11/} When Berger, an experienced securities professional and former compliance officer, applied to renew his registration with NASD, thereby submitting himself to NASD's jurisdiction, he agreed that he understood and consented to abide by NASD's rules, including the requirement to provide information requested by NASD for its investigations. We sustained NASD's finding that Berger filled in his personal information and executed an electronic signature on an application for registration with Millennium a few days before the expiration of NASD's two-year period of retained jurisdiction over him. We agreed with NASD that it retained jurisdiction over Berger.

Having established NASD's jurisdiction, we found that Berger violated NASD Rules 8210 and 2110 when he failed to appear at the two OTRs. We noted that Berger did not respond in any manner to the first OTR request until the day of the scheduled OTR, and then only after the time for the scheduled OTR had elapsed. Even after NASD accommodated him by scheduling a second OTR after consultation with Second Counsel, Berger failed to appear.

III.

Exchange Act Section 19(e)(2) ^{12/} requires us to review a disciplinary sanction imposed by NASD upon a member firm or associated person "to determine whether the sanction 'imposes any burden on competition not necessary or appropriate' to further the purposes of the [Exchange] Act, or is 'excessive or oppressive.'" ^{13/}

A. We first set forth the regulatory framework with respect to sanctions for failure to respond to an NASD request for information. ^{14/} The Exchange Act requires that the rules of a self-regulatory organization ("SRO") like NASD be designed for the protection of investors, ^{15/} and Exchange Act Section 15A requires that NASD enforce compliance by its members and their

^{11/} NASD Notice to Members 99-95 (Dec. 1, 1999).

^{12/} 15 U.S.C. § 78s(e)(2).

^{13/} PAZ, 494 F.3d at 1064.

^{14/} See PAZ Sec. Inc., Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5123, appeal filed, No. 08-1188 (D.C. Cir. May 13, 2008).

^{15/} 15 U.S.C. § 78o-3(b)(6) (stating that an association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that its rules are designed to, among other things, protect investors and the public interest).

associated persons with the Exchange Act, the Exchange Act rules, and NASD rules. ^{16/} “Because of limited Commission resources, Congress has given NASD and other securities industry self-regulatory organizations significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations.” ^{17/}

NASD lacks subpoena power, however. It must therefore “rely upon Procedural Rule 8210 in connection with its obligation to police the activities of its members and associated persons.” ^{18/} Rule 8210 “provides a means, in the absence of subpoena power, for the NASD to obtain from its members information necessary to conduct investigations.” ^{19/} The rule is at the heart of the self-regulatory system for the securities industry. The language of Rule 8210 – “No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to the Rule” ^{20/} – is “unequivocal” with respect to an associated person’s obligation to cooperate with NASD information requests. ^{21/} In responding to Rule 8210 requests, therefore, “[d]elay and neglect on the part of members and their associated persons undermine the ability of the NASD to conduct investigations and thereby

^{16/} 15 U.S.C. 78o-3; see also Report of Investigation Pursuant to Section 21(A), Exchange Act Rel. No. 51163 (Feb. 9, 2005), 84 SEC Docket 3129, 3130 (“As a registered association, the NASD has a statutory obligation to comply with the Exchange Act, and to enforce compliance by its members with the Exchange Act and its own rules.”). Exchange Act Section 19(h)(1) authorizes the Commission to suspend or revoke the registration of an SRO if the Commission finds that such SRO has failed to enforce compliance with the provisions of the Exchange Act, the rules thereunder, or the rules of the SRO. 15 U.S.C. § 78s(h)(1).

^{17/} Charles C. Fawcett, IV, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3157.

^{18/} Joseph Patrick Hannan, 53 S.E.C. 854, 858-59 (1998).

^{19/} Richard J. Rouse, 51 S.E.C. 581, 584 (1993). See also Elliot M. Hershberg, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 498 (stating that “compliance is essential to NASD’s self-regulatory function because NASD lacks subpoena power” and that “[f]ailure to comply is a serious violation justifying stringent sanctions because it subverts NASD’s ability to execute its regulatory functions”) (citations omitted), aff’d, 210 Fed. Appx. 125 (2d Cir. 2006).

^{20/} NASD Manual, Procedural Rule 8210(c).

^{21/} See Michael Markowski, Exchange Act Rel. No. 32562 (June 30, 1993), 54 SEC Docket 1211, 1216-17, petition for review denied, 34 F.3d 99 (2d Cir. 1994).

protect the public interest.” 22/ The failure to respond impedes NASD’s ability to detect misconduct that threatens investors and markets.

Vigorous enforcement of Rule 8210 helps ensure the continued strength of the self-regulatory system – and thereby enhances the integrity of the securities markets and protects investors – by preventing members and their associated persons who demonstrate their unfitness by failing to respond in any manner to Rule 8210 requests from remaining in the securities industry. 23/ Members and their associated persons who fail to respond in any manner to Rule 8210 requests present “too great a risk” to the markets and investors to be permitted to remain in the securities industry. 24/

NASD applied the NASD’s Sanction Guidelines (the “Sanction Guidelines”) 25/ when it determined to sanction Berger for the violation of Rule 8210 and bar him from associating with any NASD member in any capacity. Although the Commission is not bound by the Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). 26/ The Sanction Guidelines state that, “[i]f the individual did not respond in any manner, a bar should be standard.” 27/ Where mitigation exists, or where the individual did not respond in a timely manner, the recommended maximum sanction is a two-year suspension. 28/ The guideline for violations of Rule 8210 is one of only three out of a total of eighty sanction

22/ Barry C. Wilson, 52 S.E.C. 1070, 1075 (1996).

23/ See Fawcett, 91 SEC Docket at 3157 (sustaining sanction of a bar for failure to comply with NASD requests for information).

24/ Id.

25/ See Fawcett, 91 SEC Docket at 3148.

26/ The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. NASD Sanction Guidelines 1 (2006 ed.). Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. Id. The Sanction Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD adjudicators, which the Sanction Guidelines define as Hearing Panels and the National Adjudicatory Council. Id.

27/ NASD Sanction Guidelines (2001 ed.) at 39.

28/ Id. See also Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 696 n.38; Hershberg, 87 SEC Docket at 498.

guidelines that recommend a bar as the standard sanction. ^{29/} The imposition of a bar as the standard sanction for a complete failure to respond to NASD information requests “reflects the judgment that, in the absence of mitigating factors, a complete failure to cooperate with NASD requests for information or testimony is so fundamentally incompatible with NASD’s self-regulatory function that the risk to the markets and investors posed by such misconduct is properly remedied by a bar.” ^{30/} “NASD’s barring of [Rule 8210 violators] is [thus] ‘consistent with the Exchange Act’s basic purpose of protecting public investors.’” ^{31/} Because we conclude that “removing those who present such a risk is necessary to further ‘the Exchange Act’s basic purpose of protecting public investors,’ a bar in such circumstances – a complete failure to respond and no mitigation – has a remedial, and not a punitive, purpose.” ^{32/}

NASD’s standard sanction of a bar protects investors not only by removing from the securities industry an individual or firm that has already shown a refusal to be investigated but also by deterring all current and future SRO members and associated persons from failing to cooperate. ^{33/} NASD members and associated persons who know of wrongdoing and are approached by NASD with requests for information as part of an investigation should not have an incentive to fail to cooperate. The sanction for any misconduct in a NASD investigation uncovers could be less than a bar, and wrongdoers should know that cooperation is their best chance of avoiding the bar that they may receive for non-cooperation (in the absence of mitigating factors).

B. We next consider the arguments that Berger raises in support of his claim that a permanent bar is excessive or oppressive and imposes an unnecessary burden on competition. On remand, Berger argues that no sanction is appropriate because of his “objectively reasonable belief” that he was not subject to NASD’s jurisdiction, that barring him from association with a broker or dealer does not serve a remedial purpose, and that his reliance on counsel is a

^{29/} Fawcett, 91 SEC Docket at 3157 n.27. The other two are the sanction guidelines applicable to the conversion of customer funds and to cheating during broker-dealer qualification examinations. Id. A bar may be imposed for many other violations, such as intentional or reckless misrepresentations or omissions of material fact, where NASD deems the particular misconduct at issue to be egregious. See, e.g., NASD Sanction Guidelines at 93.

^{30/} Fawcett, 91 SEC Docket at 3157.

^{31/} Dennis A. Pearson, Jr., Exchange Act Rel. No. 54913 (Dec. 11, 2006), 89 SEC Docket 1627, 1640 (quoting Gershon Tannenbaum, 50 S.E.C. 1138, 1141 (1992)).

^{32/} PAZ, 93 SEC Docket at 5127-28 (internal citations omitted).

^{33/} See PAZ, 494 F.3d at 1066 (stating that “general deterrence” may be “considered as part of the overall remedial inquiry”) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

mitigating factor that warrants a lesser sanction. For the reasons discussed below, we reject these arguments.

1. Berger contends that, because he had an “objectively reasonable” belief that he was not subject to NASD’s jurisdiction, he should not have been sanctioned at all. 34/ Our prior opinion in this case determined that NASD does not have a mechanism for resolving questions of jurisdiction prior to a respondent’s scheduled appearance at an OTR; that NASD followed its rules in this proceeding; that its procedures accorded with the “fair procedure[s]” contemplated by Exchange Act Section 15A(b)(8); 35/ that subjecting oneself to NASD’s disciplinary process, interposing one’s objection, and relying on NASD’s procedures is the appropriate route to challenge NASD jurisdiction; and that NASD had jurisdiction over Berger. None of these conclusions is open to challenge on remand. Berger does not explain how, in light of them, his claim that he had a “colorable basis for objecting” to NASD’s requests for testimony under Rule 8210 should immunize him from sanctions for failing to comply.

The only authority Berger cites for his arguments is Fiero v. SEC 36/, an unpublished opinion, which the court of appeals stated was “a summary order, which cannot be cited, let alone relied upon.” 37/ Moreover, Fiero is distinguishable from the facts at issue here.

Respondent Fiero received and ultimately refused to comply with a request from an individual identified as NASD’s Deputy Director of Market Surveillance (the “Deputy Director”) that Fiero appear for testimony pursuant to the version of Rule 8210 then in effect. 38/ The court of appeals reversed and vacated the Commission’s order affirming NASD’s sanctions against Fiero. 39/ The court determined that NASD’s Market Surveillance Committee (“Committee”) did not have the authority to request the investigative testimony and that a reasonable person would have thought that the Deputy Director was acting on behalf of that Committee when requesting that Fiero testify. However, the court in Fiero distinguished the facts before it from a case in which “testimony or information is sought from witnesses by those NASD committees

34/ We address here Berger’s argument that the existence of a jurisdictional defense precludes sanctions altogether. Berger also argues that his jurisdictional defense is a mitigating factor in the sanctions analysis, which we take up in addressing his advice-of-counsel claim.

35/ 15 U.S.C. § 78o-3(b)(8).

36/ No. 98-4103, 1999 WL 33952140 (2d Cir. Jan. 20, 1999) (unpublished opinion) (reversing and vacating John J. Fiero, 53 S.E.C. 434 (1998)).

37/ Fiero v. SEC, No. 98-4103, slip op. at 2 (2d Cir. Mar. 26, 1999) (denying rehearing).

38/ Fiero, 1999 WL 33952140, at *1.

39/ Id. at *4.

with appropriate authority," stating that under those circumstances "witnesses are not permitted to place conditions on their testimony." 40/

That is precisely the case here. For the reasons stated in our prior opinion, we found that NASD staff were authorized to seek Berger's appearance pursuant to Rule 8210. We previously found, as had NASD, that Berger played an "active role in completing" the initial Form U4, which was filed four days before his securities licenses were due to expire, and the first and second amended Forms U4, filed over the next month. The record showed that during the period from late March 2003 to mid-May 2003, Berger initiated the registration process; filled out and forwarded to Millennium a template of personal information in a back-and-forth process with its chief compliance officer (the individual responsible for filing Forms U4 at the firm); signed the Form U4 electronically by typing in his own name; and supplied detailed Form U4 information that was previously unavailable in the Central Registration Depository ("CRD") in response to deficiency notices from NASD. These findings concerning Berger's actions undermine his claim that he reasonably believed that he had not applied for registration. While Berger testified that he had "no recollection of receiving or signing" the Form U4, he does not claim that, at the time he received and refused to comply with NASD's requests for testimony, he made any attempt to refresh his recollection by contacting Millennium or to obtain copies of any documents. For these reasons, we reject Berger's claim of an "objectively reasonable" belief.

2. Berger contends that a permanent bar is punitive rather than remedial because NASD has made no determination of his overall fitness or the likelihood that he will commit future misconduct. Rather, according to Berger, NASD's basis for barring him was "really general deterrence; punish Berger to ensure that the next person complies."

As we have explained above, the risks presented by persons who, in the absence of mitigating factors, completely fail to respond to Rule 8210 requests are appropriately remedied by a bar. Berger provides no explanation for his failure to comply with NASD's first request for information, other than his first counsel's comments in oral argument before the NAC indicating that Berger left the matter entirely to his attorney, who "failed to get back to the NASD in time." Berger's only stated reason for not complying with the second request was a jurisdictional defense that, as discussed, is belied by what the evidence shows about his own actions with respect to the Forms U4. Berger provided no information in response to either request and did not offer to provide any such information until nearly sixteen months after the first request, after a disciplinary proceeding had been brought, a hearing held, and a bar imposed. Even then Berger offered to comply only on the condition that NASD eliminate the sanction against him. As discussed below, Berger has failed to show that the circumstances of this case mitigate his violation.

In addition, Berger has a prior disciplinary history. NASD considered the serious nature of Berger's previous misconduct, which included flipping, supervision, and registration

40/ Id. at *3.

violations that carried substantial sanctions. That his settlements with NASD, involving significant, multiple acts of past misconduct, “occurred nearly ten years ago” and did not “involve[] violations of Rule 8210 or a failure to cooperate with an investigation,” as he argues, does not mean that they have no bearing on his present fitness to remain in the securities industry. Viewing the circumstances of Berger’s failure to respond to its information requests in light of his previous violations, NASD determined that Berger’s misconduct posed a serious risk to investors.

To minimize his failure to comply in any manner with the Rule 8210 requests and its implications for his present fitness, Berger argues that NASD is acting as if he were “accused of serious wrongdoing, threatening to commit future misconduct, and abjectly refusing to testify without cause in order to avoid punishment.” Berger contends that none of this is true; that in general terms he has simply tried to preserve his “privacy” and “time,” and, therefore, that a bar is not warranted. He further asserts that not all Rule 8210 violations are the same and that, while “[s]ome may be accused of underlying wrongdoing,” he was not.

However, “a request for information is no less serious because NASD issues the request in an effort to prevent or uncover misconduct rather than to unearth the details of misconduct of which it is already aware.” ^{41/} To allow Berger to justify his refusal to testify by using an after-the-fact assessment of the results of NASD’s investigation would shift the focus from NASD’s perspective at the time it seeks the information and disregard intervening events. It would also ignore the fact that refusal to cooperate with an investigation can prevent NASD from determining and establishing whether wrongdoing occurred, undermining NASD’s ability to protect the investing public. ^{42/} Berger’s violative conduct does not cease to be serious because it was allegedly motivated by a desire to avoid the loss of privacy and time that is inherent in compliance with any information request.

Nor does it diminish the seriousness of Berger’s failure to provide information that he may have been, in his words, “merely a witness” in an investigation that he assumes was not “impacted” by his refusal to testify. ^{43/} Berger may not second guess NASD’s information requests. ^{44/} Moreover, the requests for testimony concerned information essential to NASD’s investor-protection efforts. Given his access to Millennium’s back-office systems, Berger was

^{41/} PAZ, 93 SEC Docket at 5131.

^{42/} See id. at 5131-32.

^{43/} See supra note 10.

^{44/} Morton Bruce Erenstein, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3120 (stating that a “member or associated person may not ‘second guess[]’ an NASD information request . . .”), petition denied, No. 07-15736, 2008 WL 4216552 (11th Cir. Sept. 16, 2008).

well-situated to provide potentially valuable information, and his assumptions about the investigation are unwarranted and unsupported. 45/

As discussed, an NASD staff supervisor testified at the hearing that, while conducting a routine examination of Millennium, NASD staff detected the potential circumvention of day-trading rules and noncompliance with margin regulations by the firm's day-trading clients, with the possible involvement and awareness of Millennium principals and personnel. Exchange Act Section 7 incorporates rules (specifically, Regulation T) of the Board of Governors of the Federal Reserve governing margin requirements and prescribes lending limits for the initial extension of credit on securities "[f]or the purpose of preventing the excessive use of credit for the purchase or carrying of securities." 46/ The Commission has "note[d] the importance of the extension of credit rules promulgated under Exchange Act Section 7," which "protect public customers from the potential consequences of over-leveraging their securities purchases, and preserve the public interest by maintaining the financial integrity of broker-dealers." 47/ In 2001, in approving proposed NASD rule changes that specifically addressed risks associated with day-trading, and that included a per-account minimum-equity requirement, the Commission explained that "[g]iven the potential for significant losses to those persons who engage in day-trading activities, legislators and regulators have scrutinized the practice and have taken steps to protect investors and limit financial risks to investors, broker-dealers, and securities markets." 48/ The Commission found that the proposed rules "are designed to reduce excessive and unnecessary risk of financial loss to market participants" and thereby increase "overall market integrity." 49/

Berger also argues that a permanent bar is punitive because it virtually assures that an individual threatened with a permanent bar for initially not responding will never comply with an NASD information request. According to Berger, a conditional bar – a bar that would remain in place only so long as he refused to comply with Rule 8210 – would be remedial because it could coerce compliance with Rule 8210 and therefore would result in less harm to the investigation. Berger's argument, however, omits the fact that NASD's rules do not provide for a conditional bar. Nor is there any statutory requirement that NASD provide for conditional bars. In rejecting a similar argument that a bar was inappropriate where a respondent offered to comply with a Rule 8210 request after having refused to do so for fourteen months, we stated that "NASD should not have to bring a disciplinary proceeding in order to obtain compliance with its rules

45/ See, e.g., supra text accompanying note 10.

46/ 15 U.S.C. § 78g(a).

47/ See John Thomas Gabriel, 51 S.E.C. 1285, 1293 (1994).

48/ Order Approving Proposed Rule Changes Relating to Margin Requirements for Day Trading, 66 Fed. Reg. 13608, 13611, 13616 (Feb. 27, 2001).

49/ Id. at 13617.

governing investigations.” 50/ In addition, timely compliance is essential to the prompt discovery and remediation of wrongdoing. We agree with NASD that a conditional bar could result in a delay in compliance with NASD’s information request as an individual calculates whether refusing to comply would be more advantageous than providing the requested information and when compliance would best suit his or her own interests, with no assurance that the information would ever be provided, much less while it was still useful.

Moreover, this case illustrates the deficiencies of a conditional bar as a sanction for failure to comply with Rule 8210. Millennium terminated or withdrew its registration on March 16, 2005, was expelled from NASD membership on July 12, 2005 for non-payment of fines, and accepted on July 28, 2005 a \$125,000 fine and censure for “various compliance violations.” 51/ These events took place fourteen months or more after Berger was first asked to testify. Although Berger suggests that they show that the relevant NASD investigation was not affected by his failure to cooperate, there is no indication that these events relate to the relevant NASD investigation (the subject matter appears unrelated). To the contrary, NASD argues, “Berger’s failure to testify impeded NASD’s investigation by depriving NASD of the ability to ask for facts and explanations regarding day-trading and Regulation T issues concerning Millennium and the PTF account” and that “[l]argely as result of Berger’s refusal to testify,” NASD was not “able to determine whether Millennium engaged in any violative activity with respect to the PTF accounts.” Berger argues that his conduct was not serious because NASD could have “resumed its investigation” after he “offered to testify” in a June 7, 2005 affidavit as “part of his appeal” of the Hearing Panel’s March 23, 2005 decision. However, the events here demonstrate NASD’s need for prompt cooperation and why a respondent may not substitute his judgment for NASD’s with respect to its priorities, resource allocation, and manner of conducting an investigation.

The cases Berger cites to support a conditional bar are inapposite. None involves a complete failure to respond to an NASD information request. Several involve a failure to comply with a court order where a conditional sanction carried the potential to remedy the harm. 52/ Moreover, the cases cited by Berger involve coercion by conditional sanction through

50/ Hershberg, 87 SEC Docket at 498.

51/ Berger attaches to the appendix to his opening brief information relating to Millennium’s recent disciplinary history and its 2005 expulsion from NASD membership. Rule 323 of our Rules of Practice, 17 C.F.R. § 201.323, permits us to take official notice of any “material fact” and, accordingly, we take official notice of the Millennium information.

52/ See, e.g., Hicks ex rel. Feiock v. Feiock, 485 U.S. 624 (1988) (remanding proceeding to determine, among other things, whether parent, who had been held in contempt for failure to comply with a child-support order, would purge the contempt judgment by paying his arrearage); Smith v. Sullivan, 611 F.2d 1050 (5th Cir. 1980) (reversing contempt judgments against sheriff and other public officials for failure to comply with a district

(continued...)

the use of subpoena power, judicial enforcement of subpoena power, and judicial contempt powers. ^{53/} These are powerful tools to obtain the sought-after information, but NASD does not have such powers. The question here is whether a bar is necessary or appropriate to safeguard NASD's ability to investigate questionable activity. We believe it is and reject Berger's argument that NASD's sanction of a permanent, as opposed to conditional, bar is punitive and excessive.

3. Berger next contends that, even if his conduct warranted a sanction, his reliance on counsel was a mitigating factor that should trigger a lesser sanction than a bar. Citing the "principal considerations" enumerated in the introductory section of the Sanction Guidelines, Berger identifies as a mitigating factor "[w]hether the respondent demonstrated reasonable reliance on competent legal or accounting advice." ^{54/} He also notes that the Sanction Guidelines provide that a respondent's intent, recklessness, or negligence with respect to the violation is to be considered. Berger argues that his reliance on Second Counsel's advice "negates any finding that he acted willfully in violating NASD rules."

Berger cites to a three-page affidavit that he created and submitted to NASD on June 7, 2005 – following the ruling by the Hearing Panel, but prior to the hearing of his appeal before NASD's National Adjudicatory Council (the "NAC"). ^{55/} The affidavit states that the advice that Second Counsel provided to Berger "[c]an be summarized" in the following terms: (1) "you do not have to appear for the OTR because you are not subject to the NASD's jurisdiction;" (2) "if you appear for the OTR, you will waive your jurisdictional defenses;" and (3) "if the NASD (incorrectly) determines that you are subject to their jurisdiction, the sanction will be conditional and you will be given an opportunity to testify to avoid the sanction."

The affidavit also states that "[a]fter receiving [Second Counsel's] initial advice," Berger "questioned [Second Counsel] several times about the consequences of not appearing. Each time, he firmly reiterated his advice, assuring [Berger] that [Berger] was not subject to the

^{52/} (...continued)

court order limiting the inmate population of a county jail, where lifting of contempt sanctions was conditioned on inmate population not exceeding a certain number during specified dates).

^{53/} In Penfield Co. of Cal. v. SEC, 330 U.S. 585, 593-95 (1947), for example, the court held that a contempt judgment that does not include relief of a coercive nature is punitive. However, that case involved Commission subpoena authority, which can be judicially enforced. NASD has no such authority.

^{54/} NASD Sanction Guidelines at 9.

^{55/} Following the Hearing Panel decision but before the NAC hearing, Initial Counsel resumed his representation of Berger.

NASD's jurisdiction, but even if [he] were, this [was] the appropriate way to challenge jurisdiction." The affidavit adds that Second Counsel "[n]ever" advised Berger that "[Berger] could receive a permanent sanction as a result of [his] nonappearance," and moreover, had counsel advised him otherwise, Berger "would have appeared." The affidavit states further that Berger "hired an expert attorney [Second Counsel] who told [him] that [Berger] was not subject to the NASD's jurisdiction and that [his] nonappearance was not only legitimate but the only means for asserting [his] jurisdictional rights." The affidavit asserts that, "[b]ecause [Berger] acted reasonably in light of the advice [he] received and in good faith, [he] believe[s] the severe sanction imposed on him was unjustified." Berger argues that he is entitled to "mitigation credit" reducing his bar to a two-year suspension based on his reliance on Second Counsel's advice.

As we noted in our prior opinion, Berger does not claim that he failed to appear at the first OTR on the advice of counsel. Berger seeks to rely on advice of counsel with respect to the second OTR.

In our prior opinion, we recognized that a valid claim of reliance upon counsel may have a mitigating effect on sanctions. To constitute mitigation, however, the claim must have sufficient content and sufficient supporting evidence. Both are lacking in this case. Indeed, the evidence that establishes that NASD had jurisdiction over Berger is flatly inconsistent with Berger's account of his actions with regard to the Forms U4 and undercuts his assertions of reasonable, good-faith reliance on counsel.

As a legal matter, Berger, citing SEC v. Howard, argues that he need not "hit each of the 'elements'" that courts and the Commission commonly consider in deciding whether to credit an advice-of-counsel claim. ^{56/} Those elements are that the person made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice. ^{57/}

Contrary to Berger's contention, Howard does not excuse a less than "complete" advice-of-counsel claim in this case. The Howard court considered evidence of advice of counsel in making a determination about an essential element of liability that the plaintiff must prove: whether there was substantial evidence that Howard acted with the state of mind (scienter) necessary to violate the applicable substantive law. As we have held previously, scienter is not

^{56/} 376 F.3d 1136, 1147 (D.C. Cir. 2004).

^{57/} Markowski v. SEC, 34 F.3d 99, 105 (2d Cir. 1994); C.E. Carlson v. SEC, 859 F.2d 1429, 1436 (10th Cir. 1988); SEC v. Goldfield Deep Mines Co. of Nevada, 758 F.2d 459, 467 (9th Cir. 1985); SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981). See also Joseph J. Vastano, Jr., 57 S.E.C. 803, 813 n.22 (2004); Anthony H. Barkate, 57 S.E.C. 488, 497 n.19 (2004); Toni Valentino, 57 S.E.C. 330, 338-39 & n.11 (2004).

an element of a Rule 8210 violation. 58/ An advice-of-counsel claim is not relevant to liability in this case, but instead, only potentially as to sanctions. The Howard court did not address when a claim of reliance on advice of counsel will qualify as mitigation of an established violation for purposes of determining what remedial sanction is in the public interest.

The Commission reviews the sanctions against Berger with “due regard for the public interest and the protection of investors,” which is at issue even if a respondent did not act with scienter. 59/ Reasonable reliance on competent legal advice is simply one factor to be considered in the overall sanctions analysis and can be evidence of a less culpable mental state that justifies a reduced sanction. 60/ However, when a respondent is found to have committed violations, he should not too easily avoid a sanction that is necessary for the protection of the investing public. We believe that the respondent asserting such reliance must provide sufficient evidence to the body making the sanction determination that the respondent made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice. Courts consider it important that “the advice of counsel [the client] received was based on a full and complete disclosure.” 61/ Further, it “isn’t possible to make out” an advice-of-

58/ Rouse, 51 S.E.C. 581 (1993) (rejecting the view that we must find scienter to find a violation of the predecessor of Rule 8210). Cf. Joseph G. Chiulli, 54 S.E.C. 515, 522 (2000) (finding no scienter requirement for Rule 3110).

59/ 15 U.S.C. 78(e)(2); see PAZ, 494 F.3d at 1065.

60/ See, e.g., Goldfield, 758 F.2d at 467; SEC v. Steadman, 967 F.2d 636, 648 (D.C. Cir. 1992) (where evidence of attorney’s advice “in a formal, unqualified opinion letter” that was also received and not questioned by the clients’ “disinterested independent auditor, a partner at one of the country’s largest accounting firms who had substantial expertise in [the relevant area of] accounting and auditing,” coupled with “no suggestion” that the clients “did not act in good faith,” established “[g]ood faith reliance on counsel,” considering it as “a factor in determining the propriety of injunctive relief”); Savoy, 665 F.2d at 1315 n.28 (even when the four factors are established, reliance on advice of counsel “is only one factor to be considered in determining the propriety of injunctive relief”); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1101-02 (2d Cir. 1972) (advice of counsel “may be a factor to consider in deciding whether to grant injunctive relief” where the defendant “relie[s] in good faith on counsel’s advice” and “counsel’s interpretation of the law” is “neither frivolous nor wholly unreasonable”). Berger cites no case rejecting these principles.

61/ SEC v. Merchant Capital, 483 F.3d 747, 772 (11th Cir. 2007); accord Dolphin & Bradbury, Inc. v. SEC, 512 F.3d 634, 642 (D.C. Cir. 2008) (that respondent “failed to disclose the [pertinent] information to [his counsel], who lacked independent knowledge of this information,” “substantially undercuts his [reliance on counsel] argument”; “Reliance on advice of counsel will not be available to the defendant if he failed to

(continued...)

counsel claim “without producing the actual advice from an actual lawyer.” 62/ The Seventh Circuit rejected a defendant’s argument that “reliance on advice of counsel exculpates his conduct” because the defendant “offered nothing more than his say-so.” 63/ The court noted that “[h]e did not produce any letter from a securities lawyer giving advice that reflected knowledge of all material facts; he did not produce any opinion letter, period. Nor did [he] offer the live testimony of any securities lawyer.” 64/

Berger’s advice-of-counsel claim is deficient in both of these respects. During the period from NASD’s first request for Berger’s testimony on January 14, 2004 to the Hearing Panel’s decision on March 23, 2005, Berger and Second Counsel made only the barest of references to advice of counsel. These references occurred in letters to NASD, in arguments advanced during a pre-hearing conference and the NASD hearing and in briefs, and in one short exchange between Second Counsel and Berger at the December 2004 hearing. 65/ None of these references contains information about what advice Second Counsel offered or what he had been told in rendering this advice. 66/

61/ (...continued)

disclose all relevant facts to the attorney.”) (citation omitted); Howard, 376 F.3d at 1148 (in crediting reliance-on-counsel argument, stating that outside counsel “oversaw the closing of the first offering at its law offices, that it drafted the documents for the second offering,” and that inside and outside counsel “approv[ed] of” transactions challenged in the case).

62/ SEC v. McNamee, 481 F.3d 451, 456 (7th Cir. 2007).

63/ Id. at 455-56.

64/ Id. at 456; accord Eugene T. Ichinose, Jr., 47 S.E.C. 393, 395 (1980) (finding that respondent could not rely on advice of counsel where record did not “show with any specificity what advice [respondent] may have received from” counsel).

65/ At the December 2004 hearing, Second Counsel asked Berger: “[W]as it on advice of counsel that you didn’t come in?” Berger replied, “For the on-the-record interview, yes.” That exchange, prompted by a Hearing Panel member’s question, was abruptly curtailed by Second Counsel’s assertion of attorney-client privilege. However, the attorney-client privilege “cannot at once be used as a shield and a sword[,]” and the privilege “may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications.” United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (citations omitted), cert. denied, 502 U.S. 813 (1991).

66/ In his affidavit, Berger appears to criticize the quality of Second Counsel’s advice, noting that Second Counsel “did not advise me of the consequences of asserting [attorney-client] privilege with respect to my ‘advice of counsel’ defense, or even that the decision

(continued...)

Not until June 7, 2005, during his appeal to the NAC, did Berger seek to introduce evidence of any details of his communications with Second Counsel, in the form of his affidavit drafted under the renewed representation of his Initial Counsel. Because Berger had given no substantive testimony on the advice-of-counsel claim, he deprived the Hearing Panel and the NAC of a proper airing of the claim, including cross-examination, and of the opportunity to assess his credibility. Berger also presented no evidence to corroborate the assertions in his affidavit, such as an affidavit or testimony from Second Counsel. 67/

Berger's affidavit contains no description of what disclosure he made to Second Counsel and whether Berger provided him with all relevant facts, nor has Berger cited anything else in the record that does. 68/ This is particularly meaningful in light of what the record shows Berger would have known, but did not include in his testimony at the hearing, about the Forms U4 and, at a minimum, his claimed uncertainty about his own actions with regard to the Forms, which would have been important for counsel to know in assessing jurisdiction. Due to the lack of evidence about what Berger told his counsel, the record does not show that Berger relied reasonably and in good faith on advice that NASD did not have jurisdiction over him and that even if NASD did have jurisdiction, the sanction would be conditional and Berger would be given an opportunity to testify to avoid the sanction.

Record support is also lacking for Berger's assertions about the legal advice he received. By its own terms, Berger's affidavit purports only to "summarize[]" Second Counsel's advice. Second Counsel's February 11, 2004 letter to NASD merely stated that "NASD does not have jurisdiction over [Berger]" and that Berger was unwilling to testify until "it is determined that NASD does have jurisdiction." That Second Counsel raised certain arguments during the litigation of the proceeding, cited by Berger in his reply brief on remand, is not sufficient to

66/ (...continued)
whether or not to waive it was mine." However, Berger "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . ." Link v. Wabash, R.R., 370 U.S. 626, 633-634 (1962).

67/ Berger asserts that nothing precluded NASD from obtaining testimony or an affidavit from Second Counsel. NASD does not have subpoena power and could not have compelled Berger's attorney to testify. In addition, it is Berger's obligation to marshal all evidence in his defense. See Robert Thomas Clawson, 56 S.E.C. 584, 595 & n.25 (2003), petition denied, 2005 WL 2174637 (9th Cir. 2005) (unpublished opinion).

68/ See, e.g., Hal S. Herman, 55 SEC 395, 403 (2001) (finding no reliance on advice of counsel where respondent could not establish that he made full disclosure to counsel).

establish that counsel advised Berger at the time NASD requested his testimony that failing to appear was legal or that Berger's reliance on such advice was reasonable. 69/

We note that the record with respect to Second Counsel's advice contrasts with the evidence in Morton Bruce Erenstein. 70/ In Erenstein, we sustained NASD's imposition of a one-year suspension instead of a bar and noted that NASD "appropriately considered," in mitigation of Erenstein's Rule 8210 violation, his attorney's apparently "good faith interposition of his objections" The record demonstrated that Erenstein appeared at an OTR and testified until his counsel objected to NASD's requests for information about Erenstein's tax returns. Counsel subsequently sent a letter and other communications to NASD detailing the basis for his objection. 71/ Here, by contrast, Berger did not rely on counsel's advice in failing to appear at the first OTR and refused to appear at the second OTR. Neither he nor his counsel attempted to explain to NASD at the time of the scheduled testimony the basis for Berger's claim that NASD lacked jurisdiction. Instead, Second Counsel's letter responding to NASD's letter scheduling the second OTR stated merely that "we will determine whether the NASD has jurisdiction over Mr. Berger" and "will notify you of our intention as to whether or not Mr. Berger will testify on that date." Second Counsel's subsequent letter advising NASD that Berger would not appear provided no basis for his jurisdictional objection, referring only to "our view that the NASD does not have jurisdiction" and declining to address the matter further until "the NASD determines to bring an 8210 proceeding."

Berger appears to concede that an advice-of-counsel claim is not mitigating if it is premised on a strategy to avoid full compliance with applicable regulatory requirements. 72/

69/ Even examining Second Counsel's statements during the proceeding does not help Berger. Statements that lack of jurisdiction "was not a frivolous defense," that it "has substance," and that "[w]e have a lawfully legitimate right to challenge NASD's jurisdiction" show nothing more than that Second Counsel argued that Berger had a colorable jurisdictional argument, not necessarily one that was likely to prevail. We can find no statement anywhere in the record by Second Counsel that if NASD proves jurisdiction, "the sanction will be conditional and [Berger] will be given an opportunity to testify to avoid the sanction."

70/ Erenstein, 91 SEC Docket at 3114.

71/ Id. at 3124. Erenstein eventually produced the withheld information eight months after it was first requested, after receiving a Wells notice informing him that NASD staff intended to recommend institution of disciplinary proceedings.

72/ See Valentino, 57 S.E.C. at 338 (stating that "[w]e have repeatedly held that reliance on counsel does not excuse an associated persons's obligation to supply information or testimony or otherwise cooperate with NASD investigations," nor "should it mitigate the

(continued...)

Berger seems to suggest that even if the record gave rise to such a concern, which the Hearing Panel expressed here, he could dismiss that concern from consideration by asserting in his affidavit that he did not seek "to thwart the NASD's investigation or to foster strategic advantage." We understand the basis of the Hearing Panel's concern. Berger has stated that he did not want to spend the time required to provide the requested information. However, given the lack of evidence that Berger relied on the advice of counsel, we do not need to reach the issue of whether Berger sought to thwart NASD. On the record before us, we have no basis to determine whether Berger's reliance on advice-of-counsel claim is valid. Thus, we cannot accept Berger's advice-of-counsel claim as mitigating.

Based on the rationale behind the recommendation of a bar as the standard sanction for a complete failure to respond to an NASD request for information, and given the absence of any mitigating factors in this case, we find that the bar against Berger is neither excessive nor oppressive.

Berger argues for the first time in his reply brief that barring him from association with any broker or dealer would impose an undue burden on competition. He asserts that the "stigma" of a bar would impede his ability to engage in lawful economic activity, particularly in the securities industry. This is not the type of competitive concern that Exchange Act Section 19 meant to be considered.^{73/} Otherwise, NASD could never impose a bar on an individual or firm because the bar would always have the same effect that Berger describes. Even lesser sanctions could have the same such effect and therefore would be forbidden in Berger's view. We do not

^{72/} (...continued)
 sanctions imposed" under circumstances in which the respondent, "in determining whether to testify," was "weighing a concern regarding her continued ability to work in the securities industry if she failed to testify against a concern about the potential consequences to her husband if she pro[f]fered testimony" and "engaged in dilatory tactics to evade questioning by NASD"). Cf. Steadman, 967 F.2d at 642 (in considering whether defendants raising an advice-of-counsel claim "acted in bad faith," noting lack of "any motive" or "anything, to gain.").

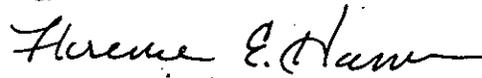
^{73/} The requirement that sanctions imposed by an SRO not impose an unnecessary or inappropriate burden on competition was added to Section 19 of the Exchange Act by the Securities Reform Act of 1975 (the "SRA"), Pub. L. No. 94-29, 89 Stat. 97 (codified as amended in scattered sections of 15 U.S.C.), a legislative effort to enhance competition among securities exchanges and markets. The SRA's intent, and consequently, that of Exchange Act Section 19, is to "break down the unnecessary regulatory restrictions which . . . restrain competition among markets and market makers . . ." S. Rep. No. 94-75, at 12-13 (1975). The SRA does not address the economic impact on former securities professionals barred from further participation in the industry.

believe that Exchange Act Section 19 embraces consideration of the reasons advanced by Berger for competitive harm.

Accordingly, we find that the bar against Berger does not impose any burden on competition and is neither excessive nor oppressive, because, as set forth above, the bar serves a remedial rather than a punitive purpose and Berger has not identified any factors that mitigate his violations.

An appropriate order will issue. 74/

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR, and PAREDES; Commissioner WALTER not participating).



Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58950 / November 14, 2008

Admin. Proc. File No. 3-12393r

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES
ASSOCIATION

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

ORDERED that the disciplinary action taken by NASD against Howard Brett Berger, and
NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.



Florence E. Harmon
Acting Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, 230, 240, 244 and 249

[RELEASE NOS. 33-8982; 34-58960; File No. S7-27-08]

RIN 3235-AJ93

**ROADMAP FOR THE POTENTIAL USE OF FINANCIAL STATEMENTS
PREPARED IN ACCORDANCE WITH INTERNATIONAL FINANCIAL
REPORTING STANDARDS BY U.S. ISSUERS**

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing a Roadmap for the potential use of financial statements prepared in accordance with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board by U.S. issuers for purposes of their filings with the Commission. This Roadmap sets forth several milestones that, if achieved, could lead to the required use of IFRS by U.S. issuers in 2014 if the Commission believes it to be in the public interest and for the protection of investors. This Roadmap also includes discussion of various areas of consideration for market participants related to the eventual use of IFRS in the United States. As part of the Roadmap, the Commission is proposing amendments to various regulations, rules and forms that would permit early use of IFRS by a limited number of U.S. issuers where this would enhance the comparability of financial information to investors. Only an issuer whose industry uses IFRS as the basis of financial reporting more than any other set of standards would be eligible to elect to use IFRS, beginning with filings in 2010.

11 of 28

DATES: Comments should be received on or before [insert date 90 days following publication in the Federal Register].

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

Electronic Comments:

- Use of the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-27-08 on the subject line; or
- Use the Federal Rulemaking ePortal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-27-08. The file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal

identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Craig Olinger, Deputy Chief Accountant, Division of Corporation Finance, at (202) 551-3400 or Michael D. Coco, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, at (202) 551-3450, or Liza McAndrew Moberg, Professional Accounting Fellow, Office of the Chief Accountant, at (202) 551-5300, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: The Commission is publishing for comment a proposed Roadmap and proposed amendments to Regulations S-X,¹ S-K² and C³ under the Securities Act of 1933 (the "Securities Act"),⁴ and Rule 12b-2,⁵ Schedule 13E-3,⁶ Schedule TO,⁷ Regulation G,⁸ and Form 8-K,⁹ under the Securities Exchange Act of 1934 (the "Exchange Act").¹⁰ In Regulation S-X, we propose to amend Rules 1-01,¹¹

¹ 17 CFR 210.1-01 - 210.12-29. Regulation S-X sets forth the form and content of requirements for financial statements.

² 17 CFR 229.10 et seq.

³ 17 CFR 230.400 et seq.

⁴ 15 U.S.C. 77a et seq.

⁵ 17 CFR 240.12b-2.

⁶ 17 CFR 240.13e-100.

⁷ 17 CFR 240.14d-100.

⁸ 17 CFR 244 et seq.

⁹ 17 CFR 249.308.

¹⁰ 15 U.S.C. 78a et seq.

¹¹ 17 CFR 210.1-01.

1-02,¹² 3-10,¹³ 4-01¹⁴ and 8-01,¹⁵ and to add Article 13. We are proposing the new Article 13 to apply to U.S. issuers and, as a conforming change, to foreign private issuers¹⁶ that file IFRS financial statements.¹⁷ In Regulation S-K, we propose to amend Items 10,¹⁸ 101,¹⁹ 301,²⁰ 504,²¹ 1100,²² 1112,²³ 1114²⁴ and 1115.²⁵ In Regulation C, we propose to amend Rule 405.²⁶ In Regulation G, we propose to amend Item 101.²⁷

¹² 17 CFR 210.1-02.

¹³ 17 CFR 210.3-10.

¹⁴ 17 CFR 210.4-01.

¹⁵ 17 CFR 210.8-01.

¹⁶ A "foreign private issuer," as defined in Rule 3b-4(c) [17 CFR 240.3b-4(c)], means any foreign issuer other than a foreign government except an issuer that meets the following conditions: (1) more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

¹⁷ As explained in Section V.B. below, inclusion of foreign private issuers in Article 13 will not change the content of their financial statements filed under Form 20-F.

¹⁸ 17 CFR 229.10.

¹⁹ 17 CFR 229.101.

²⁰ 17 CFR 229.301.

²¹ 17 CFR 229.504.

²² 17 CFR 229.1100.

²³ 17 CFR 229.1112.

²⁴ 17 CFR 229.1114.

²⁵ 17 CFR 229.1115.

²⁶ 17 CFR 230.405.

²⁷ 17 CFR 244.101.

TABLE OF CONTENTS

I. OVERVIEW

II. THE ROLE OF IFRS IN THE U.S. CAPITAL MARKETS

A. The Promise of Global Accounting Standards

- 1. The Global Nature of Today's Capital Markets**
- 2. Potential for IFRS as the Global Accounting Standard**

B. Past Policy Considerations Regarding IFRS

III. A PROPOSED ROADMAP TO IFRS REPORTING BY U.S. ISSUERS

A. Milestones to be Achieved Leading to the Use of IFRS by U.S. Issuers

- 1. Improvements in Accounting Standards**
- 2. Accountability and Funding of the IASC Foundation**
- 3. Improvement in the Ability to Use Interactive Data for IFRS Reporting**
- 4. Education and Training**
- 5. Limited Early Use of IFRS Where This Would Enhance Comparability for U.S. Investors**
- 6. Anticipated Timing of Future Rulemaking by the Commission**
- 7. Implementation of the Mandatory Use of IFRS**

B. Other Areas of Consideration

- 1. The Roles of Financial Information**
- 2. Accounting Systems, Controls and Procedures**
- 3. Auditing**
- 4. Considerations of IFRS and the IASB's Standard Setting Process**
 - a. State of IFRS**

b. **Relationship to the Accounting Standard Setting Process**

IV. PROPOSAL FOR THE LIMITED EARLY USE OF IFRS WHERE THIS WOULD ENHANCE COMPARABILITY FOR U.S. INVESTORS

- A. **Eligibility Requirements**
- B. **Staff Letter of No Objection to the Use of IFRS**
- C. **Transition**
- D. **Alternative Proposals for U.S. GAAP Information**
 - 1. **Proposal A – Reconciled Information Pursuant to IFRS 1**
 - 2. **Proposal B – Supplemental U.S. GAAP Information**
 - 3. **Discussion of Proposals A and B**

V. DISCUSSION OF PROPOSED AMENDMENTS

- A. **The Use of IFRS Financial Statements in Commission Filings by Eligible Issuers**
 - 1. **Proposed Amendments to Rule 4-01 of Regulation S-X**
 - 2. **Proposed Definition of “IFRS Issuer”**
- B. **Application**
 - 1. **Article 13 of Regulation S-X**
 - 2. **Proposed Clarifying Amendments with Respect to References to IFRS as Issued by the IASB**
- C. **Proposed Amendments to Item 10(e) of Regulation S-K and Regulation G**
- D. **Related Disclosure and Financial Reporting Issues**
 - 1. **Selected Financial Data**
 - 2. **Market-Risk and the Safe Harbor Provisions**
 - 3. **Disclosure of First-Time Adoption of IFRS in Form 10-K**

4. Other Considerations Relating to IFRS and U.S. GAAP Guidance

E. Financial Statements of Other Entities under Regulation S-X

1. Application of the Amendments to Rules 3-05, 3-09 and 3-14

a. Significance Testing

b. Separate Historical Financial Statements of Another Entity Provided under Rule 3-05, 3-09 or 3-14

2. Financial Statements Provided under Rule 3-10

3. Financial Statements Provided under Rule 3-16

F. Pro Forma Financial Statements Provided under Article 11

G. Industry Specific Matters

1. Disclosure Pursuant to Industry Guides

2. Disclosure from Oil and Gas Companies under FAS 69

H. Application of the Proposed Amendments to Other Forms, Rules and Schedules

1. Application of Proposed Amendments to Exempt Offerings

2. References to FASB Pronouncements in Form 8-K

3. Application of IFRS to Tender Offer and Going-Private Rules

VI. GENERAL REQUEST FOR COMMENTS

VII. PAPERWORK REDUCTION ACT

A. Background

B. Burden and Cost Estimates Related to the Proposed Amendments

C. Request for Comment

VIII. COST-BENEFIT ANALYSIS

A. Proposal for Early Use of IFRS by U.S. Issuers

1. **Expected Benefits**

2. **Expected Costs**

B. Proposal A: Reconciled Information Pursuant to IFRS 1

1. **Expected Benefits**

2. **Expected Costs**

C. Proposal B: Supplemental U.S. GAAP Information

1. **Expected Benefits**

2. **Expected Costs**

IX. REGULATORY FLEXIBILITY ACT CERTIFICATION

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

**XI. PROPOSED AMENDMENTS TO THE CODIFICATION OF FINANCIAL
REPORTING POLICIES**

XII. STATUTORY BASIS AND TEXT OF PROPOSED AMENDMENTS

I. OVERVIEW

The Commission is proposing this Roadmap towards requiring the use of International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB")²⁸ by U.S. issuers²⁹ as part of its consideration of the role a single set of high-quality accounting standards plays in investor protection and the efficiency and effectiveness of capital formation and allocation. As capital markets have become increasingly global, U.S. investors have a corresponding increase in international investment opportunities. In this environment, we believe that U.S. investors would benefit from an enhanced ability to compare financial information of U.S. companies with that of non-U.S. companies. The Commission has long expressed its support for a single set of high-quality global accounting standards as an important means of enhancing this comparability.³⁰ We believe that IFRS has the potential to best provide the common platform on which companies can report and investors can compare financial information.

This proposed Roadmap first addresses the basis for considering the mandatory use of IFRS by U.S. issuers. It then sets forth seven milestones which, if achieved, could

²⁸As used in this release, the phrase "IFRS as issued by the IASB" refers to the authoritative text of IFRS, which, according to the Constitution of the International Accounting Standards Committee Foundation ("IASC Foundation"), is published in English. See "International Financial Reporting Standards, including International Accounting Standards and Interpretations as at 1 January 2007," Preface to International Financial Reporting Standards, at paragraph 23. Unless otherwise noted, the phrase "IFRS" refers to IFRS as issued by the IASB.

²⁹The terms "U.S. issuer" and "domestic issuer" are used interchangeably in this release. Although there is no specific definition of those terms under the Exchange Act or the Securities Act, they are used in this document to refer to any issuer that files annual reports pursuant to the Exchange Act on Form 10-K [17 CFR 249.310] or a registration statement under the Securities Act for which foreign private issuer status is not an eligibility requirement. For purposes of this release, the terms U.S. issuer and domestic issuer also include a foreign issuer or foreign private issuer, as defined in Rule 3b-4 under the Exchange Act [17 CFR 240.3b-4(c)] and in Rule 405 under the Securities Act [17 CFR 230.405], that elects to file on domestic forms.

³⁰See, for example, Release No. 33-6807 (November 14, 1988) [53 FR 46963 (November 21, 1988)].

lead to the use of IFRS by U.S. issuers in their filings with the Commission.³¹ The Commission in 2011 would determine whether to proceed with rulemaking to require that U.S. issuers use IFRS beginning in 2014 if it is in the public interest and for the protection of investors to do so. These milestones relate to:

- improvements in accounting standards;
- the accountability and funding of the IASC Foundation;
- the improvement in the ability to use interactive data for IFRS reporting;
- education and training relating to IFRS;
- limited early use of IFRS where this would enhance comparability for U.S. investors;
- the anticipated timing of future rulemaking by the Commission; and
- the implementation of the mandatory use of IFRS by U.S. issuers.

After describing the milestones, this proposed Roadmap also discusses how IFRS reporting by U.S. issuers may affect other participants in the capital markets.

As a step along this Roadmap, this release then describes proposed amendments to permit a U.S. issuer that is among the largest companies worldwide within its industry, and whose industry uses IFRS as the basis of financial reporting more than any other set of standards, to elect to use IFRS beginning with filings for fiscal years ending on or after December 15, 2009. These amendments include a process by which U.S. issuers would

³¹ This release does not address the method the Commission would use to mandate IFRS for U.S. issuers. One of the options would be for the Financial Accounting Standards Board ("FASB") to continue to be the designated standard setter for purposes of establishing the financial reporting standards in issuer filings with the Commission. In this option our presumption would be that the FASB would incorporate all provisions under IFRS, and all future changes to IFRS, directly into generally accepted accounting principles as used in the United States ("U.S. GAAP"). This type of approach has been adopted by a significant number of other jurisdictions when they adopted IFRS as the basis of financial reporting in their capital markets.

seek confirmation from Commission staff that they are eligible to use IFRS in their Commission filings. This release also seeks comment on two alternative proposals under which U.S. issuers that elect to use IFRS would disclose U.S. GAAP information.

II. THE ROLE OF IFRS IN THE U.S. CAPITAL MARKETS

A. The Promise of Global Accounting Standards

1. The Global Nature of Today's Capital Markets

Today, investors, issuers and other capital markets participants are able to engage in financial transactions across national boundaries and to make investment, capital allocation and financing decisions on a global basis more readily than ever before. This is due in large measure to today's ever-faster communications, and ever-more-closely linked markets. Advances in technology that facilitate securities transactions have reduced barriers that previously existed and that may have impeded cross-border investment for both retail and institutional investors. For instance, investors can more readily obtain information on a wide variety of international investment opportunities than in the past, largely due to the availability of information over the Internet. Further, it is now possible for U.S. investors to have access to real-time securities transaction data from stock exchanges and other securities markets from around the world and to trade on global exchanges through accounts they manage over the Internet. As trading and investment become more global, investors face an increasing need for full, fair and reliable disclosure that enables comparison of financial information across investment alternatives that cross national boundaries.

A large and increasing number of U.S. investors hold securities of non-U.S. issuers. Further, U.S. investors have the ability to make cross-border investments

readily.³² Thus, we believe it is important for U.S. investors to have access to the tools to compare effectively and efficiently their investment opportunities in a global capital market. The Commission has long considered a reduction in the disparity between the accounting and disclosure practices of the United States and those of other countries as an important objective for both the protection of investors and the efficiency of capital markets.³³ Further, while our recent Advisory Committee on Improvements to Financial Reporting (“CIFiR”) purposefully limited its scope relating to international matters due to ongoing efforts by the Commission and the FASB, it did similarly note the following in its final report to the Commission:³⁴

We broadly support the continued move to a single set of high-quality global accounting standards, coupled with enhanced international coordination to foster their consistent interpretation and to avoid jurisdictional variants. Further, we encourage the development of a roadmap to identify issues and milestones to transition to this end state in the U.S., with sufficient time to minimize disruptions, resource constraints, and the complexity arising from such a significant change.³⁵

The Commission recognizes that the use of a single, widely accepted set of high-quality accounting standards would benefit both the global capital markets and U.S. investors by providing a common basis for investors, issuers and others to evaluate

³² Over the period from 1990 to 2006, estimated investments in foreign equity securities held by U.S. residents has grown from approximately \$200 billion to \$4,300 billion, based on estimates published by the U.S. Bureau of Economic Analysis, U.S. Treasury statistics. See http://bea.gov/international/xls/intinv07_12.xls. Included in this category are investments in equities, whether listed or unlisted, where the holding by the U.S. resident is less than 10%.

³³ See, for example, Release No. 33-6360 (November 20, 1981) [46 FR 58511 (December 2, 1981)]. For a further discussion of the Commission’s previous actions promoting development of a single set of high-quality globally accepted accounting standards, see Section III.C. of Release No. 33-8831 (August 7, 2007) [72 FR 45600 (August 14, 2007)] (“2007 Concept Release”).

³⁴ See Final Report of the Advisory Committee on Improvements to Financial Reporting to the United States Securities and Exchange Commission (August 1, 2008) (“CIFiR Final Report”).

³⁵ CIFiR Final Report, at page 21 (footnotes references omitted).

investment opportunities and prospects in different jurisdictions. U.S. investors would be able to make better-informed investment decisions if they were to obtain high-quality financial information from U.S. companies that is more comparable to the presently available information from non-U.S. companies operating in the same industry or line of business. Capital formation and investor understanding would be enhanced if the world's major capital markets all operated under a single set of high-quality accounting standards that elicit comparable, high-quality financial information from public companies.

2. Potential for IFRS as the Global Accounting Standard

The increasing acceptance and use of IFRS in major capital markets throughout the world over the past several years, and its anticipated use in other countries in the near future, indicate that IFRS has the potential to become the set of accounting standards that best provide a common platform on which companies can report and investors can compare financial information. Approximately 113 countries around the world currently require or permit IFRS reporting for domestic, listed companies.³⁶

Foreign jurisdictions have chosen to require or allow IFRS for many different reasons. For example, in the European Union (the "E.U."), prior to its requirement relating to IFRS applicable to companies incorporated and publicly traded in its Member States,³⁷ accounting standards in each of the E.U. Member States generally were

³⁶ Some countries have enacted IFRS as national standards and require compliance to be stated with those national standards. In some cases, these national standards are identical to IFRS as issued by the IASB; in other cases, these national standards have been more narrow, yet consistent with IFRS as issued by the IASB; and, in yet other cases, these national standards may permit additional options that are inconsistent with IFRS as issued by the IASB, although companies may opt to apply standards so that they comply with IFRS as issued by the IASB. See <http://www.iasplus.com/country/useias.htm>.

³⁷ See Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of the European Union of 19 July 2002 on the application of international accounting standards, Official Journal L. 243, 11/09/2002 P. 0001- 0004.

established individually in each jurisdiction. Further, each Member State would typically permit the use in its capital markets of accounting standards set in other jurisdictions, in addition to its own domestic accounting standards.³⁸ IFRS provided a common set of accounting principles under which all domestic listings in the E.U. could report. In Canada, accounting standard setters concluded that, given the increasing globalization of capital markets and other recent developments, that it was timely for public Canadian companies to adopt globally accepted, high-quality accounting standards by converging Canadian GAAP with IFRS over a transitional period, after which a separate and distinct Canadian GAAP would cease to exist as a basis of financial reporting for public companies.³⁹ In Australia, the decision to adopt IFRS was part of a strategy to ensure consistency and comparability of Australian financial reporting with financial reporting across global financial markets.⁴⁰ More countries have adopted IFRS, including Israel,⁴¹ and others have plans to allow it, including Brazil.⁴² The market capitalization of exchange listed companies in the E.U., Australia and Israel totals \$11 trillion (or approximately 26% of global market capitalization), and the market capitalization from

³⁸ For example, U.S. GAAP was accepted by some E.U. Member States for domestic registrants and still is accepted for foreign registrants.

³⁹ For additional information, see http://www.cica.ca/index.cfm/ci_id/44036/la_id/1.htm. The staff of the Canadian Securities Administrators ("CSA") has proposed retaining the existing option for a domestic Canadian issuer that is also an SEC issuer to use U.S. GAAP. See <http://www.cica.ca/3/9/1/6/6/index1.shtml> for the link to "CSA Announcement re: IFRS in Canada" (CSA Staff Notice 52-321).

⁴⁰ See <http://www.asic.gov.au/asic/asic.nsf/byheadline/Your+questions+about+implementing+the+IFRS?openDocument#1>.

⁴¹ See Israel Accounting Standard No. 29 "Adoption of International Financial Reporting Standards," which describes the adoption of IFRS in Israel for years starting on January 1, 2008.

⁴² See <http://www.cvm.gov.br/port/snc/inst457.pdf>.

those countries plus Brazil and Canada totals \$13.4 trillion (or approximately 31% of global market capitalization).⁴³

The Commission is aware of the transitions made by other countries to IFRS. For example, the vast majority of listed European companies, including banks and insurance companies, moved to comply with the E.U. IFRS requirement in 2005 with the remainder transitioning in 2007. Under these transition approaches, in essence all or almost all of the listed companies transitioned to IFRS at the same time. Some foreign regulators have published reports relating to the implementation of IFRS in their country. For example, the U.K. Financial Reporting Review Panel and the Autorité des Marchés Financiers of France ("AMF") have both published reports making observations on IFRS as applied in their jurisdictions.⁴⁴

As with all countries that have evaluated the potential use of IFRS in their own markets, the policy considerations in the United States must factor in the individual circumstances of its investors and capital markets. The U.S. capital markets are among the largest and most liquid in the world. U.S. GAAP is a well-established basis of financial reporting and is applied by all U.S. public companies, many foreign companies, and many U.S. private companies, as well as their auditors. Today, U.S. GAAP is accepted in capital markets around the world, and the Commission requires its use by all

⁴³ All figures are from the World Federation of Stock Exchanges, Domestic Market Capitalization as of September 30, 2008, in U.S. dollars.

⁴⁴ For the report of the U.K. Financial Reporting Review Panel, see "Preliminary Report: IFRS Implementation" available at <http://www.frc.org.uk/images/uploaded/documents/IFRS%20Implementation%20-%20preliminary.pdf>. For the report of the AMF, see "Recommendations on accounting information reported in financial statements for 2006," dated December 19, 2006, available at http://www.amf-france.org/documents/general/7565_1.pdf.

domestic issuers.⁴⁵ The accounting principles established by the FASB have been recognized by the Commission as “generally accepted” for purposes of the U.S. federal securities laws.⁴⁶

Regardless of whether the Commission decides to allow or require IFRS for U.S. issuers in the future, the past and anticipated move towards the use of IFRS in other jurisdictions may have begun to affect U.S. investors’ ability to evaluate investment alternatives as their level of investment in non-U.S. companies has increased over time.⁴⁷ The growing level of foreign investment by U.S. residents in international investment opportunities, including opportunities to invest in issuers that do not file reports with the Commission, makes it likely that U.S. investors will increasingly need to use IFRS financial statements.⁴⁸ Also, it is likely that large U.S. issuers that compete for capital on a global basis will increasingly need to use and understand IFRS financial statements in order to remain competitive. For these reasons, the Commission finds it advisable to continue to pursue consideration of the use of IFRS in the U.S. markets in order to better equip U.S. investors to make comparisons of U.S. companies with certain non-U.S. companies, while balancing this with the fact that U.S. investors should be able to compare U.S. companies with other U.S. companies.

⁴⁵ See Rule 4-01(a)(1) of Regulation S-X [17 CFR 210.4-01(a)(1)].

⁴⁶ See Release No. 33-8221, Financial Reporting Release (“FR”) 70 (April 25, 2003) [68 FR 23333 (May 1, 2003)] (“FR 70”).

⁴⁷ As more companies move towards IFRS reporting, current and potential investors in U.S. issuers may increasingly be comparing those U.S. issuers’ financial information to IFRS-based financial information of competing investment opportunities. For example, approximately 120 foreign private issuers currently report to the Commission using IFRS financial statements.

⁴⁸ For example, U.S. investors may purchase securities issued by a non-reporting foreign company directly on a foreign exchange; or they may invest in American Depositary Receipts representing the securities of a foreign private issuer that is exempt from Exchange Act reporting requirements pursuant to Rule 12g3-2(b) [17 CFR 240.12g3-2(b)].

Promoting a single set of globally accepted accounting standards will benefit investors as more and more companies prepare their financial statements applying a single set of high-quality accounting standards. With a single set of accounting standards, investors can more easily compare information and will be in a better position to make informed investment decisions. This benefit is dependent upon use of a single set of high-quality standards globally and financial reporting that is, in fact, consistently applied across companies, industries and countries. Any decision we may take to expand the use of IFRS to U.S. issuers would necessitate our evaluation of whether global developments support the assertion of IFRS as the single set of high-quality globally accepted accounting standards that is applied consistently across companies, industries and countries.

The Commission has identified certain considerations which may influence the degree to which comparability may be achieved through widespread adoption of IFRS. These considerations include the extent to which IFRS is adopted and applied globally, and whether IFRS is adopted and applied in foreign jurisdictions as issued by the IASB or as jurisdictional variants of IFRS.⁴⁹ We believe that the benefits of moving towards a single set of globally accepted standards as a long-term objective for increased comparability of financial statements are attainable through the use of IFRS only if IFRS represents a single set of high-quality accounting standards, which is best accomplished through the use of IFRS as issued by the IASB. As stated previously, each jurisdiction's considerations surrounding the use of IFRS in its markets are unique to the jurisdiction's

⁴⁹ Different jurisdictions often have internal processes through which they adopt or incorporate IFRS into their national accounting standards. Decisions made during those processes may result in discrepancies from IFRS as issued by the IASB.

circumstances. Therefore, the large number of countries allowing or requiring IFRS in their markets does not alone determine the Commission's decision. However, in determining whether to proceed with requiring the use of IFRS by U.S. issuers, the Commission will consider the extent to which IFRS as issued by the IASB is used globally, is applied consistently, and supports the assertion of IFRS as the single set of high-quality global accounting standards.⁵⁰

B. Past Policy Considerations Regarding IFRS

Over time, the Commission has undertaken a series of initiatives to promote a single set of high-quality globally accepted accounting standards as a means of advancing the objective of reduced disparity in financial reporting between U.S. issuers and foreign issuers. Convergence of U.S. GAAP and IFRS as issued by the IASB, which involves the best efforts of the IASB and the FASB (referred to jointly as "the Boards") to make their financial reporting standards fully compatible on a standard-by-standard basis, has been the predominant approach taken in the United States to achieve that objective over the past six years.⁵¹ As discussed further below, the Commission continues to support the joint efforts of the IASB and the FASB as an important means of increasing the quality of IFRS and U.S. GAAP and, at the same time, reducing disparity between the two.

⁵⁰ In 2007, as part of our efforts to foster a single set of globally accepted accounting standards, we adopted amendments to allow foreign private issuers to file IFRS financial statements without reconciliation to U.S. GAAP only if the financial statements were prepared in accordance with IFRS as issued by the IASB. See "Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards without Reconciliation to U.S.," Release No. 33-8879 (December 21, 2007) [73 FR 986 (January 4, 2008)] (the "2007 Adopting Release"). The Commission proposed these rules in June 2007 [Release No. 33-8818 (July 3, 2007)] [72 FR 37962 (July 11, 2007)] (the "2007 Proposing Release").

⁵¹ The Norwalk Agreement, issued in 2002, and a Memorandum of Understanding entered into by the FASB and the IASB in 2006 express the Boards' intentions to, on a best efforts basis, converge U.S. GAAP and IFRS. See <http://www.fasb.org/news/memorandum.pdf> and http://www.fasb.org/intl/mou_02-27-06.pdf for further details.

More recently, the Commission's consideration of the use of IFRS by U.S. issuers has included the issuance of a Concept Release addressing whether U.S. issuers should be permitted, but not required, to use IFRS in their filings with the Commission.⁵²

Specifically, the Commission sought input on the nature and extent of the public's interest in giving U.S. issuers the option to file with the Commission financial statements prepared in accordance with IFRS as issued by the IASB. The Commission received over 80 comment letters from a wide range of issuers, investors, accounting firms and other market participants.⁵³

The Commission also has held three public roundtables consisting of investors, issuers, accounting firms, educators, standard setters and other capital market participants to receive further input about the use of IFRS.⁵⁴ In December 2007, the Commission held one roundtable on IFRS in U.S. markets and a second on practical issues surrounding the use of IFRS in recent years and its potential expanded use in future years. The third roundtable, in August 2008, related to the performance of U.S. GAAP and IFRS during the sub-prime crisis.

While many commenters on the 2007 Concept Release and the participants at the roundtables supported allowing U.S. issuers to use IFRS, certain commenters expressed the belief that IFRS should be mandated for all U.S. issuers and not limited to a specific group of U.S. issuers. Other commenters believed that U.S. issuers should continue to use U.S. GAAP, while supporting ongoing convergence.

⁵² See 2007 Concept Release.

⁵³ These comments are available at <http://www.sec.gov/comments/s7-20-07/s72007.shtml>.

⁵⁴ Information on these Roundtables, including transcripts, is available on the Commission's Web site at <http://www.sec.gov/spotlight/ifrsroadmap.htm>.

III. A PROPOSED ROADMAP TO IFRS REPORTING BY U.S. ISSUERS

A. Milestones to be Achieved Leading to the Use of IFRS by U.S. Issuers

The Commission is proposing this Roadmap to set forth milestones which, if achieved, could lead to the eventual use of IFRS by all U.S. issuers. Through this Roadmap, the Commission is seeking to realize the objective of providing investors with financial information from U.S. issuers under a set of high-quality globally accepted accounting standards, which would enable U.S. investors to better compare financial information of U.S. issuers and competing international investment opportunities. This Roadmap is further intended to encourage market participants to consider the effect of IFRS in our capital markets and to prepare for the use of IFRS financial statements by U.S. issuers in their filings with the Commission.

In addition to the milestones, the Commission also expects to consider, among other things, whether IFRS as issued by the IASB is a globally accepted set of accounting standards and whether it is consistently applied. The advantages to U.S. investors of increased comparability across investment alternatives, as contemplated under this Roadmap, are dependent upon financial reporting under IFRS that is, in fact, consistent across companies, industries and countries.

The course of action described in this proposed Roadmap reflects the deliberations of the Commission in light of current circumstances. We intend to publish the final Roadmap, if adopted, in our Codification of Financial Reporting Policies.⁵⁵ We recognize, however, that as events occur, new circumstances may require us to update or revise the Roadmap. With the knowledge of the anticipated timetable for Commission

⁵⁵ See FR 1 (April 15, 1982), 7 Fed. Sec. L. Rep. (CCH) ¶72,401, at 62,021.

rulemaking initiatives on this policy matter, investors, issuers and other market participants may engage more concretely in discussions about IFRS for U.S. issuers, both through comments provided to the Commission as well as in further dialogue among parties potentially affected. The Commission believes that any future actions relating to the use of IFRS by U.S. issuers would benefit from the increased awareness by all affected parties of the related issues and preparedness that this Roadmap is intended to foster. As we progress along this initiative, we anticipate receiving extensive input from investors, issuers and other affected parties, which we will consider carefully.

This proposed Roadmap relates solely to U.S. issuers with respect to their periodic reporting requirements under Sections 13 and 15(d) of the Exchange Act, proxy and information statements under Section 14 of the Exchange Act and registration statements under Section 12 of the Exchange Act and Section 7 of the Securities Act. Our considerations at this time with respect to the possible use of IFRS do not include issuers that are investment companies under the Investment Company Act of 1940. Likewise, at this time, the Roadmap does not extend to other types of financial reports that are filed or furnished to the Commission by regulated entities, such as registered broker-dealers.

1. Improvements in Accounting Standards

In October 2002, the FASB and the IASB announced the issuance of a memorandum of understanding, called the Norwalk Agreement. The two bodies acknowledged their joint commitment to the development, "as soon as practicable," of high-quality, compatible accounting standards that could be used for both domestic and cross-border financial reporting. At that time, the FASB and the IASB pledged to use

their best efforts to make their existing financial reporting standards fully compatible as soon as is practicable and to co-ordinate their future work programs to ensure that once achieved, compatibility is maintained. In a 2006 Memorandum of Understanding, the FASB and the IASB indicated that a common set of high-quality global standards remains the long-term strategic priority of both the FASB and the IASB. As part of this commitment, the IASB and the FASB set out a work plan covering several projects and coordinated agendas so that major projects that one board takes up may also be taken up by the other board. That plan covered specific long- and short-term projects for work into 2008. In November 2007, the Trustees of the IASC Foundation reiterated their support for continuing the work program described in these memoranda, noting that future work is largely focused on areas in which the objective is to develop new world-class international standards. The FASB and the IASB have updated the timetable for their joint work under the 2006 Memorandum of Understanding.⁵⁶ The next phase of the joint work plan goes through 2011.

The current joint work plans of the two standard setters, as well as other work undertaken by them, furthers the goal of comprehensive, high-quality standards. The Commission will continue to monitor the activities of both the FASB and the IASB and the progress of their efforts. In past Commission releases, we have noted areas where IFRS provides limited guidance on a particular topic, such as accounting for insurance contracts and for extractive activities.⁵⁷ Further, the current work plan of the FASB and the IASB includes accounting standards, including (without emphasizing priority)

⁵⁶ See the update to the 2006 Memorandum of Understanding at http://www.fasb.org/intl/MOU_09-11-08.pdf.

⁵⁷ See the discussion in Section III.B.4, below.

revenue recognition and financial statement presentation, that when completed should improve financial reporting significantly. The Commission will consider the degree of progress made by the FASB and the IASB in any future evaluation of the potential expanded role of IFRS in the reporting by U.S. issuers. When the Commission considers mandating use of IFRS by U.S. issuers in 2011, it would consider whether those accounting standards are of high quality and sufficiently comprehensive.⁵⁸ The Commission urges the two Boards to continue working towards the completion of their joint work plan estimated to be completed in 2011 and other projects that are expected to improve financial reporting.

In addition, it is important that accounting standards be established under a robust, independent process that includes careful consideration of possible alternative approaches and due process, which allows for input from and consideration of views expressed by affected parties, including investors. It is also important that accounting standards are promptly considered to keep standards current and reflect emerging accounting issues and changing business practices. Further, it is important that the accounting standards produced are capable of improving the accuracy and effectiveness of financial reporting and the protection of investors, and of resulting in a high quality of financial reporting relative to the standards which may be replaced. Thus, in considering future action as set out in this Roadmap, the Commission would also assess whether it believes that the IASB continues to develop its standards, including converged standards, through a process that reflects these elements.

⁵⁸ High quality accounting standards consist of a set of neutral principles that require consistent, comparable, relevant and reliable information that is useful for investors. See "SEC Concept Release: International Accounting Standards," Release No. 33-7801 (February 16, 2000) [65 FR 8896 (February 23, 2000)].

2. Accountability and Funding of the IASC Foundation

The IASB is based in London and is an accounting standard setting body established to develop global standards for financial reporting.⁵⁹ It is overseen by the IASC Foundation. The IASC Foundation is based in London and is a stand-alone, not-for-profit organization, incorporated in Delaware. It is responsible for the activities of the IASB and other work that centers on IFRS, such as initiatives related to translation of IFRS from the English language, education about IFRS and the development of interactive data taxonomies for IFRS. The IASC Foundation is governed by 22 trustees (“IASC Foundation Trustees”) whose backgrounds are geographically diverse.

The IASC Foundation has financed IASB operations largely through voluntary contributions from a wide range of market participants from across the world’s capital markets, including from a number of firms in the accounting profession, companies, international organizations, central banks and governments. Funding commitments were made for the period 2001-2005 and then were extended for an additional two years through 2007. In June 2006, the IASC Foundation Trustees agreed on four elements that should govern the establishment of a funding approach designed to enable the IASC Foundation to remain a private-sector organization with the necessary resources to conduct its work in a timely fashion. The IASC Foundation Trustees determined that characteristics of the new scheme for 2008 would be broad-based, compelling, open-ended and country-specific.⁶⁰ The

⁵⁹ For more information on the structure and operation of the IASB, see www.iasb.org.

⁶⁰ Further description of these elements can be found on the IASB’s Web site at <http://www.iasb.org/About+Us/About+the+IASC+Foundation/Funding.htm>. The IASC Foundation describes these principles as follows:

* Broad-based: A sustainable long-term financing system must expand the base of support to include major participants in the world’s capital markets, including official institutions, in order to ensure diversification of sources.

* Compelling: A system must carry with it enough pressure to make free riding very difficult. This could be accomplished through a variety of means, including official support from the relevant regulatory authorities and formal approval by the collecting organizations.

IASC Foundation Trustees continue to make progress in obtaining funding that satisfies those elements.⁶¹

The Commission will carefully consider the degree to which the IASC Foundation has a secure, stable funding mechanism that permits it to function independently and that enhances the IASB's standard setting process. The IASC Foundation has developed targeted contribution levels from individual jurisdictions. Realizing the IASC Foundation's goal of receiving open-ended funding commitments from a broad base of constituents and that are compulsory would encourage the independent functioning of the IASB in its standard setting process. Otherwise, the IASB may be subject to a perceived or, potentially, an actual connection between the availability of funding and the outcome of its standard setting process. We believe that our future determination regarding the required use of IFRS for all U.S. issuers should only occur after the IASC Foundation reaches its goal of securing a stable funding mechanism that supports the independent functioning of the IASB.

National accounting standard setters traditionally have been accountable to a national securities regulator or other government authority. In the United States, the Financial Accounting Foundation ("FAF"), the parent of the FASB, is overseen by the Commission. The IASC Foundation has not historically had a similar link with any national securities regulators. Recognizing that such a relationship would enhance the

* Open-ended: The financial commitments should be open-ended and not contingent on any particular action that would infringe on the independence of the IASC Foundation and the IASB. This should include sustained support from official international organizations, central banks and the major accounting firms.

* Country-specific: The funding burden should be shared by the major economies of the world on a proportionate basis, using GDP as the key determining factor of measurement. Each country should meet its designated target in a manner consistent with the principles above. Trustees should be assigned to specific countries to assist in the development of the funding scheme.

⁶¹ See <http://www.iasb.org/About+Us/About+the+IASC+Foundation/2008+funding+commitments.htm>.

public accountability of the IASC Foundation, its Trustees have proposed amendments to its Constitution to establish a connection between the IASC Foundation and a Monitoring Group composed of securities authorities charged with the adoption or recognition of accounting standards used in their respective jurisdictions.⁶² The Commission has been working with other national securities authorities and the International Organization of Securities Commissions to establish the Monitoring Group to enable it to begin its work once the IASC Foundation adopts the necessary changes to its Constitution.⁶³ The securities authorities, including the Commission, envision that the Monitoring Group will participate in and approve nominations for IASC Foundation Trustees, review the funding arrangements of the IASC Foundation for adequacy and appropriateness, and address matters that the IASC Foundation Trustees are responsible for, such as oversight of the IASB and potential areas for consideration by the IASB in its ongoing work.⁶⁴

The Commission believes that the accountability of the IASC Foundation will be enhanced once the Monitoring Group provides the forum for interaction between securities authorities and the IASC Foundation Trustees. The Commission believes that effective oversight is critical to mandating that U.S. issuers prepare financial statements in accordance with IFRS. Based on the progress of the discussions among securities regulators, as well as the IASC Foundation's timetable for adopting the relevant changes to its Constitution, the Commission assumes that the Monitoring Group will have been

⁶² See http://www.iasb.org/NR/rdonlyres/12CC476D-B88F-418A-826F-71A7465FC2E0/0/Proposal_and_issues_for_the_Constitution.pdf for a full description of the proposed amendments to the Constitution.

⁶³ See the Commission's joint statement with other national securities regulators with respect to the establishment of a Monitoring Group at <http://www.sec.gov/news/press/2007/2007-226.htm>.

⁶⁴ The proposed responsibilities of the Monitoring Group do not extend to the standard setting process.

established and be functioning by the time the Commission considers mandating the use of IFRS for U.S. issuers. We will evaluate the effectiveness of the oversight mechanism (including the functioning of the multilateral nature of the Monitoring Group) in making the determination whether mandating IFRS is in the public interest for the protection of investors and our markets.

3. Improvement in the Ability to Use Interactive Data for IFRS Reporting

In May 2008, the Commission proposed rules to require companies to provide their financial statements to the Commission and on their corporate Web sites in interactive data format using the eXtensible Business Reporting Language ("XBRL") in order to improve their usefulness to investors.⁶⁵ Under those proposed rules, financial statement information could be submitted by public companies in interactive data format, and that financial information could then be downloaded directly into spreadsheets, analyzed in a variety of ways using off-the-shelf commercial software, or used within investment models in any of a number of other software formats. The rules proposed in May, if adopted, would apply to domestic and foreign public companies that prepare their financial statements in accordance with U.S. GAAP, and foreign private issuers that prepare their financial statements using IFRS as issued by the IASB. Under the proposal, foreign private issuers that prepare their financial statements using IFRS as issued by the IASB would be required to provide financial statements in interactive data format starting with their fiscal periods ending on or after December 15, 2010. If the Commission adopts its proposed rules relating to interactive data, it is anticipated that they would

⁶⁵ See "Interactive Data to Improve Financial Reporting," Release No. 33-8924 (May 30, 2008) [73 FR 32794 (June 10, 2008)].

apply to the limited number of U.S. issuers that could elect to file IFRS financial statements as proposed in this release.

In order to realize the improvements in the usefulness and comparability of financial information anticipated upon the widespread use of interactive data, U.S. issuers would have to be capable of providing IFRS financial statements to the Commission in interactive data format at a greater level of detail than is currently available. Therefore, the state of development of an IFRS list of tags for interactive data reporting will be a consideration in the Commission's determination of whether to require the use of IFRS for all U.S. issuers. The IASC Foundation first published a complete list of tags for the IFRS "Bound Volume" in 2004, and has published annual updates since then to reflect new pronouncements, changes in XBRL technical standards, and other improvements; the most recent such update was published in July 2008. The Commission staff is actively involved in the improvement and monitoring of the IFRS list of tags via participation in the IASC Foundation's XBRL Advisory Council. The Commission believes it is appropriate to consider the IASC Foundation's progress in the development of IFRS taxonomies prior to proceeding with rulemaking on IFRS for all U.S. issuers.

4. Education and Training

Reporting in accordance with IFRS by U.S. issuers would increase the need for effective training and education about IFRS for investors, accountants, auditors and others involved in the preparation and use of financial statements, as there are differences between U.S. GAAP and IFRS.⁶⁶ Investor education is particularly important, so that

⁶⁶ See, as just one example, [http://www.kpmgifrsinstitute.com/documents/IFRS/721200810043IFRS%20compared%20to%20U.S.%20GAAP%20An%20Overview%20\(2008\).pdf](http://www.kpmgifrsinstitute.com/documents/IFRS/721200810043IFRS%20compared%20to%20U.S.%20GAAP%20An%20Overview%20(2008).pdf).

users of financial statements can work with the financial information issuers publish. The main benefits to investors of a single set of high-quality globally accepted accounting standards would be realized only if investors more fully understood the basis for the reported results. In addition to investors, other financial statement users may include customers, vendors, rating agencies and analysts.

The education and ongoing training of most accountants in the United States is limited to or predominantly focused on the current provisions of U.S. GAAP. Consequently, many parties would likely need to undertake comprehensive education on IFRS. The need for IFRS training would involve personnel of issuers, their governing bodies, such as audit committees, and their auditors. Such requirements for training also extend to specialists, such as actuaries and valuation experts, since these professionals are engaged by management to assist in measuring certain assets and liabilities, and likely are not currently proficient in IFRS. Professional associations and industry groups would need to integrate IFRS into their training materials, publications, testing and certification programs. Colleges and universities would need to include IFRS in their curricula.⁶⁷ Furthermore, it would be appropriate to include IFRS in the Uniform CPA Examination.⁶⁸

On the regulatory side, the Commission staff has continued to develop its familiarity with IFRS, and such efforts would need to continue and intensify if the Commission were to require U.S. issuers to file financial statements prepared in

⁶⁷ IFRS supplements to and IFRS content in accounting textbooks used in U.S. universities have become increasingly available.

⁶⁸ The Board of Examiners of the AICPA has issued an exposure draft, "Proposed Content and Skill Specifications for the Uniform CPA Examination" which proposed, among other things, inclusion of certain aspects of the IFRS conceptual framework and standard setting process in future Uniform CPA Examinations. Further, the proposal states that if IFRS becomes generally accepted in the United States, inclusion of those standards in the examination would expand. See http://www.cpa-exam.org/cpa/exposure_draft.html for the full text of the exposure draft.

accordance with IFRS. The Public Company Accounting Oversight Board ("PCAOB"), as part of its inspection of registered public accounting firms, regularly reviews the audits of public companies. We understand the PCAOB has already begun to implement training courses in IFRS to assist its staff in carrying out inspections, but would need to expand these training programs.

The strategies taken by those participants in markets where issuers already report in accordance with IFRS may serve as examples of approaches to increasing education and awareness of IFRS. The private sector may also respond to any increase in demand for education about IFRS by making educational materials available. Since the Commission's issuance of the Concept Release in August 2007, several of the largest accounting firms in the United States have increased the material made available to the public about IFRS generally as well as about the application of specific IFRS standards. For example, several of the accounting firms have held web casts accessible free of charge to the general public discussing different aspects of IFRS. The Commission would take into account the then current status of the overall education, training and readiness of investors, preparers, auditors and other parties involved in the preparation of financial statements prior to proceeding with rulemaking on IFRS for all U.S. issuers.

5. Limited Early Use of IFRS Where This Would Enhance Comparability for U.S. Investors

This Roadmap contemplates that the Commission would make a decision in 2011 with regard to the mandated use of IFRS for U.S. issuers, as described below in Sections III.A.6. and 7. As part of this Roadmap, we also are proposing amendments to our rules, regulations and forms which, if adopted, would allow a limited number of U.S. issuers to

file IFRS financial statements prior to any mandated use of IFRS in Commission filings. These proposed amendments are described later in this release.

These proposed amendments would allow the limited early use of IFRS by U.S. issuers where it would enhance the comparability of financial reporting to U.S. investors for purposes of comparing the largest U.S. issuers with the largest non-U.S. companies in the same industry. Further, the Commission anticipates that providing the alternative to U.S. issuers to file IFRS financial statements would broaden the awareness and attention given to IFRS as a single set of high-quality globally accepted accounting standards.

The Commission acknowledges the wide variety of opinion that has been expressed on this subject, including through comment letters received on the 2007 Concept Release and feedback received in the Commission's roundtables. Many commenters expressed the view that the option to use IFRS should be extended to all U.S. issuers. Others stated that we should require IFRS for all U.S. issuers. Several of these commenters indicated that any option to use IFRS should only be part of a transition to the mandatory use of IFRS. Others opposed the optional or mandatory use of IFRS at this time, and instead called for a continuation of the ongoing work to improve and converge U.S. GAAP and IFRS. Still others cited concerns in such areas as tax regimes, the stage of development of IFRS in certain areas in comparison to U.S. GAAP, the U.S. legal environment, and the ability of auditors to issue opinions on IFRS financial statements, as bearing on the questions of whether and how the use of IFRS should be extended to any U.S. issuers. We believe allowing the limited use of IFRS by U.S. issuers, only in those cases where to do so would enhance the comparability of an industry's financial reporting for the benefit of investors in making comparisons to non-

U.S. issuers, may help inform the decision whether to mandate the use of IFRS for U.S. public issuers. We also believe that the ability of capital market participants to evaluate and comment on these questions would be enhanced by allowing this limited use of IFRS. We believe this is a prudent approach that will support and inform our consideration of the milestones in the proposed Roadmap as well as any future Commission action.

We also are aware that the proposed amendments would permit some U.S. issuers to use IFRS financial statements while other U.S. issuers continue to use U.S. GAAP, thereby creating a dual system of financial reporting that has not existed previously for U.S. public companies. This would reduce the comparability among U.S. issuers and would require investor familiarity with both sets of accounting standards. If the Commission did not act on further milestones in this Roadmap, this dual system could continue and could increase if more issuers eligible to use IFRS elect to do so. To the extent a dual system of financial reporting develops in the United States for U.S. public companies, and this development affects the comparability of financial statements among U.S. public companies, this may create a need to reach a final resolution on the Roadmap. In order to increase the likelihood that the comparability between issuers would be enhanced, we therefore have limited the proposed option to use IFRS to a group of larger U.S. companies in industries in which IFRS is the most-used set of standards globally.⁶⁹ We believe that U.S. investors would benefit from an enhanced ability to compare investment opportunities.

⁶⁹ Mindful that all U.S. issuers currently use U.S. GAAP in their Commission filings, we are also making alternative proposals for U.S. issuers that elect to use IFRS with respect to the disclosure of U.S. GAAP information, which should promote the continued comparability among U.S. issuers whether they use IFRS or U.S. GAAP in their primary financial statements.

6. Anticipated Timing of Future Rulemaking by the Commission

After reviewing the status of the milestones and the study discussed below, the Commission would determine, in 2011, whether to proceed with rules requiring U.S. public companies to file financial statements prepared in accordance with IFRS by 2014 if it is in the public interest and promotes investor protection for us to do so. In order to assist the Commission in determining whether to proceed with such a rulemaking, the staff has already begun a comprehensive review of all Commission rules relating to financial reporting in order to recommend amendments that would fully implement IFRS reporting throughout the regulatory framework for registration and reporting under the Exchange Act and the Securities Act.⁷⁰ We believe that a Commission decision and action in 2011 would provide issuers with sufficient early notice of the transition to IFRS to permit them to begin their internal accounting using IFRS in 2012, which would be the earliest fiscal year that would be covered under the earliest anticipated phase-in for IFRS reporting in 2014, as described below in Section III.A.7.

We are proposing this Roadmap towards the mandatory, rather than elective, use of IFRS for U.S. issuers in order to promote fully a single set of high-quality globally accepted accounting standards to improve the comparability of financial information prepared by U.S. public companies and foreign companies. As described in Section I, IFRS is the basis of financial reporting used in a large and increasing number of countries worldwide. Because IFRS has the greatest potential to become the global standard of accounting, we believe it is in the interest of U.S. investors, U.S. issuers and U.S. markets to consider mandating reporting using IFRS in the United States as well. Additionally,

⁷⁰ The Commission also would evaluate the role of a private sector accounting standard setter, including the role of the FASB and how IFRS would be incorporated as mandatory accounting standards for U.S. issuers.

we believe that over the long term the existence of dual accounting standards in the United States may create challenges in the U.S. capital markets, such as comparability for investors and other users of financial information and professional competence of auditors. We therefore are proposing this Roadmap towards the mandatory use of IFRS by U.S. issuers.

If we decide to move forward with rulemaking for the use of IFRS by U.S. issuers, we expect to continue to require that issuers provide three years of audited annual IFRS financial statements. Currently, U.S. issuers are required to provide in their filings with the Commission three years of audited U.S. GAAP financial statements.⁷¹ Because the initiative to require the use of IFRS by U.S. issuers relates to the set of accounting principles that is used for financial reporting and not to the periods for which financial reporting is required, the Commission expects that it would require three years of audited financial statements in the first year of IFRS reporting.⁷²

To assist the Commission in its decision to mandate the use of IFRS by U.S. issuers, the Commission directs the Office of the Chief Accountant with appropriate consultation with other Divisions and Offices to undertake a study and report to the Commission on the implications for investors and other market participants of the implementation of IFRS for U.S. issuers. We anticipate that the report would be made public by the Commission.

⁷¹ See Rule 3-02(a) of Regulation S-X [17 CFR 210.3-02(a)].

⁷² To illustrate, if we require IFRS for the years ending on or after December 15, 2014, a calendar year company would report for the year ending December 31, 2014 using IFRS for the years ending December 31, 2012, 2013 and 2014. Many such companies would want to start IFRS internal accounting on January 1, 2012. However, during 2012, 2013 and the first three quarters of 2014, they would continue to be publicly reporting under existing U.S. GAAP.

7. Implementation of the Mandatory Use of IFRS

One means of implementing IFRS reporting by U.S. issuers that we are considering is a staged transition, as opposed to all U.S. issuers transitioning at once. Provisionally, under the transition, IFRS filings would begin for large accelerated filers for fiscal years ending on or after December 15, 2014.⁷³ Accelerated filers would begin IFRS filings for years ending on or after December 15, 2015. Non-accelerated filers, including smaller reporting companies, would begin IFRS filings for years ending on or after December 15, 2016. In each instance, this would allow the filer to begin its books and records and internal accounting controls with respect to IFRS reporting for all three years of audited financial statements that would be required in its first year of IFRS reporting (e.g., 2012 to 2014 for large accelerated filers, 2013 to 2015 for accelerated filers, and 2014 to 2016 for non-accelerated filers).

We understand that a transition from one set of accounting standards to another, including changing the controls and systems relating to the production of financial statements, would involve costs. The definitions of accelerated filer and large accelerated filer under the Exchange Act reference the size of an issuer based on its worldwide public float of its equity securities. Our current expectation that an issuer's status as an accelerated filer could determine the date of a required transition to IFRS is based on the premise that larger issuers would be better able to allocate resources to the transition to IFRS more quickly than smaller issuers, and a staged transition also may help manage resource demands on auditors, consultants and other market participants. Reliance on the

⁷³ The terms "large accelerated filer" and "accelerated filer" are defined in Exchange Act Rule 12b-2 [17 CFR 240.12b-2]. Although the term "non-accelerated filer" is not defined in our rules, we use it in this release to refer to an Exchange Act reporting company that does not meet the Rule 12b-2 definition of either an "accelerated filer" or a "large accelerated filer."

existing definitions of accelerated/large accelerated filer also is expected to facilitate an orderly, predictable transition to IFRS because an issuer would already need to ascertain its status as an accelerated filer for other reporting purposes and allow it to predict when it would be required to adopt IFRS.⁷⁴ This predictability may also encourage voluntary movement to IFRS, as an issuer may have an incentive to use IFRS prior to the date the rules would require it to do so if its competitors were already using IFRS.⁷⁵ We also recognize, however, that sequencing the transition, while it would avoid some costs associated with all issuers transitioning at once, also would result in some non-comparability of financial information due to application of the IFRS transition provisions at differing dates. Staging the transition by an issuer's size would embed that non-comparability among the issuers within an industry. Further, a staged transition would, temporarily, create a dual system of reporting for U.S. issuers that would require investor familiarity with both IFRS and U.S. GAAP, as described above in Section III.A.5.

As part of the Commission's evaluation, it also may consider transition rules to expand the eligibility criteria of those U.S. issuers which could elect to use IFRS in their Commission filings, so that additional U.S. issuers would be able to use IFRS prior to a mandatory transition date. In proceeding along the Roadmap, the Commission would consider the circumstances in which the early use of IFRS would be most appropriate for investor protection and capital formation. Another consideration would be how to

⁷⁴ Exchange Act Rule 12b-2 contains provisions for entering and exiting accelerated filer and large accelerated filer status, including when an issuer must determine its status.

⁷⁵ In addition, we anticipate that newly public companies, which are non-accelerated filers until after their first year of reporting, would be able to use IFRS prior to a mandatory phase-in date for non-accelerated filers if the Commission decided to adopt a staged or sequenced transition to IFRS as discussed.

address the current choices available to foreign private issuers for their financial reporting in filings with the Commission. Currently, foreign private issuers can choose to prepare their financial statements in accordance with U.S. GAAP, IFRS as issued by the IASB, or another comprehensive set of accounting principles with a reconciliation to U.S. GAAP.

B. Other Areas of Consideration

The process of incorporating new accounting standards into any financial reporting system naturally varies between jurisdictions and is accomplished gradually. Differences between national accounting standards, including the extent of similarities or differences between financial reporting frameworks and the degree of judgment they require, affect any given jurisdiction's experience with transition to financial reporting that is in accordance with IFRS. In addition, there are many elements forming the infrastructure underpinning a set of accounting standards that keep it current and functioning effectively in a given jurisdiction. Integration considerations related to the use of IFRS in different jurisdictions also are manifested in the different regulatory and legal environments. If the Commission were to require U.S. issuers to report in accordance with IFRS, a number of considerations and actions with a series of lead times may be required for investors, issuers, and other parties that use financial statements or have a role in the capital markets or the financial reporting infrastructure. Some of these considerations are discussed in the remainder of this section.

1. The Roles of Financial Information

In addition to filing financial statements with the Commission, U.S. issuers commonly provide financial information to other parties. While the federal securities laws provide the Commission with the authority to prescribe accounting principles and

standards to be followed by public companies and other entities that file financial statements with the Commission, the provision and content of information to other parties may not be generally or directly regulated by the Commission. However, changes in the accounting standards used for purposes of preparing financial statements included in filings with the Commission could have an effect on financial reporting by companies to other parties. The following provides examples of circumstances or parties that may be affected.

Various federal and state regulators, including regulators of financial institutions, insurance companies and public utilities, are provided with periodic financial information on an on-going basis. For example, U.S. GAAP financial statements frequently are used as the basis for determining capital requirements for financial institutions. Another example of the effect on reporting to others relates to federal and state income taxes. As the Internal Revenue Code has developed over an extended period of time with existing U.S. GAAP as the predominant set of accounting standards used in the United States, certain interactions exist between certain provisions of U.S. GAAP and income tax requirements. For example, the Internal Revenue Code has conformity provisions related to the method of accounting for inventory for tax reporting purposes and the method used for reporting to shareholders (and other owners or beneficiaries) or for credit purposes.⁷⁶ IFRS does not allow for the use of the last-in, first-out, or LIFO, method of accounting for inventory.⁷⁷ As a result, a company that reports in accordance with IFRS would be required to use a method of accounting for inventory that is acceptable under IFRS, for example the first-in, first-out, or FIFO, method. U.S. issuers changing to FIFO for

⁷⁶ See Section 472 of the Internal Revenue Code.

⁷⁷ See IAS 2 "Inventories," paragraph IN63.

financial reporting purposes may experience a change in taxable income based on the difference between inventory valued on a LIFO basis and on a FIFO basis.

Many U.S. companies have issued debt securities under indentures or have entered into lending agreements that may contain various covenants based upon financial measurements, such as a stated minimum net worth. Those indentures and agreements, as well as other types of contractual agreements to which issuers may be subject, may require periodic reporting of financial information. These contractual obligations may explicitly require the use of U.S. GAAP in connection with financial covenants or financial reporting. Other contractual obligations may have an assumption about the nature of the accounting model under which such reporting will occur. For a U.S. issuer, it is likely that such requirements are based on how U.S. GAAP would report financial results.

Some market indices, such as the S&P 500, currently only include issuers that report financial statements in accordance with U.S. GAAP. IFRS reporting might affect an issuer's ability to be included in such indices or financial instruments based on those indices, exclusion from which may have an adverse effect on these issuers, unless the instruments or indices make any necessary changes to include issuers which report in IFRS.

2. Accounting Systems, Controls and Procedures

Use of any new accounting standards requires changes to financial reporting systems and procedures to identify, collect, analyze and report financial information and the corresponding controls. Changing numerous accounting standards at the same time, regardless of the starting point, would require numerous changes in a company's policies and procedures and system of internal controls. Some changes may prove more

complicated than others. Systems changes would apply not only to the issuers preparing such statements, but also to various other market participants such as users of financial information and regulators. Some companies that have significant foreign operations may already have familiarity with IFRS. It may not be as difficult for these companies to adopt IFRS for all of their operations for U.S. reporting purposes.

There would be additional implications on financial reporting. Two examples of the implications relate to an issuer's equity method investment in another company and initial public offerings. Many issuers hold investments in other entities which are accounted for under the equity method. In order for an issuer to properly record the equity method investment, the issuer would need IFRS-based information about the investee each reporting period. If the investment were in equity of a company using U.S. GAAP for its own financial statement preparation and reporting purposes, obtaining the required IFRS-based information may prove difficult and costly. This would be similar to the situation that exists today if an issuer using U.S. GAAP has an equity investee that uses a different basis of financial reporting. Further, an additional cost and complication would be added to the initial public offering process if a private company whose financial statements were not in accordance with IFRS were required to provide them for purposes of its initial registration statement with the Commission.

3. Auditing

Another affected party is the audit firms that are engaged to audit a U.S. issuer's financial statements and to report on the effectiveness of its internal control over financial reporting. This may be particularly challenging for less globally oriented audit firms, which typically may have fewer resources available through affiliated or network firms

located in jurisdictions in which issuers already report in accordance with IFRS. This could be a further factor affecting concentration in the auditing profession.

Audit firms would need to consider elements of their systems of quality control, such as their practices related to hiring, assigning personnel to engagements, professional development and advancement activities. Some U.S. audit firms already have some experience with conducting audits of financial information prepared in accordance with IFRS, as they may be involved in the audit of the U.S. operations of a foreign company that does so. But because U.S. auditors generally have less experience with IFRS than with U.S. GAAP, in the short term, U.S. audit firms may encounter challenges in establishing policies and procedures, and hiring and training personnel, to provide themselves with reasonable assurance that their personnel would possess knowledge appropriate to perform audits of U.S. issuers. Even with appropriate systems of quality control, however, additional auditing guidance still may be necessary.

Additionally, U.S. firms that are members of global audit networks may have already begun to consider systems of quality control to foster the high quality and consistent application in reporting under IFRS across national borders. If U.S. issuers were to report in accordance with IFRS, the U.S. firms of these global audit networks could be affected more than they are presently by the reporting of audit clients of their foreign affiliates and by U.S. subsidiaries of those clients.

One consideration for audit firms relates to their ability to issue opinions on IFRS financial statements in accordance with PCAOB standards. For example, one of the conditions under IFRS for recognizing a provision for a legal contingency is that it is

more likely than not that an obligation exists.⁷⁸ This recognition threshold is lower than the current recognition threshold in U.S. GAAP, resulting in the potential for an earlier income statement recognition of costs associated with litigation.⁷⁹ Concerns have been raised about an auditor's ability to corroborate the information furnished by management related to litigation, claims, and assessments by obtaining an audit inquiry letter from a client's attorney.⁸⁰

We note that references to current U.S. GAAP literature exist in various standards issued by the PCAOB and other accounting or auditing organizations. If IFRS were required for all U.S. issuers, amendments to existing references to U.S. GAAP literature may be appropriate. Certain changes have already begun with respect to IFRS in the U.S. accounting profession. For example, under AICPA rules, a member of the AICPA can only report on financial statements prepared in accordance with standards promulgated by standard setting bodies designated by the AICPA Council. In May 2008, the AICPA's Council voted to designate the IASB in London as an international accounting standard setter for purposes of establishing international financial accounting and reporting

⁷⁸ See IAS 37, paragraphs 15 and 16.

⁷⁹ See FAS 5.

⁸⁰ Some believe that changes to the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information may be necessary. See AU § 337C. The Statement of Policy, commonly referred to as the "Treaty," recognizes the professional responsibilities of attorneys and auditors and seeks to preserve confidentiality while providing the necessary level of assurance for the audit. The Treaty recognizes that the confidentiality of communications between an attorney and a client may be impaired by the disclosure of the substance of such communications to third parties, including auditors. By describing thresholds for disclosure and limitations on responses, the Treaty sets the scope of the attorney's responses to audit requests for information on legal matters. Some believe that the thresholds and limitations described in the Treaty are inconsistent with certain provisions within IFRS.

principles, and to make related amendments to its rules to provide AICPA members with the option to use IFRS.⁸¹

4. Considerations of IFRS and the IASB's Standard Setting Process

a. State of IFRS

As discussed in the 2007 Concept Release, IFRS is not as developed as U.S. GAAP in certain areas.⁸² IFRS also is not as prescriptive as U.S. GAAP in certain areas and in certain areas permits a greater amount of options than in U.S. GAAP.⁸³ The smaller volume of IFRS literature as compared to U.S. GAAP may decrease the amount of authoritative guidance available in a particular circumstance. This relatively lesser amount of guidance and, in some cases, greater optionality in IFRS could reduce comparability of reported financial information, as different issuers may account or provide disclosure for similar transactions or events in different ways but this flexibility also allows a financial statement that may more closely reflect the economics of transactions. As we noted in the 2007 Concept Release, in certain limited areas in which the IASB has yet to develop guidance on particular industry activities in which IFRS

⁸¹ See http://www.aicpa.org/download/info/AICPA_NewsUpdate_Vol.11_No.21.pdf.

⁸² IFRS does not have a specific standard or interpretation on accounting treatment for insurance contracts, extractive activities, certain common control transactions, recapitalization transactions, reorganizations, acquisitions of minority shares not resulting in a change of control and similar transactions. However, there are areas where current U.S. GAAP also does not have a single comprehensive standard or interpretations, such as for revenue recognition or property, plant and equipment.

⁸³ As noted by CIFIr in its Final Report:

From an international perspective, we note that IFRS currently permits numerous alternative accounting policies. While we acknowledge the IASB's efforts in reducing some of these alternative treatments, we nonetheless believe the SEC should encourage the IASB to [...] seek to eliminate alternatives as part of its standards-setting projects.

CIFIr:Final Report, at 51.

permits disparate options, we have noted that the level of diversity has manifested itself in the reporting practices of foreign private issuers.

As U.S. GAAP has been used longer and more extensively than IFRS, more U.S. GAAP implementation guidance has developed over time. A variety of factors may have resulted in the accounting profession in the United States becoming more accustomed to relying on a greater degree of detailed accounting guidance, including factors such as seeking consistency and reducing exposure to litigation and liabilities. Such guidance also can affect the outcomes of discussions between management and auditors on the use of a particular accounting treatment. Less prescriptive guidance also may make litigation or enforcement outcomes more difficult to predict.

On the other hand, less prescriptive guidance may increase issuers' ability to account for transactions or events in accordance with their underlying economics, which could improve comparability of economically similar situations and highlight differences in dissimilar situations. As CIFI^R noted in its final report:

Investors are likely to benefit from more emphasis on principles-based standards, since rules-based standards... may provide a method, such as through exceptions and bright-line tests, to avoid the accounting objectives underlying the standards. In other words, without the exercise of judgment, rules in the form of bright lines may result in a false consistency – that is, ostensibly uniform accounting for differing fact patterns. If properly implemented, “principles-based” standards should improve the information provided to investors while reducing investor concerns about “financial engineering” by companies using the rules to avoid accounting for the substance of a transaction.⁸⁴

⁸⁴ See CIFI^R Final Report, at 88.

The Commission and its staff also have supported the increased use of objectives, outcomes and principles in accounting standards in contrast to detailed prescriptive guidance.⁸⁵

In addition, in cases where specific guidance is not available, IFRS encourages disclosure on the accounting policies that the preparer of the financial statements has elected and applied.⁸⁶ The same also is generally true where IFRS permits greater optionality.⁸⁷ In adopting IFRS, an issuer may find it appropriate to evaluate its disclosure practices, such as the disclosure provided in financial statement footnotes and management's discussion and analysis, to clearly communicate these choices. Further, as we indicated when we adopted changes to accept IFRS financial statements from foreign private issuers without a reconciliation to U.S. GAAP,⁸⁸ our staff has indicated that the

⁸⁵ For example, the SEC issued "Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter" Release No. 33-8821 (April 25, 2003), which included numerous recommendations for the FAF and FASB to consider, including greater use of principles-based accounting standards whenever reasonable to do so. The SEC staff also issued "Study Pursuant to Section 108(d) of the Sarbanes-Oxley Act of 2002 on the Adoption by the United States Financial Reporting System of a Principles-Based Accounting System" (July 25, 2003), which further explained the benefits of objectives-oriented standards.

⁸⁶ In areas for which an IFRS does not exist, IAS 8 "Accounting Policies, Changes in Accounting Estimates and Errors" requires preparers to use judgment in developing accounting policies such that financial information is provided that, among other things, is relevant to the needs of users and the financial statements reliably reflect the economic substance of transactions. In applying such judgment, preparers must consider other guidance found in IFRS and, if no analogous guidance is found, the definitions, criteria and concepts in the IFRS conceptual framework. Additionally, IAS 8 allows preparers to consider pronouncements of other standard setting bodies if those pronouncements are drawn from a conceptual framework similar to that underlying IFRS, to the extent that such pronouncements do not conflict with IFRS.

⁸⁷ See IAS 1 "Presentation of Financial Statements," paragraph 119 for general guidance on disclosure of accounting policies from among alternatives. Certain standards under IFRS specifically require disclosure of selected accounting policies when choices are allowed. See for example IAS 16 "Property, Plant and Equipment," paragraph 73.

⁸⁸ See the 2007 Adopting Release.

issues it has observed in its review of IFRS financial statements do not appear to be more pervasive or significant than those it has identified in U.S. GAAP financial statements.

b. Relationship to the Accounting Standard Setting Process

A change to commit U.S reporting to following IFRS would include a change in the relationship of the U.S. capital markets to the accounting standard setting process.

The IASB and its related organizations include members from a number of countries. The IASB is expected to be responsive to broad, world-wide constituencies of investors, issuers, regulators and many others in all facets of its work, including the establishment of its agenda and the development of standards. These constituencies can be expected to represent a wide-range of interests, reflecting varying economic, social and political environments.

These factors likely would mean that the interaction, and potentially the relevance and influence, of U.S. capital market participants, including the Commission and its staff, would be reduced compared to the current standard setting process in the United States.

The IASB is expected to consider its world-wide constituencies of investors, issuers, and regulators during the deliberative process for issuing new or revised accounting standards. Further, the IASB has entered into convergence agreements with other national accounting standard setters, such as with the Accounting Standards Board of Japan.⁸⁹ Due to the IASB's need to develop standards with a wider variety of constituents in mind, U.S. capital market participants will have a lesser degree of input into the standard setting process including fewer members of the IASB and fewer participants on

⁸⁹ See

<http://www.iasb.org/News/Press+Releases/The+ASBJ+and+the+IASB+announce+Tokyo+Agreement+on+achieving+convergence+of+accounting+standards+by+2.htm>.

roundtables and advisory and other groups than they currently have in the U.S. standard setting process. Further, in the U.S. standard setting process, participants from multiple constituencies but in the same geographic market (i.e., the United States) are involved. On the IASB, constituencies and geographic market (i.e., different countries) participation are commingled. Also, constituents involved in the IFRS standard setting process may come from different financial reporting environments and may have objectives that are different from or not present in the standard setting process for U.S. GAAP.

In addition, individual jurisdictions' processes for incorporating IFRS into their markets may result in varying degrees of pressure placed on the IASB in the development of individual standards. For example, some jurisdictions adopt or endorse IFRS on a standard-by-standard basis unlike the historical approach in the United States to look to a standard setter to establish the body of accounting standards as a whole. Further, the IASB's need to consider a greater number of constituents in seeking consensus on a new or revised standard, and the associated need to consider multiple jurisdictions in scheduling implementation, could lead to a longer deliberative process in issuing accounting standards. Further, individual jurisdictions, through their securities regulators, accounting standard setters or other bodies, could adopt or provide for interpretations or applications of IFRS for companies in those jurisdictions which are different from those in other jurisdictions.

The Commission's participation in the oversight of the IASB would principally be through participation in the Monitoring Group proposed by the IASB's governing body, the IASC Foundation. This would be a less direct oversight relationship as to the

participation in board and trustee appointments, review of finances, and interaction with the board than the Commission and its staff has currently with respect to the FASB and the Financial Accounting Foundation.⁹⁰

Request for Comment

1. Do commenters agree that U.S. investors, U.S. issuers and U.S. markets would benefit from the development and use of a single set of globally accepted accounting standards? Why or why not? What are commenters' views on the potential for IFRS as issued by the IASB as the single set of globally accepted accounting standards?
2. Do commenters agree that the milestones and considerations described in Section III.A. of this release ("Milestones to be Achieved Leading to the Use of IFRS by U.S. Issuers") comprise a framework through which the Commission can effectively evaluate whether IFRS financial statements should be used by U.S. issuers in their filings with the Commission? Are any of the proposed milestones not relevant to the Commission's evaluation? Are there any other milestones that the Commission should consider?
3. Do commenters agree with the timing presented by the milestones? Why or why not? In particular, do commenters agree that the Commission should make a determination in 2011 whether to require use of IFRS by U.S. issuers? Should the Commission make a determination earlier or

⁹⁰ See FR 70. As noted earlier, this release does not address the method the Commission would use to mandate IFRS for U.S. issuers. In addition, the Commission would retain the ability to take such action as may be appropriate to address financial reporting issues in filings with the Commission.

later than 2011? Are there any other timing considerations that the Commission should take into account?

4. What are commenters' views on the mandated use of IFRS by U.S. issuers beginning in 2014, on an either staged-transition or non-staged transition basis? Should the date for mandated use be earlier or later? If the Commission requires the use of IFRS, should it do so on a staged or sequenced basis? If a staged or sequenced basis would be appropriate, what are commenters' views on the types of U.S. issuers that should first be subject to a requirement to file IFRS financial statements and those that should come later in time? Should any sequenced transition be based on the existing definitions of large accelerated filer and accelerated filer? Should the time period between stages be longer than one year, such as two or three years?
5. What do commenters believe would be the effect on convergence if the Commission were to follow the proposed Roadmap or allow certain U.S. issuers to use IFRS as proposed?
6. Is it appropriate to exclude investment companies and other regulated entities filing or furnishing reports with the Commission from the scope of this Roadmap? Should any Roadmap to move to IFRS include these entities within its scope? Should these considerations be a part of the Roadmap? Are there other classes of issuers that should be excluded from present consideration and be addressed separately?

7. Do commenters agree that these matters would affect market participants in the United States as described above? What other matters may affect market participants? Are there other market participants that would be affected by the use by U.S. issuers of IFRS in their Commission filings? If so, who are they and how would they be affected?
8. Would a requirement that U.S. issuers file financial statements prepared in accordance with IFRS have any effect on audit quality, the availability of audit services, or concentration of market share among certain audit firms (such as firms with existing international networks)? Would such a requirement affect the competitive position of some audit firms? If the competitiveness of some firms would be adversely affected, would these effects be disproportionately felt by firms other than the largest firms?
9. What are commenters' views on the IASB's and FASB's joint work plan? Does the work plan serve to promote a single set of high-quality globally accepted accounting standards? Why or why not?
10. How will the Commission's expectation of progress on the IASB's and FASB's joint work plan impact U.S. investors, U.S. issuers, and U.S. markets? What steps should be taken to promote further progress by the two standard setters?
11. The current phase of the IASB's and FASB's joint work plan is scheduled to end in 2011. How should the Commission measure the IASB's and FASB's progress on a going-forward basis? What factors should the

Commission evaluate in assessing the IASB's and the FASB's work under the joint work plan?

12. What are investors', U.S. issuers', and other market participants' views on the resolution of the IASB governance and funding issues identified in this release?
13. What steps should the Commission and others take in order to determine whether U.S. investors, U.S. issuers, and other market participants are ready to transition to IFRS? How should the Commission measure the progress of U.S. investors, U.S. issuers, and other market participants in this area? What specific factors should the Commission consider?
14. Are there any other significant issues the Commission should evaluate in assessing whether IFRS is sufficiently comprehensive?
15. Where a standard is absent under IFRS and management must develop and apply an accounting policy (such as described in IAS 8, for example) should the Commission require issuers to provide supplemental disclosures of the accounting policies they have elected and applied, to the extent such disclosures have not been included in the financial statements?

IV. PROPOSAL FOR THE LIMITED EARLY USE OF IFRS WHERE THIS WOULD ENHANCE COMPARABILITY FOR U.S. INVESTORS

A. Eligibility Requirements

We are proposing amendments to our rules that would allow certain U.S. issuers that meet specific criteria to file financial statements in accordance with IFRS as issued by the IASB, rather than U.S. GAAP, for use in their annual and other reports made

under Section 13(a) or 15(d) of the Exchange Act,⁹¹ proxy statements and information statements under Schedules 14A and 14C under the Exchange Act,⁹² as well as in registration statements under the Securities Act and the Exchange Act.⁹³ The Commission is proposing these amendments for several reasons. Investors may find the financial information provided by eligible issuers who elect to report such information in accordance with IFRS to be more comparable to the financial information of non-U.S. competitors. Permitting some U.S. issuers to report under IFRS may provide assistance in a transition to mandatory financial reporting in accordance with IFRS by creating additional, but manageable, demand for IFRS-related services at this time. The Commission also could learn from investors and the U.S. public capital market participants about their consideration of IFRS financial information from domestic issuers. Further, investors in the industry sectors for which the eligibility requirements are met likely would have familiarity with IFRS given that it is used more than any other financial reporting standard on a global basis. The Commission recognizes that there are many questions relating to permitting some U.S. issuers to report under IFRS, particularly in light of the proposed milestones, and encourages public comment on the proposal and the related alternative proposals concerning what, if any, additional U.S. GAAP information should be provided by electing issuers.

⁹¹ 15 U.S.C. 78m(a) or 78o(d). Section 13(a) of the Exchange Act requires every issuer of a security registered pursuant to Section 12 of the Exchange Act [15 U.S.C. 78l] to file with the Commission such annual reports and such other reports as the Commission may prescribe. Section 15(d) of the Exchange Act requires each issuer that has filed a registration statement that has become effective pursuant to the Securities Act to file such supplementary and periodic information, documents and reports as may be required pursuant to Section 13 in respect of a security registered pursuant to Section 12, unless the duty to file under Section 15(d) has been suspended for any financial year.

⁹² 17 CFR 240.14a-101 and 17 CFR 240.14c-101.

⁹³ As such, the proposed option would not apply to the filing requirements for other regulatory purposes, such as those of regulated entities such as broker-dealers.

In deciding which issuers should be proposed for inclusion in this group, the objective of the Commission was to identify those categories of U.S. issuers for whom the use of IFRS would promote comparability with their significant industry competitors. Since investors frequently make capital allocation decisions among companies within a particular industry sector,⁹⁴ the first element of the eligibility criteria relates to the use of IFRS in the issuers' industry. The second element is intended to focus on significant competitors within the industry group, and so requires an identification of the accounting standards used by the largest twenty companies by market capitalization. We believe these are the competitors which are the most likely to be comparable among themselves and most likely to be ready to make the transition to IFRS. Both proposed elements – the prevalence of the use of IFRS and the significance of the issuer in a given industry – would need to be met for a U.S. issuer to be eligible to file its financial statements in accordance with IFRS with the Commission.

The industry criterion identifies companies for which we preliminarily believe it would be overall beneficial to investors for the U.S. issuer to be eligible to use IFRS because financial statement comparability with other significant competitors in their industry would be promoted and enhanced. Under this test, an industry would be eligible if IFRS is used as the basis of financial reporting more often than any other basis of financial reporting by the 20 largest listed companies worldwide within that industry as measured by market capitalization. The U.S. issuer would make that determination as follows:

⁹⁴ For example, at the end of 2007, there were 219 exchange-traded funds with an industry/sector-based investment objective, with net assets of approximately \$93 billion. 2008 Investment Company Factbook, published by the Investment Company Institute.

- (1) An issuer would ascertain its industry group by using the North American Industry Classification System (NAICS)⁹⁵ code at the three-digit level, Standard Industrial Classification (SIC)⁹⁶ codes at the two-digit level, or the International Standard Industrial Classification (ISIC)⁹⁷ codes at the "Division" level. Alternatively, the issuer could use a privately provided, published, and widely accepted industry classification scheme at a similar level of detail, such as the Industry Classification Benchmark (ICB)⁹⁸ at the "Sector" level or the Global Industry Classification Standard (GICS)⁹⁹ at the "Industry" level. For classifications of individual companies, the issuer must use a single published and widely accepted industry source. (The provider of the classification scheme may be the same entity as the source of classifications of individual companies.)
- (2) Then, the U.S. issuer would determine whether IFRS is used as the basis of financial reporting more than any other basis of financial reporting by the 20 largest listed companies worldwide within its industry.
 - a. An issuer would do this by first identifying the 20 largest listed companies globally in its industry by market capitalization.¹⁰⁰ For

⁹⁵ See <http://www.census.gov/epcd/www/naics.html>.

⁹⁶ See <http://www.census.gov/epcd/www/sic.html>.

⁹⁷ See <http://unstats.un.org/unsd/class/family/family2.asp?Cl=27>.

⁹⁸ See <http://www.icbenchmark.com/>.

⁹⁹ See <http://www.mscibarra.com/products/gics/>.

¹⁰⁰ For these purposes, market capitalization refers to the worldwide market value of a company's outstanding voting and non-voting common equity securities.

the purposes of this calculation, market capitalization should be determined as of the same day within the 180 days preceding the date on which the SEC staff receives a request for a letter of no objection (as described below). Market capitalization would need to be determined from a widely accepted source.

- b. Next, the U.S. issuer would ascertain which accounting standards each of the 20 companies uses to report its financial results to the public capital markets. Companies within the industry are considered to report under a specified set of accounting standards if they have published audited annual financial statements under those accounting standards.¹⁰¹ As described below, a U.S. company that elects to report using IFRS would be required to file financial statements prepared in accordance with IFRS as issued by the IASB.

If the U.S. issuer were among the 20 largest companies globally in a particular industry and IFRS is used as the basis of financial reporting more often than any other basis of financial reporting among the 20 largest listed companies worldwide in that industry, then the U.S. issuer would be eligible to elect to use IFRS in its filings with the Commission. To illustrate, if among the top 20 companies in a given industry, there were 8 companies using IFRS, 7 using U.S. GAAP and 5 using other bases of financial reporting, the industry would be viewed as an "IFRS industry" and the 7 U.S. companies

¹⁰¹ For purposes of the calculation, companies reporting under more than one set of standards can be counted as using any of these standards.

would be eligible to change to IFRS.¹⁰² If among the top 20 companies there were 4 using IFRS, 3 using U.S. GAAP and 13 using other bases of financial reporting but no single other basis accounted for more than 3, the industry would be viewed as an IFRS industry. In contrast, if among the top 20 companies there were 7 using IFRS, 7 using U.S. GAAP and 6 using other bases of financial reporting, the industry would not be considered an IFRS industry. If there were 8 companies using U.S. GAAP, 7 using IFRS and 5 using other bases of financial reporting, then the industry also would not be an IFRS industry and the U.S. companies would not be eligible to use IFRS.

Using one of the industry classification systems (SIC codes), we estimate that at present a minimum of approximately 110 U.S. issuers in 34 "IFRS industries" would be eligible to receive a letter of no objection from the staff using the proposed criteria.¹⁰³ Our estimate contains a number of assumptions and may be impacted by some data not being readily available, as indicated below. Further, certain factors could result in the number of eligible issuers becoming higher, although this availability is most likely to occur in periods beyond 2011 when the Commission would expect to make its decision on IFRS implementation under the Roadmap.¹⁰⁴

¹⁰² The distribution of size among the top 20 companies would not matter. In other words, there would be no requirement that the group of companies using a given set of accounting principles, such as IFRS, would constitute the largest percentage by market capitalization within the industry or in comparison to other groups of countries using other sets of accounting principles. The only criterion would be that the number of companies using IFRS was more than the number of companies using any other basis of financial reporting.

¹⁰³ For example, under the methodology described in this section, metal mining under SIC code 10 and conglomerates under SIC code 99 may be eligible.

¹⁰⁴ The number of eligible companies at the outset could be higher due to the fact that different industry classification systems would be available to determine eligibility. This could affect the number of U.S. issuers that would be ranked among the 20 largest in their industry by market capitalization, because companies may be eligible to use IFRS under one classification system, but not another. In addition, if companies in an industry that is eligible under one classification system switch to IFRS, this action may result in IFRS being used more often than any other set of standards within a separate industry, under a

To develop our estimate of the potentially eligible issuers, our staff obtained data from publicly available sources on the 20 largest listed companies measured by market capitalization in each industry, using two-digit SIC industry classification codes as assigned by Standard and Poors' COMPUSTAT.¹⁰⁵ We did not estimate what the population of eligible issuers would be under other industry classification methods available under this proposed rule. Therefore, our estimate represents a lower bound on the number of U.S. issuers at present that we believe may be eligible to adopt IFRS under this proposed rule.

To simplify the analysis, the staff relied on a number of assumptions regarding the bases of accounting of the companies in the estimated population. In evaluating what bases of financial reporting were used by the companies within this estimated population, our staff assumed that all U.S. entities were registered with the Commission and therefore

different classification system. This effect could result in an expansion of IFRS industries as U.S. companies switch to IFRS, and, in turn, an increase in eligible U.S. companies. In addition, under the proposed eligibility criteria, as more countries change to IFRS, more industries may become "IFRS industries," and more U.S. companies would become eligible to file IFRS financial statements. For example, assuming that Brazil, Canada, Chile and South Korea follow IFRS, the number of IFRS industries increases by 9 and total number of eligible U.S. companies under our methodology would increase to approximately 160, representing approximately 23% of the market capitalization in the United States. Also, to the extent the mix of competitors by market capitalization changes to include more competitors that report in IFRS, additional industries may qualify as IFRS industries over time. We estimate that, if all 74 industries under our methodology were IFRS industries the theoretical maximum number of U.S. issuers that could be eligible given the present assumptions of companies in the top 20 by industry would be approximately 380, representing 57% of the market capitalization in the United States. The potential impact of this dynamic is limited, however, by the fact that the Roadmap anticipates a decision by the Commission on the use of IFRS by 2011. Eligibility would likely expand for other reasons. For example, relatively young foreign public equity markets, particularly in emerging markets, are developing at a faster rate than the mature U.S. equity market, resulting in greater representation of large foreign companies on equity exchanges. This factor may result in an increase in the number of IFRS-using listed companies in the top 20 of each industry, by market capitalization, and a corresponding increase in eligible industries.

¹⁰⁵ There are 74 industry groups under this classification approach. For some industries, there were less than 20 companies available under the data obtained. Our staff kept these industries in its population applying the test of whether IFRS was used more than any other basis of reporting among the available list of companies in that industry.

reporting under U.S. GAAP. In addition, the staff assumed that any company from an E.U. country, Australia, New Zealand, South Africa or Switzerland was reporting under IFRS. For other companies, our staff attempted to obtain information on the set of accounting standards used. For purposes of this analysis, an assumption was made that any assertion as to the use of IFRS, such as on the issuer's Web site, in the issuer's financial statements or in the audit report, was considered as reporting under IFRS.

In some cases, our staff was not able to obtain sufficient information about the basis of financial reporting used. For example, published financial statements could not be readily located for all companies and for others financial statements were not readily available in English. Because of this and other limitations, the staff's estimate is an approximate minimum number of issuers that would currently be eligible under the proposed rule, and the actual number could be significantly greater. Based on these assumptions, approximately 34 of the 74 industries identified would be "IFRS industries." The minimum of approximately 110 U.S. issuers that we estimate presently would be eligible to file IFRS financial statements had as of December 2007 a total market capitalization of \$2.5 trillion, which represented approximately 12% of the total U.S. market capitalization.¹⁰⁶ The market capitalization of these eligible companies range from approximately \$250 million to \$300 billion, with a mean of \$23 billion and a median of \$8.3 billion. Approximately 94% of these eligible issuers would have a worldwide market capitalization over \$700 million.

¹⁰⁶ Based on an estimated U.S. market capitalization of \$20 trillion. See <http://www.world-exchanges.org/WFE/home.asp?menu=395>.

B. Staff Letter of No Objection to the Use of IFRS

To be able to use IFRS financial statements in filings with the Commission, the U.S. issuer would need to obtain a letter of no objection from the SEC staff. This process would assist U.S. issuers in determining whether they would be eligible to switch to IFRS financial statements and provide them with greater certainty before they undertake the complex process of converting their financial statements from U.S. GAAP to IFRS. In addition, through our postings of these letters on our Web site, we would provide information to investors and others about the possibility of the issuer filing reports using IFRS. Obtaining a staff no-objection letter would not commit the issuer to use IFRS. As noted later, such a letter would provide an issuer with the ability to commence filing reports using IFRS for a period of three years from the date of the staff response.

To obtain such a letter, the issuer would make a submission to the staff of the Division of Corporation Finance's Office of Chief Accountant.¹⁰⁷ In that submission, the issuer would describe its analysis in determining its eligibility to use IFRS.¹⁰⁸ In preparing a request for a staff letter of no objection to the use of IFRS, we would expect U.S. issuers to undertake reasonable efforts to determine the sets of accounting standards for all companies that comprise the twenty largest in its industry group. If the staff has no objections to the issuer's conclusion that it is eligible to file IFRS financial statements, the staff would issue a letter of no objection. When issued, the staff letter would be made

¹⁰⁷ To the extent applicable, an applicant could invoke Rule 83.

¹⁰⁸ To the extent an issuer's analysis includes companies whose financial statements are prepared under a jurisdictional version of IFRS or as to which it is not clear whether the financial statements are prepared under IFRS as issued by the IASB, the issuer should state that no information came to its attention from the content of the financial statements of the companies analyzed or otherwise that causes it to believe that the financial statements are not in accordance with IFRS as issued by the IASB.

publicly available on the Commission Web site, together with the issuer's incoming submission. The incoming submission from the issuer would not be made public on the Commission Web site if the staff did not issue a letter of no objection. A U.S. issuer could file IFRS financial statements only if it received a letter of no objection. Once the staff issued a letter of no objection, the issuer could adopt IFRS at any time during the three-year period following issuance of the letter without the criteria being recalculated with more current data.¹⁰⁹ The company would also disclose in its first filing using IFRS the date that it submitted its request to the staff demonstrating that it met the criteria and the date the staff issued its letter of no objection.

The proposed definition of "IFRS Issuer" in Rule 1-02(cc) of Regulation S-X, which contains the eligibility criteria that must be demonstrated in the issuer's request to the staff of the Commission, specifically excludes investment companies; employee stock purchase, savings and similar plans; and smaller reporting companies.¹¹⁰ We have excluded smaller reporting companies from the proposed definition of IFRS issuer as a limitation on the number of issuers that would be eligible to file IFRS financial statements under the proposed rules. Investment companies are proposed to be excluded because of the separate regulatory requirements that exist for those entities. Employee stock purchase, savings and similar plans are proposed to be excluded because they are special investment entities that are subject to tailored accounting practices.

¹⁰⁹ If we were to adopt the proposal, once a U.S. issuer commenced filing reports using IFRS under these rules, it would not have to recalculate its eligibility using more current data. A recalculation and a new staff letter of no objection would be necessary only if the issuer did not commence filing reports using IFRS within three years of receipt of the letter.

¹¹⁰ The term "smaller reporting company" is defined in Exchange Act Rule 12b-2 [17 CFR 240.12b-2] and in Securities Act Rule 405 [17 CFR 230.405].

Request for Comment

16. Do commenters agree that certain U.S. issuers should have the alternative to report using IFRS prior to 2011? What circumstances should the Commission evaluate in order to assess the effects of early adoption on comparability of industry financial reporting to investors?
17. Do commenters agree with the proposed criteria by which the comparability of an industry's financial reporting would be assessed? If not, what should the criteria be?
18. Which eligible U.S. issuers have the incentive to avail themselves of the proposed amendments, if adopted? Are there reasons for which an issuer that is in a position to file IFRS financial statements under the proposed amendments would elect not to do so? If so, what are they?
19. Is limiting the proposal to the largest 20 competitors by market capitalization an appropriate criterion? Should it be higher or lower? Should additional U.S. issuers be eligible to elect to report in IFRS if some minimum threshold of U.S. issuers (based on the actual number or market capitalization of U.S. issuers choosing to report in IFRS) elects to report in IFRS under the eligibility requirements proposed? To the extent additional U.S. issuers are not permitted to report in IFRS even if such a minimum threshold is met, are such non-eligible U.S. issuers placed at a competitive disadvantage vis-à-vis U.S. issuers reporting in IFRS?
20. Would the use of different industry classification schemes as proposed be unclear or create confusion in determining whether an issuer is IFRS

eligible? Should we require that all issuers use a single industry classification scheme? Why or why not?

21. What impact will the Commission's determination to allow an industry to qualify as an "IFRS industry" without majority IFRS use have on the Commission's objective of promoting comparability for U.S. investors? How will this impact U.S. investors, U.S. issuers, and U.S. markets? Is the use of IFRS more than any other set of financial reporting standards the right criterion? Should it be higher or lower?
22. Should the Commission permit additional industries to qualify as IFRS industries, and thus additional U.S. issuers to become early adopters, as more countries outside the U.S. adopt IFRS? Alternatively, should the group of potential industries and early adopters be limited to those that qualify at the time the Commission determines to permit early adoption?
23. Do commenters have any suggestions about the procedural aspects of the proposed eligibility requirements, e.g., the procedure for obtaining a letter of no objection from the Commission staff or the minimum contents of the required submission? Is such a procedure necessary? Do commenters agree that such a procedure would assist both issuers and investors? Should the procedural aspects of the proposed eligibility requirements be less formal? Should the procedure be similar to that in the no action letter process regarding shareholder proposals under Rule 14a-8 of the Exchange Act? Should the letter of no objection be advisory only? Should obtaining a letter of no objection be optional? Is the method for

calculating eligibility clear and appropriate or are there alternative suggestions that should be considered? Should the Commission publish standards or criteria to guide the staff's determination? What do commenters believe the respective role of the Commission and its staff should be in making these eligibility determinations? Should the Commission post on its Web site all submissions and responses, including those for which the staff does not issue a no-objection letter?

24. Currently, some public companies in the U.S. public capital market report in accordance with IFRS and others in accordance with U.S. GAAP. Today, however, this ability to report using IFRS exists only for foreign companies. What consequences, opportunities or challenges would be created, and for whom, of extending the option to use IFRS to a limited number of U.S. companies based on the criterion of improving the comparability of financial reporting for investors?
25. Do commenters agree that the criterion of enhanced comparability is the correct one? Are there other criteria that should be used? For example, should issuers be eligible based on their size or their global activities? If a size criterion were used to include the largest U.S. issuers, what should the cut-off be? Should there be a criterion based on the absence of past violations of the federal securities laws¹¹¹ or based on shareholder approval?

¹¹¹ An example of such a criterion is found under clauses (vi), (vii) and (viii) under the definition of "ineligible issuer" under Rule 405 under the Securities Act [17 CFR 230.405].

26. Do commenters agree that the proposed required disclosures are appropriate? If not, what disclosures should be provided?
27. What are commenters' views on the accounting principles that should be used by those U.S. issuers that elect to file IFRS financial statements if the Commission decides not to mandate or permit other U.S. issuers to file IFRS financial statements in 2011? Should the Commission require these issuers to revert back to U.S. GAAP in that situation?
28. Is it appropriate to exclude investment companies, employee stock purchase, savings and similar plans and smaller reporting companies? Are there other classes of issuers or certain industries that should be excluded?

C. Transition

We believe that the option to move to IFRS should be made available to eligible U.S. issuers upon adoption of rule amendments; thus we propose that it be applicable for filings for fiscal years ending on or after December 15, 2009. We believe that the ease with which an eligible issuer could transition to IFRS in filings with the Commission, and thus the actual transition timing for an eligible issuer, would depend on the extent to which the issuer has experience with IFRS. An eligible issuer that elects to file IFRS financial statements with the Commission under the proposed amendments would be required first to do so in an annual report containing three years of audited financial statements. Similarly, an IFRS issuer changing from IFRS as issued by the IASB to U.S. GAAP may only begin reporting using U.S. GAAP in an annual report on Form 10-K. An eligible issuer would not be able to file IFRS financial statements with the Commission for the first time in a quarterly report, Securities Act or Exchange Act.

registration statement, or proxy or information statement. We propose limiting first time filing to annual reports to minimize the potential diversity of filings available, as a multitude of options may be difficult for investors to track and some of the filings may be directed only to a subset of investors. We also do not believe the transition to IFRS requires amendments to our rules relating to the timing of filings with the Commission.

An issuer that is eligible to file IFRS financial statements with the Commission and is a "first-time adopter" of IFRS would provide the reconciliation and disclosure information required by IFRS 1 "First-Time Adoption of IFRS" ("IFRS 1").

If we adopt these amendments, we would continue to require that issuers provide three years of audited annual financial statements. Currently, U.S. issuers are required to provide in their filings with the Commission three years of audited financial statements prepared in accordance with U.S. GAAP. Because these proposals relate to the set of accounting principles that is used for preparing financial statements and not to the periods for which financial statements are required, we propose to continue to require three years of audited financial statements from U.S. issuers in the first year of IFRS reporting. We are not inclined to allow U.S. issuers to present only two years of IFRS financial statements, although we request comment below on a potential option for when a company would file three years of U.S. GAAP and two years of IFRS financial statements.

Under the proposal, an eligible issuer that elects to file IFRS financial statements may begin to file financial statements prepared in accordance with IFRS as issued by the IASB for fiscal years ending on or after December 15, 2009.¹¹² As discussed in further

¹¹² A company filing an annual report for the year ended December 31, 2009 would have to present IFRS financial statements for its fiscal years ended December 31, 2007, 2008 and 2009.

detail below in Section V.D.3., we also are proposing that an issuer that elects to file IFRS financial statements with the Commission disclose information related to its decision to change to IFRS in its first Form 10-K that contains IFRS financial statements.

Request for Comment

29. Should we limit the first filing available to an annual report on Form 10-K, as proposed? If not, why not? Is the proposed transition date of fiscal years ending on or after December 15, 2009 appropriate? Should it be earlier or later, and why? What factors should be considered in setting the date?
30. Are there any considerations that may make it difficult for an eligible U.S. issuer to file IFRS financial statements? Are there considerations about filing IFRS financial statements that would weigh differently for an eligible U.S. issuer than they would for a foreign private issuer that files IFRS financial statements?
31. What difficulties, if any, do U.S. issuers anticipate in applying the requirements of IFRS 1 on first-time adoption of IFRS, including the requirements for restatement of and reconciliation from previous years' U.S. GAAP financial statements?
32. What would affect a company's willingness to use IFRS if it were eligible to do so? For example, some market indices, such as the S&P 500, currently only include issuers that report in U.S. GAAP. Are there other investment instruments or indices that would affect companies that would be eligible to use IFRS under the proposed criteria? Would the ability to

be included in the S&P 500, or other instrument or index affect whether an eligible U.S. issuer decides to use IFRS? Would these indices be prepared to accept IFRS, and, if so, how long would it take for them to change their criteria? Would more issuers be likely to use IFRS after they do? Should these considerations influence our decision on whether or when to permit or require U.S. issuers to use IFRS in their Commission filings?

33. To facilitate the transition to IFRS, should we add an instruction to Form 10-K and Form 10-Q under which an issuer could file two years, rather than three years, of IFRS financial statements in its first annual report containing IFRS financial statements as long as it also filed in that annual report three years of U.S. GAAP financial statements? Under such an approach, an issuer could, during its third year after beginning its IFRS accounting, choose to file a Form 10-K/A with IFRS financial statements covering the previous two fiscal years.¹¹³ For the current (third) fiscal year, the issuer could then file quarterly reports on Form 10-Q using IFRS financial statements.¹¹⁴ For example, a calendar-year issuer that began its IFRS accounting for the 2010 fiscal year would use U.S. GAAP to prepare its Forms 10-Q and Forms 10-K for the 2010 and 2011 fiscal years. In 2012, that issuer would have the option of filing a Form 10-K or a Form 10-K/A with IFRS financial statements for 2010 and 2011, which would

¹¹³ The IFRS financial statements covering the two prior years could be included in the Form 10-K if the issuer were prepared to do so as of the due date. In that case, the Form 10-K would also contain three years of U.S. GAAP financial statements. Compliance with Exchange Act Rule 13a-14 [240.13a-14] would be required for both a Form 10-K and a Form 10-K/A that contained IFRS financial statements.

¹¹⁴ An issuer that did not choose to file two years of IFRS financial statements would file its quarterly reports for the third year using U.S. GAAP.

allow it to use IFRS in its quarterly reports during 2012, or continuing to use U.S. GAAP. In either case, the Form 10-K covering the 2012 fiscal year would include three years of IFRS financial statements.

D. Alternative Proposals for U.S. GAAP Information

The Commission is proposing two alternatives with respect to the disclosure of U.S. GAAP information by U.S. issuers that elect to use IFRS financial statements in their Commission filings. Under the first proposal, U.S. issuers would provide a one-time reconciliation from certain U.S. GAAP financial statements to IFRS in accordance with IFRS 1. Under the second proposal, U.S. issuers also would provide on an annual basis a reconciliation from IFRS financial statements to U.S. GAAP covering a three-year period. The Commission is soliciting comment on these alternative proposals to assist it with assessing whether a one-time reconciliation in accordance with IFRS is sufficient or whether it also should require the on-going disclosure of supplemental U.S. GAAP financial information by U.S. issuers that have elected to file IFRS financial statements.

1. Proposal A – Reconciled Information Pursuant to IFRS 1

Under the first alternative, Proposal A, a U.S. issuer that elects to file IFRS financial statements would provide the reconciling information from U.S. GAAP to IFRS called for under IFRS 1 in a footnote to its audited financial statements. IFRS 1 provides the requirements for transition from a prior basis of reporting, in this case U.S. GAAP, to IFRS as issued by the IASB. This information includes the restatement of and reconciliation from prior year's financial statements and the related disclosures. This information helps investors and users of financial statements to understand the

differences between financial statements prepared in accordance with the prior basis of financial reporting and IFRS as issued by the IASB.

This reconciliation called for under IFRS 1 would be included as part of the issuer's audited financial statements in its first annual report that includes IFRS financial statements. IFRS 1 requires that entities explain how the transition from previous GAAP to IFRS affects its reported financial position, financial performance and cash flows. To comply with this requirement, an entity's first IFRS financial statements must include reconciliations of its equity reported under previous GAAP to its equity under IFRS for the date of transition to IFRS and the end of the latest period presented in the most recent annual financial statements prepared under previous GAAP, and of its profit and loss, and cash flows, reported under previous GAAP for the latest period in the most recent annual financial statements to its profit and loss under IFRS for the same period.¹¹⁵ Under Proposal A, U.S. issuers would comply with these requirements under IFRS. We are not proposing additional requirements, including specific form and content requirements for the reconciliations presented under IFRS 1. This reconciling information from U.S. GAAP to IFRS as of the dates and for the annual period required under IFRS would provide investors with information relating to the financial statement effects of the change from U.S. GAAP to IFRS for these dates and annual period.

Under Proposal A, an eligible issuer that elects to file IFRS financial statements may begin to file financial statements prepared in accordance with IFRS for fiscal years ending on or after December 15, 2009. As an example, under this alternative, a U.S. issuer filing an annual report for the year ending December 31, 2009 in accordance with IFRS for the first time would include a reconciliation of its reported equity from U.S.

¹¹⁵ See IFRS 1, paragraph 39.

GAAP to IFRS as of January 1, 2007 and December 31, 2008 and a reconciliation for the year ending December 31, 2008 of its reported total comprehensive income. After the initial reconciliation, the issuer would not be required to provide any reconciliation in future filings with the Commission. However, nothing would prevent a U.S. issuer from voluntarily disclosing such U.S. GAAP information to the market that it believes may be useful for investors.

2. Proposal B – Supplemental U.S. GAAP Information

Under the second alternative, Proposal B, U.S. issuers that elect to file IFRS financial statements would provide the reconciling information from U.S. GAAP to IFRS required under IFRS 1, and would also disclose on an annual basis certain unaudited supplemental U.S. GAAP financial information covering a three-year period. This unaudited supplemental financial information would be in the form of a reconciliation from IFRS as issued by the IASB to U.S. GAAP. For each period covered, the reconciliation would be substantially similar to that required under IFRS 1, except that it would reconcile from IFRS financial statements to U.S. GAAP and it would reconcile the financial statements indicated below. Under Proposal B, the reconciliation would relate to all annual periods covered by IFRS audited financial statements, usually the most recent three fiscal years. This unaudited information would be disclosed on an annual basis in the issuer's annual report on Form 10-K.

The supplemental U.S. GAAP information provided under Proposal B would incrementally increase comparability in the following ways. In the annual report covering the year in which a U.S. issuer elected to report in accordance with IFRS, Proposal B would require U.S. GAAP information concerning the three most recently

completed fiscal years. It also would require U.S. GAAP information in annual reports for periods after that in which an issuer elected to report in accordance with IFRS. In addition to improved comparability, the additional periods of U.S. GAAP information would incrementally aid investors in understanding the differences between IFRS and U.S. GAAP, including trends. Proposal B also increases the likelihood that U.S. issuers would maintain U.S. GAAP controls, procedures, and books and records, for periods after the election to report in IFRS. Consequently, were the Commission to determine not to continue to permit or require U.S. issuers to use IFRS, those issuers who had elected to report under IFRS could more easily return to reporting in accordance with U.S. GAAP. In addition, even if the Commission did not require issuers to revert to U.S. GAAP, some issuers may find it appropriate to do so.

To implement Proposal B, we would amend Item 101 "Business" of Regulation S-K by adding a paragraph (j). Under proposed Item 101(j), an issuer that uses IFRS as issued by the IASB as its basis of financial reporting would provide reconciliations from its IFRS financial statements to U.S. GAAP for each of the three fiscal years covered by the audited IFRS financial statements included elsewhere in the Form 10-K. The reconciliations would cover all of the financial statements required to be presented under IFRS: the balance sheets, statements of income (loss), statements of cash flow, statements of changes in shareholders' equity, and statements of comprehensive income. Quarterly reports on Form 10-Q would not be required to provide disclosure pursuant to Item 101(j).

Under proposed Item 101(j), the reconciliations would be presented in a form and level of information in sufficient detail to explain all material adjustments to the relevant

financial statements.¹¹⁶ We are not proposing specific form and content requirements for the reconciliations presented under Item 101(j). While issuers could elect to reconcile the statements of comprehensive income and shareholders' equity from IFRS to U.S. GAAP, they may find it easier to prepare these statements using U.S. GAAP amounts.

Under this alternative, the information disclosed pursuant to proposed Item 101(j) would be contained under an appropriate caption in the body of the annual report on Form 10-K. As such, consistent with other non-financial statement information, it would be considered "filed" for purposes of Section 18 of the Exchange Act¹¹⁷, would be subject to the certifications by the principal executive and financial officers pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act of 2002¹¹⁸, and would be subject to the disclosures and certifications relating to disclosure controls and procedures.¹¹⁹

The preparation of the supplemental U.S. GAAP information, the underlying books and records on which that information is based and the internal accounting controls and procedures used to prepare such information would not be subject either to management's assessment of, or to the independent auditor's report relating to, internal controls and procedures over financial reporting pursuant to Section 404 of the Sarbanes-Oxley Act.¹²⁰ In addition, the supplemental U.S. GAAP information would not be required to be audited or reviewed by the issuer's independent auditors.

¹¹⁶ Item 101(j) is based on paragraph 40 of IFRS 1.

¹¹⁷ 15 U.S.C. 78r.

¹¹⁸ 15 U.S.C. 7241 and 18 U.S.C. 1349.

¹¹⁹ Exchange Act Rules 13a-15 and 15d-15 [17 CFR 240.13a-15 and 240.15d-15].

¹²⁰ 15 U.S.C. 7262.

If we subsequently adopt rules to mandate the use of IFRS or subsequently determine not to mandate the use of IFRS and require "early use" issuers to revert back to U.S. GAAP, we anticipate eliminating any requirement to disclose supplemental U.S. GAAP financial information.

Under Proposal B, an eligible issuer that elects to file IFRS financial statements may begin to file financial statements prepared in accordance with IFRS for fiscal years ending on or after December 15, 2009. As an example, under this alternative, a U.S. issuer filing an annual report for the year ending December 31, 2009 in accordance with IFRS for the first time would include, in addition to the one-time reconciliation required under IFRS 1 (as described under Proposal A), the reconciliation from IFRS to U.S. GAAP as of December 31, 2008 and 2009 for balance sheet information and for the three years ending December 31, 2009 for the statements of income (loss) and other annual period financial statements. Thereafter, in each annual report on Form 10-K, the issuer would provide the IFRS to U.S. GAAP reconciliation covering the same three-year period as the audited financial statements included in the Form 10-K.

3. Discussion of Proposals A and B

We believe that U.S. GAAP financial information, whether presented under either Proposal, would be useful to investors in order to facilitate their understanding of and education with respect to IFRS during the early stages of the transition of U.S. issuers to IFRS. This reconciliation, under either Proposal, would assist investors in their understanding and appreciation of the differences between U.S. GAAP and IFRS as issued by the IASB as such differences relate to the issuer providing the disclosure. The Proposal B requirement to provide a U.S. GAAP reconciliation on an annual and on-

going basis would provide U.S. GAAP information for additional and future periods beyond the one-time requirement under IFRS 1. Under Proposal B, issuers would need to have in place sufficient records and controls to prepare this U.S. GAAP information.

In addition, U.S. GAAP financial information, whether presented under either Proposal, would facilitate the ability of investors to make comparisons among U.S. issuers that prepare U.S. GAAP financial statements and those that have elected the early use of IFRS. As proposed, only a limited number of U.S. issuers would be eligible to elect the early use of IFRS. While we believe the early use of IFRS by these eligible issuers may promote their comparability to non-U.S. issuers in certain industries, investors may also find it useful to make comparisons with other U.S. issuers, the majority of which would continue to prepare U.S. GAAP financial statements. The Proposal B requirement to provide a U.S. GAAP reconciliation on an annual and ongoing basis could promote comparability with U.S. issuers that continue to use U.S. GAAP.

Were the Commission to determine not to continue to permit or require additional U.S. issuers to use IFRS, the Commission would determine whether to require U.S. issuers that had elected the early use of IFRS to revert back to U.S. GAAP. In addition, those issuers may find it appropriate to revert back to U.S. GAAP even if not required to do so. Thus, it would appear important that U.S. issuers electing to file IFRS financial statements maintain sufficient information, records and controls in place to be able to revert back to U.S. GAAP. The Proposal A requirement to provide only the reconciliation under IFRS 1 would not appear to promote the ability of U.S. issuers to revert back to U.S. GAAP, since U.S. GAAP information would not have been required

to be accumulated or disclosed beyond the last year that the issuer previously reported under U.S. GAAP. The Proposal B requirement to provide a U.S. GAAP reconciliation on an annual and on-going basis may promote the ability of U.S. issuers to revert back to U.S. GAAP.

Request for Comment

34. What are commenters' views on Proposals A and B relating to U.S. GAAP reconciling information? Which Proposal would be most useful for investors? Is there a need for the supplemental information provided by Proposal B? Would the requirement under Proposal B have an effect on whether eligible U.S. companies elect to file IFRS financial statements? To what extent might market discipline (i.e., investor demand for reconciliation information) encourage early adopters to reconcile to U.S. GAAP even in the absence of a reconciliation requirement?
35. What role does keeping a set of books in accordance with U.S. GAAP play in the transition of U.S. issuers to IFRS? What impact will keeping U.S. GAAP books have on U.S. investors, U.S. issuers, and market participants?
36. How valuable is reconciliation to U.S. investors, U.S. issuers, and market participants? How valuable is reconciliation to global market participants? Are there some financial statements (such as the statement of comprehensive income) which should not be required to be reconciled to U.S. GAAP?

37. Under either Proposal, would investors find the U.S. GAAP information helpful in their education about IFRS or in being able to continue to make financial statement comparisons with U.S. (and non-U.S.) issuers that continue to prepare U.S. GAAP financial statements? Would one alternative be more helpful to U.S. investors, regulators, or others in understanding information prepared under IFRS or to continue to make comparisons with issuers who prepare U.S. GAAP financial statements?
38. Should we be concerned about the ability of U.S. issuers that elect the early use of IFRS to revert to U.S. GAAP? Would either Proposal be preferred to facilitate such a reversion, should that be appropriate or required as described above?
39. Under Proposal B, should the proposed U.S. GAAP financial information be audited? Is the proposed role of the auditor appropriate? Should the proposed U.S. GAAP financial information be filed as an exhibit to the Form 10-K annual report, instead of as part of the body of the report? Is the proposed treatment of the information appropriate? For example, should the information be deemed "furnished" and not "filed" for purposes of Section 18 of the Exchange Act? Should we require that the supplemental U.S. GAAP information be contained in the annual report that is prepared pursuant to Exchange Act Rule 14a-3(b)?¹²¹ Should the supplemental U.S. GAAP information appear as a note to the financial statements? Is the proposed role of the auditor appropriate?

¹²¹ 17 CFR 240.14a-3(b).

40. Under either Proposal, should we provide more guidance as to the form and content of the information called for? Under either Proposal, should we require that additional information be provided, such as a “full reconciliation” as is required under Item 18 of Form 20-F?¹²² Is there an intermediate position between the reconciliation under Proposal B and the reconciliation under Item 18 of Form 20-F?
41. Under either Proposal, should we require that the issuer’s “Management’s Discussion and Analysis of Financial Condition and Results of Operations” prepared under Item 303 of Regulation S-K contain a discussion of the reconciliation and the differences between IFRS as issued by the IASB and U.S. GAAP?¹²³
42. Should we require supplemental U.S. GAAP information, such as that in Proposal B, for all quarterly periods covered by IFRS financial statements?
43. Should the option to report under IFRS, whether under Proposal A or Proposal B, automatically terminate as of a date certain? If so, should that date be a set period of time? For example, should it be three years following the effective date of an adopting release? Should it be a longer or shorter time period? Should it be measured from another date (e.g., the first permissible compliance date or the date of the first letter of no

¹²² Item 18 of Form 20-F requires that a foreign private issuer provide as part of the U.S. GAAP reconciliation “all other information required by U.S. generally accepted accounting principles and Regulation S-X.”

¹²³ Foreign private issuers that provide a U.S. GAAP reconciliation are required to provide such disclosure. See Instruction 2 to Item 5 of Form 20-F.

objection issued)? What considerations should be part of our decision as to the date or duration?

44. Under Proposal B, does providing U.S. GAAP information require issuers electing to file IFRS financial statements to maintain sufficient information, records and controls in order to revert back to U.S. GAAP? If not, what additional information, records or controls must be maintained?
45. Under Proposal A, what additional information, records or controls would be necessary for U.S. issuers electing to file IFRS financial statements to maintain so that they could revert back to U.S. GAAP?

V. DISCUSSION OF PROPOSED AMENDMENTS

Because we have not previously permitted U.S. issuers to use financial statements prepared in accordance with IFRS as issued by the IASB in their Securities Act and Exchange Act filings, our disclosure requirements and forms have not been specifically adapted for IFRS. This section discusses the proposed amendments to our rules and forms designed to permit the limited early use of IFRS as issued by the IASB as described in Section IV. The amendments also are designed to provide further instruction as to how any issuer that prepares its financial statements in accordance with IFRS as issued by the IASB for filings with the Commission, whether a U.S. issuer or a foreign private issuer that elects to file IFRS financial statements, should respond to disclosure requirements.¹²⁴

¹²⁴ As discussed below in Section V.B., inclusion of foreign private issuers in Article 13 will not change the content of their financial statements filed under Form 20-F.

A. The Use of IFRS Financial Statements in Commission Filings by Eligible Issuers

1. Proposed Amendments to Rule 4-01 of Regulation S-X

Regulation S-X contains, among other things, the form and content requirements for financial statements included in Securities Act registration statements, registration statements under Section 12 of the Exchange Act, annual and other reports under Sections 13 and 15(d) of the Exchange Act, and proxy and information statements under Section 14 of the Exchange Act. Article 4 of Regulation S-X sets out the rules of general application for those financial statements, and Rule 4-01 of Article 4 describes the form, order and terminology to be used for financial statements included in filings under the Securities Act and the Exchange Act.

Under current Regulation S-X, the financial statements contained in the filings of any domestic issuer must be prepared in accordance with U.S. GAAP, unless the Commission has otherwise provided.¹²⁵ Although the Commission has made such provisions for foreign private issuers, which may prepare their financial statements in accordance with a comprehensive set of accounting principles other than U.S. GAAP with a reconciliation to U.S. GAAP or in accordance with IFRS as issued by the IASB without a reconciliation to U.S. GAAP,¹²⁶ issuers that are not foreign private issuers are permitted to use only U.S. GAAP.

To accommodate the limited early use of IFRS proposed in this release, we are proposing to add a new paragraph (a)(3) to Rule 4-01 of Regulation S-X so that a new category of issuers (e.g., those meeting the proposed definition of "IFRS issuer"

¹²⁵ See Rule 4-01(a)(1) of Regulation S-X.

¹²⁶ See Rule 4-01(a)(2) of Regulation S-X.

discussed further below) may prepare their financial statements in accordance with IFRS as issued by the IASB. Under the proposed Rule 4-01(a)(3), financial statements prepared in accordance with IFRS as issued by the IASB would be subject to the proposed new Article 13, as described in Section V.B.; below. Neither proposed Rule 4-01(a)(3) nor the proposed definition of "IFRS issuer" would affect the use of financial statements prepared in accordance with IFRS as issued by the IASB by foreign private issuers.

2. Proposed Definition of "IFRS Issuer"

We are proposing to include a definition of "IFRS Issuer" in the definitions section of Regulation S-X as new Rule 1-02(cc). The term "IFRS issuer" would be defined as any issuer, other than a foreign private issuer that files financial statements pursuant to Item 17 or Item 18 of Form 20-F, that prepares its financial statements in accordance with IFRS as issued by the IASB and meets the eligibility criteria discussed in Section IV.A. We also propose to add a definition of "IFRS issuer" to the general definitions section of Rule 405 of Regulation C under the Securities Act and Rule 12b-2 of Regulation 12B under the Exchange Act. These proposed definitions would refer to the definition contained in proposed Rule 1-02(cc) of Regulation S-X. We propose defining "IFRS issuer" in the same way under Regulation S-X, the Securities Act and the Exchange Act in order to indicate clearly that the term is to have the same meaning in the application of all applicable rules, regulations and forms under the Securities Act and the Exchange Act.

Request for Comment

46. Are the criteria for issuers eligible to file financial statements in accordance with IFRS as issued by the IASB clear from the proposed definition of "IFRS issuer?" If not, in what way is the definition unclear, and what revisions would be necessary to eliminate any lack of clarity?
47. Is there any ambiguity in the proposed amendments regarding the reasons for the distinction between "IFRS issuer" and foreign private issuer, and the application of the rules to each? If so, what is the nature of the ambiguity and what would be necessary to provide clarity?
48. Is the application of Regulation S-X and Regulation S-K to financial statements prepared in accordance with IFRS as issued by the IASB clear from the proposed amendments, or are there other items within those regulations that should be specifically amended to permit the filing of financial statements prepared in accordance with IFRS as issued by the IASB? If so, how would the application of Regulation S-X and Regulation S-K be unclear if there were no changes to those other than those proposed? What changes would be suggested in order to make them clear?

B. Application

1. Article 13 of Regulation S-X

We are proposing a new Article 13 to Regulation S-X which relates to the use of IFRS and sets out requirements as to the application of Regulation S-X and related rules and forms for any issuer, be it an eligible U.S. issuer or a foreign private issuer, that

prepares financial statements in accordance with IFRS as issued by the IASB for filings with the Commission. We believe aggregating provisions relating to the use of IFRS as issued by the IASB into a single new article provides for the greatest simplicity and ease of use at this time.

Proposed Rule 13-01 relates to the application of proposed Article 13 with regard to both financial statements and issuers. Under proposed Rule 13-01(a), Article 13 applies to financial statements that are prepared in accordance with IFRS as issued by the IASB filed by an IFRS issuer, by a foreign private issuer pursuant to Form 20-F, or by an issuer with regard to non-issuer financial statements pursuant to Rule 3-05, 3-09 or 3-14 of Regulation S-X, as discussed further in Section V.E.1. below. We do not include foreign private issuers under the definition of IFRS issuer, and consequently list foreign private issuers and IFRS issuers separately in proposed Rule 13-01(a), because financial statement and other disclosure requirements for foreign private issuers are contained separately in Form 20-F. Because Form 20-F refers a foreign private issuer back to Regulation S-X, we believe providing for the application of Article 13 in this manner will provide that our rules relating to the use of financial statements prepared in accordance with IFRS as issued by the IASB will apply equally to both domestic issuers and foreign private issuers, while recognizing that foreign private issuers are subject to a separate disclosure and reporting regime under Form 20-F.

Proposed Rule 13-01(b) brings together three basic requirements for IFRS financial statements. First, such financial statements must contain an appropriate captioned note in which the issuer unreservedly and explicitly states compliance with IFRS as issued by the IASB. Second, the applicable accountant's report must include an

opinion on whether the financial statements comply with IFRS as issued by the IASB.

Finally, financial statements which are not prepared in accordance with IFRS as issued by the IASB will be presumed to be misleading or inaccurate, despite footnote or other disclosures, unless the Commission has otherwise provided. The first two requirements currently exist for foreign private issuers that use IFRS as issued by the IASB, but exist outside of Regulation S-X. The third clarifies the application of Rule 4-01(a) for IFRS financial statements.

The purpose of these requirements is so that issuers that file IFRS financial statements with the Commission do not deviate from IFRS as issued by the IASB. Deviations would not foster the development and use of a single set of high-quality global accounting standards and would undercut an objective of the proposed option, which as stated previously is intended to enhance comparability in an industry where IFRS is used more often than any other set of accounting standards. As we stated in the adopting release accepting IFRS financial statements by foreign private issuers without reconciliation to U.S. GAAP, we believe that the benefits of moving towards a single set of globally accepted standards as a long-term objective, including increased transparency and comparability of financial statements, are attainable only if IFRS represents a single set of high-quality accounting standards and not a multiplicity of divergent standards using the same name. However, we would retain the ability to take such action as may be appropriate to address financial reporting issues in filings with the Commission.

Proposed Rule 13-02 describes how the other articles contained in Regulation S-X would apply to IFRS financial statements. Regulation S-X has various provisions that specify the financial presentation, disclosure content, and in some cases, recognition and

measurement of amounts, to be provided within an issuer's financial statements. Under the proposed rules, an eligible IFRS issuer would apply IFRS as issued by the IASB in its entirety, and ordinarily would not be required to comply with provisions of Regulation S-X that specify financial presentation, disclosure content, or recognition and measurement of amounts within the issuer's financial statements. However, as described more fully in Section V.D.4., in many instances an eligible IFRS issuer may be permitted to follow these types of provisions as acceptable accounting policy choices under IAS 8. Also, in many instances disclosures of the types specified by Regulation S-X may be necessary in IFRS financial statements to fully comply with the general requirement for fair presentation of IFRS financial statements under IAS 1 "Presentation of Financial Statements."

Regulation S-X also has various provisions that specify the age, dates and periods to be covered by financial statements of the issuer in Commission filings under various circumstances, the qualifications of auditors and the content of audit reports, and circumstances in which financial statements of entities other than the issuer are required in the issuer's filings. These provisions are relevant irrespective of any particular system of accounting principles and would continue to apply to IFRS issuers.

A walkthrough of how proposed Rule 13-02 would specify this application follows. In those instances where an eligible IFRS issuer is not required to comply with the particular provision of Regulation S-X, but may be permitted to do so as an acceptable accounting policy choice under IAS 8, the provision is described as "need not

apply”¹²⁷ If the particular provision of Regulation S-X is by its nature not applicable to IFRS financial statements, or would be in conflict with IFRS as issued by the IASB, the provision is described as “shall not apply”. Otherwise, the provisions of Regulation S-X would apply.

Article 1 “Application of Regulation S-X” describes the application of Regulation S-X in setting forth the form and content requirements for financial statements filed as part of Commission filings, and includes definitions of terms used throughout Regulation S-X. Except as noted below regarding Rule 4-10, Article 1 would apply.

Article 2 “Qualifications and Reports of Accountants” describes the qualifications and reports of accountants and includes certain requirements related thereto. Article 2 would apply.

Article 3 “General Instructions as to Financial Statements”, which principally addresses the age, dates and periods to be covered by financial statements of the issuer and the circumstances in which financial statements of entities other than the issuer are required in the issuer’s filings, would apply. However, some of the individual rules contained in Article 3 specify certain disclosure content within an issuer’s financial statements, and need not, or would not, apply to IFRS financial statements. Specifically, Rule 3-03 “Instructions to income statement requirements,” and Rule 3-04 “Changes in other stockholders’ equity,” need not apply to IFRS financial statements because the areas to which they relate are provided for in IFRS as issued by the IASB. Rule 3-15(a)(1) “Special provisions as to real estate investment trusts,” would not apply because

¹²⁷ However, such a provision could not be used to the extent it would create a conflict with IFRS. For example, certain provisions of Rule 4-10(c) “Full Cost Method” may conflict with certain requirements of particular IFRS standards or the IFRS Framework.

its requirements with respect to income statement presentation are incompatible with IFRS as issued by the IASB.¹²⁸ Rules 3-15(b) and (c) need not apply to IFRS financial statements but the disclosures specified therein may be necessary for a fair presentation under IAS 1. Rule 3-20 “Currency for financial statements of foreign private issuers” by its terms applies only to foreign private issuers.

Article 3A “Consolidated and Combined Financial Statements” need not apply, because the areas to which those rules relate are provided for in IFRS as issued by the IASB.¹²⁹

Article 4 “Rules of General Application” would apply, except for Rules 4-07, 4-08, and certain paragraphs of Rule 4-10. Rule 4-07 “Discount on shares” and Rule 4-08 “General notes to financial statements,” need not apply to IFRS financial statements, because the areas to which those rules relate are provided for in IFRS as issued by the IASB.¹³⁰

Rule 4-10, “Financial Accounting and Reporting for Oil and Gas Producing Activities Pursuant to the Federal Securities Laws and the Energy Policy and Conservation Act of 1975” references energy-related statutes and contains references to specific pronouncements under U.S. GAAP.¹³¹ With respect to Commission filings, Rule

¹²⁸ See IAS 1 “Presentation of Financial Statements.”

¹²⁹ See IAS 27 “Consolidated and Separate Financial Statements” and SIC 12 “Consolidation – Special Purpose Entities.”

¹³⁰ Financial statement footnote disclosure requirements on particular topical areas are found throughout the standards and interpretations of IFRS.

¹³¹ The Commission has recently issued a proposing release relating to oil and gas disclosure requirements contained in Regulation S-X and Regulation S-K. See Release No. 33-8935 [73 FR 39526 (July 9, 2008)].

4-10 would apply, except as noted below.¹³² Specifically, Rule 4-10(a) would apply to IFRS financial statements because the definitions it contains are used in the disclosure requirements under Industry Guide 2 and FAS 69, with which an issuer using IFRS would continue to comply.¹³³ Rule 4-10(b) “Successful Efforts Method,” which specifies compliance with FAS 19 “Financial Accounting and Reporting by Oil and Gas Producing Companies,” need not be applied to IFRS financial statements. Although FAS 19 may be applied in IFRS financial statements in the absence of specific guidance on oil and gas accounting under IFRS, IFRS does not require the application of FAS 19.¹³⁴ Rule 4-10(c) “Full Cost Method” need not apply to IFRS financial statements. Rule 4-10(d) “Income Taxes” need not apply to IFRS financial statements because the areas to which they relate are provided for in IFRS as issued by the IASB.¹³⁵

With respect to Article 5 “Commercial and Industrial Companies,” Article 7 “Insurance Companies,” and Article 9 “Bank Holding Companies,” which prescribe specific financial statement captions and certain footnote disclosures for issuers in their respective industries, these articles need not apply to IFRS financial statements. However, the schedules under Rules 5-04, 7-05, and 9-06, which specify supplemental parent company-only information or separate supplemental tabular disclosures, would still apply. As discussed in Section V.B.2., below, in providing separate audited

¹³² We propose to clarify in Rule 1-01(c) of Regulation S-X that the proposed application of Rule 4-10 in Rule 13-02 would apply only to Commission filings.

¹³³ See Section V.G.2. below.

¹³⁴ For discussion relating to IAS 8 “Accounting Policies, Changes in Accounting Estimates and Errors” and the use of guidance to areas for which specific IFRS do not exist, see Section III.B.4., above, and Section V.C.4., below.

¹³⁵ IAS 12 “Income Taxes.”

schedules pursuant to those rules, we propose that an IFRS issuer or foreign private issuer may use amounts based on IFRS as issued by the IASB.

Article 6 "Registered Investment Companies," Article 6A "Employee Stock Purchase, Savings and Similar Plans," and Article 8 "Financial Statements of Smaller Reporting Companies" would not apply because, as described in Section IV above, such issuers would be excluded from the definition of "IFRS issuer."

Article 10, "Interim Financial Statements," would not generally apply to IFRS financial statements. This is because interim financial statements that comply with IFRS as issued by the IASB must comply with IAS 34 "Interim Financial Reporting," which prescribes the minimum content of an interim financial report and the principles for recognition and measurement in interim period financial statements.

However, several paragraphs of Rule 10-01 would continue to apply to IFRS financial statements. Rule 10-01(a)(1) would apply because it contains the general requirement for interim financial statements that must be provided. Rule 10-01(a)(6) would continue to apply so as to allow the omission of schedules for IFRS interim financial statements. Rule 10-01(b)(6) would continue to apply to require disclosure relating to any material accounting changes and the filing of a preferability letter from the issuer's independent auditor. For issuers that file IFRS financial statements, the disclosure required by this paragraph should comply with the requirements of IAS 34. Rules 10-01(c)(1) - (3)¹³⁶ would also continue to apply to IFRS financial statements for interim periods, as those paragraphs describe the periods for which balance sheets, income statements, and changes in financial position are required to be presented in

¹³⁶ Rule 10-01(c)(4) would not apply to an IFRS issuer. IAS 34 permits a highly seasonal entity to present a 12-month interim period in addition to, but not in lieu of, the year-to-date interim period.

quarterly reports on Form 10-Q.¹³⁷ Rule 10-01(d), which requires that interim financial statements included in quarterly reports be reviewed by an independent accountant, would continue to apply. Rule 10-01(e) also continues to apply to permit the filing of interim financial information to be waived in certain cases.

Finally, both Article 11 "Pro Forma Financial Information," and Article 12 "Form and Content of Schedules," would apply in their entirety. Additional information on the proposed application of Article 11 is provided in Section V.E.

Request for Comment

49. Is there any reason why an issuer would be unable to assert compliance with IFRS as issued by the IASB and obtain the necessary opinion from its independent auditor?
50. Is the application of Articles 1 through 12 of Regulation S-X to IFRS financial statements clear from the proposed Rule 13-02? If not, what further clarification is necessary? Are there other rules contained in Articles 1 through 12 that do not, or may not, apply to financial statements prepared in accordance with IFRS as issued by the IASB and that are not addressed in proposed Rule 13-02? If so, what are they and how should they be addressed?
51. A U.S. issuer engaged in oil and gas producing activities that has followed the successful efforts method and carries forward that practice under IFRS will have consistent reserves disclosure under FAS 19, FAS 69 and Industry Guide 2. If that issuer were to apply another method of

¹³⁷ IAS 34 uses the term "changes in equity" rather than the term "changes in financial position" that is used in Regulation S-X.

accounting permitted under IFRS, it may lead to inconsistencies between Industry Guide disclosure, FAS 69 disclosure, and the financial statements. Would such potential inconsistencies create ambiguity for users of that information or otherwise be a cause for concern? If so, what would be an appropriate means of addressing the inconsistencies?

2. Proposed Clarifying Amendments with Respect to References to IFRS as Issued by the IASB

The federal securities laws contain several references to “generally accepted accounting principles.”¹³⁸ In addition, our regulations contain numerous accounting references, which include both references to “generally accepted accounting principles”, or “GAAP” and specific references to provisions of U.S. GAAP. This may cause some doubt as to how such references should apply with respect to financial statements prepared in accordance with IFRS as issued by the IASB. In order to provide clarity as to application of our regulations, we are proposing Rule 13-03 to address application of both general references to GAAP as well as the references to specific U.S. GAAP pronouncements for IFRS financial statements. Consistent with our proposed approach to Article 13 of Regulation S-X overall, we propose an approach to address these matters on a consolidated basis rather than amending each of the specific references at this time.

With regard to general references to GAAP, we are proposing an approach consistent with the approach we used when we adopted rules pursuant to Section 401(b) of the Sarbanes-Oxley Act of 2002¹³⁹ with respect to the use of non-GAAP financial

¹³⁸ See, e.g., Exchange Act Section 13(b)(2)(B)(ii) [15 U.S.C. 78m(b)(2)(B)(ii)].

¹³⁹ 15 U.S.C. 7201 *et seq.*

measures by foreign private issuers.¹⁴⁰ In both Regulation G and Item 10(e)(3) of Regulation S-K, we specified that GAAP refers to U.S. GAAP, but in the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, GAAP refers to the principles under which those primary financial statements are prepared.¹⁴¹ Similarly, we are proposing a similar approach for administrative purposes only in Rule 13-03(a) that, unless otherwise specifically provided,¹⁴² references to “generally accepted accounting principles” in Parts 210, 229, 230, 239, 240 and 249, except for certain rules in Part 240 not relating to financial statements in Exchange Act registration statements, periodic reports and proxy or information statements,¹⁴³ should be construed by issuers to which Article 13 applies to mean IFRS as issued by the IASB.¹⁴⁴

In addition to general references to GAAP, our regulations also contain numerous references to specific standards and interpretations included in U.S. GAAP.¹⁴⁵ We are proposing an approach consistent with the approach we used for our amendments removing the reconciliation requirement for IFRS financial statements by foreign private issuers. Proposed Rule 13-03(b) would indicate that, unless otherwise specifically

¹⁴⁰ See Release No. 33-8176 (January 22, 2003) [68 FR 4820 (January 30, 2003)]. See also Rule 407(d)(5) of Regulation S-K for a similar approach with respect to audit committee financial expert disclosure.

¹⁴¹ See, e.g., Section 101(b) of Regulation G and Item 10(e)(3)(i) of Regulation S-K.

¹⁴² An example of specifically providing otherwise is in Regulation G and Item 10(e)(3) of Regulation S-K, where references to U.S. GAAP and other comprehensive bases of accounting is intended to be specific. See also Rule 4-01 of Regulation S-X.

¹⁴³ Specifically, Rules 11a-1h, 15c3-1g, 17a-5, 17g-3, 17h-1T, and 17i-6.

¹⁴⁴ The staff has taken a similar approach in the application of internal control reporting requirements by foreign private issuers without recognizing foreign bases of accounting as “generally accepted.” See <http://www.sec.gov/info/accountants/controlfaq.htm>.

¹⁴⁵ See, e.g., Item 303(a)(4) of Regulation S-K [17 CFR 229.303(a)(4)].

provided, in providing information in response to requirements in Parts 210, 229, 230, 239, 240 and 249 that refer to pronouncements of U.S. GAAP, disclosure is to be provided that satisfies the objective of the relevant disclosure requirements. We are not proposing to revise the references to U.S. GAAP standards and interpretation to include their analog under IFRS as issued by the IASB. We believe that issuers preparing IFRS financial statements would be able to determine which, if any, IFRS standards would provide useful reference in satisfying the relevant disclosure requirements without undue burden.

Finally, proposed Rule 13-03(c) would clarify that in providing general caption data, segment data or schedule information in response to Regulation S-K item requirements, IFRS issuers may present amounts based on IFRS as issued by the IASB. This proposed approach is consistent with the approach adopted for foreign private issuers that file IFRS financial statements without a reconciliation to U.S. GAAP.¹⁴⁶ It is also consistent with the proposed approach to schedule information from IFRS issuers under Articles 5, 7 and 9 of Regulation S-X, as discussed above.

Request for Comment

52. With regard to specific references to U.S. GAAP in our regulations, should we amend the references to U.S. GAAP pronouncements to also reference appropriate IFRS guidance, and, if so, what should the references refer to? Would issuers be able to apply the proposed broad approach to U.S. GAAP pronouncements and would this approach elicit appropriate information for investors? Should we retain the U.S. GAAP references for definitional purposes?

¹⁴⁶ See Instruction 5 to Item 5 of Form 20-F.

53. With regard to general references to U.S. GAAP, is our proposed approach appropriate and sufficiently clear? If not, how should these matters be addressed differently and why?

54. Is our proposed approach sufficiently clear on how to address general caption data, segment data and schedule information outside the financial statements? If not, what changes should we make? Are there other places in our regulations that need to be addressed?

C. Proposed Amendments to Item 10(e) of Regulation S-K and Regulation G

In addition to the general references to “generally accepted accounting principles” described above, certain rules relating to the use of non-GAAP financial measures contain specific references to “U.S. generally accepted accounting principles.” both Item 10(e)(3) of Regulation S-K¹⁴⁷ and Rule 101(b) of Regulation G¹⁴⁸ state that for purposes of those regulations, “GAAP refers to generally accepted accounting principles in the United States.” In each case, there is an express provision addressing the application of Item 10(e) and Regulation G to foreign private issuers that prepare financial statements in accordance with non-U.S. generally accepted accounting principles.¹⁴⁹ In order to similarly address the situation of U.S. issuers preparing their financial statements in accordance with IFRS as issued by the IASB, we are proposing to amend Item 10(e)(3) of Regulation S-K and Rule 101(b) of Regulation G to include IFRS issuers together with foreign private issuers in how to apply our rules relating to the use of non-GAAP

¹⁴⁷ 17 CFR 229.10(e)(3).

¹⁴⁸ 17 CFR 244.101(b).

¹⁴⁹ See Item 10(e)(3)(i) and (ii) of Regulation S-K [17 CFR 229.10(e)(3)(i) and 229.10(e)(3)(ii)] and Rule 101(b)(1) and (2) of Regulation G [17 CFR 244.101(b)(1) and 244.101(b)(2)].

financial measures when the issuer's primary financial statements are prepared on a basis other than U.S. GAAP.

D. Related Disclosure and Financial Reporting Issues

1. Selected Financial Data

Under Item 301(a) of Regulation S-K, issuers must provide five years of selected financial data. As part of our proposal to accept financial statements prepared using IFRS as issued by the IASB from certain domestic issuers, we are proposing to add an instruction to Item 301 to clarify that an IFRS issuer shall present selected financial data on the basis of IFRS as issued by the IASB.

We recognize that, under the amendments proposed in this release, many IFRS issuers will be adopting IFRS as issued by the IASB for the first time and therefore will not have available five years of financial data based on IFRS as issued by the IASB. Accordingly, the proposed instruction to Item 301 allows an IFRS issuer that prepares its financial statements in accordance with IFRS as issued by the IASB for the first time to present selected historical financial data for the three most recent fiscal years. If this instruction is adopted, in each of the two subsequent fiscal years that IFRS issuer would provide an additional year of selected financial data based on IFRS as issued by the IASB, building up to five years.

Request for Comment

55. Will three years of selected financial data based on IFRS be sufficient for investors, or should IFRS issuers be required to disclose in their selected financial data previously published information based on U.S. GAAP with respect to previous financial years or interim periods?

2. Market-Risk and the Safe Harbor Provisions

Pursuant to Item 305 of Regulation S-K,¹⁵⁰ an issuer is required to provide quantitative and qualitative disclosure about market risk related to certain financial instruments. This information, which is not included in the financial statements of a filing, is expressly subject to the statutory safe harbors provided under Section 27A of the Securities Act¹⁵¹ and Section 21E of the Exchange Act¹⁵² to the extent it constitutes “forward looking statements.”¹⁵³

IFRS 7 “Financial Instruments: Disclosure” as recently amended, requires market risk disclosure that is similar to that required under Item 305.¹⁵⁴ In this respect, the sensitivity analysis provided under IFRS will be based on forward-looking information. This information will appear in the footnotes to audited IFRS financial statements.

Section 27A of the Securities Act and Section 21E of the Exchange Act expressly exclude from the safe harbor any information “included in a financial statement prepared in accordance with generally accepted accounting principles.”¹⁵⁵ The safe harbor therefore is not available for any forward looking information included in IFRS financial statements. When we adopted the market risk disclosure requirements, the Commission considered whether the market risk disclosure could be included in a registrant’s financial

¹⁵⁰ 17 CFR 229.3-05.

¹⁵¹ 15 U.S.C. 77z-2.

¹⁵² 15 U.S.C. 78u-5.

¹⁵³ See Item 305(d) of Regulation S-K. See also Release No. 33-7386 (January 31, 1997) [62 FR 6044 (February 10, 1997)] for the release adopting the derivatives disclosure requirement and the related express safe harbor.

¹⁵⁴ IFRS 7 requires this information beginning with the 2007 fiscal year.

¹⁵⁵ See Securities Act Section 27A(b)(2)(A) and Exchange Act Section 21E(b)(2)(A).

statements and, if so, whether the safe harbor should apply to that disclosure. The Commission decided to require that the information required under Item 305 be disclosed outside the financial statements.

As required by Article 4-01 of Regulation S-X, the financial statements filed by a registrant must comply fully with a comprehensive body of accounting principles, which, under the proposed amendments, includes IFRS 7 for those companies that use IFRS as issued by the IASB.

We recognize that foreign private issuers that are IFRS filers have expressed particular concerns related to the applicability of the safe harbor for forward-looking statements.¹⁵⁶ As we did in connection with our approach to foreign private issuers, we are not proposing any changes in this area for U.S. issuers that elect to use IFRS, although we are soliciting comments below. At this time, we believe the question warrants further consideration and, if appropriate, we may address through a separate rulemaking initiative.

Request for Comment

56. Should the Commission address the implications of forward-looking disclosure contained in a footnote to the financial statements in accordance with IFRS 7? For example, would some kind of safe harbor provision or other relief or statement be appropriate?

3. Disclosure of First-Time Adoption of IFRS in Form 10-K

As referenced above in Section IV.C., we are proposing that an eligible U.S. issuer that changes to IFRS disclose certain information related to that change in its

¹⁵⁶ See the 2007 Adopting Release, discussion at Section III.C.2.c.

annual report on Form 10-K covering the fiscal year for which IFRS financial statements are first filed. Because U.S. issuers have not previously been permitted to use a basis of financial reporting other than U.S. GAAP, we believe it is appropriate that an issuer provide disclosure related to a change in its basis of financial reporting prominently in its Form 10-K, such as at the beginning of the Business section.¹⁵⁷

Under our integrated disclosure system, disclosure requirements for Form 10-K are contained in Regulation S-K. To implement these disclosure requirements in Form 10-K, we are proposing to amend Item 101 "Business" in Regulation S-K by adding a paragraph (i). Under the proposed Item 101(i), an issuer that changes the comprehensive set of accounting principles used in preparing its primary financial statements to IFRS must prominently disclose the following in its first annual report on Form 10-K that uses IFRS:

- The financial statements are prepared using IFRS;
- The reasons for the change;
- The corporate governance processes followed in electing to make the change (including whether a shareholder vote was held and whether the company's board of directors and audit committee considered the matter); and
- The date the issuer submitted its request to the staff demonstrating that it met the criteria to change to IFRS and the date the staff issued its letter of no objection.

Under proposed Item 101(i), similar disclosure relating to the first three items above would be required from any IFRS issuer that subsequently chose to revert back to

¹⁵⁷ We have not proposed amendments to Form 20-F to require similar disclosure from foreign private issuers that adopt IFRS for the first time because foreign private issuers have previously been permitted to change their basis of financial reporting and because a foreign private issuer's change to IFRS in many cases will be mandatory.

U.S. GAAP. That disclosure would be included in the annual report on Form 10-K for the year in which the issuer reverted to U.S. GAAP.

Request for Comment

57. Is the proposed disclosure in Form 10-K sufficient in prominence and content to indicate to investors that the issuer has changed its basis of financial reporting from that used in previous filings? If not, what further disclosure should be provided, and where? Should we require that an issuer disclose the criteria under which it is eligible to file IFRS financial statements? Should issuers be required to reference the letter of no objection in their first IFRS filing?
58. Should we amend Form 8-K to require "forward-looking" disclosure relating to an issuer's consideration of whether it will file IFRS financial statements in the future? If so, what type of information should be disclosed, and at what point in time prior to the issuer actually filing IFRS financial statements? Would a requirement to make such forward-looking disclosure have any impact on an issuer's decision to adopt IFRS? If so, what would the effect be?

4. Other Considerations Relating to IFRS and U.S. GAAP Guidance

The Commission recognizes that a U.S. issuer that files financial statements prepared in accordance with IFRS as issued by the IASB may nevertheless pursuant to the application of IAS 8 look for guidance from Commission sources other than rules and regulations, including Accounting Series Releases ("ASRs") and Financial Reporting

Releases ("FRs").¹⁵⁸ In addition, such an issuer may look to the guidance that the Commission staff provides in Staff Accounting Bulletins ("SABs"), and, if the issuer is engaged in certain lines of business, various Industry Guides.¹⁵⁹ No changes to such guidance are planned. We believe that an issuer that prepares its financial statements in accordance with IFRS as issued by the IASB, and its auditor, would continue to be required to follow any Commission guidance that relates to auditing issues.¹⁶⁰ An issuer using IFRS as issued by the IASB, although not required to follow U.S. GAAP guidance, may find reference to FRs, ASRs, SABs, and Industry Guides and other forms of guidance useful in the application of IAS 8.¹⁶¹

Request for Comment

59. Are there issues on which further guidance for IFRS issuers would be necessary and appropriate?

¹⁵⁸ FRs contain the Commission's views and interpretations relating to financial reporting. Prior to 1982, the Commission published its views and interpretations relating to financial reporting in Accounting Series Releases (ASRs). In FR 1, Adoption of the Financial Reporting Release Series and Codification of Currently Relevant ASRs, the Commission codified certain previously issued ASRs on financial reporting matters.

¹⁵⁹ Staff Accounting Bulletins reflect the Commission staff's views regarding accounting-related disclosure practices. They represent interpretations and policies followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the federal securities laws. Industry Guides serve as expressions of the policies and practices of the Division of Corporation Finance. They are of assistance to issuers, their counsel and others preparing registration statements and reports, as well as to the Commission's staff. SABs and Industry Guides are not rules, regulations, or statements of the Commission. They have not been issued pursuant to notice and comment rulemaking, and the Commission has neither approved nor disapproved these interpretations.

¹⁶⁰ Issuers are required to have audits conducted in accordance with the standards of the PCAOB regardless of the comprehensive basis of financial reporting they use to prepare their financial statements.

¹⁶¹ The provisions of IAS 8 are described above in footnote 76.

E. Financial Statements of Other Entities under Regulation S-X

Several rules under Regulation S-X relate to financial statements of other entities that an issuer must include in its filings. This section describes how these rules would apply to an issuer that files IFRS financial statements.

1. Application of the Amendments to Rules 3-05, 3-09 and 3-14

Under Rules 3-05, 3-09 and 3-14 of Regulation S-X, an issuer, in certain circumstances, must include the financial statements of another entity in its filings.¹⁶² Although we are not proposing specific amendments to those rules as part of this rulemaking initiative, as noted in proposed Rule 13-03(a), the amendments we are proposing in this release will apply equally in the application of Rules 3-05, 3-09 and 3-14.

a. Significance Testing

Under Rules 3-05, 3-09 and 3-14, an issuer is required to include the financial statements of another entity if the entity meets certain significance tests.¹⁶³ If the significance thresholds under Rule 3-05, 3-09 or 3-14 are met, then the issuer must provide on a separate basis audited annual financial statements of the subject entity.

Significance testing under Rule 1-02(w) has historically been performed using U.S. GAAP amounts. As part of our adopting release accepting IFRS financial

¹⁶² Rule 3-05 specifies the requirements for financial statements of businesses acquired or to be acquired. Rule 3-09 specifies the requirements for financial statements of unconsolidated majority-owned subsidiaries and 50% or less owned investments accounted for by the equity method. Rule 3-14 specifies requirements for financial statements of real estate operations (properties) acquired or to be acquired.

¹⁶³ An entity is significant to the issuer under Rules 3-05 and 3-09 if the issuer's investment in the entity exceeds 20% of the issuer's total assets, the entity's income (as defined) exceeds 20% of the issuer's corresponding income, or (for Rule 3-05 only) the entity's total assets exceed 20% of the issuer's total assets. Rule 3-14 significance is based on the 10% level in Rule 1-02(w).

statements by foreign private issuers without reconciliation to U.S. GAAP, we amended Rule 1-02(w) to clarify that a foreign private issuer that prepares its financial statements in accordance with IFRS as issued by the IASB should conduct significance testing using amounts determined under IFRS as issued by the IASB. We are proposing to revise Rule 1-02(w) to clarify that an IFRS issuer that prepares its financial statements in accordance with IFRS as issued by the IASB also should perform significance testing using amounts determined under IFRS as issued by the IASB.

Requirements for significance testing are governed by the financial statements of the issuer. Generally, if an issuer prepares its own financial statements using IFRS as issued by the IASB, that issuer would perform the significance tests under Rules 3-05, 3-09 and 3-14 using IFRS as issued by the IASB, regardless of the basis of financial reporting used by the other entity.

b. Separate Historical Financial Statements of Another Entity Provided under Rule 3-05, 3-09 or 3-14

Generally, the historical financial statement requirements for an acquired business or investee under Rule 3-05, 3-09 or 3-14 are governed by the status of that entity, and the burden of providing the financial statements of a non-issuer entity would be no higher than if it were the issuer. Under the adopting release accepting IFRS financial statements by foreign private issuers without reconciliation to U.S. GAAP, we permit foreign and domestic issuers to file financial statements under Rules 3-05 and 3-09 for foreign businesses under IFRS as issued by the IASB without reconciliation to U.S. GAAP. In addition, in applying the proposed amendments, if an IFRS issuer or foreign private issuer is required to file financial statements under Rule 3-05, 3-09, or 3-14 for any entity, whether domestic or foreign, whose audited financial statements are in accordance

with IFRS as issued by the IASB, those financial statements would be acceptable in a Commission filing.¹⁶⁴ For example, IFRS issuers and foreign private issuers that acquire a “significant” business, domestic or foreign, under Rule 3-05 would be permitted, under the proposed rules, to include the acquiree’s financial statements prepared in accordance with IFRS as issued by the IASB. The same would be true for the financial statements of a “significant” investee under Rule 3-09 or acquired property under Rule 3-14. To clarify this ability to use IFRS as issued by the IASB for any financial statements under Rule 3-05, 3-09 or 3-14, we are proposing to amend Rule 4-01(a) of Regulation S-X to clarify that such an option is available.

2. Financial Statements Provided under Rule 3-10

Rule 3-10 of Regulation S-X specifies financial statement requirements for issuers of guaranteed securities and guarantors.¹⁶⁵ Generally, under this rule both the issuer of the guaranteed security and the guarantor must follow the financial statement requirements of a registrant. If both entities were IFRS issuers, we would accept the financial statements prepared in accordance with IFRS as issued by the IASB.

However, Rule 3-10 permits modified reporting by subsidiary issuers of guaranteed securities and subsidiary guarantors. Separate financial statements need not be filed for subsidiaries meeting the applicable conditions contained in Rules 3-10(b) through 3-10(f). Instead, condensed consolidating financial information is presented in the parent company’s reports in an additional audited footnote to the financial statements. A parent issuer or guarantor that presents consolidated financial statements under IFRS as

¹⁶⁴ The entity need not meet the proposed definition of “IFRS issuer.”

¹⁶⁵ A guarantee of a registered security is itself a security, so a guarantor of a registered security is itself considered an issuer of a security. See Securities Act Section 2(a)(1).

issued by the IASB would present the condensed consolidating financial information on the basis of IFRS as issued by the IASB.¹⁶⁶ We do not believe that any revision to Rule 3-10 is necessary to implement the acceptance of financial statements prepared using IFRS as issued by the IASB, other than extending the reference to the articles of Regulation S-X to incorporate Article 13.

3. Financial Statements Provided under Rule 3-16

Rule 3-16 specifies the requirement for financial statements of affiliates of an issuer whose securities collateralize an issue registered or being registered. The requirement to provide separate financial statements under Rule 3-16 is based upon whether or not the securities are a substantial portion (as defined) of the collateral for the class of securities registered or being registered.¹⁶⁷ Affiliates whose securities collateralize a security registered or being registered are not themselves issuers, but the issuer whose securities are collateralized (ordinarily the parent company) must file the financial statements of those affiliates under Rule 3-16 "that would be required if the affiliate were a registrant." The affiliates will ordinarily be consolidated subsidiaries of the parent/issuer. If the parent/issuer is an eligible IFRS issuer, then we would accept financial statements prepared in accordance with IFRS as issued by the IASB for both the parent/issuer and the Rule 3-16 affiliates. If the parent/issuer files U.S. GAAP financial statements, we would expect the Rule 3-16 financial statements to be U.S. GAAP as well. We do not believe that any revision to Rule 3-16 is necessary to implement the

¹⁶⁶ We took a similar approach in our adopting release accepting IFRS financial statements by foreign private issuers without reconciliation to U.S. GAAP.

¹⁶⁷ Substantial portion of the collateral is defined in Rule 3-16(b) as "the aggregate principal amount, par value, or book value of the [affiliate's] securities as carried by the registrant, or the market value of such securities, whichever is the greatest, equals 20 percent or more of the principal amount of the secured class of securities."

acceptance of financial statements prepared in accordance with IFRS as issued by the IASB.

F. Pro Forma Financial Statements Provided under Article 11

Under Article 11 of Regulation S-X, issuers are required to prepare unaudited pro forma financial information that is intended to give effect as if a particular transaction, such as a significant recent or probable business combination, had occurred at the beginning of the financial period. Requirements for pro forma financial information under Article 11 continue to be governed by the financial statements of the issuer rather than of the acquiree or other entity, as the pro forma results must be presented using the same basis of financial reporting as the issuer. Similarly, these rules do not impose a higher presentation burden on pro forma financial information than would be imposed on the historical financial statements of the issuer. We are not proposing to amend Article 11, but the proposed amendments will apply in the application of Article 11. Accordingly, if the proposed amendments are adopted, an IFRS issuer would prepare the pro forma financial information by presenting its IFRS results and converting the financial statements of the business acquired (or to be acquired) into IFRS as issued by the IASB.¹⁶⁸

Request for Comment

60. Is the application of the proposed rules to the preparation of financial statements and financial information described in Sections V.D and V.E above sufficiently clear? If not, what areas need to be clarified? Are any

¹⁶⁸ We took a similar approach in our adopting release accepting IFRS financial statements by foreign private issuers without reconciliation to U.S. GAAP.

further changes needed for issuers that prepare their financial statements using IFRS as issued by the IASB?

61. Under the proposed rules, an IFRS issuer or foreign private issuer may file financial statements of an entity under Rule 3-05, 3-09 or 3-14 prepared in accordance with IFRS as issued by the IASB even though the entity does not meet the definition of "IFRS issuer." Should we also accept financial statements required under Rule 3-05, 3-09 or 3-14 prepared in accordance with IFRS as issued by the IASB without regard to the status of the issuer as an IFRS issuer or foreign private issuer? Should our acceptance depend on characteristics of the entity whose financial statements are being provided, such as that the entity already prepares IFRS financial statements or the entity principally operates outside the United States?
62. Are there other rules in Regulation S-X that should be specifically amended to accommodate our proposal? If so, how would the application of those rules be unclear if there were no changes to those rules, and what changes would be suggested in order to make them clear?

G. Industry Specific Matters

1. Disclosure Pursuant to Industry Guides

Companies that are engaged in certain lines of business are subject to various Industry Guides.¹⁶⁹ The Commission is not proposing any specific amendments with respect to information required to be disclosed pursuant to the Industry Guides by IFRS

¹⁶⁹ Industry Guides serve as expressions of the policies and practices of the Division of Corporation Finance. They are of assistance to issuers, their counsel and others preparing registration statements and reports, as well as to the Commission's staff. See 17 CFR 229.801(a) - (g) and 229.802(a) - (d) and (e).

issuers and believes that IFRS issuers that transition to IFRS and to which these Guides apply do not need a general accommodation.

Several of the Industry Guides contain specific references to U.S. GAAP pronouncements. Although we are not proposing to amend the Industry Guides, IFRS issuers should respond to those provisions in a manner consistent with the approach taken in the proposed Rule 13-03 of Regulation S-K. Specifically, an IFRS issuer that is subject to the Industry Guides, in responding to Industry Guide items that refer to U.S. GAAP pronouncements, should provide disclosure that satisfies the objective of the Industry Guide disclosure requirements. In providing such disclosure, an IFRS issuer would not need to repeat information contained in its IFRS financial statements.

Industry Guide disclosure is intended to provide a "track-record" of trend information such as loan quality information for banks providing disclosure under Industry Guide 3 or property casualty loss reserve development under Industry Guide 6. The Commission recognizes that transition to IFRS will impact the Industry Guide disclosure of IFRS issuers for the first time, who may not have available prior years of Industry Guide information prepared under IFRS as issued by the IASB. Although the staff does not intend to amend the Industry Guides, the staff believes and intends to apply the Industry Guides such that a first-time adopter of IFRS who relies on the amendments, if adopted, would be consistent with existing Industry Guides if it provides three years of Industry Guide information under IFRS as issued by the IASB, with information provided under U.S. GAAP to cover earlier years as called for by the Industry Guides, as applicable.

Under Industry Guide 5 "Preparation of Financial Statements Relating to Interest in Real Estate Limited Partnerships," real estate limited partnerships provide prior performance information of programs sponsored by the general partner and its affiliates in tabular form. The tables containing this information may encompass numerous affiliates of the General Partner, and often are quite voluminous. For issuers that prepare their financial statements in accordance with IFRS as issued by the IASB, the staff would permit this prior performance information to continue to be presented in U.S. GAAP. The General Partner and affiliated partnerships need not convert their prior performance information to IFRS if the partnership is otherwise eligible to use IFRS under the proposed rules.

2. Disclosure from Oil and Gas Companies under FAS 69

Pursuant to either earlier Commission rules or more recent FASB standards, public companies with significant oil and gas activities have been required to disclose reserve and other information relating to those activities. In November 1982, the FASB adopted FAS 69 "Disclosures about Oil and Gas Producing Activities," which establishes a comprehensive set of disclosures for oil and gas producing activities. Under this standard, public companies with such significant activities are required to disclose unaudited supplementary information relating to proved oil and gas reserves, and capitalized costs relating to oil and gas producing activities. As a result of the FASB's adoption of FAS 69, the Commission initially suspended the effectiveness of a rule under Regulation S-X calling for substantially similar information,¹⁷⁰ and then deleted the rule

¹⁷⁰ The requirement was found in former Rule 4-10(k) of Regulation S-X. The application of this rule was suspended in Release No. 33-6444 (December 15, 1982) [47 FR 57911 (December 29, 1982)].

altogether.¹⁷¹ The Commission noted that, in light of the FASB standard, its own earlier rule requiring this disclosure was duplicative and no longer necessary.

As we did with foreign private issuers when we provided the option to provide IFRS financial statements without a reconciliation to U.S. GAAP, we are proposing to continue to require an IFRS issuer to provide the information called for under FAS 69 even though the company is preparing financial statements in accordance with IFRS as issued by the IASB. See proposed Rule 13-03(d) of Regulation S-X. The nature of the information provided under FAS 69 is not in the nature of U.S. GAAP information but rather is supplementary information included as an unaudited footnote to the audited financial statements. We believe that the information required by FAS 69 is useful to investors and would not otherwise be required to be disclosed under IFRS.

Request for Comment

63. Should an IFRS issuer be required to continue to comply with the disclosure requirements of FAS 69? What alternatives may be available to elicit the same or substantially the same disclosure? Proposed Rule 13-03(d) of Regulation S-X is modeled on an instruction relating to FAS 69 in Item 18 of Form 20-F. Does this proposed rule need to be modified in any way to more clearly require filers to provide information required by FAS 69?

¹⁷¹ Release No. 33-6818 (February 17, 1989) [54 FR 8202 (February 27, 1989)] proposed the deletion which was adopted in Release No. 33-6959 (September 17, 1992).

H. Application of the Proposed Amendments to Other Forms, Rules and Schedules

I. Application of Proposed Amendments to Exempt Offerings

The proposed amendments, if adopted, would apply to financial statements filed with the Commission by an eligible IFRS issuer that are included in any registration statement filed under the Securities Act or the Exchange Act, periodic or other report filed under Section 13(a) or 15(d) of the Exchange Act and any proxy or information statement pursuant to Section 14 of the Exchange Act. An IFRS issuer that would be eligible to file with the Commission financial statements prepared in accordance with IFRS under the proposed rules also would be able to use those financial statements when conducting an offer or sale of securities that is exempt from registration under the Securities Act, where the exemption relied upon requires that financial statements be furnished to investors.¹⁷² We believe allowing an eligible IFRS issuer to use IFRS financial statements in its Commission filings while disallowing the use of those financial statements in an exempt offering would be unduly burdensome to issuers and inconsistent with our proposed acceptance of the use of IFRS as issued by the IASB in the United States capital market. However, an issuer to which proposed Article 13 of Regulation S-X would not apply would not be able to use financial statements prepared in accordance with IFRS as issued by the IASB in exempt offers or sales of securities where the exemption relied upon requires that financial statements be furnished to investors

¹⁷² For example, a reporting issuer that makes an offering of over \$7,500,000 under Regulation D of the Securities Act (Sections 230.501 - 230-508) must furnish purchasers with information contained in any reports filed by the issuer under Sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act. See Rule 502(b)(2)(ii)(C).

(including if that issuer would have been permitted to file IFRS financial statements solely for purposes of Rules 3-05, 3-09 and 3-14 pursuant to proposed Rule 4-01(a)(4)).

2. References to FASB Pronouncements in Form 8-K

The proposed amendments, if adopted, would apply to current reports on Form 8-K filed pursuant to Rule 13a-11 or Rule 15d-11 under the Exchange Act and for reports of nonpublic information required to be disclosed by Regulation FD.¹⁷³ The proposed amendments also would apply to filings made pursuant to Rule 425 under the Securities Act, regarding written communications related to business combination transactions, or Rules 14a-12(b) or Rule 14d-2(b) under the Exchange Act relating to soliciting materials and pre-commencement communications pursuant to tender offers.

Form 8-K contains several items that contain references to specific standards included in U.S. GAAP. We are proposing to add instructions to those items to provide references to specific IFRS standards to which an IFRS issuer would refer instead of the U.S. GAAP standard. Specifically, we are proposing to add a new sentence at the end of instruction 4 to Item 2.04 to refer to IAS 37 "Provisions, Contingent Liabilities and Contingent Assets," as may be modified, supplemented or succeeded. We also are proposing to add a new instruction to Item 2.05 to refer to IFRS 5, "Non-current Assets Held for Sale and Discontinued Operations," as may be modified, supplemented or succeeded. Finally, we are proposing to add a new instruction to Item 4.02 to refer to IAS 8 "Accounting Policies, Changes in Accounting Estimates and Errors," as may be modified, supplemented or succeeded.

¹⁷³ 17 CFR 243.100 and 243.101.

This proposed reference to specific IFRS standards in Form 8-K differs from the general approach in proposed Rule 13-03(c), where we are not proposing to identify specific IFRS standards that an IFRS issuer should look to when responding to item requirements that make reference to specific U.S. GAAP pronouncements.¹⁷⁴ We believe that providing the specific IFRS standard is necessary as the occurrence of an event specified in Items 2.04, 2.05 and 4.02 of Form 8-K requires the U.S. issuer to file a Form 8-K in addition to disclosing these events.

3. Application of IFRS to Tender Offer and Going-Private Rules

Instructions 6 and 8 to Item 10 of Schedule TO, the tender offer statement under the Exchange Act,¹⁷⁵ contain references to a reconciliation to U.S. GAAP. Instructions 1 and 2 to Item 13 of Schedule 13E-3,¹⁷⁶ the transaction statement under Section 13(e) of the Exchange Act, also contain references to a reconciliation to U.S. GAAP. In order to implement fully the proposed use of IFRS by eligible U.S. issuers, we are proposing conforming amendments to these instructions of Schedule TO and Schedule 13E-3 to clarify that issuers eligible to use IFRS financial statements may use those financial statements in Schedule TO and Schedule 13E-3 without a reconciliation to U.S. GAAP.

Request for Comment

64. Is the guidance in this proposal sufficient to avoid any ambiguity about the use of IFRS financial statements in exempt offerings? If not, what

¹⁷⁴ See Section V.B.2., above.

¹⁷⁵ 17 CFR 240.14d-100.

¹⁷⁶ 17 CFR 240.13e-100.

additional clarification is needed? Is any revision to forms or rules necessary?

65. Are there other rules or forms under the Securities Act or the Exchange Act that should be specifically amended to permit the filing of financial statements prepared in accordance with IFRS as issued by the IASB? If so, how would the rules or forms be unclear if there were no changes to those forms, and what changes would be suggested in order to make them clear?

VI. GENERAL REQUEST FOR COMMENTS

We request and encourage any interested persons to submit comments regarding:

- the proposed changes that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the proposals contained in this release.

In addition to providing comments on these matters, we encourage interested parties to provide comment on broader matters related to the development of a single set of globally accepted accounting standards, for example:

66. Are there other considerations in addition to those discussed in this release that the Commission should consider as part of the proposed amendments to permit the limited use of IFRS or its future decision regarding the use of IFRS by U.S. issuers?

We request comment from the point of view of registrants, investors, accountants, accounting standard setters, users of financial statements and other market participants. With regard to any comments, we note that such comments are of greatest assistance to our

rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

VII. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").¹⁷⁷ We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.¹⁷⁸ The titles for the collection of information are:¹⁷⁹

- (1) "Form 10-K" (OMB Control No. 3235-0063);
- (2) "Form 10-Q" (OMB Control No. 3235-0070);
- (3) "Form 8-K" (OMB Control No. 3235-0060);
- (4) "Form S-4" (OMB Control No. 3235-0324);
- (5) "Schedule 14A" (OMB Control No. 3235-0059);
- (6) "Schedule 14C" (OMB Control No. 3235-0057);
- (7) "Regulation S-X" (OMB Control No. 3235-0009);
- (8) "Regulation S-K" (OMB Control No. 3235-0071);

¹⁷⁷ 44 U.S.C. 3501 *et seq.*

¹⁷⁸ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

¹⁷⁹ Certain provisions of the proposed amendments to Regulation S-X could also affect collection of information requirements within the meaning of the PRA for Form S-1 under the Securities Act and Form 10 under the Exchange Act. However, all of the issuers that currently would be eligible to use IFRS accounting if these proposals were adopted are issuers that are eligible to use alternative forms in lieu of Forms S-1 and 10 that would allow an issuer to incorporate the Regulation S-X disclosures from the issuer's Exchange Act periodic reports. We reviewed the types of filings made by a sample of the issuers that we estimate are currently eligible over a three year period, and none of the issuers filed a Form S-1 or Form 10 over this time. Accordingly, we do not believe the proposed amendments would impose any new recordkeeping or information collection requirements, or other collections of information requiring OMB's approval for Forms S-1 and 10.

- (9) "Regulation C" (OMB Control No. 3235-0074); and
- (10) "Request for a Letter of No Objection to use IFRS"

The regulations, schedules and forms were adopted under the Securities Act and the Exchange Act and set forth the disclosure requirements for annual, quarterly and current reports; registration statements; and proxy and information statements filed by U.S. issuers to help shareholders make informed voting and investment decisions. The hours and costs associated with preparing, filing and sending the form constitute reporting and cost burdens imposed by each collection of information. The Request for a Letter of No Objection to use IFRS would constitute a new collection of information under the Exchange Act to be used by issuers that would be eligible to switch to IFRS accounting. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the proposed amendments by eligible U.S. issuers opting to file their financial statements in accordance with IFRS would be mandatory. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the information disclosed.

As discussed in more detail above, we are proposing two alternatives that would allow certain U.S. issuers to file financial statements in accordance with IFRS, rather than U.S. GAAP, for use in their periodic and current reports made under Section 13(a) or 15(d) of the Exchange Act; Schedules 14A and 14C under the Exchange Act, as well as in registration statements under the Securities Act and Exchange Act. Under Proposal A, eligible U.S. issuers would be allowed to file their financial statements in accordance with IFRS and would need to include a one-time reconciliation from certain U.S. GAAP

financial statements to IFRS in accordance with IFRS 1. Under Proposal B, eligible U.S. issuers would be allowed to file their financial statements in accordance with IFRS but would be required to provide a reconciliation from IFRS financial statements to U.S. GAAP for each of the three years presented.

Under both Proposal A and Proposal B, once an issuer determines that it is eligible to use IFRS accounting and seeks to use IFRS accounting, it would first need to submit a Request for a Letter of No Objection to use IFRS describing its analysis in determining its eligibility to use IFRS accounting. In addition, an eligible issuer would need to disclose in its first Form 10-K filing using IFRS accounting that its financial statements are prepared using IFRS as issued by the IASB. As described in Section V.D.3., the issuer also must disclose the reasons for the change to IFRS, the corporate governance processes by which the issuer decided to transition to IFRS, the date of the issuer's submission to the Commission staff requesting a letter of no objection and the date such a letter was issued by the Commission staff.

B. Burden and Cost Estimates Related to the Proposed Amendments

We anticipate that the amendments would increase the burdens and costs for U.S. issuers that switch from U.S. GAAP to IFRS accounting. We estimated the average number of hours an issuer would spend completing the forms and the average hourly rate for outside professionals. In deriving this estimate, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the complexity of their organizations, the nature of their current accounting procedures, the types of transactions they enter into and the approach they take in adopting IFRS. We believe that some issuers will experience costs in excess of this average in the first year

of compliance with proposals and some issuers may experience less than the average costs. As further discussed below, we also believe that costs will decrease after the first year of compliance due to the extent of effort required for first-time adoption of IFRS as compared to subsequent years. We have considered all of these factors in formulating our proposed estimates.

We derived the burden hour estimates for the forms and schedules by estimating the total amount of time that it would take an issuer to transition to presenting its financial statements in accordance with IFRS. The estimates include the time and the cost of in-house preparers, reviews by executive officers, in-house counsel, outside counsel, independent auditors and members of the audit committee.¹⁸⁰ Our estimates are based on the number of filings, over the past three years, received from a selection of issuers with characteristics similar to those that we currently anticipate may be eligible to rely on the proposals, if adopted.

The estimate is based in part on data published in a report on IFRS implementation in the E.U. prepared by the Institute of Chartered Accountants of England and Wales.¹⁸¹ In this report, the ICAEW estimated that the typical cost incurred

¹⁸⁰ Consistent with other recent rulemakings, we estimate an hourly rate of \$400 based on our discussions with several private law firms as the cost to companies for the services of outside professionals retained to assist in the preparation of these disclosures. For Securities Act registration statements, we also consider additional reviews of the disclosure by underwriters and their counsel.

¹⁸¹ See "EU Implementation of IFRS and Fair Value Directive" by the Institute of Chartered Accountants of England and Wales ("ICAEW"), available at http://www.icaew.com/index.cfm/route/145392/icaew_ga/en/Technical_amp_Business_Topics/Topics/Accounting_and_corporate_reporting/em_IFRS_one_year_on_ICAEW_assesses_implementation_em. The ICAEW published the report for the European Commission on the first year of implementation IFRS in the E.U. The report evaluates the implementation of IFRS across E.U. industries, market places and member states, and includes an estimate of implementation costs based on an on-line survey of approximately 100 companies drawn from across most E.U. member states

The staff also used its own experience with IFRS to estimate the burden.

by a publicly traded company established in the E.U. to prepare its first IFRS consolidated financial statements was approximately 0.05% of the company's revenue. We estimated that the cost of IFRS transition under Proposal A would be 0.125% of revenue for the U.S. issuers that would be eligible to use IFRS accounting, and would be approximately 0.13% of revenue under Proposal B to reflect the additional U.S. GAAP reconciliation disclosure.¹⁸² We used a higher percentage of revenue to take into account our different filing obligations in the U.S., which require, among other things, issuers to include three years of audited financial statements, and our requirements related to internal controls over financial reporting.

Our annual burden estimates are also based on several other assumptions. First, we assumed that the transition from U.S. GAAP to IFRS by eligible issuers would be a multi-year process. Therefore, our PRA estimates represent the average annual burden over a three-year period. We estimated that the first-year burden would be greater than that for subsequent years, as a portion of the costs will reflect some one-time expenditures associated with making the transition from U.S. GAAP to IFRS, such as compiling documentation, preparing the Request for a Letter of No Objection to use IFRS and implementing new processes. We reduced the second-year estimates by 75% as compared to the first-year estimates to eliminate the one-time costs and to account for the fact that eligible issuers applying IFRS should become more efficient at preparing their financial statements after the first year as the process becomes more routine. We adjusted the third-year estimates by a 90% reduction in costs as compared to the second-

¹⁸² The Commission staff estimated the cost based on revenues reported by a selection of U.S. issuers with characteristics similar to those issuers that we currently anticipate may be eligible to rely on the proposals, if adopted.

year costs to reflect continuing improvements in efficiency with reporting under IFRS.¹⁸³

This reflects the assumption that the costs of transition would likely have been largely reduced by the third year of actual reporting.

Second, we assumed that 110 U.S. issuers, representing the approximate minimum number of those presently eligible to use IFRS accounting under the proposals, would elect to switch from U.S. GAAP to IFRS. This assumption is conservative, in that it is unlikely that all of those issuers would elect to file their financial statements in accordance with IFRS. We do not know the actual number of eligible issuers that would choose to switch to IFRS accounting. We also acknowledge that eligibility extends beyond this estimated group, which represents a minimum of eligible issuers under the proposals. We request comment and supporting empirical data, for purposes of the PRA, on the number of eligible issuers, and the number that would elect to switch to IFRS accounting.

Third, we assumed that there would be a direct correlation between the extent of the burden and the size of the eligible issuer, with the burden increasing commensurate with the size of the company.

¹⁸³ In developing our annual burden estimates we included many costs that will reflect one-time expenditures associated with making the transition from U.S. GAAP to IFRS by large companies. Activities giving rise to these costs include, but are not limited to, identifying differences between U.S. GAAP and IFRS, determining accounting policies under IFRS, maintaining systems for financial reporting under both U.S. GAAP and IFRS for up to three years in order to present comparative IFRS information in the first Form 10-K including IFRS financial statements, implementing new accounting systems and the associated changes to internal controls over financial reporting and disclosures, and drafting financial statement disclosures under IFRS. Our estimates of the annual burden for years 2 and 3 represent the continuation of many of these activities but at significantly lower levels, as refinements are made to IFRS reporting. These refinements include improvements in the accounting and internal control systems and to financial statement disclosures. The decreases in the annual burden estimates between years 1 and 2 (75%) and between years 2 and 3 (90%) were based on the collective experience of the staff in working with and at preparers and audit firms in adopting new accounting standards, updating accounting policies, implementing new information technology systems and complying with internal control reporting requirements over multi-year periods. Comment on these and other PRA estimates are sought at the end of this PRA section.

Fourth, we assumed that substantially all of the burdens associated with the proposed amendments would be associated with Forms 10-K and 10-Q as these would be the primary forms for which IFRS financial statements would be prepared and presented, and that any IFRS financial statements that would be required in Form S-4 and Schedules 14A and 14C would be incorporated from Forms 10-K and 10-Q.

Table 1 below illustrates the total annual compliance burden of the collection of information in hours and in cost under Proposal A for annual reports; quarterly reports; proxy and information statements; Form S-4 under the Securities Act, the Request for a Letter of No Objection to use IFRS; and Regulations S-X, S-K and C. Table 2 below illustrates the total annual compliance burdens under Proposal B for the same collections. The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity would spend completing the different forms and schedules. For Exchange Act reports, the proxy and information statements, and the Request for a Letter of No Objection to use IFRS, we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of \$400 per hour. For Form S-4, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of \$400 per hour. There is no change to the estimated burden of the collections of information entitled "Regulation S-K," "Regulation S-X," and "Regulation C" because the burdens that these regulations impose are reflected in our revised estimates for the forms. The portion of the

burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

Table 1. Incremental Paperwork Burden under Proposal A:¹⁸⁴

	Number of Responses (A)	Burden Hours/Form (B)	Total Burden Hours (C)=(A)*(B)	75% Company (D)=(C)*0.75	25% Professional (E)=(C)*0.25	Professional Costs (F)=(E)*\$400
10-K	110	50,636	5,570,004	4,177,503	1,329,501	\$557,000,400
10-Q	330	4,134	1,364,098	1,023,073	341,024	\$136,409,780
8-K	880	110	96,996	72,747	24,249	\$9,699,615
Sch. 14A	108	1	108	81	27	\$10,800
Sch. 14C	2	1	2	1.5	0.5	\$200
Form S-4	6	1	6	4.5	1.5	\$600
No Objection Request	110	50	5,500	4,125	1,375	\$550,000
Reg. S-K	N/A	1	1	N/A	N/A	N/A
Reg. S-X	N/A	1	1	N/A	N/A	N/A
Reg. C	N/A	1	1	N/A	N/A	N/A
Total	1,546		7,036,717	5,277,535	1,696,178	\$703,671,395

Table 2. Incremental Paperwork Burden under Proposal B:

	Number of Responses (A)	Burden Hours/Form (B)	Total Burden Hours (C)=(A)*(B)	75% Company (D)=(C)*0.75	25% Professional (E)=(C)*0.25	Professional Costs (F)=(E)*\$400
10-K	110	55,301	6,083,125	4,562,323	1,520,781	\$608,312,454
10-Q	330	4,134	1,364,098	1,023,073	341,024	\$136,409,780
8-K	880	110	96,996	72,747	24,249	\$9,699,615
Sch. 14A	108	1	108	81	27	\$10,800
Sch. 14C	2	1	2	1.5	0.5	\$200
Form S-4	6	1	6	4.5	1.5	\$600
No Objection Request	110	50	5,500	4,125	1,375	\$550,000
Reg. S-K	N/A	1	1	N/A	N/A	N/A
Reg. S-X	N/A	1	1	N/A	N/A	N/A
Reg. C	N/A	1	1	N/A	N/A	N/A
Total	1,546		7,549,838	5,662,355	1,887,458	\$754,983,449

¹⁸⁴ The number of responses was calculated by examining the actual number of forms and schedules filed over the last three fiscal years by a sample of U.S. issuers with characteristics similar to those of issuers that may be eligible to request IFRS accounting use under the rule proposals. Our PRA estimates also include an estimated 0.5 hour burden in the forms and schedules to account for the filing by an eligible issuer of one-time disclosure that an issuer would have to disclose, such as, when the decision to file IFRS financial statements was made, the reasons for the change, and the corporate governance processes by which the issuer decided to transition to IFRS. Figures in both Tables have been rounded to the nearest whole number.

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- evaluate the accuracy of our estimates of the burden of the proposed collections of information;
- determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-27-08. Requests for materials submitted to the OMB by us with regard to

these collections of information should be in writing, refer to File No. S7-27-08 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street NE, Washington DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

VIII. COST-BENEFIT ANALYSIS

We are proposing amendments to existing regulations, rules and forms to accept financial statements from U.S. issuers meeting specific criteria ("eligible U.S. issuers") prepared in accordance with IFRS as issued by the IASB. Currently, financial statements that U.S. issuers file with the Commission must be prepared in accordance with U.S. GAAP. The amendments, if adopted, would therefore provide eligible U.S. issuers with an option to use IFRS in preparing financial statements for filing with the Commission. The amendments would apply to a registrant's financial statements contained in annual reports on Form 10-K, its quarterly reports on Form 10-Q, its proxy or information statements, and its financial statements included in Securities Act and Securities Exchange Act registration statements filed by U.S. issuers or, when applicable, included in a registration statement or reported pursuant to Rule 3-05, 3-09 or 3-14 of Regulation S-X.

Currently, there are approximately 12,000 U.S. issuers registered with the Commission. The proposed amendments would be available to only a limited number of U.S. issuers that operate in industry sectors in which IFRS is used more than any other set of standards. Specifically, the eligible U.S. issuers are among the top 20 listed companies

worldwide, as measured by market capitalization, in any industry in which IFRS is used more than any other basis of financial reporting to prepare financial statements for the public capital markets. For example, if 6 companies among the top 20 by market capitalization in an industry reported in IFRS, 4 reported in U.S. GAAP and the other 12 reported in 4 different bases of accounting among them (and no other basis of financial reporting was used by more than 5 companies), then the 4 U.S. issuers among the top 20 in market capitalization in this industry would each be eligible to use IFRS.

We estimate that an approximate minimum of 110 issuers, accounting for approximately 12% of total U.S. market capitalization as of December 2007, would be eligible to be an "IFRS issuer" as we propose to define it. For reasons described in Section IV, these amounts represent the estimated lower bounds on current eligibility. Additionally, in the future, we expect both the number of eligible issuers and the portion of total U.S. market capitalization to increase. Several countries have announced plans to require IFRS financial statements from their listed companies, and others are considering this step. Overall trends point to the continuing increase in use of IFRS in preference to other bases of financial reporting. Further, relatively young foreign public equity markets, especially emerging markets, are developing at a faster rate than the mature U.S. equity market. Existing large foreign companies are increasingly listing in these markets. The result is that the number of foreign companies in an industry in the top 20 by market capitalization worldwide is growing over time. These companies are more likely to use IFRS than U.S. GAAP. These factors may result in an increase in the number of IFRS-using listed companies in the top 20 of each industry, by market capitalization, and a corresponding increase in eligible industries. Early adoption of IFRS by eligible U.S.

issuers would also increase eligibility.¹⁸⁵ For these reasons, both current and future levels of eligibility are subject to substantial uncertainty.

Only eligible U.S. issuers, which we expect would be limited in number, would be permitted to file financial statements with the Commission that are prepared in accordance with IFRS. Of this limited number of eligible issuers, we believe few would be in a position to file IFRS financial statements with the Commission immediately upon adoption of the proposed rules. This is because we understand that there are few U.S. issuers that have already prepared IFRS financial statements for any other purpose. In order to avail themselves of the IFRS alternative, eligible U.S. issuers would need to (1) make a submission to the Commission and obtain a letter of no objection as described in Section IV., (2) work through the first time adoption requirements of IFRS, (3) apply IFRS to the preparation of their financial statements for the entire period called for in our filings,¹⁸⁶ (4) make the necessary disclosures proposed in Section V.D.3., and (5) provide the supplemental U.S. GAAP information required under Proposal B, if adopted.

Our proposed rules to allow for the limited use of financial statements prepared using IFRS, if adopted, may foster the use of IFRS as issued by the IASB as a way of moving to a single set of globally accepted accounting standards. This effect would be strengthened by potential network effects of the proposed amendments: the more issuers that use IFRS as issued by the IASB, the greater the incentive for other issuers to do so.

¹⁸⁵ Under the proposed rules, issuers may choose from multiple industry classification systems. These systems classify companies differently, implying that companies may be eligible under one classification system, but not another. If companies in an industry that is eligible under one classification system switch to IFRS, this action may result in IFRS then being used more often than any other set of standards within a separate industry, under a different classification system. This effect results in an expansion of eligibility across industries as U.S. companies switch to IFRS.

¹⁸⁶ As noted, this period is generally three years.

The cost-benefit analysis analyzes separately three components of the proposed rules. The first component is the acceptance of IFRS financial statements from U.S. issuers under the proposed eligibility criteria. The second component is Proposal A, under which U.S. issuers adopting IFRS would only be required to provide the reconciling information from U.S. GAAP to IFRS called for under IFRS 1. The third component is Proposal B, under which U.S. issuers adopting IFRS would, in addition to providing the reconciling information called for under IFRS 1, disclose on an annual basis certain unaudited supplemental U.S. GAAP financial information covering the financial statements included in an annual report, including the current year.

A. Proposal for Early Use of IFRS by U.S. Issuers

1. Expected Benefits

In industries with a large number of companies using IFRS, allowing U.S. issuers to move to IFRS could help eliminate the principal source of accounting differences within the industry and potentially enhance comparability within the industry, improving the ability of investors to allocate capital. Thus, if a large percentage of companies use IFRS, allowing U.S. issuers to use IFRS could potentially benefit investors by improving the comparability of companies within the industry. If investors prefer IFRS and we do allow a switch to IFRS, then a U.S. issuer may experience an increased following in the marketplace. In contrast, if an industry consists primarily of companies using other bases of accounting, particularly bases of accounting that produce results more comparable to U.S. GAAP than to IFRS, allowing U.S. issuers to move to IFRS would not improve comparability – investors would still need to interpret multiple bases of accounting to perform within-industry comparisons.

Comparability within any set of accounting standards depends on consistent interpretation and application across jurisdictions. In particular, potential benefits of the proposed rule relating to increased within-industry comparability across jurisdictions depend on the consistent interpretation and application of IFRS. Such benefits may be limited to the extent that, for example, foreign companies use local variations of IFRS as issued by the IASB. Transparent disclosure about the nature and effect of variations from IFRS as issued by the IASB may offset some of these limitations to benefits in comparability. In recognition of the benefits associated with consistent application of IFRS, the proposed rule makes eligibility contingent on use of IFRS as issued by the IASB by a large number of companies in the industry.

The utility for investors of a set of accounting standards increases as the number of issuers using it increases. Investors reap a benefit from the network effects caused by numerous individual issuers each deciding to use IFRS. To the extent an issuer switching to IFRS does not internalize the full benefits of any such network effects, such issuer is expected to be less likely to switch even if eligible to do so.

The benefits associated with a set of accounting standards are dependent upon the quality of the standards, including how the standards are applied in practice. Factors that could affect the quality of IFRS are both institutional with respect to the IASC Foundation, including its governance and funding, as well as operational with respect to the actual standard setting process of the IASB. We recognize that our relationship with the IASB is currently less direct than our relationship with the FASB. Further, constituents of the IASB are greater in number and more varied than the constituents of the FASB. The result is that our view - based on U.S. constituents - is one of many views

that the IASB receives from around the world and considers when developing future standards. As the IASB must prioritize the needs of its various constituents, including investors, the timeliness in which improvements or development of standards occur of particular relevance or importance to our issuers and markets could be affected.

The use of IFRS by a limited number of U.S. issuers in industries in which IFRS is used more often than any other set of standards would provide some empirical basis for evaluating, among other things, the cost of converting to IFRS. Early adoption of IFRS will generate information for regulators, including the Commission, to be used in further decision making. Using IFRS would also give U.S. investors the opportunity to better understand and compare the financial reports of U.S. and foreign issuers if all of their reports are prepared in accordance with IFRS. This effect may not be immediate because it may take time for U.S. investors to become familiar with working with financial results reported under IFRS.

Over the longer term, if all other things are equal, the increased worldwide demand for the securities of U.S. issuers using IFRS could make their capital more efficiently priced. This effect is contingent on the degree to which foreign investors can use IFRS more effectively than U.S. GAAP. While U.S. GAAP is accepted worldwide, foreign investors may become increasingly familiar with IFRS and may be more likely to make their decisions to invest in U.S. issuers contingent on use of IFRS by those issuers. Currently, U.S. issuers, using exclusively U.S. GAAP, comprise a large portion of worldwide equity market capitalization, and foreign investors likely have a correspondingly thorough understanding of U.S. GAAP. This percentage may decrease

as foreign equity markets continue to develop, and it may become less advantageous for foreign investors to maintain this level of understanding.

Some U.S. issuers currently may use IFRS in addition to U.S. GAAP. For example, some foreign subsidiaries of U.S. issuers may be required to use IFRS. Under the proposed rules, any such issuer who is eligible and elects to adopt IFRS may need fewer resources to prepare Commission filings. Investors may benefit from this to the extent that an issuer can realize cost savings from having the parent company and all its subsidiaries use one basis of accounting.

As discussed in the 2007 Proposing Release and in Section III.B.4., above, IFRS is not as developed as current U.S. GAAP in certain areas. IFRS also is not as prescriptive as U.S. GAAP in certain areas and in certain areas permits a greater amount of allowable options than currently in U.S. GAAP.¹⁸⁷ This relatively lesser amount of guidance and greater optionality may increase issuers' ability to account for transactions or events in accordance with their underlying economics but may also result in the application of greater judgment in applying the standards.

2. Expected Costs

Under the proposed amendments, if adopted, the required financial information that investors in the U.S. capital markets receive from any U.S. issuer that avails itself of the option to use IFRS will differ from what it was previously. This may or may not

¹⁸⁷ As noted by CIFIIR in its Final Report:

From an international perspective, we note that IFRS currently permits numerous alternative accounting policies. While we acknowledge the IASB's efforts in reducing some of these alternative treatments, we nonetheless believe the SEC should encourage the IASB to [...] seek to eliminate alternatives as part of its standards-setting projects.

CIFIIR Final Report, at 51.

represent a loss or an increase of information in absolute terms. Whether there is an absolute loss or gain in information will depend upon whether IFRS financial statements yield more or less information, or higher or lower quality information, about a particular issuer than the U.S. GAAP financial statements yielded. The usefulness of any omitted U.S. GAAP information or any additional IFRS information depends on the extent to which the investor used the U.S. GAAP information provided, if at all, relative to the extent to which the investor will use the new IFRS information, if at all.

Investors are differently situated in the market and have varying levels of familiarity with IFRS. Consequently, investors may not all bear the costs or obtain the benefits from the proposed amendments equally. The extent to which a particular investor may use IFRS financial information will depend on many factors including the size and nature of the investor and the industry to which the issuer in question belongs.

The proposed amendments, if adopted, may lead to some costs to both investors and U.S. issuers. If the investor community prefers the information communicated by U.S. GAAP, then a U.S. issuer that uses IFRS as issued by the IASB to prepare financial statements may face a reduced following in the marketplace. Investors that are not sufficiently familiar with IFRS accounting standards may prefer U.S. GAAP. In addition, unfamiliarity with IFRS as issued by the IASB may have an adverse effect on investors' confidence in the reported results. At a minimum, for those investors who seek to understand accounting principles, they will bear incremental transitional learning costs to become familiar with IFRS. While many regard both U.S. GAAP and IFRS as high-quality sets of accounting standards, the relative quality of the financial information provided under each set of standards may differ. Potential costs involved in moving to or

remaining on a set of standards that provides relatively lower quality information may include reductions in liquidity and pricing efficiency of the issuers' securities. These effects are related to changes in information asymmetry between insiders and investors. Any potential changes in information asymmetry may also affect transaction costs for issuers in raising capital.

Companies may choose to adopt IFRS only after concluding the benefits justify the costs to their investors; alternatively, because of principal-agent problems inherent in corporate governance, companies may choose to adopt IFRS after concluding that benefits to management exceed costs to management. In either calculation, costs to the company of adopting IFRS play a key role in the analysis. Costs to adopt IFRS may include those associated with making a submission to the Commission staff in order to obtain a no objection letter, as described in Section IV.B.; costs to transition to IFRS reporting, including determining the effect of first-time adoption under IFRS 1 and systems changes to support financial reporting in accordance with IFRS; costs to prepare the disclosures proposed in Section V.D.3. upon initially reporting under IFRS; and potentially higher costs for accounting personnel, outside consultants and auditors who are familiar with IFRS. Additionally, for those issuers currently audited by an accounting firm without extensive IFRS experience, incremental costs may be incurred in order to change to an audit firm with a sufficient background in IFRS. For the companies we estimate to be eligible, based on the data used for purposes of the Paperwork Reduction Act we estimate the costs for issuers of transitioning to IFRS to sum to approximately \$32 million per company and relate to the first three years of filings on Form 10-K under IFRS. Total estimated costs for the approximate minimum of 110 issuers estimated to be

eligible would therefore be approximately \$3.5 billion. We expect that the majority of these transition costs would be incurred primarily in preparation of filings for the first year in which an issuer reports with the Commission using IFRS.¹⁸⁸ These estimates will continue to be re-evaluated during the comment period as more information is known.

A further cost of allowing U.S. issuers to file IFRS financial statements is the potential change in the level of comparability among the reported results of U.S. issuers. This affects investors to the extent they are seeking to compare only U.S. companies rather than companies in the top 20 by market capitalization within a worldwide industry. If some U.S. issuers in an industry in which IFRS is used more than any other set of standards choose to switch from U.S. GAAP, comparing the financial results of any remaining U.S. issuers to those that have switched will be more costly and less precise. In eligible industries, it is likely that not all companies will convert to IFRS simultaneously, if at all. This may lead to enhanced comparability on an industry-wide basis, but potential reductions in comparability for the subset of the industry represented by U.S. firms. In addition, if investors wish to compare companies across different industries - for example, they may want to compare companies sharing the same inputs, such as energy or labor - there would be either improvements or a diminution in comparability. If one industry is eligible to convert to IFRS, but another is not, comparability may be diminished. If IFRS is used more frequently than any other set of accounting standards in the top 20 companies by market capitalization in each industry to be compared and if U.S. issuers choose to adopt IFRS, on the other hand, comparability

¹⁸⁸ Specifically, we assume that per-year costs decline by 75% in the second year and by 90% in the third year. See Section VII., Paperwork Reduction Act. Costs do not include incremental reconciliation requirements of Proposal B.

may be improved. In companies with multiple business lines, switching to IFRS could potentially enhance the comparability of some business lines, but detract from comparability of others. Any change in comparability would potentially have the greatest impact on less sophisticated investors. Because they are less able to compare financial results across different bases of accounting, changes in comparability would disproportionately affect them. In all cases, the extent to which the comparability could be affected would in part depend on the degree to which companies across jurisdictions consistently apply IFRS as issued by the IASB.

While improving the comparability of financial reporting across entire industries is a benefit to investors, assuming the information being compared is not of lower quality than the information produced under the prior basis of financial reporting, a number of considerations limit the extent of that benefit in the case of international comparisons, relative to domestic comparisons. There are reporting differences between U.S. registrants and non-registrants that are unrelated to the basis for accounting. These differences include language used in presenting financial statements, the level of information provided in non-financial statement disclosures, and the extent of interim disclosure. Additionally, other economic differences, such as product markets and regulatory structures, may exist. To the extent these differences diminish the value of international comparisons for investors, the benefit of the proposed amendments is correspondingly limited.

The number of eligible U.S. issuers that elect to adopt IFRS may influence a future decision by the Commission regarding the ongoing role of IFRS in the U.S. capital markets. If, in the future, all U.S. issuers were required to use U.S. GAAP in filings with

the Commission, those eligible issuers that had elected to adopt IFRS under these proposed rules would incur costs of switching back to U.S. GAAP. These costs could be expected to be less than the estimated costs of adoption of IFRS, due to the existing knowledge of U.S. GAAP by accountants in the United States and because issuers would have previous U.S. GAAP policies and reported information available. However, if a substantial number of issuers or percentage of total U.S. market capitalization adopts IFRS under the proposed "early use" option, the costs of requiring these issuers to return to U.S. GAAP may be large enough that they may affect the Commission's consideration of this decision, which would be a cost to investors. Alternatively, if the Commission chooses to continue to allow both IFRS and U.S. GAAP use by U.S. issuers, investors may continue to face the costs of limited comparability across U.S. companies, as described above, in perpetuity, or at least until convergence reduces differences between bases of accounting. However, U.S. investors would continue to receive the benefit of increased comparability between U.S. issuers reporting in IFRS and their foreign counterparts reporting in IFRS. If the Commission chooses to require mandatory IFRS reporting, transition costs to IFRS could be similar, on a per-company basis, to transition costs described in the PRA analysis.

Another consideration if the Commission were to adopt the amendments as proposed is the impact on the continued improvement of IFRS. The Commission's intention is to enhance the incentives for the continued improvements to IFRS and U.S. GAAP. We believe, moreover, that the needs of the marketplace will continue to support the IASB and the FASB working together on their next phase of joint work to develop the best international standards to be used in the United States and internationally. Without

prejudice as to priority, the current joint work program includes topics such as revenue recognition and financial statement presentation. These are topics on which both the IASB and the FASB seek to develop better standards (rather than one standard setter adopting the other standard setter's existing U.S. GAAP or IFRS standard). We believe that investors and issuers seek comparable information in global capital markets, thereby providing an incentive for continued improvements to U.S. GAAP and IFRS. It is possible, though, that acceptance of IFRS for U.S. issuers could reduce the incentive to converge standards under IFRS and U.S. GAAP.

This proposed rulemaking, if adopted, may create costs to investors in eligible issuers that choose to continue to prepare their financial statements under U.S. GAAP. The desire of potential investors for comparability of financial information may create an incentive for those that continue to use U.S. GAAP, where comparable companies have adopted IFRS, to provide additional financial information prepared under IFRS as issued by the IASB in addition to U.S. GAAP financial statements. If those U.S. issuers make this choice voluntarily to provide their investors with additional information, their investors would bear additional preparation cost, while benefiting, along with potential investors and regulators, from additional information provided. U.S. issuers currently compete for capital with companies who provide financial information prepared under IFRS. In spite of this international competition for capital, we do not believe it is currently a widespread practice for U.S. issuers to provide financial information under IFRS, perhaps because U.S. GAAP is accepted by investors in foreign markets.

As discussed above, IFRS is not as developed as current U.S. GAAP in certain areas. IFRS also is not as prescriptive as U.S. GAAP in certain areas and in certain areas

permits a greater amount of allowable options than currently in U.S. GAAP.¹⁸⁹ This relatively lesser amount of guidance and greater optionality may reduce comparability of reported financial information, as different issuers may account or provide disclosure for similar transactions or events in different ways. This increased level of managerial choice could affect comparability across companies.

B. Proposal A: Reconciled Information Pursuant to IFRS 1

Under Proposal A, U.S. issuers adopting IFRS would only be required to publish the reconciling information required under IFRS 1. This information is a one-time disclosure related to transition from a prior basis of reporting, in this case U.S. GAAP, to IFRS. This information includes, among other things, reconciliation of the prior year's total comprehensive income and ending equity under previous GAAP to IFRS and certain disclosures to assist users' understanding of the effect and implications of transitioning to IFRS. Adoption of IFRS as issued by the IASB requires implementation of IFRS 1 and therefore Proposal A represents the minimum reconciliation disclosure that would be required of an eligible U.S. issuer electing to adopt IFRS under these proposed rules. The following sections separately describe the benefits and costs of these IFRS 1-related requirements, relative to a theoretical benchmark in which these requirements were excluded from IFRS.

¹⁸⁹ As noted by CIFIr in its Final Report:

From an international perspective, we note that IFRS currently permits numerous alternative accounting policies. While we acknowledge the IASB's efforts in reducing some of these alternative treatments, we nonetheless believe the SEC should encourage the IASB to [...] seek to eliminate alternatives as part of its standards-setting projects.

CIFIr Final Report, at 51.

1. Expected Benefits

The IASB noted in the basis for conclusion discussion accompanying IFRS 1 that the required reconciliations and disclosures were necessary to help users understand the effect and implementation of the transition to IFRS. Further, such information is expected to assist users in identifying changes needed to their analytical models to make use of information presented under IFRS.

2. Expected Costs

Both Proposal A and Proposal B require an issuer that elects to adopt IFRS to prepare financial information under both IFRS and U.S. GAAP for a period of time. This could be accomplished in a number of ways, including maintaining systems for financial reporting under both IFRS and U.S. GAAP contemporaneously or maintaining such systems under one set of accounting standards and making adjustments to determine the appropriate amounts and information under the other set of accounting standards. Regardless of the approach taken, the preparation of financial information under two sets of accounting standards would impose costs on issuers.

Due to the requirement to present financial statements that generally include three years of activity, the application of IFRS 1, as contemplated in Proposal A, would result in certain gaps in information provided to investors about the amounts and nature of differences between previously-reported U.S. GAAP information and IFRS comparative information included in an issuer's first annual report under IFRS. Specifically, a U.S. issuer would be required under IFRS 1 to reconcile equity as of the date of transition to IFRS, which is the first day of the fiscal year for the earliest period presented. Additionally, a U.S. issuer would be required under IFRS 1 to reconcile the previously

reported U.S. GAAP equity to IFRS equity as of the end of the second year presented, along with a reconciliation of total comprehensive income for that second fiscal year. However, no reconciling information would be required for the year-end equity or total comprehensive income related to the first year presented. Further, under the proposed rules, an issuer would present and file with the Commission on Form 10-Q quarterly information under U.S. GAAP during the first year of IFRS reporting, but would report under IFRS in its annual report on Form 10-K. IFRS 1 would not require reconciling information for the year in which IFRS financial statements are first presented.

As an example, if a U.S. issuer with a December 31 fiscal year end were to elect to report under IFRS beginning with the year ending December 31, 2012, the financial statements included in Form 10-K would present IFRS financial statements for 2010, 2011 and 2012.¹⁹⁰ IFRS 1 would require a reconciliation of equity from U.S. GAAP to IFRS as of January 1, 2010. Further, IFRS 1 would require a reconciliation of ending equity and total comprehensive income for the year ending December 31, 2011. In this example, users of the financial statements who wish to evaluate trends for the three years presented would not have information about the effects of IFRS adoption for the year ending 2010 nor for the year ending December 31, 2012.

C. Proposal B: Supplemental U.S. GAAP Information

Under Proposal B, in addition to the reconciling information from U.S. GAAP required under IFRS 1, U.S. issuers adopting IFRS would annually disclose certain unaudited supplemental U.S. GAAP financial information covering the period called for in our filings, generally three years, including the current year. The following sections

¹⁹⁰ In addition, for purposes of this example, the Form 10-Q filed for the first three fiscal quarters of 2012 would contain U.S. GAAP financial statements.

describe benefits and costs of Proposal B as a whole, combining the benefits and costs of IFRS 1 disclosures and the benefits and costs of the additional, continuing reconciliation.

1. Expected Benefits

Because IFRS 1 disclosure requirements are part of Proposals A and B, the expected benefits of Proposal B include the expected benefits of Proposal A. Specifically, users of financial statements would be provided the information to help them understand the effect and implementation of the transition to IFRS. Such disclosure is expected to assist users in identifying changes needed to analytical models applied to issuers' reported financial information.

Under the additional reconciliation requirements of Proposal B, investors benefit from the inclusion of a continuing reconciliation to U.S. GAAP of certain items in the financial statements. Ongoing reconciliation to U.S. GAAP of certain items allows a degree of continued comparability between U.S. issuers adopting IFRS and other U.S. issuers continuing to report under U.S. GAAP, and a degree of comparability between current and past financial results of issuers electing to adopt IFRS. Additionally, reconciliation may help to highlight differences between U.S. GAAP and IFRS, providing useful information for regulators and for other U.S. issuers contemplating adoption.

Reconciliation also reduces the costs to issuers of returning to U.S. GAAP, should the Commission require such an action.¹⁹¹ As previously described, such costs could

¹⁹¹ Absent such future rulemaking, the Commission may decide to propose rules requiring the use of U.S. GAAP for all U.S. issuers. Alternatively, an issuer may decide to resume reporting under U.S. GAAP only. In such cases, associated costs would include audit fees and internal labor costs associated with obtaining an audit of the U.S. GAAP information for the periods during which the issuer was reporting with the Commission under IFRS.

affect the Commission's decision in 2011, representing a cost to investors; by reducing these costs, reconciliation creates a benefit for investors. On the other hand, eligible U.S. issuers choosing to report in IFRS may be able to assess for themselves the possibility of a return to U.S. GAAP and have an incentive to take voluntary steps as they see appropriate to enable reporting in U.S. GAAP should we require them to do so in the future.

Reductions in comparability mentioned above as costs to investors are substantially mitigated by the inclusion of a reconciliation to U.S. GAAP. This effect is tempered by the unaudited and selective nature of the reconciliation.

The benefits of the additional reconciliation requirements of Proposal B related to comparability are mitigated by several factors. Not all items in financial statements are reconciled; investors seeking to compare details between IFRS and U.S. GAAP financial statements will be less able to do so, even with a reconciliation. Because the reconciliation would not be required to be audited, information contained therein would not be subject to external assurances by an independent auditor of fair presentation. To the extent that investors benefit from such scrutiny, they may be affected. However, the possibility that U.S. GAAP books and records will be audited in the future, upon any potential return to reporting by the issuer under U.S. GAAP, may help to diminish any such effect.¹⁹²

2. Expected Costs

Because IFRS I disclosure requirements are part of Proposals A and B, the expected costs of Proposal B include certain expected costs of Proposal A. Specifically,

¹⁹² Moreover, if the reconciliation requirement addressed these matters and thus became more costly, it could discourage eligible issuers from switching to IFRS.

the costs related to the preparation of financial information under both IFRS and U.S. GAAP for a period of time would be imposed under either proposal. However, certain expected costs under Proposal A relate to the absence of certain reconciliation disclosures to assist users of financial information to understand the impact of reporting under IFRS rather than U.S. GAAP. Thus, the expected costs under Proposal A associated with providing users with less information would not be imposed under Proposal B.

Because Proposal B would require continued reconciliation between certain U.S. GAAP and IFRS information, the expected costs of preparing information under two sets of accounting standards would be greater under Proposal B. The additional requirements of Proposal B to provide a continuing reconciliation of certain items to U.S. GAAP increase reporting costs and, potentially, record-keeping costs for issuers, which may be passed through to their investors. Based on the data used for purposes of the Paperwork Reduction Act, we currently estimate the costs at this time to be approximately \$2.7 million per adopting company over three years, or an aggregate of approximately \$297 million over three years, for the approximately 110 issuers estimated to be the approximate minimum eligible under the proposed amendments.¹⁹³ These cost estimates assume an annual, recurring cost of \$900,000 per company and reflect an assumption that issuers will choose to keep two sets of books and records as a result of the proposed reconciliation requirement.¹⁹⁴ The degree to which ongoing reconciliation imposes an incremental cost depends on the manner in which a company would implement adoption in the absence of an ongoing reconciliation requirement. Under the proposed rule,

¹⁹³ These estimated amounts are based on an estimated annual recurring cost of \$900,000 per eligible issuer, over a three year period and assuming that all 110 of the approximate minimum estimated eligible issuers would adopt IFRS and be subject to the annual reconciliation requirement.

¹⁹⁴ See Section VII., Paperwork Reduction Act.

companies adopting IFRS may keep two parallel sets of books and records, one in U.S. GAAP and one in IFRS, for a period of time, whether or not an ongoing reconciliation is required. Keeping parallel books and records would help a company to ensure a smooth transition between accounting systems and would allow flexibility to return to U.S. GAAP reporting, were such an action necessary. If such a practice is the norm, we expect that the costs of required ongoing reconciliation would be small, as U.S. GAAP results would be readily available. Alternatively, some companies adopting IFRS, in the absence of the requirements in Proposal B, may elect to switch to IFRS without keeping two sets of books and records. If companies follow this practice, then the incremental costs of a required ongoing reconciliation would be larger. In either case, some companies may continue to provide ongoing U.S. GAAP information voluntarily, in the absence of a requirement, based on market demand. Shareholder efforts to require consistent and high-quality disclosure can be considered a public good, which is expected to be underprovided in the absence of regulation. Addressing this underprovision of monitoring efforts through disclosure is one of the key purposes of regulatory disclosure requirements. In this case, the incremental costs of required ongoing reconciliation for these companies would be small. We are aware of very few companies that publish financial results in accordance with more than one set of accounting standards absent a requirement to do so.

As noted, if some U.S. issuers elect to adopt IFRS, regulators and investors benefit from enhanced information about the use of IFRS in U.S. markets, information useful for investment and regulatory decision making. This benefit may be mitigated if, under Proposal B, some companies would be less likely to adopt IFRS. Proposal B could

have two potential effects affecting likelihood of an eligible issuer adopting IFRS. First, a reconciliation requirement involves some costs to the issuer, discussed in the previous paragraph; any increase in adoption costs likely reduces issuers' willingness to adopt IFRS. Second, as discussed in the benefits section of Proposal B, a reconciliation reduces the costs of requiring a return to U.S. GAAP. These lowered costs may result in issuers believing that the Commission will decide in 2011 not to require IFRS, and issuers may also then believe that there is a chance of a required return to U.S. GAAP. This would lower their net benefits from early adoption, and they may elect not to adopt IFRS.

Request for Comment

67. Do you agree with our assessment of the costs and benefits as discussed in this section? Are there costs or benefits that we have not considered? Are you aware of data and/or estimation techniques for attempting to quantify these costs and/or benefits? If so, what are they and how might the information be obtained?

IX. REGULATORY FLEXIBILITY ACT CERTIFICATION

The Commission hereby certifies pursuant to 5 U.S.C. 605(b), that the amendments contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposal would amend those regulations, rules and forms to allow eligible U.S. issuers to use as their basis of financial reporting IFRS as issued by the IASB and to file their financial statements prepared in that manner. The Commission is not proposing that filing in this manner be required, therefore if these amendments were adopted small entities need not take any action. We propose to exclude smaller reporting companies from the proposed definition of "IFRS

issuer” as a limitation on the number of issuers that would be eligible to file IFRS financial statements under the proposed rules. In addition, we believe that few small entities would meet the eligibility test under the proposed rules, which would permit an issuer to use IFRS only if is in the largest 20 companies in its industry worldwide as measured by market capitalization. For these reasons, the proposed amendments should not have a significant economic impact on a substantial number of small entities.

Additionally, in the event that we decide in 2011 to mandate the use of IFRS for all U.S. issuers, any disparate impact on small entities caused by the proposed amendments in this release would be temporary. We solicit written comments regarding this certification.

We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

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

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or “SBREFA,”¹⁹⁵ we solicit data to determine whether the proposals constitute a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in:

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

¹⁹⁵ 5 U.S.C. 603.

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

Section 23(a)(2) of the Exchange Act¹⁹⁶ also requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b)¹⁹⁷ of the Securities Act and Section 3(f)¹⁹⁸ of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

The proposed amendments would allow eligible U.S. issuers to use IFRS rather than U.S. GAAP to prepare their financial statements in filings with the Commission. This proposal is designed to increase efficiency, competition and capital formation by helping to move towards the use of a single set of globally accepted accounting standards. The use of a single set of accounting standards could help investors better understand investment opportunities than the use of differing sets of accounting standards. In addition, presenting investors with financial information that varies substantially depending on which set of accounting standards is employed can cause

¹⁹⁶ 15 U.S.C. 78w(a).

¹⁹⁷ 15 U.S.C. 77b(b).

¹⁹⁸ 15 U.S.C. 78c(f).

confusion about the actual financial results of a company and result in a correspondingly adverse effect on investor confidence and cost of capital.

The proposals are intended to increase efficiency by enabling investors to better compare financial statements of U.S. issuers that adopt IFRS with those of non-U.S. issuers operating in the same industry. Issuers with subsidiaries that already use IFRS also may be able to streamline their accounting systems and increase their efficiency if they adopt IFRS across all of their operations. We also are aware that the proposed amendments would permit some U.S. issuers to use IFRS financial statements while other U.S. issuers continue to use U.S. GAAP, thereby creating a dual system of financial reporting that has not existed previously for U.S. public companies. This could reduce the comparability among U.S. issuers and would require investor familiarity with both sets of accounting standards, which may adversely affect efficiency. However, we anticipate any such dual system may be transitional and not permanent.

The proposed amendments are designed to promote competition by enhancing the ability of eligible U.S. issuers that adopt IFRS to compete with non-U.S. issuers that use IFRS. The proposed rules would not enhance the competitiveness of U.S. issuers that would not be eligible to adopt IFRS but that compete with issuers that do use IFRS.

The proposed amendments may facilitate capital formation for eligible U.S. issuers that adopt IFRS by allowing them greater access to global capital raising opportunities. As more jurisdictions accept financial statements prepared in accordance with IFRS for local regulatory or statutory filing purposes, companies accessing global capital markets would not incur any additional costs to translate financial statements using different accounting standards to IFRS. However, U.S. issuers that would not be

eligible to use IFRS under the proposed amendments may be for a time at a comparative disadvantage in this regard.

It is possible that the amendments would not confer comparative advantages on those eligible issuers who transition to IFRS versus the companies that continue using U.S. GAAP. In addition, the amendments could have a negative impact on capital formation if IFRS does not gain acceptance by U.S. investors. We solicit public comment that will assist us in assessing the impact that the proposed amendments could have on competition, efficiency and capital formation.

Request for Comment

68. We solicit comment on whether the proposed rules would impose a burden on competition or whether they would promote efficiency, competition and capital formation. For example, would the proposals have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act?
69. Would the proposals create an adverse competitive effect on U.S. issuers that are not in a position to rely on the alternative or on foreign private issuers that do not report in IFRS?
70. Would the proposed amendments, if adopted, promote efficiency, competition and capital formation?

Commenters are requested to provide empirical data and other factual support for their views if possible.

XI. PROPOSED AMENDMENTS TO THE CODIFICATION OF FINANCIAL REPORTING POLICIES

We propose to update the "Codification of Financial Reporting Policies" announced in Financial Reporting Release 1 (April 15, 1982) [47 FR 21028] as follows:

By adding at the end of Section 101, under the Financial Reporting Number (FR-XX) assigned to this release, the text of Sections I through III of this release.

The Codification is a separate publication of the Commission. It will not be published in the Code of Federal Regulations System.

XII. STATUTORY BASIS AND TEXT OF PROPOSED AMENDMENTS

We are proposing amendments to Rules 1-01, 1-02, 3-10, 4-01, 8-01 and Article 13 of Regulation S-X; Items 10, 101, 301, 504, 1100, 1112, 1114 and 1115 of Regulation S-K and Rule 405 of Regulation C under the Securities Act; and Rule 12b-2 of Regulation 12B, Schedule 13E-3, Schedule TO, Rule 101(b) of Regulation G and Form 8-K under the Exchange Act; pursuant to Sections 6, 7, 10, and 19 of the Securities Act, Sections 3, 12, 13, 15, 23 and 36 of the Exchange Act, and Sections 3(c)(2) and 108(c) of the Sarbanes Oxley Act of 2002.

Text of Amendments

List of Subjects

17 CFR Parts 210, 229, 230, 240, 244 and 249

Reporting and recordkeeping requirements, Securities.

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

PART 210 - FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF

1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISORS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w(a), 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202, and 7262, unless otherwise noted.

2. Section 210.1-01 is amended by adding a sentence at the end of paragraph

(c) to read as follows:

§210.1-01 Application of Regulation S-X (17 CFR part 210).

* * * * *

(c) * * * In this regard, the application of § 210.4-10 in Article 13 of this Part only applies to filings pursuant to the federal securities laws.

3. Section 210.1-02 is amended by
- a. revising the last sentence to the "Note to paragraph (w)," and
 - b. adding paragraph (cc).

The revision and addition read as follows:

§210.1-02 Definitions of terms used in Regulation S-X (17 CFR part 210).

* * * * *

(w) * * *

(3) * * *

Note to paragraph (w): * * * An IFRS issuer or a foreign private issuer that files its financial statements in accordance with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB") shall make the prescribed tests using amounts determined under IFRS as issued by the IASB.

* * * * *

(cc) IFRS issuer. The term IFRS issuer means any issuer, other than a foreign private issuer that files financial statements pursuant to Item 17 or Item 18 of Form 20-F (§249.220f of this chapter), that meets the following criteria and files its financial statements in accordance with IFRS as issued by the IASB pursuant to Rule 4-01(a)(3) and Article 13 of Regulation S-X (§§ 210.4-01(a)(3) and 210.13):

(1) The issuer is not an investment company, an employee stock purchase, savings and similar plan, or a smaller reporting company;

(2) The issuer has requested and received a letter from the staff of the Commission expressing no objection that the issuer is eligible to file with the Commission financial statements prepared in accordance with IFRS as issued by the IASB;

(3) The issuer makes its first filing preparing its required financial statements in accordance with IFRS as issued by the IASB within 3 years following issuance of the most recently dated letter from the staff of the Commission described in paragraph (cc)(2) of this section; and

(4) The issuer's incoming request to the staff of the Commission pursuant to paragraph (cc)(2) of this section must be sent to the attention of the Division of Corporation Finance - Office of the Chief Accountant and demonstrate the following:

(i) The issuer is in an industry in which IFRS as issued by the IASB is used as the basis of financial reporting more than any other basis of financial reporting by the 20 largest listed companies worldwide by market capitalization within that industry; and

(ii) The issuer is one of the 20 largest listed companies worldwide by market capitalization within that industry as of a date within 180 days prior to the request.

Note 1 to paragraph (cc): An issuer, in determining its industry and the top 20 largest listed companies worldwide by market capitalization within that industry, must use one of the following classification schemes: the North American Industry Classification System (NAICS) codes at the three-digit level, the Standard Industrial Classification (SIC) codes at the two-digit level, or the International Standard Industrial Classification (ISIC) codes at the "Division" level. In the alternative, an issuer could use a private industry classification scheme provided that such classification scheme is published and is widely accepted as an industry classification scheme, such as, for example, the Industry Classification Benchmark (ICB) at the "Sector" level or the Global Industry Classification Standard (GICS) at the "Industry" level. For classifications of individual companies, the issuer must use a single published and widely accepted industry source. The provider of the classification scheme may be the same entity as the source of classifications of individual companies.

Note 2 to paragraph (cc): Market capitalization for purposes of this section means aggregate worldwide market value of voting and non-voting common equity. Market capitalization must be determined from a widely accepted source as of the same day within 180 days prior to the request.

Note 3 to paragraph (cc): The basis of financial reporting is to be determined based on a specified set of accounting principles. Companies in an industry are considered to report under a specified set of accounting principles if they have published audited financial statements under those accounting principles. Companies reporting

under more than one set of accounting principles can be counted as using any of those sets of accounting principles. In determining its eligibility to use IFRS as issued by the IASB, an issuer must undertake reasonable efforts to determine the set of accounting standards used by the twenty largest companies in its industry group. To the extent an issuer's analysis includes companies whose financial statements are prepared under a jurisdictional version of IFRS or as to which it is not clear whether the financial statements are prepared under IFRS as issued by the IASB, the issuer should state that no information came to its attention from the content of the financial statements of the companies analyzed or otherwise that causes it to believe that the financial statements are not in accordance with IFRS as issued by the IASB.

4. Section 210.3-10, paragraph (g)(2)(ii), is amended by revising the reference “(§§ 210.1-01 through 12-29)” to read “(§§ 210.1-01 through 210.13-03).”

5. Section 210.4-01 is amended by:

- a. redesignating paragraph (a)(3) as paragraph (a)(5), and
- b. adding new paragraphs (a)(3), (a)(4) and (d).

The addition reads as follows.

§210.4-01 Form, order and terminology.

(a) * * *

(3) In filings of IFRS issuers defined in § 210.1-02(cc) financial statements may be prepared according to International Financial Reporting Standards (“IFRS”) as issued by the International Accounting Standards Board (“IASB”).

(4) With respect to financial statements required by Rule 3-05, 3-09 or 3-14 of Regulation S-X (§§ 210.3-05, 210.3-09 or 210.3-14) in the filings of IFRS issuers or

foreign private issuers, the financial statements may be prepared in accordance with IFRS as issued by the IASB.

* * * * *

(d) Financial statements prepared in accordance with IFRS as issued by the IASB are subject to Article 13 (§§ 210.13-01 through 210.13-03).

6. Section 210.8-01, in Note 6 to § 210.8, is amended by revising the reference “Section 210.4-01(a)(3)” to read “Section 210.4-01(a)(5)”.

7. Add §§ 210.13-01, 210.13-02 and 210.13-03 and an undesignated center heading following § 210.12-29 to read as follows:

Article 13 – Use of International Financial Reporting Standards

Sec.

210.13-01 Application of Article 13.

210.13-02 Application of Regulation S-X.

210.13-03 Application of references.

Article 13 – Use of International Financial Reporting Standards

§ 210.13-01 Application of Article 13.

(a) This article shall be applicable to financial statements that are to be prepared in accordance with International Financial Reporting Standards (“IFRS”) as issued by the International Accounting Standards Board (“IASB”) filed:

- (1) By an IFRS issuer as defined in § 210.1-02(cc);
- (2) By a foreign private issuer pursuant to Item 17 or Item 18 of Form 20-F (§ 249.220f of this chapter); or

(3) Pursuant to Rule 3-05, 3-09 or 3-14 of Regulation S-X (§ 210.3-05, 210.3-09 or 210.3-14), where applicable.

(b) With respect to the financial statements described in paragraph (a) of this section:

(1) Such financial statements must contain an appropriately captioned note in which the issuer unreservedly and explicitly states compliance with IFRS as issued by the IASB;

(2) The applicable accountant's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB; and

(3) Financial statements which are not prepared in accordance with IFRS as issued by the IASB will be presumed to be misleading or inaccurate, despite footnote or other disclosures, unless the Commission has otherwise provided.

(c) Transition provisions for IFRS issuers. An IFRS issuer changing from U.S. GAAP to IFRS as issued by the IASB may only begin reporting using IFRS as issued by the IASB in an annual report on Form 10-K (§ 249.310 of this chapter). Similarly, an IFRS issuer changing from IFRS as issued by the IASB to U.S. GAAP may only begin reporting using U.S. GAAP in an annual report on Form 10-K.

§210.13-02 Application of Regulation S-X.

Unless a specific provision of Regulation S-X does not otherwise apply, the provisions of Article 1 through Article 12 of Regulation S-X shall apply to financial statements described in § 210.13-01(a) as follows:

(a) Article 1 "Application of Regulation S-X" shall apply;

(b) Article 2 "Qualifications and Reports of Accountants" shall apply;

(c) Article 3 "General Instructions as to Financial Statements" shall apply, except for:

- (1) Section 210.3-03 which need not apply;
 - (2) Section 210.3-04, which need not apply;
 - (3) Section 210.3-15(a), which shall not apply;
 - (4) Section 210.3-15(b) and (c), which need not apply; and
 - (5) Section 210.3-20, which shall not apply to an IFRS issuer.
- (d) Article 3A "Consolidated and Combined Financial Statements" need not

apply.

(e) Article 4 "Rules of General Application" shall apply, except for:

- (1) Section 210.4-07, which need not apply,
- (2) Section 210.4-08, which need not apply; and
- (3) The following paragraphs of § 210.4-10:
 - (i) Paragraph (b) which need not apply;
 - (ii) Paragraph (c) which need not apply; and
 - (iii) Paragraph (d) which need not apply.

(f) Article 5 "Commercial and Industrial Companies" need not apply, except for § 210.5-04, which shall apply.

(g) Article 6 "Registered Investment Companies" shall not apply.

(h) Article 6A "Employee Stock Purchase, Savings and Similar Plans" shall not apply.

(i) Article 7 "Insurance Companies" need not apply, except for § 210.7-05, which shall apply.

(j) Article 8 "Financial Statements of Smaller Reporting Companies" shall not apply.

(k) Article 9 "Bank Holding Companies" need not apply, except for § 210.9-06, which shall apply.

(l) Article 10 "Interim Financial Statements" need not apply, except for the following, which shall apply:

(1) Sections 210.10-01(a)(1) and (a)(6);

(2) Section 210.10-01(b)(6);

(3) Sections 210.10-01(c)(1) through (c)(3);

(4) Section 210.10-01(d); and

(5) Section 210.10-01(e).

(m) Article 11 "Pro Forma Financial Information" shall apply.

(n) Article 12 "Form and Content of Schedules" shall apply.

§ 210.13-03 Application of references.

(a) Unless otherwise specifically provided, references in Parts 210, 229, 230, 239, 240 (other than §§ 240.11a1-h, 240.15c3-1g, 240.17a-5, 240.17g-3, 240.17h-1T, and 240.17i-6 of this chapter) and 249 to "generally accepted accounting principles," should be construed solely for purposes of application of the relevant requirement to mean IFRS as issued by the IASB.

(b) Unless otherwise specifically provided, in providing information in response to requirements in Parts 210, 229, 230, 239, 240 and 249 that refer to specific pronouncements of U.S. GAAP, disclosure is to be provided that satisfies the objective of the relevant disclosure requirements.

(c) In providing general caption data, segment data or schedule information in response to Regulation S-K item requirements (§§ 229.10 through 229.915 of this chapter), amounts may be presented based on IFRS as issued by the IASB. In providing schedules pursuant to § 210.5-04 or 210.7-05, an IFRS issuer or foreign private issuer that prepares financial statements in accordance with IFRS as issued by the IASB may present amounts based on IFRS as issued by the IASB. Financial information presented pursuant to § 210-9.06 may be presented as a separate audited schedule and may use amounts based on IFRS as issued by the IASB.

(d) An issuer or entity that is required to provide disclosure under FASB Statement of Accounting Standards No. 69, "Disclosure about Oil and Gas Producing Activities," shall do so regardless of whether its financial statements are prepared in accordance with IFRS as issued by the IASB.

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

8. The authority citation for part 229 continues to read in part as follows:

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

* * * * *

9. Sections 229.10 is amended by revising paragraphs (e)(3)(i) and (ii) to read as follows:

§ 229.10 (Item 10) General.

* * * * *

(e) * * *

(3) * * *

(i) In the case of foreign private issuers or IFRS issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, GAAP refers to the principles under which those primary financial statements are prepared; and

(ii) In the case of foreign private issuers or IFRS issuers that include a non-GAAP financial measure derived from a measure calculated in accordance with U.S. generally accepted accounting principles, GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of this paragraph (e) to the disclosure of that measure.

* * * * *

10. Section 229.101 is amended by adding paragraphs (i) and (j) before the Instructions to Item 101 to read as follows:

§229.101 (Item 101) Description of business.

* * * * *

(i) Change in comprehensive set of accounting principles. An issuer that has elected to change the comprehensive set of accounting principles used in preparing its primary financial statements to International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB"), or to U.S. GAAP from IFRS as issued by the IASB, for purposes of its filings with the Commission shall

prominently disclose the following in its first annual report on Form 10-K (§ 249.310 of this chapter) that contains financial statements prepared using such comprehensive set of accounting principles:

- (1) The new comprehensive set of accounting principles used to prepare the financial statements;
- (2) The reasons for which the issuer elected to make the change;
- (3) The corporate governance processes followed in electing to make the change, including, for example, whether a shareholder vote was held and the extent to which the issuer's board of directors and audit committee considered the matter; and
- (4) With respect to an election to IFRS as issued by the IASB, the date the issuer made its request to the staff of the Commission demonstrating that the issuer met the criteria in Rule 1-02(cc) of Regulation S-X (§ 210.1-02(cc) of this chapter) for being an "IFRS issuer," and the date the staff of the Commission issued its letter of no objection to such request.

(j) Supplemental U.S. GAAP information. An issuer that prepares its primary financial statements included in an annual report on Form 10-K (§ 249.310 of this chapter) in accordance with IFRS as issued by the IASB, pursuant to Article 13 of Regulation S-X (§§ 210.13-01 through 210.13-03 of this chapter) shall provide in the annual report a reconciliation of financial information from IFRS as issued by the IASB to U.S. generally accepted accounting principles. The reconciliation shall give sufficient details to enable users to understand the material adjustments to the primary financial statements presented in accordance with IFRS as issued by the IASB that would be

necessary were the primary financial statements presented in accordance with U.S. generally accepted accounting principles.

11. Section 229.301 is amended adding Instruction 8 to the Instructions to Item 301 to read as follows:

§ 229.301 (Item 301) Selected financial data.

Instructions to Item 301:

8. IFRS issuers shall present the selected financial data on the basis of IFRS as issued by the IASB. An IFRS issuer that prepares its primary financial statements in accordance with IFRS as issued by the IASB for the first time may provide selected financial data based on IFRS as issued by the IASB for the three most recent years.

12. Instruction 6 to § 229.504 is amended by revising the reference “(17 CFR 210.1-01 through 210.12-29)” to read “(17 CFR 210.1-01 through 210.13-03)”.

13. Section 229.1100(c)(2)(ii)(F), § 229.1112(b)(2), first sentence, § 229.1114(b)(2)(ii), first sentence, and § 229.1115(b)(2), first sentence, are amended by revising the reference “(§§ 210.1-01 through 210.12-29 of this chapter)” to read “(§§ 210.1-01 through 210.13.03 of this chapter)”.

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

14. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

15. Amend §230.405 to add the definition of "IFRS issuer" in alphabetical order to read as follows.

§230.405 Definition of terms.

* * * * *

IFRS issuer. The term IFRS issuer means any issuer that meets the definition of "IFRS issuer" contained in Rule 1-02 of Regulation S-X (§ 210.1-02 of this chapter).

* * * * *

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

16. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

17. Amend § 240.12b-2 to add the definition "IFRS issuer" in alphabetical order to read as follows:

§240.12b-2 Definitions.

* * * * *

IFRS issuer. The term IFRS issuer means any issuer that meets the definition of "IFRS issuer" contained in Rule 1-02 of Regulation S-X (§ 210.1-02 of this chapter).

* * * * *

18. Amend § 240.13e-100, Instructions to Item 13, by revising the last sentence of Instruction 1 and revising Instruction 2 to read as follows:

§ 240.13e-100 Schedule 13E-3, Transaction statement under section 13(e) of the Securities Exchange Act of 1934 and Rule 13e-3 (§ 240.13e-3) thereunder.

* * * * *

Instructions to Item 13:

1. * * * If the summarized financial information is prepared on the basis of a comprehensive body of accounting principles other than either U.S. GAAP, or International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB") if filed by a foreign private issuer or an IFRS issuer as defined in Rule 1-02(cc) of Regulation S-X (§ 210.1-02(cc) of this chapter), the summarized financial information must be accompanied by a reconciliation as described in Instruction 2 of this Item.

2. If the financial statements required by this Item are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, or IFRS as issued by the IASB if filed by a foreign private issuer or an IFRS issuer, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20-F (§ 249.220f of this chapter).

* * * * *

19. Amend § 240.14d-100, Instructions to Item 10, by revising the last sentence of Instruction 6 and revising Instruction 8 to read as follows:

§ 240.14d-100 Schedule TO. Tender offer statement under section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934.

* * * * *

Instructions to Item 10:

* * * * *

6. * * * If the summarized financial information is prepared on the basis of a comprehensive body of accounting principles other than either U.S. GAAP, or International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB") if filed by a foreign private issuer or an IFRS issuer as defined in Rule 1-02(cc) of Regulation S-X (§ 210.1-02(cc) of this chapter), the summarized financial information must be accompanied by a reconciliation as described in Instruction 8 of this Item.

* * * * *

8. If the financial statements required by this Item are prepared on the basis of a comprehensive body of accounting principles other than either U.S. GAAP, or IFRS as issued by the IASB if filed by a foreign private issuer or an IFRS issuer, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20-F (§249.220f of this chapter), unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, however, when financial statements are prepared on a basis other than U.S. GAAP, or IFRS as issued by the IASB if filed by a foreign private issuer or an IFRS issuer, a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. must be presented.

* * * * *

PART 244 – REGULATION G

20. The authority citation for part 244 continues to read as follows:

Authority: 15 U.S.C. 7261, 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29.

21. Amend § 244.101 by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 244.101 Definitions.

* * * * *

(b) * * *

(1) In the case of foreign private issuers or IFRS issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, GAAP refers to the principles under which those primary financial statements are prepared; and

(2) In the case of foreign private issuers or IFRS issuers that include a non-GAAP financial measure derived from a measure calculated in accordance with U.S. generally accepted accounting principles, GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of Regulation G to the disclosure of that measure.

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

22. The authority citation for part 249 continues to read in part as follows:

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

* * * * *

23. Amend Form 8-K (referenced in § 249.308) as follows:

- a. in Item 2.04, add a sentence at the end of Instruction 4;
- b. in Item 2.05, add an Instruction following paragraph (d); and
- c. in Item 4.02, add an Instruction following paragraph (c)(3).

The additions and revisions read as follows.

Note: The text of Form 8-K does not and this amendment will not appear in the Code of Federal Regulations.

FORM 8-K

Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.

Instructions.

4. *** When providing disclosure in response to provisions of this Item that refer to SFAS No. 5, an IFRS issuer should refer instead to IAS 37 "Provisions, Contingent Liabilities and Contingent Assets," as may be modified, supplemented or succeeded.

Item 2.05 Costs Associated with Exit or Disposal Activities.

(d) ***

Instruction.

When providing disclosure in response to provisions of this Item that refer to SFAS No. 146, an IFRS issuer should refer instead to IFRS 5 "Non-current Assets Held for Sale and Discontinued Operations," as may be modified, supplemented or succeeded.

Item 4:02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.

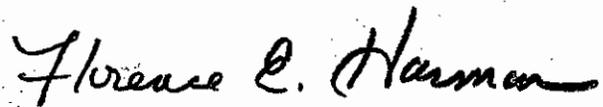
(c) ***

(3) ***

Instruction.

When providing disclosure in response to provisions of this Item that refer to Accounting Principles Board Opinion No. 20, as may be modified, supplemented or succeeded, an IFRS issuer should refer instead to IAS 8 "Accounting Policies, Changes in Accounting Estimates and Errors," as may be modified, supplemented or succeeded.

By the Commission.



Florence E. Harmon
Acting Secretary

Dated: November 14, 2008

F

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 17, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13291

In the Matter of

Baldwin Piano & Organ Co.,
Banner Holding Corp.,
Be Safe Services, Inc.,
Belmoral Mines Ltd.,
Benefund, Inc.,
Benz Energy Ltd.
(n/k/a Benz Energy, Inc.), and
Beyond Belief, 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 Baldwin Piano & Organ Co., Banner Holding Corp., Be Safe Services, Inc., Belmoral Mines Ltd., Benefund, Inc., Benz Energy Ltd. (n/k/a Benz Energy, Inc.), and Beyond Belief, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Baldwin Piano & Organ Co. (CIK No. 797315) is a Delaware corporation located in Mason, Ohio with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Baldwin 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, 2001, which reported a net loss of over \$4.7 million for the prior three months.

12 of 28

2. Banner Holding Corp. (CIK No. 1064105) is a Florida corporation located in Oklahoma City, Oklahoma with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Banner 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, 2004, which reported a net loss of \$167,000 for the prior six months.

3. Be Safe Services, Inc. (CIK No. 1084904) is a Delaware corporation located in Tampa, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Be Safe 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 \$580,992 for the prior nine months.

4. Belmoral Mines Ltd. (CIK No. 275125) is an Ontario corporation located in Toronto, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Belmoral 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 December 31, 1992.

5. Benefund, Inc. (CIK No. 861628) is a dissolved Colorado corporation located in Tulsa, Oklahoma with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Benefund 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, 1995. As of July 29, 2008, the company's stock (symbol "BENF") was traded on the over-the-counter markets:

6. Benz Energy Ltd. (n/k/a Benz Energy, Inc.) (CIK No. 1067064) is a void Delaware corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Benz 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 over \$38 million for the prior six months. On November 8, 2000, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Texas, which was converted to a Chapter 7 case on March 8, 2001, and closed on July 6, 2007.

7. Beyond Belief, Inc. (CIK No. 1120827) is a Colorado corporation located in Colorado Springs, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Beyond is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB on August 4, 2000.

B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of

Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

10. 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


By: Jill M. Peterson
Assistant Secretary

Appendix 1

**Chart of Delinquent Filings
In the Matter of Baldwin Piano & Organ Co., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Baldwin Piano & Organ Co.					
	10-Q	06/30/01	08/14/01	Not filed	87
	10-Q	09/30/01	11/14/01	Not filed	84
	10-K	12/31/01	04/01/02	Not filed	79
	10-Q	03/31/02	05/15/02	Not filed	78
	10-Q	06/30/02	08/14/02	Not filed	75
	10-Q	09/30/02	11/14/02	Not filed	72
	10-K	12/31/02	03/31/03	Not filed	68
	10-Q	03/31/03	05/15/03	Not filed	66
	10-Q	06/30/03	08/14/03	Not filed	63
	10-Q	09/30/03	11/14/03	Not filed	60
	10-K	12/31/03	03/30/04	Not filed	56
	10-Q	03/31/04	05/17/04	Not filed	54
	10-Q	06/30/04	08/16/04	Not filed	51
	10-Q	09/30/04	11/15/04	Not filed	48
	10-K	12/31/04	03/31/05	Not filed	44
	10-Q	03/31/05	05/16/05	Not filed	42
	10-Q	06/30/05	08/15/05	Not filed	39
	10-Q	09/30/05	11/14/05	Not filed	36
	10-K	12/31/05	03/31/06	Not filed	32
	10-Q	03/31/06	05/15/06	Not filed	30
	10-Q	06/30/06	08/14/06	Not filed	27
	10-Q	09/30/06	11/14/06	Not filed	24
	10-K	12/31/06	04/02/07	Not filed	19
	10-Q	03/31/07	05/15/07	Not filed	18
	10-Q	06/30/07	08/14/07	Not filed	15
	10-Q	09/30/07	11/14/07	Not filed	12
	10-K	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/14/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent		30			

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Banner Holding Corp.					
	10-KSB	04/30/04	07/29/04	11/14/08	Not filed
	10-QSB	07/31/04	09/14/04	11/14/08	Not filed
	10-QSB	10/31/04	12/15/04	11/14/08	Not filed
	10-QSB	01/31/05	03/17/05	11/14/08	Not filed
	10-KSB	04/30/05	07/29/05	11/14/08	Not filed
	10-QSB	07/31/05	09/14/05	11/14/08	Not filed
	10-QSB	10/31/05	12/15/05	11/14/08	Not filed
	10-QSB	01/31/06	03/17/06	11/14/08	Not filed
	10-KSB	04/30/06	07/31/06	11/14/08	Not filed
	10-QSB	07/31/06	09/14/06	11/14/08	Not filed
	10-QSB	10/31/06	12/15/06	11/14/08	Not filed
	10-QSB	01/31/07	03/19/07	11/14/08	Not filed
	10-KSB	04/30/07	07/30/07	11/14/08	Not filed
	10-QSB	07/31/07	09/14/07	11/14/08	Not filed
	10-QSB	10/31/07	12/17/07	11/14/08	Not filed
	10-QSB	01/31/08	03/17/08	11/14/08	Not filed
	10-KSB	04/30/08	07/29/08	11/14/08	Not filed
	10-QSB	07/31/08	09/15/08	11/14/08	Not filed

Total Filings Delinquent 18

Be Safe Services, Inc.

10-KSB	12/31/02	03/31/03	Not filed	68
10-QSB	03/31/03	05/15/03	Not filed	66
10-QSB	06/30/03	08/14/03	Not filed	63
10-QSB	09/30/03	11/14/03	Not filed	60
10-KSB	12/31/03	03/30/04	Not filed	56
10-QSB	03/31/04	05/17/04	Not filed	54
10-QSB	06/30/04	08/16/04	Not filed	51
10-QSB	09/30/04	11/15/04	Not filed	48
10-KSB	12/31/04	03/31/05	Not filed	44
10-QSB	03/31/05	05/16/05	Not filed	42
10-QSB	06/30/05	08/15/05	Not filed	39
10-QSB	09/30/05	11/14/05	Not filed	36

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Be Safe Services, Inc.					
	10-KSB	12/31/05	03/31/06	Not filed	32
	10-QSB	03/31/06	05/15/06	Not filed	30
	10-QSB	06/30/06	08/14/06	Not filed	27
	10-QSB	09/30/06	11/14/06	Not filed	24
	10-KSB	12/31/06	04/02/07	Not filed	19
	10-QSB	03/31/07	05/15/07	Not filed	18
	10-QSB	06/30/07	08/14/07	Not filed	15
	10-QSB	09/30/07	11/14/07	Not filed	12
	10-KSB	12/31/07	03/31/08	Not filed	8
	10-Q ¹	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/14/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent		24			

Belmoral Mines Ltd.

	20-F	12/31/93	06/30/94	Not filed	173
	20-F	12/31/94	06/30/95	Not filed	161
	20-F	12/31/95	07/01/96	Not filed	148
	20-F	12/31/96	06/30/97	Not filed	137
	20-F	12/31/97	06/30/98	Not filed	125
	20-F	12/31/98	06/30/99	Not filed	113
	20-F	12/31/99	06/30/00	Not filed	101
	20-F	12/31/00	07/02/01	Not filed	88
	20-F	12/31/01	07/01/02	Not filed	76
	20-F	12/31/02	06/30/03	Not filed	65
	20-F	12/31/03	06/30/04	Not filed	53
	20-F	12/31/04	06/30/05	Not filed	41
	20-F	12/31/05	06/30/06	Not filed	29
	20-F	12/31/06	07/02/07	Not filed	16
	20-F	12/31/07	06/30/08	Not filed	5
Total Filings Delinquent		15			

Benefund, Inc.

	10-KSB	09/30/95	12/29/95	Not filed	155
	10-QSB	12/31/95	02/14/96	Not filed	153
	10-QSB	03/31/96	05/15/96	Not filed	150

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Benefund, Inc.	10-QSB	06/30/96	08/14/96	Not filed	147
	10-KSB	09/30/96	12/30/96	Not filed	143
	10-QSB	12/31/96	02/14/97	Not filed	141
	10-QSB	03/31/97	05/15/97	Not filed	138
	10-QSB	06/30/97	08/14/97	Not filed	135
	10-KSB	09/30/97	12/29/97	Not filed	131
	10-QSB	12/31/97	02/17/98	Not filed	129
	10-QSB	03/31/98	05/15/98	Not filed	126
	10-QSB	06/30/98	08/14/98	Not filed	123
	10-KSB	09/30/98	12/29/98	Not filed	119
	10-QSB	12/31/98	02/16/99	Not filed	117
	10-QSB	03/31/99	05/17/99	Not filed	114
	10-QSB	06/30/99	08/16/99	Not filed	111
	10-KSB	09/30/99	12/29/99	Not filed	107
	10-QSB	12/31/99	02/14/00	Not filed	105
	10-QSB	03/31/00	05/15/00	Not filed	102
	10-QSB	06/30/00	08/14/00	Not filed	99
	10-KSB	09/30/00	12/29/00	Not filed	95
	10-QSB	12/31/00	02/14/01	Not filed	93
	10-QSB	03/31/01	05/15/01	Not filed	90
	10-QSB	06/30/01	08/14/01	Not filed	87
	10-KSB	09/30/01	12/31/01	Not filed	83
	10-QSB	12/31/01	02/14/02	Not filed	81
	10-QSB	03/31/02	05/15/02	Not filed	78
	10-QSB	06/30/02	08/14/02	Not filed	75
	10-KSB	09/30/02	12/30/02	Not filed	71
	10-QSB	12/31/02	02/14/03	Not filed	69
	10-QSB	03/31/03	05/15/03	Not filed	66
	10-QSB	06/30/03	08/14/03	Not filed	63
	10-KSB	09/30/03	12/29/03	Not filed	59
	10-QSB	12/31/03	02/17/04	Not filed	57
	10-QSB	03/31/04	05/17/04	Not filed	54
	10-QSB	06/30/04	08/16/04	Not filed	51
	10-KSB	09/30/04	12/29/04	Not filed	47
	10-QSB	12/31/04	02/14/05	Not filed	45
	10-QSB	03/31/05	05/16/05	Not filed	42

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Benefund, Inc.					
	10-QSB	06/30/05	08/15/05	Not filed	39
	10-KSB	09/30/05	12/29/05	Not filed	35
	10-QSB	12/31/05	02/14/06	Not filed	33
	10-QSB	03/31/06	05/15/06	Not filed	30
	10-QSB	06/30/06	08/14/06	Not filed	27
	10-KSB	09/30/06	12/29/06	Not filed	23
	10-QSB	12/31/06	02/14/07	Not filed	21
	10-QSB	03/31/07	05/15/07	Not filed	18
	10-QSB	06/30/07	08/14/07	Not filed	15
	10-KSB	09/30/07	12/29/07	Not filed	11
	10-QSB	12/31/07	02/14/08	Not filed	9
	10-QSB	03/31/08	05/15/08	Not filed	6
	10-QSB	06/30/08	08/14/08	Not filed	3

Total Filings Delinquent 52

**Benz Energy Ltd. (n/k/a
Benz Energy, Inc.)**

10-QSB	09/30/00	11/14/00	Not filed	96
10-KSB	12/31/00	04/02/01	Not filed	91
10-QSB	03/31/01	05/15/01	Not filed	90
10-QSB	06/30/01	08/14/01	Not filed	87
10-QSB	09/30/01	11/14/01	Not filed	84
10-KSB	12/31/01	04/01/02	Not filed	79
10-QSB	03/31/02	05/15/02	Not filed	78
10-QSB	06/30/02	08/14/02	Not filed	75
10-QSB	09/30/02	11/14/02	Not filed	72
10-KSB	12/31/02	03/31/03	Not filed	68
10-QSB	03/31/03	05/15/03	Not filed	66
10-QSB	06/30/03	08/14/03	Not filed	63
10-QSB	09/30/03	11/14/03	Not filed	60
10-KSB	12/31/03	03/30/04	Not filed	56
10-QSB	03/31/04	05/17/04	Not filed	54
10-QSB	06/30/04	08/16/04	Not filed	51
10-QSB	09/30/04	11/15/04	Not filed	48
10-KSB	12/31/04	03/31/05	Not filed	44

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Benz Energy Ltd. (n/k/a Benz Energy, Inc.)	10-QSB	03/31/05	05/16/05	Not filed	42
	10-QSB	06/30/05	08/15/05	Not filed	39
	10-QSB	09/30/05	11/14/05	Not filed	36
	10-KSB	12/31/05	03/31/06	Not filed	32
	10-QSB	03/31/06	05/15/06	Not filed	30
	10-QSB	06/30/06	08/14/06	Not filed	27
	10-QSB	09/30/06	11/14/06	Not filed	24
	10-KSB	12/31/06	04/02/07	Not filed	19
	10-QSB	03/31/07	05/15/07	Not filed	18
	10-QSB	06/30/07	08/14/07	Not filed	15
	10-QSB	09/30/07	11/14/07	Not filed	12
	10-KSB	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/14/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0

Total Filings Delinquent 33

Beyond Belief, Inc.

10-QSB	09/30/00	11/14/00	Not filed	96
10-KSB	12/31/00	04/02/01	Not filed	91
10-QSB	03/31/01	05/15/01	Not filed	90
10-QSB	06/30/01	08/14/01	Not filed	87
10-QSB	09/30/01	11/14/01	Not filed	84
10-KSB	12/31/01	04/01/02	Not filed	79
10-QSB	03/31/02	05/15/02	Not filed	78
10-QSB	06/30/02	08/14/02	Not filed	75
10-QSB	09/30/02	11/14/02	Not filed	72
10-KSB	12/31/02	03/31/03	Not filed	68
10-QSB	03/31/03	05/15/03	Not filed	66
10-QSB	06/30/03	08/14/03	Not filed	63
10-QSB	09/30/03	11/14/03	Not filed	60
10-KSB	12/31/03	03/30/04	Not filed	56
10-QSB	03/31/04	05/17/04	Not filed	54
10-QSB	06/30/04	08/16/04	Not filed	51

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Beyond Belief, Inc.					
	10-QSB	09/30/04	11/15/04	Not filed	48
	10-KSB	12/31/04	03/31/05	Not filed	44
	10-QSB	03/31/05	05/16/05	Not filed	42
	10-QSB	06/30/05	08/15/05	Not filed	39
	10-QSB	09/30/05	11/14/05	Not filed	36
	10-KSB	12/31/05	03/31/06	Not filed	32
	10-QSB	03/31/06	05/15/06	Not filed	30
	10-QSB	06/30/06	08/14/06	Not filed	27
	10-QSB	09/30/06	11/14/06	Not filed	24
	10-KSB	12/31/06	04/02/07	Not filed	19
	10-QSB	03/31/07	05/15/07	Not filed	18
	10-QSB	06/30/07	08/14/07	Not filed	15
	10-QSB	09/30/07	11/14/07	Not filed	12
	10-KSB	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/14/08	Not filed	3
	10-Q	09/30/07	11/14/07	Not filed	12
Total Filings Delinquent					33

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.

f--

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 17, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13292

In the Matter of

**Pacific Industrial Corp.,
Pacific Security Companies, Inc., and
Pandora Industries, Inc. (n/k/a Creston
Moly 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 Industrial Corp., Pacific Security Companies, Inc., and Pandora Industries, Inc. (n/k/a Creston Moly Corp.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Pacific Industrial Corp. ("Pacific Industrial") (CIK No. 1081238) is a permanently revoked Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Pacific Industrial 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 \$147,412 since the company's inception on November 20, 1998.

2. Pacific Security Companies, Inc. ("Pacific Security") (CIK No. 203159) is a Washington corporation located in Spokane, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Pacific Security 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 April 30, 2004, which reported a net loss \$1.8 million for the prior nine months.

3. Pandora Industries, Inc. (n/k/a Creston Moly Corp.) ("Pandora") (CIK No. 782870) is a British Columbia corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Pandora 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 July 31, 1994. In a filing made in the Canadian Systems for Electronic Document Analysis and Retrieval ("SEDAR"), Pandora reported a loss of over \$4.9 million (Canadian) for the year ended July 31, 2007.

B. DELINQUENT PERIODIC FILINGS

4. 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.

5. 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 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.

6. 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

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

Appendix 1

**Chart of Delinquent Filings
In the Matter of Pacific Industrial Corp., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
<i>Pacific Industrial Corp.</i>					
	<i>10-QSB</i>	06/30/00	08/14/00	Not filed	99
	<i>10-KSB</i>	09/30/00	12/29/00	Not filed	95
	<i>10-QSB</i>	12/31/00	02/14/01	Not filed	93
	<i>10-QSB</i>	03/31/01	05/15/01	Not filed	90
	<i>10-QSB</i>	06/30/01	08/14/01	Not filed	87
	<i>10-KSB</i>	09/30/01	12/31/01	Not filed	83
	<i>10-QSB</i>	12/31/01	02/14/02	Not filed	81
	<i>10-QSB</i>	03/31/02	05/15/02	Not filed	78
	<i>10-QSB</i>	06/30/02	08/14/02	Not filed	75
	<i>10-KSB</i>	09/30/02	12/30/02	Not filed	71
	<i>10-QSB</i>	12/31/02	02/14/03	Not filed	69
	<i>10-QSB</i>	03/31/03	05/15/03	Not filed	66
	<i>10-QSB</i>	06/30/03	08/14/03	Not filed	63
	<i>10-KSB</i>	09/30/03	12/29/03	Not filed	59
	<i>10-QSB</i>	12/31/03	02/17/04	Not filed	57
	<i>10-QSB</i>	03/31/04	05/17/04	Not filed	54
	<i>10-QSB</i>	06/30/04	08/16/04	Not filed	51
	<i>10-KSB</i>	09/30/04	12/29/04	Not filed	47
	<i>10-QSB</i>	12/31/04	02/14/05	Not filed	45
	<i>10-QSB</i>	03/31/05	05/16/05	Not filed	42
	<i>10-QSB</i>	06/30/05	08/15/05	Not filed	39
	<i>10-KSB</i>	09/30/05	12/29/05	Not filed	35
	<i>10-QSB</i>	12/31/05	02/14/06	Not filed	33
	<i>10-QSB</i>	03/31/06	05/15/06	Not filed	30
	<i>10-QSB</i>	06/30/06	08/14/06	Not filed	27
	<i>10-KSB</i>	09/30/06	12/29/06	Not filed	23
	<i>10-QSB</i>	12/31/06	02/14/07	Not filed	21
	<i>10-QSB</i>	03/31/07	05/15/07	Not filed	18
	<i>10-QSB</i>	06/30/07	08/14/07	Not filed	15

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pacific Industrial Corp.					
	10-KSB	09/30/07	12/29/07	Not filed	11
	10-QSB	12/31/07	02/14/08	Not filed	9
	10-QSB	03/31/08	05/15/08	Not filed	6
	10-QSB	06/30/08	08/14/08	Not filed	3

Total Filings Delinquent 33

Pacific Security Companies, Inc.

10-K	07/31/04	10/29/04	Not filed	49
10-Q	10/31/04	12/15/04	Not filed	47
10-Q	01/31/05	03/17/05	Not filed	44
10-Q	04/30/05	06/14/05	Not filed	41
10-K	07/31/05	10/31/05	Not filed	37
10-Q	10/31/05	12/15/05	Not filed	35
10-Q	01/31/06	03/17/06	Not filed	32
10-Q	04/30/06	06/14/06	Not filed	29
10-K	07/31/06	10/30/06	Not filed	25
10-Q	10/31/06	12/15/06	Not filed	23
10-Q	01/31/07	03/19/07	Not filed	20
10-Q	04/30/07	06/14/07	Not filed	17
10-K	07/31/07	10/29/07	Not filed	13
10-Q	10/31/07	12/17/07	Not filed	11
10-Q	01/31/08	03/17/08	Not filed	8
10-Q	04/30/08	06/16/08	Not filed	5
10-K	07/31/08	10/29/08	Not filed	1

Total Filings Delinquent 17

**Pandora Industries, Inc.
(n/k/a Creston Moly Corp.)**

20-F	07/31/95	6/30/95	Not filed	161
20-F	07/31/96	7/1/96	Not filed	148
20-F	07/31/97	6/30/97	Not filed	137
20-F	07/31/98	6/30/98	Not filed	125

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pandora Industries, Inc.					
(n/k/a Creston Moly Corp.)					
	20-F	07/31/99	6/30/00	Not filed	101
	20-F	07/31/00	7/2/01	Not filed	88
	20-F	07/31/01	7/1/02	Not filed	76
	20-F	07/31/02	6/30/03	Not filed	65
	20-F	07/31/03	6/30/04	Not filed	53
	20-F	07/31/04	6/30/05	Not filed	41
	20-F	07/31/05	6/30/06	Not filed	29
	20-F	07/31/06	7/2/07	Not filed	16
	20-F	07/31/07	6/30/08	Not filed	5
Total Filings Delinquent		13			

F

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 17, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13290

In the Matter of

Graystone World Wide, Inc.,
Keratoplanetes Corp.,
Lighthouse Partners, Inc.,
Maritime Partners, Ltd., and
Myrient, 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 Graystone World Wide, Inc., Keratoplanetes Corp., Lighthouse Partners, Inc., Maritime Partners, Ltd., and Myrient, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Graystone World Wide, Inc. (CIK No. 919599) is a void Delaware corporation located in Beverly Hills, 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-QSB for the period ended June 30, 2000, which reported a net loss of \$2.1 million since inception in 1992.

2. Keratoplanetes Corp. (CIK No. 919604) is a void Delaware corporation located in Dana Point, 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-KSB for the period ended March 31, 2000, which reported a net loss of \$110.

14 of 28

3. Lighthouse Partners, Inc. (CIK No. 1092794) is a void Delaware corporation located in Dana Point, 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-QSB for the period ended March 31, 2005, which reported no assets.

4. Maritime Partners, Ltd. (CIK No. 1092798) is a Delaware corporation located in Dana Point, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Maritime 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.

5. Myrient, Inc. (CIK No. 949113) is a Nevada corporation located in Aliso Viejo, 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-QSB for the period ended May 31, 2003, which reported a net loss of \$475,668 for the prior three months. As of November 12, 2008, the company's common stock (symbol "MYNT") 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 Commission's 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 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 Graystone World Wide, Inc., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Graystone World Wide, Inc.	10-QSB	09/30/00	11/14/00	Not filed	96
	10-KSB	12/31/00	04/02/01	Not filed	91
	10-QSB	03/31/01	05/15/01	Not filed	90
	10-QSB	06/30/01	08/14/01	Not filed	87
	10-QSB	09/30/01	11/14/01	Not filed	84
	10-KSB	12/31/01	04/01/02	Not filed	79
	10-QSB	03/31/02	05/15/02	Not filed	78
	10-QSB	06/30/02	08/14/02	Not filed	75
	10-QSB	09/30/02	11/14/02	Not filed	72
	10-KSB	12/31/02	03/31/03	Not filed	50
	10-QSB	03/31/03	05/15/03	Not filed	66
	10-QSB	06/30/03	08/14/03	Not filed	63
	10-QSB	09/30/03	11/14/03	Not filed	60
	10-KSB	12/31/03	03/30/04	Not filed	56
	10-QSB	03/31/04	05/15/04	Not filed	54
	10-QSB	06/30/04	08/16/04	Not filed	51
	10-QSB	09/30/04	11/15/04	Not filed	48
	10-KSB	12/31/04	03/31/05	Not filed	44
	10-QSB	03/31/05	05/16/05	Not filed	42
	10-QSB	06/30/05	08/15/05	Not filed	39
	10-QSB	09/30/05	11/14/05	Not filed	36
	10-KSB	12/31/05	03/31/06	Not filed	32
	10-QSB	03/31/06	05/15/06	Not filed	30
	10-QSB	06/30/06	08/14/06	Not filed	27
	10-QSB	09/30/06	11/14/06	Not filed	24
	10-KSB	12/31/06	04/02/07	Not filed	19
	10-QSB	03/31/07	05/15/07	Not filed	18
	10-QSB	06/30/07	08/14/07	Not filed	15
	10-QSB	09/30/07	11/14/07	Not filed	12
	10-KSB	12/31/07	03/31/08	Not filed	8
	10-Q*	03/31/08	05/15/08	Not filed	6

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Graystone World Wide, Inc.	10-Q*	06/30/08	08/14/08	Not filed	3
	10-Q*	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent	33				

Karatoplanetes Corp.

10-QSB	06/30/00	08/14/00	Not filed	99	
10-QSB	09/30/00	11/14/00	Not filed	96	
10-QSB	12/31/00	02/14/01	Not filed	93	
10-KSB	03/31/01	05/15/01	Not filed	90	
10-QSB	06/30/01	08/14/01	Not filed	87	
10-QSB	09/30/01	11/14/01	Not filed	84	
10-QSB	12/31/01	02/14/02	Not filed	81	
10-KSB	03/31/02	05/15/02	Not filed	78	
10-QSB	06/30/02	08/14/02	Not filed	75	
10-QSB	09/30/02	11/14/02	Not filed	72	
10-QSB	12/31/02	02/14/03	Not filed	69	
10-KSB	03/31/03	05/15/03	Not filed	66	
10-QSB	06/30/03	08/14/03	Not filed	63	
10-QSB	09/30/03	11/14/03	Not filed	60	
10-QSB	12/31/03	02/16/04	Not filed	57	
10-KSB	03/31/04	05/17/04	Not filed	54	
10-QSB	06/30/04	08/16/04	Not filed	51	
10-QSB	09/30/04	11/15/04	Not filed	48	
10-QSB	12/31/04	02/14/05	Not filed	45	
10-KSB	03/31/05	05/16/05	Not filed	42	
10-QSB	06/30/05	08/15/05	Not filed	39	
10-QSB	09/30/05	11/14/05	Not filed	36	
10-QSB	12/31/05	02/14/06	Not filed	33	
10-KSB	03/31/06	05/15/06	Not filed	30	
10-QSB	06/30/06	08/14/06	Not filed	27	
10-QSB	09/30/06	11/14/06	Not filed	24	
10-QSB	12/31/06	02/14/07	Not filed	21	
10-KSB	03/31/07	06/29/07	Not filed	17	
10-QSB	06/30/07	08/14/07	Not filed	15	
10-QSB	09/30/07	11/14/07	Not filed	12	
10-QSB	12/31/07	02/14/08	Not filed	9	
10-K*	03/31/08	06/30/08	Not filed	5	
10-Q*	06/30/08	08/14/08	Not filed	3	
10-Q*	09/30/08	11/14/08	Not filed	0	
Total Filings Delinquent	34				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Lighthouse Partners, Inc.	10-KSB	06/30/05	09/28/05	Not filed	38
	10-QSB	09/30/05	11/14/05	Not filed	36
	10-QSB	12/31/05	02/14/06	Not filed	33
	10-QSB	03/31/06	05/15/06	Not filed	30
	10-KSB	06/30/06	09/28/06	Not filed	26
	10-QSB	09/30/06	11/14/06	Not filed	24
	10-QSB	12/31/06	02/14/07	Not filed	21
	10-QSB	03/31/07	05/15/07	Not filed	18
	10-KSB	06/30/07	09/28/07	Not filed	14
	10-QSB	09/30/07	11/14/07	Not filed	12
	10-QSB	12/31/07	02/14/08	Not filed	9
	10-Q*	03/31/08	05/15/08	Not filed	6
	10-K*	06/30/08	09/29/08	Not filed	2
	10-Q*	09/30/08	11/14/08	Not filed	0

Total Filings Delinquent 14

Maritime Partners, Ltd.

10-QSB	12/31/05	02/14/06	Not filed	33
10-QSB	03/31/06	05/15/06	Not filed	30
10-KSB	06/30/06	09/28/06	Not filed	26
10-QSB	09/30/06	11/14/06	Not filed	24
10-QSB	12/31/06	02/14/07	Not filed	21
10-QSB	03/31/07	05/15/07	Not filed	18
10-KSB	06/30/07	09/28/07	Not filed	14
10-QSB	09/30/07	11/14/07	Not filed	12
10-QSB	12/31/07	02/14/08	Not filed	9
10-Q*	03/31/08	05/15/08	Not filed	6
10-K*	06/30/08	09/29/08	Not filed	2
10-Q*	09/30/08	11/14/08	Not filed	0

Total Filings Delinquent 12

Myrient, Inc.

10-KSB	08/31/03	12/01/03	Not filed	59
10-QSB	11/30/03	01/14/04	Not filed	58
10-QSB	02/28/04	04/13/04	Not filed	55
10-QSB	05/31/04	07/15/04	Not filed	52
10-KSB	08/31/04	11/29/04	Not filed	48
10-QSB	11/30/04	01/14/05	Not filed	46
10-QSB	02/28/05	04/14/05	Not filed	43
10-QSB	05/31/05	07/15/05	Not filed	40
10-KSB	08/31/05	11/29/05	Not filed	36
10-QSB	11/30/05	01/16/06	Not filed	34

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Myrient, Inc.					
	10-QSB	02/28/06	04/14/06	Not filed	31
	10-QSB	05/31/06	07/17/06	Not filed	28
	10-KSB	08/31/06	11/29/06	Not filed	24
	10-QSB	11/30/06	01/15/07	Not filed	22
	10-QSB	02/28/07	04/16/07	Not filed	19
	10-QSB	05/31/07	07/16/07	Not filed	16
	10-KSB	08/31/07	11/29/07	Not filed	12
	10-QSB	11/30/07	01/14/08	Not filed	10
	10-Q*	02/28/08	04/14/08	Not filed	7
	10-Q*	05/31/08	07/15/08	Not filed	4
Total Filings Delinquent		20			

*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.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release No. IC-28487; File No. S7-32-08]

RIN 3235-AK24

Temporary Exemption for Liquidation of Certain Money Market Funds

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; request for comment.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting an interim final temporary rule under the Investment Company Act of 1940 ("Investment Company Act" or "Act") to provide relief from certain provisions of the Act for those money market funds that have elected to participate in a temporary guaranty program ("Guaranty Program" or "Program") established by the U.S. Department of Treasury ("Treasury Department"). The Guaranty Program includes a procedure for the orderly liquidation of money market fund assets in certain circumstances, and the interim final temporary rule will permit money market funds that commence liquidation under the Guaranty Program to temporarily suspend redemptions of their outstanding shares and postpone the payment of redemption proceeds.

DATES: Effective Date: From [insert date of publication in the Federal Register] until October 18, 2009, unless the Commission publishes a notice in the Federal Register announcing an earlier termination date in connection with termination of the Guaranty Program.

Comment Date: Comments should be received on or before [insert date 30 days after publication in 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/final.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-32-08 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-32-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/final.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Thu B. Ta, Senior Counsel, or Diane C. Blizzard, Attorney-Fellow, at (202) 551-6792, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting rule 22e-3T [17 CFR 270.22e-3T] under the Investment Company Act¹ as an interim final temporary rule. We are soliciting comments on all aspects of the interim final temporary rule. We will carefully consider the comments that we receive and intend to respond to them in a subsequent release.

I. BACKGROUND

Money market funds are open-end management investment companies ("funds") registered under the Investment Company Act that have an investment objective of maintaining a stable net asset value (typically \$1.00 per share) by investing in short-term, high quality securities.² Rule 2a-7 under the Investment Company Act governs the operation of money market funds; the rule facilitates the maintenance of a stable net asset value by permitting money market funds to use the amortized cost method of valuing their securities.

Under the Act, funds must calculate their current net asset value per share by reference to: (i) the market values of their portfolio securities or, (ii) in the absence of readily available market quotations for the securities, their fair value as determined in good faith by the funds' boards of directors.³ Rule 2a-7 provides an exemption from these requirements in the case of money market funds. Under the amortized cost method of valuation in rule 2a-7, portfolio securities are valued by reference to their acquisition cost as adjusted for amortization of

¹ 15 U.S.C. 80a. Unless otherwise noted, all references to rules under the Investment Company Act will be to Title 17, Part 270 of the Code of Federal Regulations [17 CFR.270], and all references to statutory sections are to the Investment Company Act.

² *See* Valuation of Debt Instruments and Computation of Current Price Per Share by Certain Open-End Investment Companies (Money Market Funds), Investment Company Act Release No. 13380 (July 11, 1983) [48 FR 32555 (July 18, 1983)]. Most money market funds seek to maintain a stable net asset value per share of \$1.00, but a few seek to maintain a stable net asset value per share of a different amount, *e.g.*, \$10.00. For convenience, throughout this release, the discussion will simply refer to the stable net asset value of \$1.00.

³ Section 2(a)(41) of the Act and rules 2a-4(a)(1) and 22c-1 under the Act.

premium or accumulation of discount.⁴ In order to use this method of valuing securities, a money market fund must establish controls to monitor the deviation between the fund's stabilized share price, *e.g.*, \$1.00, and its market-based share price.⁵ If the deviation becomes significant, the fund's board of directors may be required to take steps necessary to address this deviation, including re-pricing its shares at less than \$1.00.⁶ This is often referred to as "breaking the buck."

The risk-limiting conditions built into rule 2a-7, together with the management skill and, in some cases, the financial commitment of the advisers that sponsor money market funds, have contributed to the stability of money market funds for more than 30 years. Until recently, only one money market fund, a small institutional fund, had ever broken the buck.⁷ On September 16, 2008, The Reserve Primary Fund became the first large money market fund to break the buck when it announced that it would re-price its securities at \$0.97 per share. The fund sought and obtained from us an order permitting it to suspend redemptions and postpone the payment of redemption proceeds.⁸ These events, and the turmoil in the credit markets in general, have placed pressure on money market funds, particularly those that offer their shares primarily to institutional shareholders and have experienced substantial redemptions.⁹

⁴ Rule 2a-7(a)(2). Money market funds may also use the penny-rounding method of pricing to maintain a stable price per share. *See* rule 2a-7(a)(18).

⁵ Rule 2a-7(c)(7)(ii)(A).

⁶ *See* rule 2a-7(c)(7)(ii)(B) (requiring fund boards to "promptly consider what action, if any, should be initiated by the board of directors" if the deviation between a money market fund's market-based net asset value and amortized cost price per share exceeds ½ of 1 percent).

⁷ Community Bankers U.S. Government Money Market Fund broke the buck in 1994.

⁸ In the Matter of The Reserve Fund, Investment Company Act Release No. 28386 (Sept. 22, 2008) (order).

⁹ Between September 11th and September 17th, the assets of institutional money market funds fell by \$173 billion. *See* Investment Company Institute, *Money Market Mutual Fund Assets* (Sept. 18, 2008), http://www.ici.org/stats/mf/mm_09_18_08.html#TopOfPage.

To bolster investor confidence in money market funds and protect the stability of the global financial system, on September 19, 2008, the Treasury Department announced the establishment of the Guaranty Program.¹⁰ Under the Guaranty Program, the Treasury Department will guarantee the share price of participating money market funds that seek to maintain a stable net asset value of \$1.00 per share, or some other fixed amount, subject to certain conditions and limitations. The Guaranty Program provides coverage only to shareholders of record as of September 19, 2008, and the coverage is limited to the number of shares they held as of the close of business on that day. The Commission is assisting the Treasury Department in administering the Guaranty Program.

The Treasury Department opened the Guaranty Program on Monday, September 29, 2008. Most of the nation's money market funds elected to participate in the Program by the October 8, 2008 deadline by executing an agreement with the Treasury Department ("Guarantee Agreement" or "Agreement") and paying the required participation fee.¹¹

Under the terms of the Guaranty Program, the Treasury Department guarantees that, upon the liquidation of a participating money market fund, the fund's shareholders will receive the fund's stable share price of \$1.00 for each fund share owned as of September 19, 2008.¹² Pursuant to the Agreement, a participating money market fund that breaks the buck, *i.e.*,

¹⁰ See Press Release, U.S. Dep't of the Treasury, Treasury Announces Guaranty Program for Money Market Funds (Sept. 19, 2008), <http://www.treas.gov/press/releases/hp1147.htm>. The Program is backed by the Exchange Stabilization Fund, which currently has assets of approximately \$50 billion.

¹¹ The Guaranty Program is currently scheduled to terminate on December 18, 2008, unless the Secretary of the Treasury extends it, but in no event may the Program be extended beyond September 18, 2009. See sections 1(v), 3(a), and 3(b) of the Agreement. A form of the Guarantee Agreement is available at: http://www.treas.gov/offices/domestic-finance/key-initiatives/money-market-docs/Guarantee_Agreement_Stable-Value_Single-Fund.pdf.

¹² Sections 7(g) and 1(j) of the Agreement.

experiences a "Guarantee Event,"¹³ is required to commence liquidation within five business days (with an exception under a curing provision).¹⁴ The Agreement further requires the fund board to promptly suspend the redemption of its outstanding shares "in accordance with applicable Commission rules, orders and no-action letters."¹⁵ The fund must be liquidated within thirty days after a Guarantee Event unless the Treasury Department, in its discretion, consents in writing to a later date (the "Liquidation Date").¹⁶ These provisions are intended to ensure that the money market fund liquidates in an orderly manner and maximizes the proceeds realized from the disposition of the fund's portfolio securities.¹⁷

II. DISCUSSION

A. Reason for the Exemption

Section 22(e) of the Investment Company Act prohibits funds, including money market funds, from suspending the right of redemption, or postponing the date of payment or satisfaction upon redemption of any redeemable security for more than seven days, except for certain periods specified in that section. Although section 22(e) permits funds to postpone the date of payment or satisfaction upon redemption for up to seven days, it does not permit funds to suspend the

¹³ For funds that seek to maintain a stable net asset value per share of \$1.00, Section 1(i) of the Agreement defines a "Guarantee Event" as:

the first date after the Agreement Date on which the Market-Based NAV of the Fund is less than \$0.995... *provided, however*, that if a Guarantee Event occurs prior to the Execution Date, then the Guarantee Event shall be deemed to have occurred on the Execution Date, *provided, further*, that if the Market-Based NAV of the Fund is greater than or equal to \$0.995 on any date after such Guarantee Event but prior to the commencement of liquidation of the Fund as provided under Section 2(c)(iii)...subject to the delivery of the notice provided for in Section 2(g), the Guarantee Event will be deemed to have not occurred (a "Guarantee Cure Event").

¹⁴ Sections 2(c) and 1(i) of the Agreement.

¹⁵ Section 7(a)(ii) of the Agreement.

¹⁶ Section 7(c) of the Agreement.

¹⁷ Section 7(a)(i) of the Agreement.

right of redemption, absent certain specified circumstances or a Commission order. However, in order for the Guaranty Program to operate as intended, a participating money market fund that experiences a Guarantee Event and must liquidate may need to suspend redemptions and postpone the payment of proceeds beyond the seven-day limit (specifically, until the Liquidation Date provided by the Agreement).

The temporary rule we are adopting today provides the necessary exemption to permit participating money market funds to take full advantage of the Program and initiate the steps necessary to protect the interests of all shareholders during liquidations, including those shareholders not covered by the Guaranty Program.¹⁸ Specifically, the rule is designed to facilitate orderly liquidations and help prevent the sale of fund assets at “fire sale” prices. Such a result could lead to substantial losses for the liquidating fund and further depress prices for short-term securities that may be held in the portfolios of other money market funds.

We are adopting the rule on an interim final basis because the Program is already in place and participating money market funds are currently subject to its liquidation provisions. In light of current market conditions, it is possible that a Guarantee Event could occur for a participating money market fund at any time. We could, alternatively, consider individual applications for orders under section 22(e) from funds that experience Guarantee Events. When the net asset value of a money market fund falls below \$1.00 per share and the fund decides to liquidate, however, redemption requests can outpace the fund’s ability to sell off its portfolio instruments and the Commission’s ability to grant a timely exemptive order. As a result,

¹⁸ As discussed above, the Guaranty Program covers only shareholders of record as of September 19, 2008, and the coverage is limited to the number of shares they held as of the close of business on that day.

consideration of individual applications for exemptive orders for funds that experience Guarantee Events would be impracticable.

The Commission finds that the interim final temporary rule is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 22(e) was designed to prevent funds and their investment advisers from interfering with the redemption rights of shareholders for “ulterior motives,” such as to prevent a reduction in management fees that would result from significant redemption requests.¹⁹ Liquidation of a money market fund under the Guaranty Program would ultimately eliminate a source of advisory fees for the adviser.²⁰ Section 22(e) also provides for suspending redemptions and postponing payment in certain specified circumstances or “for such other periods as the Commission may by order permit for the protection of security holders.”²¹ The temporary rule we are adopting today is intended to achieve the same purposes when a money market fund commences liquidation under the Guaranty Program.

B. Operation of Rule 22e-3T

The exemption from section 22(e) provided by rule 22e-3T is available to any money market fund that has a currently effective Agreement, subject to two other conditions.²² First, the fund must have delivered to the Treasury Department the required notice indicating that it has

¹⁹ *See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 291 (“Senate Hearings”)* (statement of David Schenker, Chief Counsel, Investment Trust Study, SEC).

²⁰ Moreover, the Guarantee Agreement would preclude a liquidation from relieving the adviser or any other affiliated person of the fund from their obligations to support the fund’s net asset value under any agreement in place at the time the Agreement is entered into by the fund. *See* sections 1(n) and 5(c) of the Guarantee Agreement.

²¹ Section 22(e)(3) of the Act.

²² Rule 22e-3T(a).

experienced a Guarantee Event and will promptly commence liquidation of the fund under the terms of the Agreement.²³ Second, the fund must not have cured the Guarantee Event, as provided under the terms of the Agreement.²⁴ In the event that a participating money market fund experiences a Guarantee Event and commences liquidation in compliance with the terms of the Agreement, the fund will be exempt from section 22(e).

The rule also provides that the Commission may rescind or modify the exemptive relief by order if necessary to protect the liquidating money market fund's security holders.²⁵ This provision permits the Commission to modify the relief if, among other things, a liquidating fund has not devised, or is not properly executing, a plan of liquidation that protects fund security holders. Under this provision, the Commission may modify the relief "after appropriate notice and opportunity for hearing," in accordance with section 40 of the Act.

The Program cannot extend beyond September 18, 2009. Under the terms of the Agreement, however, a money market fund has thirty days to liquidate. Accordingly, rule 22e-3T will expire on October 18, 2009.²⁶

III. REQUEST FOR COMMENT

The Commission requests comment on interim final temporary rule 22e-3T. We will carefully consider the comments that we receive and intend to respond to them in a subsequent release. We seek comment generally on all aspects of the temporary rule. Are the conditions for relief adequate to protect the interests of security holders? Should the rule include additional

²³ Rule 22e-3T(a)(2). *See also* section 2(c) of the Agreement.

²⁴ Rule 22e-3T(a)(3). *See also* section 1(i) of the Agreement.

²⁵ Rule 22e-3T(b).

²⁶ The Commission may publish a notice in the Federal Register announcing an earlier expiration date for the rule if the Guaranty Program terminates before September 18, 2009.

conditions and, if so, what should those conditions be? Should the rule have a later or earlier expiration date and, if so, what should the expiration date be and why?

IV. OTHER MATTERS

The Administrative Procedure Act ("APA") generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.²⁷ This requirement does not apply, however, if the agency "for good cause finds...that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."²⁸ The APA also generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective.²⁹ This requirement also does not apply, however, if the agency finds good cause for making the rule effective sooner.³⁰

For the reasons discussed in this release, we believe that we have good cause to act immediately to adopt this rule on an interim final temporary basis. The Treasury Department established the Program in response to extraordinary market turmoil and in recognition that maintaining confidence in money market funds is critical to protecting the integrity and stability of the global financial markets. The Program is currently operating to guarantee a large portion of existing money market fund assets. Immediate adoption of this rule will facilitate the Program and allow it to operate as designed. Without the relief provided by this rule, liquidating funds would not be able to promptly suspend redemptions and postpone the payment of proceeds without formally requesting and obtaining an individual exemption from the Commission, which could cause the funds to be inundated with redemption requests that they would have to meet in

²⁷ 5 U.S.C. 553(b).

²⁸ *Id.*

²⁹ 5 U.S.C. 553(d).

³⁰ *Id.*

the interim. This could result in a disorderly liquidation that would be at odds with the objective of the Program and could substantially harm certain of the affected fund's security holders.³¹

The temporary rule takes effect on [insert date of publication in Federal Register]. For the reasons discussed above, we have acted on an interim final basis. We emphasize that we are requesting comment on the temporary rule. We will carefully consider the comments we receive, and we intend to respond to them in a subsequent release. Moreover, this is a temporary rule that will expire on October 18, 2009. The rule will have no application to any money market fund after that time.

We find that there is good cause to have the temporary rule take effect on [insert date of publication in Federal Register], and that notice and public procedure in advance of effectiveness of the rule are impracticable, unnecessary, and contrary to the public interest.

V. PAPERWORK REDUCTION ACT

Rule 22e-3T does not impose any recordkeeping or information collection requirements, or other "collections of information" within the meaning of the Paperwork Reduction Act.³²

Accordingly, the Paperwork Reduction Act is not applicable.

VI. COST-BENEFIT ANALYSIS

The Commission is sensitive to the costs and benefits of its rules. We have identified certain costs and benefits of rule 22e-3T and request comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in this analysis. Where possible, we request that commenters provide empirical data to support any positions advanced.

³¹ Without the exemption provided by rule 22e-3T, section 22(e) could operate to compel funds to redeem shares of earlier-redeeming security holders at or near the \$1.00 amortized cost and, as a result of current market conditions, later-redeeming shareholders at less than \$1.00.

³² 44 U.S.C. 3501 *et seq.*

As discussed above, the Guarantee Agreement requires money market funds to engage in an orderly liquidation upon experiencing a Guarantee Event. The Agreement further contemplates that funds will suspend the redemption of fund shares pending the liquidation. We believe it is necessary to provide an exemption from section 22(e) for funds participating in the Program to facilitate orderly liquidations.

A. Benefits

As discussed above, the rule will facilitate achievement of the benefits of the Guaranty Program by permitting participating money market funds to fulfill their obligations under the Agreement and initiate the steps necessary to effect an orderly liquidation. An orderly liquidation would protect value for fund shareholders and minimize disruption to financial markets. The rule would also provide certainty for participating funds, and enable funds to avoid the expense and delay of obtaining an exemptive order from the Commission.

B. Costs

Most of the costs associated with rule 22e-3T, such as the requirement to deliver to the Treasury Department a notice indicating that the money market fund has experienced a Guarantee Event, are necessitated by the Agreement. The rule may, however, impose some costs on shareholders who seek to redeem their shares, but are unable to do so. We believe the potential costs associated with rule 22e-3T are modest because the rule provides a narrow exemption that is only triggered in connection with the Guaranty Program and the exemption is only temporary.

C. Request for Comment

We request comment on all aspects of this cost-benefit analysis. Commenters should address in particular whether rule 22e-3T will generate the anticipated benefits or impose any

other costs on funds or other market participants. We also request comment as to any costs or benefits associated with rule 22e-3T that we may not have considered here. Commenters are specifically invited to share quantified costs and benefits.

VII. CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION

Section 2(c) of the Investment Company Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.³³ We anticipate that the rule will promote efficiency in the financial markets by facilitating orderly liquidations. The rule also may promote capital formation by providing investors reassurance about the safety of money market funds and minimizing disruption in the financial markets. We do not anticipate any effect on competition. We request comment on whether rule 22e-3T is likely to promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data to support their views.

VIII. REGULATORY FLEXIBILITY ACT CERTIFICATION

Section 3(a) of the Regulatory Flexibility Act ("RFA")³⁴ requires the Commission to undertake an initial regulatory flexibility analysis of the effect of its rules on small entities unless the Commission certifies that the rules do not have a significant economic impact on a substantial number of small entities.³⁵ Pursuant to section 605(b) of the RFA, the Commission

³³ 15 U.S.C. 80a-2(c).

³⁴ 5 U.S.C. 603(a).

³⁵ 5 U.S.C. 605(b).

hereby certifies that Investment Company Act rule 22e-3T does not have a significant impact on a substantial number of small entities.³⁶

Rule 0-10 of the Investment Company Act defines a “small entity” for purposes of the Act as an investment company that, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year. Rule 22e-3T applies only to funds participating in the Treasury Department’s Temporary Guaranty Program for Money Market Funds, and none of these funds meets the definition of a small entity under the Act.

We solicit comment on the certification. Commenters are asked to describe the nature of any impact on small entities and provide any empirical data.

IX. STATUTORY AUTHORITY

The Commission is adopting rule 22e-3T pursuant to the authority set forth in sections 6(c), 22(e) and 38(a) of the Investment Company Act [15 U.S.C. 80a-6(c), 80a-22(e) and 80a-37(a)].

List of Subjects

17 CFR Part 270

Investment companies; Securities.

TEXT OF RULE

For the reasons set out in the Preamble, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

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

³⁶ Although the requirements of the RFA do not apply to rules adopted under the APA’s “good cause” exception, *see* 5 U.S.C. 601(2) (defining “rule” and notice requirement under the APA), we have nevertheless provided this certification.

1. The authority citation for Part 270 is amended by adding the following citation to read as follows:

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

* * * * *

Section 270.22e-3T is also issued under 15 U.S.C. 80a-6(c) and 80a-37(a).

* * * * *

2. Section 270.22e-3T is added to read as follows:

§ 270.22e-3T Temporary exemption for liquidation of certain money market funds.

(a) A registered investment company, or a series thereof (“fund”), is exempt from the requirements of section 22(e) of the Act (15 U.S.C. 80a-22(e)) if:

(1) The fund has a currently effective agreement (“Agreement”) with the U.S. Department of the Treasury (“Treasury”) to participate in the Temporary Guaranty Program for Money Market Funds (“Program”);

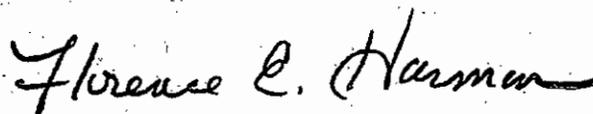
(2) The fund has delivered to Treasury a notice indicating that it has experienced a guarantee event, and will promptly commence liquidation of the fund under the terms of the Agreement; and

(3) The fund has not cured the guarantee event as provided under the terms of the Agreement.

(b) For the protection of security holders of a fund, the Commission may issue an order to rescind or modify the exemption provided by this section as to that fund, after appropriate notice and opportunity for hearing in accordance with section 40 of the Act (15 U.S.C. 80a-39).

(c) This section will expire on October 18, 2009, unless the Commission publishes a notice in the Federal Register announcing an earlier termination date in connection with termination of the Guaranty Program.

By the Commission.



Florence E. Harmon
Acting Secretary

Dated: November 20, 2008

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

November 20, 2008

In the Matter of

2TheMart.com, Inc., and
The 3DO Co.,

Respondents.

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 2TheMart.com, Inc. because it has not filed any periodic reports since it filed a Form 10-Q for the period ended March 21, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of The 3DO Co. because it has not filed any periodic reports since it filed a Form 10-Q for the period ended December 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.

16 of 28

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. EST on November 20, 2008, through 11:59 p.m. EST on December 4, 2008.

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
November 20, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13294

In the Matter of

**2 I, Inc.,
2-Infinity, Inc.,
2TheMart.com, Inc.,
The 3DO Co.,
5B Technologies Corp.,
24 Hour Auction, Inc.,
1626 New York Associates Limited
Partnership, and
2000 New Commerce, 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 2 I, Inc., 2-Infinity, Inc., 2TheMart.com, Inc., The 3DO Co., 5B Technologies Corp., 24 Hour Auction, Inc., 1626 New York Associates Limited Partnership, and 2000 New Commerce, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. 2 I, Inc. (CIK No. 831256) is an inactive Washington corporation located in Livingston, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). 2 I 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 January 31, 1995, which reported a net loss of \$3,479,670 for the prior nine months.

17 of 28

pursuant to Exchange Act Section 12(g). 2-Infinity 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, 2001, which reported a net loss of \$874,457 for the prior three months. As of November 12, 2008, 2-Infinity's common stock (symbol "TWIC") was traded on the over-the-counter markets.

3. 2TheMart.com, Inc. (CIK No. 1081192) is a suspended Oklahoma corporation located in Irvine, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). 2TheMart.com 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, 2000, which reported a net loss of \$4,266,727 for the prior three months. On January 25, 2001, 2TheMart.com filed a Chapter 7 petition in the United States Bankruptcy Court for the Central District of California, which was still pending as of November 12, 2008. As of November 12, 2008, the company's common stock (symbol "TMRT") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had seven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

4. The 3DO Co. (CIK No. 898441) is a void Delaware corporation located in Redwood City, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). 3DO is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2002, which reported a net loss of \$10,052,000 for the prior nine months. On May 28, 2003, 3DO filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of California, which was converted into a Chapter 11 petition on November 7, 2003 and was still pending as of November 12, 2008. As of November 12, 2008, the company's common stock (symbol "THDOQ") 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. 5B Technologies Corp. (CIK No. 1000179) is a void Delaware corporation located in Woodbury, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). 5B 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, 2001, which reported a net loss of \$3,925,458 for the prior nine months. On July 15, 2002, 5B filed a Chapter 7 petition in the United States Bankruptcy Court for the Eastern District of New York which was still pending as of November 12, 2008. As of November 12, 2008, the common stock of 5B (symbol "FIVE") was traded on the over-the-counter markets.

6. 24 Hour Auction, Inc. (CIK No. 1107698) is a void Delaware corporation located in Bellingham, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). 24 Hour 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 May 31, 2004, which reported a net loss of \$2,225 for the prior nine months.

7. 1626 New York Associates Limited Partnership (CIK No. 767411) is a Massachusetts limited partnership located in Boston, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). 1626 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, 1999, which reported a net loss of \$8,242,000 for the prior nine months.

8. 2000 New Commerce, Inc. (CIK No. 1106862) is a Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). 2000 New 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 \$20,717 for the prior nine months.

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 domestic requires 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 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 2 I, Inc., et al.**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
2 I, Inc.	10-K	04/30/95	07/31/95	Not filed	160
	10-Q	07/31/95	09/14/95	Not filed	158
	10-Q	10/31/95	12/15/95	Not filed	155
	10-Q	01/31/96	03/18/96	Not filed	152
	10-K	04/30/96	07/31/96	Not filed	148
	10-Q	07/31/96	09/16/96	Not filed	146
	10-Q	10/31/96	12/16/96	Not filed	143
	10-Q	01/31/97	03/17/97	Not filed	140
	10-K	04/30/97	07/29/97	Not filed	136
	10-Q	07/31/97	09/15/97	Not filed	134
	10-Q	10/31/97	12/15/97	Not filed	131
	10-Q	01/31/98	03/17/98	Not filed	128
	10-K	04/30/98	07/29/98	Not filed	124
	10-Q	07/31/98	09/14/98	Not filed	122
	10-Q	10/31/98	12/15/98	Not filed	119
	10-Q	01/31/99	03/17/99	Not filed	116
	10-K	04/30/99	07/29/99	Not filed	112
	10-Q	07/31/99	09/14/99	Not filed	110
	10-Q	10/31/99	12/15/99	Not filed	107
	10-Q	01/31/00	03/16/00	Not filed	104
	10-K	04/30/00	07/31/00	Not filed	100
	10-Q	07/31/00	09/14/00	Not filed	98
	10-Q	10/31/00	12/15/00	Not filed	95
	10-Q	01/31/01	03/19/01	Not filed	92
	10-K	04/30/01	07/30/01	Not filed	88
	10-Q	07/31/01	09/14/01	Not filed	86
	10-Q	10/31/01	12/17/01	Not filed	83
	10-Q	01/31/02	03/18/02	Not filed	80
	10-K	04/30/02	07/29/02	Not filed	76
	10-Q	07/31/02	09/16/02	Not filed	74
	10-Q	10/31/02	12/16/02	Not filed	71
	10-Q	01/31/03	03/17/03	Not filed	68
10-K	04/30/03	07/29/03	Not filed	64	
10-Q	07/31/03	09/15/03	Not filed	62	
10-Q	10/31/03	12/15/03	Not filed	59	
10-Q	01/31/04	03/16/04	Not filed	56	
10-K	04/30/04	07/29/04	Not filed	52	

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
2 I, Inc. (continued)	10-Q	07/31/04	09/14/04	Not filed	50
	10-Q	10/31/04	12/15/04	Not filed	47
	10-Q	01/31/05	03/17/05	Not filed	44
	10-K	04/30/05	07/29/05	Not filed	40
	10-Q	07/31/05	09/14/05	Not filed	38
	10-Q	10/31/05	12/15/05	Not filed	35
	10-Q	01/31/06	03/17/06	Not filed	32
	10-K	04/30/06	07/31/06	Not filed	28
	10-Q	07/31/06	09/14/06	Not filed	26
	10-Q	10/31/06	12/15/06	Not filed	23
	10-Q	01/31/07	03/19/07	Not filed	20
	10-K	04/30/07	07/30/07	Not filed	16
	10-Q	07/31/07	09/14/07	Not filed	14
	10-Q	10/31/07	12/17/07	Not filed	11
	10-Q	01/31/08	03/17/08	Not filed	8
	10-K	04/30/08	07/30/08	Not filed	4
	10-Q	07/31/08	09/15/08	Not filed	2

Total Filings Delinquent **54**

2-Infinity, Inc.

10-QSB	06/30/01	08/14/01	Not filed	87
10-QSB	09/30/01	11/14/01	Not filed	84
10-KSB	12/31/01	04/01/02	Not filed	79
10-QSB	03/31/02	05/15/02	Not filed	78
10-QSB	06/30/02	08/14/02	Not filed	75
10-QSB	09/30/02	11/14/02	Not filed	72
10-KSB	12/31/02	03/31/03	Not filed	68
10-QSB	03/31/03	05/15/03	Not filed	66
10-QSB	06/30/03	08/14/03	Not filed	63
10-QSB	09/30/03	11/14/03	Not filed	60
10-KSB	12/31/03	03/30/04	Not filed	56
10-QSB	03/31/04	05/17/04	Not filed	54
10-QSB	06/30/04	08/16/04	Not filed	51
10-QSB	09/30/04	11/15/04	Not filed	48
10-KSB	12/31/04	03/31/05	Not filed	44
10-QSB	03/31/05	05/16/05	Not filed	42
10-QSB	06/30/05	08/15/05	Not filed	39
10-QSB	09/30/05	11/14/05	Not filed	36
10-KSB	12/31/05	03/31/06	Not filed	32
10-QSB	03/31/06	05/15/06	Not filed	30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
2-Infinity, Inc. (continued)	10-QSB	06/30/06	08/14/06	Not filed	27
	10-QSB	09/30/06	11/14/06	Not filed	24
	10-KSB	12/31/06	04/02/07	Not filed	19
	10-QSB	03/31/07	05/15/07	Not filed	18
	10-QSB	06/30/07	08/14/07	Not filed	15
	10-QSB	09/30/07	11/14/07	Not filed	12
	10-KSB	12/31/07	03/31/08	Not filed	8
	10-Q ¹	03/31/08	05/15/08	Not filed	6
	10-Q ¹	06/30/08	08/15/08	Not filed	3
	10-Q ¹	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent					29

2TheMart.com, Inc.

10-Q	06/30/00	08/14/00	Not filed	99
10-Q	09/30/00	11/14/00	Not filed	96
10-K	12/31/00	04/02/01	Not filed	91
10-Q	03/31/01	05/15/01	Not filed	90
10-Q	06/30/01	08/14/01	Not filed	87
10-Q	09/30/01	11/14/01	Not filed	84
10-K	12/31/01	04/01/02	Not filed	79
10-Q	03/31/02	05/15/02	Not filed	78
10-Q	06/30/02	08/14/02	Not filed	75
10-Q	09/30/02	11/14/02	Not filed	72
10-K	12/31/02	03/31/03	Not filed	68
10-Q	03/31/03	05/15/03	Not filed	66
10-Q	06/30/03	08/14/03	Not filed	63
10-Q	09/30/03	11/14/03	Not filed	60
10-K	12/31/03	03/30/04	Not filed	56
10-Q	03/31/04	05/17/04	Not filed	54
10-Q	06/30/04	08/16/04	Not filed	51
10-Q	09/30/04	11/15/04	Not filed	48
10-K	12/31/04	03/31/05	Not filed	44
10-Q	03/31/05	05/16/05	Not filed	42
10-Q	06/30/05	08/15/05	Not filed	39
10-Q	09/30/05	11/14/05	Not filed	36
10-K	12/31/05	03/31/06	Not filed	32
10-Q	03/31/06	05/15/06	Not filed	30
10-Q	06/30/06	08/14/06	Not filed	27

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
2TheMart.com, Inc. (continued)	10-Q	09/30/06	11/14/06	Not filed	24
	10-K	12/31/06	04/02/07	Not filed	19
	10-Q	03/31/07	05/15/07	Not filed	18
	10-Q	06/30/07	08/14/07	Not filed	15
	10-Q	09/30/07	11/14/07	Not filed	12
	10-K	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/15/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent		34			

The 3DO Co.

10-K	03/31/03	06/30/03	Not filed	65
10-Q	06/30/03	08/14/03	Not filed	63
10-Q	09/30/03	11/14/03	Not filed	60
10-Q	12/31/03	02/17/04	Not filed	57
10-K	03/31/04	06/29/04	Not filed	53
10-Q	06/30/04	08/16/04	Not filed	51
10-Q	09/30/04	11/15/04	Not filed	48
10-Q	12/31/04	02/14/05	Not filed	45
10-K	03/31/05	06/29/05	Not filed	41
10-Q	06/30/05	08/15/05	Not filed	39
10-Q	09/30/05	11/14/05	Not filed	36
10-Q	12/31/05	02/14/06	Not filed	33
10-K	03/31/06	06/29/06	Not filed	29
10-Q	06/30/06	08/14/06	Not filed	27
10-Q	09/30/06	11/14/06	Not filed	24
10-Q	12/31/06	02/14/07	Not filed	21
10-K	03/31/07	06/29/07	Not filed	17
10-Q	06/30/07	08/14/07	Not filed	15
10-Q	09/30/07	11/14/07	Not filed	12

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
The 3DO Co. (continued)	10-Q	12/31/07	02/14/08	Not filed	9
	10-K	03/31/08	06/30/08	Not filed	5
	10-Q	06/30/08	08/15/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent	23				

5B Technologies Corp.

10-K	12/31/01	04/01/02	Not filed	79
10-Q	03/31/02	05/15/02	Not filed	78
10-Q	06/30/02	08/14/02	Not filed	75
10-Q	09/30/02	11/14/02	Not filed	72
10-K	12/31/02	03/31/03	Not filed	68
10-Q	03/31/03	05/15/03	Not filed	66
10-Q	06/30/03	08/14/03	Not filed	63
10-Q	09/30/03	11/14/03	Not filed	60
10-K	12/31/03	03/30/04	Not filed	56
10-Q	03/31/04	05/17/04	Not filed	54
10-Q	06/30/04	08/16/04	Not filed	51
10-Q	09/30/04	11/15/04	Not filed	48
10-K	12/31/04	03/31/05	Not filed	44
10-Q	03/31/05	05/16/05	Not filed	42
10-Q	06/30/05	08/15/05	Not filed	39
10-Q	09/30/05	11/14/05	Not filed	36
10-K	12/31/05	03/31/06	Not filed	32
10-Q	03/31/06	05/15/06	Not filed	30
10-Q	06/30/06	08/14/06	Not filed	27
10-Q	09/30/06	11/14/06	Not filed	24
10-K	12/31/06	04/02/07	Not filed	19
10-Q	03/31/07	05/15/07	Not filed	18
10-Q	06/30/07	08/14/07	Not filed	15
10-Q	09/30/07	11/14/07	Not filed	12

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
5B Technologies Corp. (continued)	10-K	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/15/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0

Total Filings Delinquent **28**

24 Hour Auction, Inc.

10-KSB	08/31/04	11/29/04	Not filed	48
10-QSB	11/30/04	01/14/05	Not filed	46
10-QSB	02/28/05	04/14/05	Not filed	43
10-QSB	05/31/05	07/15/05	Not filed	40
10-KSB	08/31/05	11/29/05	Not filed	36
10-QSB	11/30/05	01/16/06	Not filed	34
10-QSB	02/28/06	04/14/06	Not filed	31
10-QSB	05/31/06	07/17/06	Not filed	28
10-KSB	08/31/06	11/29/06	Not filed	24
10-QSB	11/30/06	01/16/07	Not filed	22
10-QSB	02/28/07	04/16/07	Not filed	19
10-QSB	05/31/07	07/16/07	Not filed	16
10-KSB	08/31/07	11/29/07	Not filed	12
10-QSB	11/30/07	01/14/08	Not filed	10
10-QSB	02/29/08	04/14/08	Not filed	7
10-QSB	05/31/08	07/16/08	Not filed	4

Total Filings Delinquent **16**

**1626 New York
Associates Limited
Partnership**

10-K	12/31/99	03/30/00	Not filed	104
10-Q	03/31/00	05/15/00	Not filed	102
10-Q	06/30/00	08/14/00	Not filed	99
10-Q	09/30/00	11/14/00	Not filed	96
10-K	12/31/00	04/02/01	Not filed	91
10-Q	03/31/01	05/15/01	Not filed	90
10-Q	06/30/01	08/14/01	Not filed	87
10-Q	09/30/01	11/14/01	Not filed	84
10-K	12/31/01	04/01/02	Not filed	79
10-Q	03/31/02	05/15/02	Not filed	78

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
1626 New York Associates Limited Partnership (continued)	10-Q	06/30/02	08/14/02	Not filed	75
	10-Q	09/30/02	11/14/02	Not filed	72
	10-K	12/31/02	03/31/03	Not filed	68
	10-Q	03/31/03	05/15/03	Not filed	66
	10-Q	06/30/03	08/14/03	Not filed	63
	10-Q	09/30/03	11/14/03	Not filed	60
	10-K	12/31/03	03/30/04	Not filed	56
	10-Q	03/31/04	05/17/04	Not filed	54
	10-Q	06/30/04	08/16/04	Not filed	51
	10-Q	09/30/04	11/15/04	Not filed	48
	10-K	12/31/04	03/31/05	Not filed	44
	10-Q	03/31/05	05/16/05	Not filed	42
	10-Q	06/30/05	08/15/05	Not filed	39
	10-Q	09/30/05	11/14/05	Not filed	36
	10-K	12/31/05	03/31/06	Not filed	32
	10-Q	03/31/06	05/15/06	Not filed	30
	10-Q	06/30/06	08/14/06	Not filed	27
	10-Q	09/30/06	11/14/06	Not filed	24
	10-K	12/31/06	04/02/07	Not filed	19
	10-Q	03/31/07	05/15/07	Not filed	18
	10-Q	06/30/07	08/14/07	Not filed	15
	10-Q	09/30/07	11/14/07	Not filed	12
	10-K	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/15/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0

Total Filings Delinquent **36**

2000 New Commerce, Inc.

10-KSB	12/31/03	03/30/04	Not filed	56
10-QSB	03/31/04	05/17/04	Not filed	54
10-QSB	06/30/04	08/16/04	Not filed	51
10-QSB	09/30/04	11/15/04	Not filed	48
10-KSB	12/31/04	03/31/05	Not filed	44
10-QSB	03/31/05	05/16/05	Not filed	42

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
2000 New Commerce, Inc. (continued)	10-QSB	06/30/05	08/15/05	Not filed	39
	10-QSB	09/30/05	11/14/05	Not filed	36
	10-KSB	12/31/05	03/31/06	Not filed	32
	10-QSB	03/31/06	05/15/06	Not filed	30
	10-QSB	06/30/06	08/14/06	Not filed	27
	10-QSB	09/30/06	11/14/06	Not filed	24
	10-KSB	12/31/06	04/02/07	Not filed	19
	10-QSB	03/31/07	05/15/07	Not filed	18
	10-QSB	06/30/07	08/14/07	Not filed	15
	10-QSB	09/30/07	11/14/07	Not filed	12
	10-KSB	12/31/07	03/31/08	Not filed	8
	10-Q ¹	03/31/08	05/15/08	Not filed	6
	10-Q ¹	06/30/08	08/15/08	Not filed	3
	10-Q ¹	09/30/08	11/14/08	Not filed	0

Total Filings Delinquent **20**

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.

L

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2809 / November 21, 2008

INVESTMENT COMPANY ACT OF 1940
Rel. No. 28519 / November 21, 2008

Admin. Proc. File No. 3-12436

In the Matter of

BRENDAN E. MURRAY

OPINION OF THE COMMISSION

INVESTMENT COMPANY PROCEEDING

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Aiding and Abetting Fraudulent Conduct by Investment Adviser

Conversion of Assets of Registered Investment Company

Managing director of investment adviser who also served as secretary to client investment companies engaged in scheme to defraud investment companies by preparing and submitting to investment companies' administrator for payment inflated invoices purportedly showing services provided to investment companies by third parties.

Held, it is in the public interest to bar managing director from association with an investment company or investment adviser, to impose a cease-and-desist order and civil money penalty, and to order disgorgement and payment of prejudgment interest.

18 of 28

APPEARANCES:

Brendan E. Murray, pro se.

James McGovern and Susannah M. Dunn, for the Division of Enforcement.

Appeal filed: August 20, 2007

Last brief received: November 13, 2007

Oral argument: September 8, 2008

I.

Brendan E. Murray ("Murray" or "Petitioner"), formerly a managing director of registered investment adviser Cornerstone Equity Advisers, Inc. ("Cornerstone") and secretary to Cornerstone's advisory clients the Cornerstone Funds, Inc. (the "Funds"), registered investment companies under the Investment Company Act of 1940, appeals from the decision of an administrative law judge. The law judge found that Murray willfully aided and abetted and caused Cornerstone to violate antifraud provisions of the Investment Advisers Act of 1940, and that Murray converted assets of the Funds in violation of the Investment Company Act. The law judge barred Murray from associating with any investment adviser and from working for any registered investment company, assessed a civil money penalty of \$60,000, imposed a cease-and-desist order, and ordered disgorgement in the amount of \$27,200. 1/ We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 2/

II.

A. Background

From September 1998 until February 2002, Cornerstone, as the Funds' investment adviser, provided the Funds with investment advice; supervised and managed all aspects of the Funds' operations; and provided, obtained, and supervised administrative services to the Funds. The Funds paid advisory fees to Cornerstone for these services based on assets under management. Cornerstone also provided officers to the Funds at no cost. The Funds ceased offering shares to the public on approximately April 30, 2000, when their auditors refused to certify their 1999 financial statements.

1/ The law judge also ordered the payment of prejudgment interest.

2/ Commission Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of a proceeding if that member has reviewed the oral argument transcript prior to such participation. Commissioners Casey and Walter conducted the required review.

Murray joined Cornerstone as a managing director in September 1998 and became Cornerstone's compliance officer in January 2001. While employed at Cornerstone, Murray performed a variety of services for the Funds: he was responsible for operations and administration and handled mutual fund clearing, processing, and sales. As secretary to the Funds, Murray attended board meetings and drafted minutes. Murray also provided some portfolio management services beginning in November 2001.

Stephen Leslie and James A. DeMatteo were Cornerstone's chief executive officer and president respectively.^{3/} Leslie also served as president of the Funds. Together, Leslie and DeMatteo owned more than fifty percent of Cornerstone's stock. They were the only principals of Voyager Institutional Services, LLC ("Voyager"), which provided website maintenance and certain administrative services to the Funds.

Until November 2001, Leslie managed the Funds' portfolios. He reviewed and approved all third-party invoices for services performed for the Funds, and forwarded each invoice to the Funds' administrator, Orbitex Fund Services, Inc. ("Orbitex"). Orbitex would then prepare an expense authorization for Leslie's approval. Leslie would return the approved expense authorization to Orbitex. When Orbitex notified Union Bank of California ("UBC"), the custodian for the Funds, that the expense was authorized, UBC paid the vendor directly.

B. The Invoice Inflation Scheme

Around October 31, 2001, Leslie was incapacitated by a stroke. Beginning in mid-November 2001, Murray assumed Leslie's responsibilities for invoice processing. By this time, it was clear to Murray that the Funds were facing liquidation. In his new capacity, Murray, together with DeMatteo, embarked on a scheme to falsify certain vendor invoices for submission to Orbitex. This scheme resulted in Voyager's receipt of a total of \$122,241 of Fund monies in excess of amounts that the Funds actually owed to the vendors.

Although it is unclear from the record the precise extent of DeMatteo's involvement, and how much Murray was acting at DeMatteo's direction, the record is clear that Murray engaged in multiple deceptive acts in furtherance of the scheme. Between November 2001 and February 2002, Murray prepared, approved, and submitted to Orbitex for payment twelve invoices from

^{3/} In a separate administrative proceeding, DeMatteo consented to an order (1) that he cease and desist from committing or causing any violations or future violations of Advisers Act Sections 206(1) and 206(2), 15 U.S.C. §§ 80b-6(1) and 80b-6(2), and Investment Company Act Section 37, 15 U.S.C. § 80a-36, and (2) barring him from association with any investment adviser and prohibiting him from serving or acting in certain capacities with an investment company. DeMatteo was also ordered to pay disgorgement and prejudgment interest, but the Commission waived payment thereof, and declined, based on DeMatteo's financial circumstances, to impose a civil penalty. James A. DeMatteo, Investment Advisers Act Rel. No. 2556 (Sept. 26, 2006), 88 SEC Docket 3362.

five third-party vendors that purportedly provided services to the Funds. In some cases, Murray requested a payment that was in excess of the amount billed by the vendor; in others, Murray simply prepared an invoice in an amount dictated to him by DeMatteo, although no services had been provided to the Funds. The expense authorizations approved by Murray and returned to Orbitex directed UBC to send the monies owing under these invoices to Voyager, not to the vendors directly. Voyager then paid any money actually owed to the vendors, and kept the difference.

For example, accountant Jay Sanders performed various tax, bookkeeping, and other services for Cornerstone, Voyager, and the Funds. On November 12, 2001, Sanders submitted an invoice in the amount of \$5,000 for enumerated services. Murray used this invoice as a model to forge an invoice that appeared to be on Sanders's letterhead (except that "Sanders" was misspelled as "Samders") for the same services but in the amount of \$17,500. Murray submitted this (and a corresponding invoice on Voyager letterhead) to Orbitex and authorized its payment to Voyager. Voyager paid Sanders the \$5,000 he had billed the Funds, and retained the remaining \$12,500. Murray repeated this pattern with respect to invoices submitted by Sanders in the amounts of \$28,275, \$41,650, and \$30,400, which Murray inflated to \$53,275, \$65,650, and \$55,400 respectively.

Murray similarly falsified bills from two property management groups. In November 2001, Murray billed the Funds \$4,000 for services allegedly provided by the PR Group ("PR Group" or the "Group"). Murray forged the PR Group's letterhead in preparing the phony invoice. The Group had not rendered any significant services to the Funds since June 2001. Murray had reason to know that the Group had not rendered services to the Funds that would justify a \$4,000 payment. Murray had negotiated the June 2001 settlement of a bill from the Group, after which he told the Group that any future services would be requested on an "as-needed" basis. The Group received no money from the bill Murray submitted to the Funds in November 2001.

Murray prepared, submitted, and approved three invoices, each in the amount of \$7,500, for services allegedly rendered by Richardson Management ("Richardson"). Murray forged Richardson letterhead for one of these invoices. Richardson's contract provided for payments of only \$2,500 per month. Murray testified that he prepared the invoices based on information provided to him by DeMatteo. However, Murray took no steps to determine whether Richardson had performed any services to the Funds. The law judge did not credit Murray's testimony that he acted as a mere scrivener for DeMatteo. UBC sent Voyager \$22,500 in satisfaction of the three invoices, of which Richardson received only \$10,615.20.

Murray also submitted inflated invoices for purported portfolio management services from several individuals. ^{4/} Edward Rabson is an experienced bond analyst. Murray had prepared two versions of a contract for Rabson's services. One required Voyager to pay Rabson \$1,000 per month; the other allotted Rabson \$5,000 per month. Only the contract for \$1,000 was executed by Rabson and Voyager. DeMatteo gave Murray the unexecuted \$5,000 contract when he told Murray to prepare the first Rabson invoice, and he told Murray that the \$5,000 contract was in effect. Murray did not ask why the contract was unexecuted, or what had happened to the \$1,000 contract. However, Murray submitted three invoices for Rabson's services, each in the amount of \$5,412.50 (including sales tax). Rabson received only \$4,000 from the more than \$16,000 that UBC paid to Voyager for his services.

Murray also billed the Funds \$8,118.75 for services purportedly rendered by Rabson's apparent replacement, Harry Peterson. However, Peterson received only \$500. In preparing Peterson's invoice, Murray relied solely on DeMatteo's representation that Peterson should be paid \$7,500 per month (plus sales tax). Murray did not confirm that Peterson performed services for the Funds. In fact, the invoice was dated only one day after Murray informed Orbitex that Rabson had stopped providing portfolio management services to the Funds and that a search for his replacement was underway.

At the hearing, Murray admitted his involvement in preparing, approving, and submitting the twelve invoices at issue. He knew some invoices were inflated and admitted that, with respect to other invoices, he failed to inquire into whether the payments were based on actual agreements or were justified by services actually performed. Moreover, Murray admitted that he knew that the purpose of submitting inflated invoices to Orbitex was to prevent Orbitex from determining how much money was being retained by Voyager.

C. Counsel Learns of the Inflated Invoices

In December 2001, Murray formed a corporation known as White Star Capital or White Star Management ("White Star"), and became its chief executive officer. He subsequently filed Form ADV with the Commission to register White Star as an investment adviser. Without consulting anyone at Cornerstone or the Funds, Murray, acting through White Star, prepared a ten-page report reviewing certain work done by accounting firms used by the Funds. In late January or early February 2002, Murray prepared, approved, and submitted a single-sentence invoice in the amount of \$37,650 for White Star's services in preparing the report. The invoice neither specified an hourly rate for Murray's services nor indicated how many hours were

^{4/} Murray also approved expense authorizations for a total of \$47,179.21 in advisory fees payable to Cornerstone for November 2001 through January 2002, which were supposed to compensate Cornerstone for providing investment advice, among other things. The record is unclear as to whether the individuals for whom Murray submitted invoices should have been compensated by Cornerstone out of the money it received for portfolio management rather than by the Funds.

involved in preparing the report. Although the invoice was addressed to DeMatteo, Murray did not provide DeMatteo with a copy. Murray also approved an expense authorization for the invoice and submitted the authorization to Orbitex, directing that payment be made to Voyager. Almost immediately after authorizing payment, Murray revised the payment instructions, directing via a letter to Orbitex and on the expense authorization form that payment should be made to White Star directly and not to Voyager (to prevent DeMatteo from becoming aware of the payment).

On February 14, 2002, Orbitex's general counsel sent a letter to an attorney representing the Funds, stating that Orbitex had

become aware of fees recently billed to the Cornerstone Funds for consulting services rendered by WhiteStar [sic] Management Inc. and Voyager Institutional Services, Inc. It has also come to our attention that Brendan Murray is a principal of both WhiteStar Management Inc. and Voyager Institutional Services, Inc. We wanted to insure that you're aware of the existence and purpose of the consulting arrangements referenced above.

Murray, DeMatteo, and Sanders met with counsel that day to discuss matters raised by the letter, and counsel instructed DeMatteo and Murray to stop submitting inflated third-party invoices. After a discussion with counsel, Murray returned the \$37,650 payment.

Voyager paid Murray an average of \$2,014.29 per month between January 19 and September 19, 2001, but between November 19, 2001 and February 17, 2002 paid him an average of \$14,066.67 per month.

D. Murray's Termination and Subsequent Actions

In February 2002, the Funds' Trustees and Directors voted to liquidate the assets of the Funds and dissolve the Funds as soon as practicable. In March 2002, they voted to establish liquidating trusts to receive the remaining assets of the Funds (the "Liquidating Trusts").

In April 2002, Murray asked the Funds' board of directors to pay White Star the \$37,650 fee for his report. The directors rejected this request. That month, Voyager, acting through DeMatteo, terminated Murray's services, paying him \$5,000 in severance. Shortly thereafter, Murray sent letters to DeMatteo and an attorney ^{5/} in which he threatened to release damaging information about DeMatteo and Leslie unless certain conditions were met, including retaining White Star to provide on-call consulting services to Voyager for a monthly fee of \$7,500, paying

^{5/} The record is unclear as to whom the attorney was representing at the time.

the \$37,650 for the White Star report, and continuing medical coverage for Murray and his dependents. 6/ Murray's conditions were not met. 7/

In November 2002, the Liquidating Trusts, as successors in interest to the Funds, filed a civil action against Voyager, DeMatteo, Leslie, Murray, and White Star, alleging, among other things, improper inflation of invoices, charges for services not performed, and the conversion of the Funds' assets for personal use. 8/ The parties settled the action in November 2003 for \$130,000, of which Murray contributed \$15,000.

Beginning in 2003, Murray provided consulting services to clients of Ehrenkrantz King Nussbaum, Inc. ("EKN"), a registered broker-dealer firm, who wanted to engage in market-timing activities. 9/ At the time of the hearing in this matter, Murray was providing consulting services to Ehrenkrantz Growth Fund, a registered investment company, and Ehrenkrantz Asset Management Group, a registered investment adviser, both of which are related to EKN.

II.

A. Aiding and Abetting Antifraud Violations of the Advisers Act

The Order Instituting Proceedings ("OIP") charged Murray with willfully aiding and abetting and being a cause of Cornerstone's violations of Sections 206(1) and 206(2) of the

6/ One of Murray's letters warned, "If the information is released the Proper Authorities will move immediately against you. . . . Your friends will loose [sic] their consulting positions. No friends participating in real estate deals. . . . Your political contacts will desert you. . . . No more management fee. No more investment bank. No more Wall Street contacts. . . . If your lawyer was shocked by what he saw imagine what the reaction will be of the press and the authorities. You will loose [sic] everything instantly."

7/ Leslie swore out a complaint for attempted extortion. The New York criminal authorities executed a search warrant at Murray's home, seizing computers and documents; however, no criminal charges were filed against Murray.

8/ Cornerstone filed for liquidation under Chapter 7 of the United States Bankruptcy Code in October 2002.

9/ In September 2005, the Commission filed a complaint in the Eastern District of New York against Murray, EKN, and EKN's then-chief executive officer related to the market-timing activities.

Advisers Act. 10/ Section 206(1) prohibits the employment by an investment adviser of "any device, scheme, or artifice to defraud any client or prospective client," and Section 206(2) proscribes on the part of an investment adviser "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 11/

To establish Murray's aiding and abetting liability, the Division of Enforcement was required to show that (1) Cornerstone violated the provisions charged, (2) Murray substantially assisted the conduct that constituted the violations, and (3) Murray provided that assistance with the requisite scienter. 12/ The scienter requirement may be satisfied by showing that Murray knew of, or recklessly disregarded, the wrongdoing and his role in furthering it. 13/ A finding that a person aided and abetted a violation necessarily makes the person a cause of that violation. 14/

Misappropriation of client funds by an investment adviser violates Sections 206(1) and 206(2). 15/ The record establishes that Cornerstone, a fiduciary to the Funds, knowingly inflated and falsified certain vendor invoices through Voyager and directed Orbitex to pay the inflated amounts, with Fund money, to Voyager. Voyager paid the vendors lesser amounts and kept the overage. This misconduct establishes the primary violations of Section 206(1) and 206(2). Murray does not dispute the primary violations by Cornerstone, and does not argue that Cornerstone's conduct was proper.

Murray admits his involvement in preparing, approving, and submitting inflated and falsified invoices (as well as falsifying letterhead for vendors), knowing that some invoices were

10/ 15 U.S.C. §§ 80b-6(1), 80b-6(2). The requirement that Murray acted willfully may be satisfied by a showing that he intended to do the acts that constituted the violation. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

11/ 15 U.S.C. §§ 80b-6(1), 80b-6(2).

12/ See Robert J. Prager, Securities Exchange Act Rel. No. 51974 (July 6, 2005), 85 SEC Docket 3413, 3421 & n.17 (citing additional cases).

13/ See, e.g., Monetta Fin. Servs., Inc. v. SEC, 390 F.3d 952, 956 (7th Cir. 2004); Howard v. SEC, 376 F.3d 1136, 1143, 1149 (D.C. Cir. 2004); Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000).

14/ See, e.g., Zion Capital Mgmt., LLC, 57 S.E.C. 99, 116 (2003) (citing Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000)).

15/ SEC v. Batterman, 2002 U.S. Dist. LEXIS 18556, at *25 (S.D.N.Y. Sept. 30, 2002); SEC v. Tandem Mgmt. Inc., 2001 U.S. Dist. LEXIS 19109, at *33, *38 (S.D.N.Y. Nov. 13, 2001); see also SEC v. Olsen, 243 F. Supp. 338, 339 (S.D.N.Y. 1965) (misappropriation of client funds by investment adviser violated Section 206).

marked up or completely falsified, and failing to inquire as to the basis for others. 16/ Moreover, Murray admits that he knew that the purpose of submitting inflated invoices to Orbitex was to conceal from Orbitex the amount of money retained by Voyager. These facts establish Murray's awareness of the wrongdoing and his substantial assistance to the scheme, as well as his knowing participation in the acts that constituted the violation. We find that Murray acted knowingly, and thus with scienter.

Murray argues that he did not act with scienter because he was merely acting on DeMatteo's instructions. He argues that Voyager was authorized to charge the Funds for its services, and that the amount that Voyager charged was set by DeMatteo. 17/ He testified that "Mr. DeMatteo insisted that this [inflation of invoices] was an acceptable process and that . . . Voyager being an authorized vendor, he could receive those funds, and that was the justification for the payment being made."

Murray is liable for his own participation in the scheme, without regard to whether he was acting on DeMatteo's instructions. 18/ The defense that one was merely following orders is not available where the fraudulent nature of conduct is obvious. 19/ Murray engaged in a series

16/ Once Murray knew that inflated invoices were being submitted to Voyager, the unquestioning approval and submission of subsequent third-party invoices manifested at least extreme recklessness unless Murray had a reasonable basis to believe an invoice was legitimate. See Howard v. SEC, 376 F.3d at 1143 (scienter established by showing of extreme recklessness where individual "encountered 'red flags' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct of the primary violator, or if there was 'a danger . . . so obvious that the actor must have been aware of' the danger" (citations omitted)).

17/ Murray testified that, in November 2001, an attorney had stated "that since the [Fund] assets had declined to the point where the management fees I guess couldn't cover certain things, that it was all right for Voyager or a third party . . . to bill the [Funds] for services . . ." However, law firm billing records showed no services rendered by the attorney in question before January 2002. Murray admitted that the attorney did not suggest that third-party invoices could be inflated in order to cover Voyager's expenses.

18/ For this reason, whether (as Murray asserts) DeMatteo testified falsely about his role in the scheme, in the civil litigation or elsewhere, has no effect on Murray's liability. We have relied solely on the record in this proceeding.

19/ See SEC v. Hughes Capital Corp., 124 F.3d 449, 454-55 (3d Cir. 1997) (holding that where undisputed facts established that transactions were so clearly suspicious that bookkeeper was negligent in continuing to complete them, bookkeeper could not avoid liability by arguing "that he was just being a good soldier and following orders"); SEC v.
(continued...)

of deceptive actions: he prepared faked invoices on faked letterhead, and unquestioningly approved and submitted other invoices while knowing that by doing so he was helping to conceal Voyager's profitability from Orbitex. He offers no rationale as to how such deception could be justified. Moreover, Murray appears to have profited from his involvement in the fraudulent scheme.

Murray's assertion that Voyager was authorized to charge the Funds for its services is irrelevant. Voyager was not charging for its services. Rather, Murray both falsely inflated invoices and manufactured other invoices from vendors where no services were rendered (or where the costs of services rendered should perhaps have been covered by routine payments by the Funds to Cornerstone). Murray makes no argument that the inflated amounts he included in the manufactured invoices had any basis in fact or were justified in any way by services actually provided to the Funds, or even that he believed at the time that the amounts were justified.

Murray argues that his preparation of "backup documentation" made no difference because "the presence of the accompanying documentation had no bearing on the amount paid to Voyager, and need not have been created or accompanied the Voyager invoices, because the procedure all along had been to pay the amounts stated on the Voyager invoices." However, the inflated backup invoices that Murray created lent plausibility by corroborating the amounts invoiced by Voyager.

Murray argues in the alternative that he is liable, if at all, only for his conduct between mid-November 2001, when he created, submitted, and authorized payment of the first inflated invoice, and mid-December 2001, when Murray sent Sanders a spreadsheet itemizing a payment to Sanders that Sanders knew to exceed the amount he had billed. Sanders responded to Murray in an email dated December 15, 2001 that he "[c]ouldn't help but notice items for me including the \$53M as paid. Shouldn't that be JS \$33 and Voyager \$20 since JS bills Voyager and the cancelled checks will need to reconcile?" Murray asserts that Sanders "was told exactly what was being done" at a meeting held "within several days of [the] December 15th email" and that

19/ (...continued)

Antar, 15 F. Supp. 2d 477, 523-24 (D.N.J. 1998) (holding that one who was "more than a mere dupe lacking any awareness of the frauds perpetrated" could not credibly argue that he was "just following orders"). Murray's contentions that DeMatteo took various steps necessary to the success of the scheme (e.g., paying third-party vendors from Voyager bank accounts) are unavailing because we find that Murray's conduct by itself is sufficient to constitute substantial assistance. Similarly, Murray's complaint that DeMatteo and Leslie engaged in similar violations, before and (in the case of DeMatteo) simultaneously with Murray's misconduct, is no defense. See, e.g., James E. Welch, 51 S.E.C. 229, 232 (1992) (finding that registered representative who executed unauthorized options trades in violation of American Stock Exchange Inc. rules would not be exonerated by even truthful allegations that supervisor approved and directed many of the trades and may have benefitted from them).

Sanders "had full knowledge of the markup of his own invoices." Murray testified that he continued the scheme in reliance on Sanders's inaction. In Murray's view Sanders, a certified public accountant, had a "fiduciary" duty "to call matters into question that were improper and direct that they be resolved."

Sanders testified that he did not remember having any meeting about marked-up invoices in the immediate aftermath of his December 15 email. Sanders agreed that he had found one discrepancy between an amount owed to him and a corresponding entry on a spreadsheet. Sanders also testified that (1) he believed the discrepancy to be a typographical error that Murray could easily correct, and (2) the discrepancy was one of a large number of issues related to the Funds that were competing for his attention in the months leading up to the liquidation of the Funds. The law judge, who observed the witnesses testify, "reject[ed] as incredible" Murray's claim that he relied on Sanders's failure to tell him to stop inflating invoices. 20/

Accordingly, we find that Murray willfully aided and abetted and was a cause of Cornerstone's willful violations of Advisers Act Sections 206(1) and 206(2).

B. Conversion

The OIP also charged Murray with a willful violation of Section 37 of the Investment Company Act. Section 37 states that "[w]hoever steals, unlawfully abstracts, [or] unlawfully and willfully converts to his own use or to the use of another . . . any of the moneys, funds . . . property, or assets of any registered investment company shall be deemed guilty of a crime . . ." 21/ Although the statutory language contemplates the imposition of criminal sanctions, federal courts have recognized the Commission's authority to pursue civil causes of

20/ Even if Sanders had been aware of Murray's deliberate inflation of invoices and the related actions set forth above and had failed to do anything to stop it, that would not exonerate Murray. Murray cannot rely on the silence of others to absolve himself of liability where the wrongfulness of his actions is so evident. Cf. Dolphin & Bradbury, Inc. v. SEC, 512 F.3d 634, 642 & n.8 (D.C. Cir. Jan. 11, 2008) (underwriter who failed to disclose critically important information to prospective investors "cannot rely on the silence of others to absolve himself from responsibility when non-disclosure presented such an obvious danger of misleading investors").

21/ 15 U.S.C. § 80a-36.

action for violations of Section 37, 22/ and we have held that sanctions based on violations of this section may also be imposed in administrative proceedings before the Commission. 23/

As used in Section 37, conversion includes both "misuse or abuse of property" and "use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." 24/ In particular, "[t]he willful misapplication of corporate funds by fiduciaries constitutes a conversion" under Section 37. 25/ Murray was secretary to the Cornerstone Funds during the period at issue, and accordingly owed a fiduciary duty to the funds. 26/ Despite this fiduciary relationship, he created, submitted, and authorized payment of faked and inflated invoices, which led to the Funds' assets being used in ways that did not benefit the Funds. Thus, Murray's knowing submission of inflated invoices for reimbursement constituted a "willful misapplication of corporate funds" to this account in violation of Section 37.

22/ See SEC v. Durgarian, 477 F. Supp. 2d 342, 359 (D. Mass. 2007) (citing the Commission's "unique role" in enforcing the Investment Company Act); SEC v. Lawbaugh, 359 F. Supp. 2d 418 (D. Md. 2005) (default judgment); SEC v. Carnicle, 1999 U.S. Dist. LEXIS 23379 (N.D. Utah 1999) (summary judgment), aff'd, 2000 U.S. App. LEXIS 14380 (10th Cir. 2000) (table); SEC v. Commonwealth Chem. Sec., Inc., 410 F. Supp. 1002, 1018 (S.D.N.Y. 1976) ("we believe that the SEC may [enforce this statute] under its broad powers to compel compliance with the securities laws"), aff'd in part and modified in part, 574 F.2d 90 (2d Cir. 1978).

23/ See Int'l Research & Mgmt. Corp., 46 S.E.C. 1167, 1170 (1978) ("We see no reason why this Commission should be precluded from taking administrative action based on the extremely serious misconduct to which [Section 37] is addressed."), aff'd, 588 F.2d 821 (3d Cir. 1978).

24/ Tanzer v. Huffines, 314 F. Supp. 189, 194 (D. Del. 1970) (citing Morissette v. United States, 342 U.S. 246, 271-72 (1952)).

25/ Brown v. Bullock, 194 F. Supp. 207, 229 (S.D.N.Y. 1961), aff'd, 294 F.2d 415 (2d Cir. 1961).

26/ See Winfield & Co., 44 S.E.C. 810, 814 (1972) (officers of an investment company "were fiduciaries of [that company]. As such, they were under a duty to act solely in the best interests of [that company] and its shareholders.") (citing Provident Mgmt. Corp., 44 S.E.C. 442, 445 (1970)); see also A.S. Hansen, Inc., 1974 SEC No-Act. LEXIS 2531, at *1 (July 12, 1974) ("Section 36(a) of the Investment Company Act also provides that the officers and directors of, and investment adviser to an investment company have a fiduciary duty to such investment company.").

Accordingly, we find that Murray willfully violated Investment Company Act Section 37.

IV.

Murray argues that he was denied a fair hearing in several respects.

A. Murray complains that the Commission did not secure the computers, records, files, or other papers for Cornerstone, Voyager, or the Funds during its investigation. He contends that DeMatteo and Leslie, among others, testified falsely about events pertaining to this matter and that "[i]f the Commission had acted expediently in securing the computers at Cornerstone's offices in 2001, such lies would have been exposed four years earlier than they were."

Murray does not identify any law that obliges the Commission to secure all the records of an investment adviser or investment company during an investigation and does not complain that the Commission staff withheld from him any record from the staff's investigation that Murray requested. Murray does not identify any particular relevant documents that were lost, destroyed, or damaged during the time between commencement of the Commission's investigation and the hearing. He does not explain how the types of documents he identifies would contribute to his defense or refute testimony. Moreover, the testimony of DeMatteo and Leslie, or others, is not the basis for our decision. As discussed above, Murray admits all the facts on which we have based our findings of his liability. For these reasons, we reject this argument.

B. Murray also argues that deterioration in DeMatteo's condition by the time of the hearing denied Murray a fair hearing. Murray asserts that, during the negotiations resulting in DeMatteo's settlement of our proceeding, ^{27/} DeMatteo claimed that he was "completely disabled, mentally enfeebled, and unable to participate in his own defense." Murray contends that "any information provided to the Commission by DeMatteo should be discarded, along with any evidence he produced for the Commission at any time in the past." The settlement negotiations to which Murray alludes are not part of the record, and he identifies no other evidence of any disability suffered by DeMatteo. Murray did not subpoena DeMatteo to testify, nor did he explain the potential relevance of any testimony by DeMatteo. He also does not identify any information or evidence provided by DeMatteo that, in his view, should be discarded. In any event, as noted above, our decision is based on facts that Murray admits, not on evidence provided by DeMatteo. We therefore reject Murray's argument.

C. Murray argues that he was denied a fair hearing because third parties to whom subpoenas were addressed failed to respond in a timely fashion. He further contends that the law judge improperly held him responsible for the delay, and that the law judge "refused to delay the start of the hearing, delay the course of the hearing, or provide Respondent with any opportunity to use the information provided by subpoena in the cross examination of witnesses at the hearing."

^{27/} See note 3 *supra*.

Most of Murray's contentions are contradicted by the record. Murray did not file his subpoena applications until twelve days after the law judge had advised him of the need to proceed expeditiously; the law judge signed two of the three applications the day Murray filed them. Although Murray waited fifteen days before responding to a motion to quash, the law judge denied the motion within three days of Murray's response.

At a prehearing conference on January 18, 2007, Murray requested postponement of the hearing (which was scheduled to begin on January 22) to allow Murray more time to obtain and review materials. The law judge refused, stating that Murray had not explained what defense he intended to offer, nor how Murray expected his efforts to lead to the introduction of admissible evidence or of documents that could be used to cross-examine witnesses. The law judge also stated that Murray had not been diligent in his preparation: he had failed to inspect the Division's documents for two months after being notified of their availability and had not acted in a timely manner to prepare and submit subpoena applications and to serve subpoenas.

Murray had received all documents responsive to his subpoenas by January 23, 2007, the second day of the hearing. After the Division concluded its case on January 24, the law judge adjourned the hearing until January 30 to give Murray a chance to review the newly produced materials. Murray told the law judge that the postponement was acceptable, and, when the hearing resumed, told the law judge that he "believe[d he had] been able to [examine the materials received in response to the subpoenas thoroughly] in the time I was allotted, yes."

The law judge also allowed Murray to submit additional documents into the record after the close of the hearing. Any such submissions were initially to be made by February 9, 2007, but the law judge extended the deadline twice, until March 2, 2007, at Murray's request. Murray submitted no additional documents from those produced in response to his subpoenas. Murray's failure to identify additional documents useful to his case undermines his argument that he was prejudiced by lack of earlier access to the materials.

As set forth above, Murray was dilatory in obtaining and serving the subpoenas. Once the materials were produced, the law judge continued the hearing to allow Murray to review them; Murray agreed with the length of the continuation, and upon resumption of the hearing, he admitted he had had sufficient time to review the materials. We reject Murray's argument that he was prejudiced by the law judge's actions in this respect.

D. Murray also argues that he was unable to use certain unspecified subpoenaed materials to cross-examine a witness who testified before those materials were introduced, apparently referring to his not having had the December 15 email from Sanders described above while questioning Sanders at the hearing. Murray questioned Sanders about the content of the email, however, even though he did not have a copy of it. Moreover, he could have sought to have Sanders recalled as a witness once he obtained the emails, but he did not. His allegations of prejudice based on the time he obtained the email are therefore unfounded.

E. Murray asserts that "the facts finally produced midway through the hearing, if known to the Commission in a timely manner, would have completely changed the Commission's faith in the charges brought against the Respondent." Our de novo review is based on the entire record in this proceeding, including facts produced midway through the hearing, and these facts do not alter our conclusions.

F. Murray asserts that he was denied a fair hearing because the law judge interpreted his participation in the settlement of the civil litigation brought by the Liquidating Trusts and his payment of \$15,000 towards that settlement as an admission of liability. The sole references to Murray's settlement in the Initial Decision are to the fact of the settlement and the offset of Murray's \$15,000 payment against the disgorgement ordered in this proceeding. We do not interpret these references to the settlement as a finding that Murray admitted liability in the civil litigation. In any event, our findings of liability in this proceeding are based only on facts adduced at the hearing before the law judge that are not disputed by Murray.

V.

A. Prohibition from Association and Bar

Investment Company Act Section 9(b) and Advisers Act Section 203(f) respectively allow us, among other things, to prohibit any person from serving or acting in certain capacities with respect to an investment company or investment adviser and to bar a person associated with an investment adviser from association with an investment adviser. 28/ We may take such action if we determine that the person in question has willfully violated or aided and abetted a violation of the Investment Company Act or the Advisers Act, and that such action is in the public interest. 29/ In determining whether a sanction is in the public interest, we consider the factors set forth in Steadman v. SEC. 30/ These factors include the egregiousness of the actions at issue, the isolated or recurrent nature of the infraction at issue, the degree of scienter involved, the recognition of the wrongful nature of the conduct and the sincerity of any assurances against future violations, and the likelihood that a respondent's occupation will present opportunities for future violations. 31/

Murray's conduct was egregious. He knew that the Funds were on the verge of liquidation, yet nonetheless engaged in a scheme to misappropriate their funds, to the

28/ 15 U.S.C. §§ 80a-9, 80b-3(f).

29/ Investment Company Act Section 9(b)(2), 15 U.S.C. § 80a-9(b)(2); Advisers Act Section 203(e)(6), 15 U.S.C. § 80b-3(e)(6).

30/ 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

31/ Id.

disadvantage of the Funds' shareholders and for his own personal benefit. As set forth in our discussion of scienter, the wrongfulness of his conduct was obvious and manifested a high degree of scienter. His violative conduct is compounded by his threatening behavior with respect to his attempts to obtain payment of the \$37,650 invoice from White Star and additional consulting fees. ^{32/}

Murray's misconduct was not an isolated instance, involving twelve invoices dated from November 9, 2001 to February 1, 2002. Each payment involved several discrete wrongful acts by Murray, including in some instances preparing false or inflated invoices, approving Voyager invoices for payment, and signing payment authorizations. He stopped only when his misconduct was identified.

Murray knew that his actions were designed to deceive Orbitex and admits that he forged and falsely inflated invoices, yet he continues to deny that his conduct was wrongful and downplays the seriousness of the violative scheme, contending that even when counsel learned of the scheme in February 2002, he and DeMatteo were only told to stop it, not to return any of the money Voyager had retained by virtue of the scheme. ^{33/} His inability to grasp the wrongful nature of conduct to which he admits suggests a risk of recurrence that requires strong sanctions to protect the public interest. Murray's provision of consulting services to Ehrenkrantz Growth Fund and Ehrenkrantz Asset Management Group presents opportunities for future violations.

Based on our consideration of the Steadman factors as discussed above, we find it in the public interest to bar Murray from associating with any investment adviser and from working for any registered investment company.

B. Cease-and-Desist Orders

Advisers Act Section 203(k)(1) authorizes the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Advisers Act or any rule or regulation thereunder, or against any person who "is, was, or would be a cause of [a] violation, due to an act or omission the person knew or should have known would contribute to such violation." ^{34/} Similarly, Investment Company Act Section 9(f)(1)

^{32/} See Robert Bruce Lohmann, 56 S.E.C. 573, 583 n.20 (2003) (matters not charged in OIP may be considered in determining appropriate sanctions).

^{33/} Murray's arguments that the Commission should have charged a violation in connection with an additional Voyager invoice, or should have proceeded against other individuals involved in the scheme, are further examples of Murray's efforts to deflect criticism from his own actions.

^{34/} 15 U.S.C. § 80b-3(k)(1).

authorizes the Commission to impose a cease-and-desist order based on violations of the Investment Company Act. 35/

In determining whether a cease-and-desist order is an appropriate sanction, we analyze the risk of future violations. 36/ The existence of a violation raises an inference that the violation will be repeated, and where the misconduct that results in the violation is egregious, the inference is justified. 37/ We also consider whether other factors demonstrate a risk of future violations. Beyond the seriousness of the violation, these may include the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, the opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions sought in the proceeding. 38/ This inquiry is flexible, and no single factor is dispositive. 39/

We find that the risk of future violations here is high. Murray's violative conduct with respect to Cornerstone raises an inference that the violation will be repeated. As discussed above, the violations at issue in this proceeding were very serious, involving repeated and purposeful deceptions and damaging the Funds, to which Murray owed a fiduciary duty, at a time that they were on the verge of liquidation. Investors were harmed because assets of the Funds were misappropriated and converted. Murray knew that his actions were intended to deceive. He has made no credible assurances against future violations. Although we have determined to bar Murray from association with an investment adviser or investment company, a cease-and-desist order may nonetheless serve a remedial function should Murray become active in the securities industry in another capacity.

We find that the record as a whole, especially the evidence with regard to the seriousness and recurrent nature of the violations, the harm to investors, and the very high degree of scienter, establishes a sufficient risk that Murray would commit future violations to warrant imposition of a cease-and-desist order. Based on all of these factors, we find a cease-and-desist order against Murray to be in the public interest.

35/ 15 U.S.C. § 80a-9(f)(1).

36/ KPMG Peat Marwick, 54 S.E.C. 1135, 1185 (2001), reconsideration denied, 55 S.E.C. 1 (2001), petition for review denied, 289 F.3d 109 (D.C. Cir. 2002).

37/ See Geiger v. SEC, 363 F.3d 481, 489 (D.C. Cir. 2004) and cases cited therein.

38/ KPMG Peat Marwick, 54 S.E.C. at 1192.

39/ Id.

C. Civil Penalties

Under Advisers Act Section 203(i)(1)(B), we may impose civil money penalties in a proceeding instituted under Advisers Act Section 203(e) or 203(f) when a respondent has willfully aided and abetted the violation of any provision of the Advisers Act, and such penalties are in the public interest. 40/ In determining whether a penalty is in the public interest, the statute provides that we may consider (1) whether the violation involved fraud, deceit, or manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 41/

If we determine that the imposition of a civil penalty is in the public interest, a three-tier system establishes the maximum civil money penalty that may be imposed for each violation found. 42/ For each act or omission involving fraud or deceit, a second-tier civil penalty may be warranted. 43/ The statutory maximum amount that may be imposed as a second-tier penalty against an individual is \$60,000 for each act or omission occurring after February 2, 2001 but before February 15, 2005. 44/ Within this statutory framework, we have discretion in setting the amount of penalty.

The Division requested a second-tier civil penalty, and we find the imposition of such a penalty to be warranted in the public interest. Murray's conduct involved fraud and deceit. Fund shareholders were harmed by the misappropriation and conversion of Fund assets at a time when the Funds were to be liquidated. 45/ Murray was unjustly enriched by his participation in the scheme. The need to deter Murray, who fails to acknowledge the wrongfulness of his conduct, is great; the sanctions imposed on Murray will also have the salutary effect of deterring others from engaging in the same serious misconduct. In the exercise of our discretion, we impose a \$60,000 penalty.

40/ 15 U.S.C. § 80b-3(i)(1)(B).

41/ Advisers Act Section 203(i)(3), 15 U.S.C. § 80b-3(i)(3).

42/ Advisers Act Section 203(i)(2), 15 U.S.C. § 80b-3(i)(2).

43/ Advisers Act Section 203(i)(2)(B), 15 U.S.C. § 80b-3(i)(2)(B).

44/ See Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, title III, §31001 (1996); 17 C.F.R. § 201.1001.

45/ The misappropriation and conversion were by their nature harmful to shareholders, although the Funds were made whole by the settlement of the litigation brought by the Liquidating Trusts.

D. Disgorgement

Investment Company Act Section 9(e) and Advisers Act Section 203(j) allow the Commission to order disgorgement and the payment of reasonable prejudgment interest in any proceeding in which a civil money penalty could be imposed. 46/ Disgorgement is an equitable remedy designed to deprive wrongdoers of unjust enrichment by returning them to where they would have been absent the violation and to deter others from violating the securities laws. 47/ The amount of disgorgement ordered "need only be a reasonable approximation of profits causally connected to the violation." 48/ Once the Division has shown that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's figure is not a reasonable approximation. 49/ Any risk of uncertainty as to the amount to be disgorged rightly falls on the wrongdoer, whose illegal conduct created the uncertainty. 50/

The law judge ordered disgorgement of \$27,200. He found that the Division had reasonably approximated Murray's unjust enrichment by showing that Murray received \$42,200 from Cornerstone between November 2001 and February 2002, and that Murray's contention that he performed legitimate services and provided real value to Voyager and Cornerstone during that period did not sustain his burden of proving that the Division's figure was not a reasonable approximation of Murray's ill-gotten gains. The law judge did, however, reduce the Division's disgorgement figure by the \$15,000 that Murray paid to settle litigation brought against him by the Liquidation Trusts based on the same misconduct.

We find that Murray was unjustly enriched by his fraudulent misconduct. Voyager bank statements, the corresponding cancelled checks, and a summary exhibit prepared by Murray show that between November 19, 2001 and February 17, 2002 Voyager paid Murray \$42,200, an average of \$14,066.67 per month, during the period of the fraudulent activity at issue. 51/ DeMatteo, who Murray identifies as having been involved in the fraud, wrote the checks to

46/ 15 U.S.C. §§ 80a-5, 80b-3(j).

47/ First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989); SEC v. Johnson, 143 F.3d 260, 263 (6th Cir. 1998); IFG Network Sec., Exchange Act Rel. No. 54127 (July 11, 2006), 88 SEC Docket 1374, 1393.

48/ First City Fin. Corp., 890 F.2d at 1231.

49/ SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995).

50/ First City Fin. Corp., 890 F.2d at 1232.

51/ Murray's summary exhibit does not include an April 13, 2001 wire in the amount of \$300 that is shown on the Voyager bank statements for the period ending April 17, 2001.

Murray. In contrast, Voyager bank statements, cancelled checks, and Murray's summary exhibit show that for the period between January 19, 2001 and September 19, 2001, Murray received an average of \$2,014.29 per month for services he provided to Voyager before he became involved in the fraudulent invoice scheme. 52/ Thus, Murray's compensation after he started participating in the fraud was more than seven times as great as it previously was. We find the increased compensation, in the amount of \$12,052.38 per month or a total of \$36,157.14, to be attributable to Murray's fraudulent conduct.

Murray attempts to explain the dramatic increase in compensation by asserting that he provided additional services to Voyager and Cornerstone after Leslie's stroke, including portfolio management services. He does not, however, attempt to quantify those services, and record evidence suggests that they were minimal: we note Murray's statement in his reply brief that "there was almost no trading to be done" during his tenure as portfolio manager, and we also note that there was an assistant portfolio manager due to Murray's lack of experience in that area. 53/

52/ Murray's summary exhibit shows that he received \$1,000 by draft on March 15, 2001. Although this payment cannot be substantiated by the Voyager bank statement for the period, we give Murray the benefit of the doubt and include the \$1,000 in our calculations.

Murray was paid at irregular intervals. The checks written to him before November 2001 are in amounts ranging from \$200 to \$2,000; those written after November 2001 are in amounts ranging from \$500 to \$14,000. The Voyager account statements for the periods from July 18 to August 16, 2001 and October 17 to November 19, 2002 do not include copies of cancelled checks, making it impossible to determine Murray's compensation for those periods. In computing Murray's monthly compensation, we excluded those months from our calculations.

53/ The Division introduced an August 2, 2001 letter in which Murray speculates about

how my former partners will "cooperate" in reporting my income to the Department of Labor. If they do cooperate then I will be collecting something in the neighborhood of \$1,600 per month. If they don't play along, and report only what they have been paying me then it's anyone's guess as to what I will get from the State. . . . I am willing to work off the books for as long as unemployment lasts.

This letter reflects Murray's apparent willingness to present false or misleading information about remuneration from employment when doing so would result in financial benefit. This attitude renders less credible Murray's contentions that his work for Voyager and Cornerstone between November 2001 and February 2002 merited the greatly increased remuneration he received.

(continued...)

We thus find that the increase in Murray's compensation during the period of the fraud represents unjust enrichment to Murray. Calculated over the three-month period between mid-November 2001 and mid-February 2002, the unjust enrichment totals \$36,157. We reduce this figure by \$15,000, based on Murray's payment to settle the Liquidating Trust litigation, and order disgorgement in the amount of \$21,157. 54/

Murray argues that the record shows that Voyager disbursed more money between November 2001 and February 2002 than the total amount misappropriated, and that it is therefore mathematically impossible for the \$42,200 he received to have derived from the misappropriated money. As we have explained the disgorgement calculation above, this argument is irrelevant. We have not assessed the amount to be disgorged based on the proceeds of the misappropriation scheme, but rather based on the amount by which his co-schemers compensated Murray for his participation in the scheme. Murray's receipt of the \$21,157 to be disgorged is therefore adequately connected to his unjust enrichment from the scheme.

An appropriate order will issue. 55/

By the Commission (Chairman COX and Commissioners CASEY, WALTER, AGUILAR and PAREDES).

Florence E. Harmon
Acting Secretary

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

53/ (...continued)

Murray argues that it is impossible for him to provide evidence of his work efforts in late 2001 and early 2002 "by virtue of the records in this case being lost to him." As noted above, however, Murray identifies no specific records that were allegedly destroyed or damaged between 2002 and the present.

54/ Additionally, prejudgment interest on the disgorgement amount is assessed, beginning March 1, 2002. See Exchange Act Sections 21B(e), 21C(e), 15 U.S.C. §§ 78u-2(e), 78u-3(e) (authorizing Commission to assess "reasonable interest" in connection with order for disgorgement in any proceeding in which a civil money penalty could be imposed or any cease-and-desist proceeding); Commission Rule of Practice 600, 17 C.F.R. § 201.600 (explaining calculation of interest).

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2809 / November 21, 2008

INVESTMENT COMPANY ACT OF 1940
Rel. No. 28519 / November 21, 2008

Admin. Proc. File No. 3-12436

In the Matter of
BRENDAN E. MURRAY

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Brendan E. Murray be, and he hereby is, barred from associating with any investment adviser or investment company; and it is further

ORDERED that Brendan E. Murray cease and desist from committing or being a cause of any violations or future violations of Section 37 of the Investment Company Act of 1940 and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940; and it is further

ORDERED that Brendan E. Murray pay a civil money penalty of \$60,000; and it is further

ORDERED that Brendan E. Murray disgorge \$21,157, plus prejudgment interest of \$10,384.65, such prejudgment interest calculated beginning on March 1, 2002, in accordance with Commission Rule of Practice 600(b), and such interest continuing to accrue if payment is not made within twenty-one days after service of this order;

Payment of the amount to be disgorged and the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations

Center, 6432 General Green Way, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be sent to James McGovern, counsel for the Division of Enforcement, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

By the Commission.

Florence E. Harmon
Acting Secretary

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

*Commissioner Walter
not participating*

F

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8984 / November 24, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13296

In the Matter of

PROSPER
MARKETPLACE, INC.,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against Prosper Marketplace, Inc. ("Prosper" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

19 of 28

III.

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

Respondent

Prosper is a Delaware corporation based in San Francisco, California, that owns and operates an online lending platform on its website, www.Prosper.com. Prosper was previously incorporated as JC Capital Solutions, Inc. ("JC Capital"). Prosper is a private corporation and is not registered with the Commission.

Summary

Prosper operates an online lending platform connecting borrowers with lenders. The loan notes issued by Prosper pursuant to this platform are securities and Prosper, from approximately January 2006 through October 14, 2008, violated Sections 5(a) and (c) of the Securities Act, which prohibit the offer or sale of securities without an effective registration statement or a valid exemption from registration.

Prosper's Platform

Prosper's lending platform functions like a double-blind auction, connecting individuals who wish to borrow money, or "borrowers," with individuals or institutions who wish to commit to purchase loans extended to borrowers, referred to on the platform as "lenders." Lenders and borrowers register on the website and create Prosper identities. They are prohibited from disclosing their actual identities anywhere on the Prosper website. Borrowers request three-year, fixed rate, unsecured loans in amounts between \$1,000 and \$25,000 by posting "listings" on the platform indicating the amount they want to borrow and the maximum interest rate they are willing to pay. Prosper assigns borrowers a credit grade based on a commercial credit score obtained from a credit bureau, but Prosper does not verify personal information, such as employment and income. Potential lenders bid on funding all or portions of loans for specified interest rates, which are typically higher than rates available from depository accounts at financial institutions. Each loan is usually funded with bids by multiple lenders. After an auction closes and a loan is fully bid upon, the borrower receives the requested loan with the interest rate fixed by Prosper at the lowest rate acceptable to all winning bidders. Individual lenders do not actually lend money directly to the borrower; rather, the borrower receives a loan from a bank with which Prosper has contracted. The interests in that loan are then sold and assigned through Prosper to the lenders, with each lender receiving an individual non-recourse promissory note.

Since the inception of its platform in January 2006, Prosper has initiated approximately \$174 million in loans. Prosper collects an origination fee from each borrower of one to three percent of loan proceeds and collects servicing fees from each lender from loan payments at an annual rate of one percent of the outstanding principal balance of the notes. Prosper administers the collection of loan payments from the borrower and the distribution of such payments to the

lenders. Prosper also initiates collection of past due loans from borrowers and assigns delinquent loan accounts to collection agencies. Lenders and borrowers are prohibited from transacting directly and are unable to learn each others' true identities.

Discussion

The notes offered by Prosper are investments. Lenders expect a profit on their investments in the form of interest, which is at a rate generally higher than that available from depository accounts at financial institutions. Prosper's website has included statements that the Prosper notes provide returns superior to those offered by alternative investments such as equity stocks, CDs and money markets. The Prosper website has also stated that it offers lenders ways to "spread your risk out and ensure a more reliable return" and describes how lenders are allowed to use payments from an outstanding loan to purchase a new loan "in order to maximize returns." In addition, marketing to institutional lenders on the Prosper website characterizes the platform as an alternative to "stock or bond returns" that is "crucial for prudent portfolio management" in "turbulent markets." Testimonials published on the Prosper website show that customers have used Prosper notes as investment vehicles. Prosper also offers Portfolio Plans that allow lenders to automatically bid on loans based on estimates of risk and return characterized by Prosper.

Lenders rely on the efforts of Prosper because Prosper's efforts are instrumental to realizing a return on the lenders' investments. Prosper lenders are effectively passive with respect to elements important to realizing profit on their investments and Prosper is instrumental in each of these elements. Prosper established and maintains the website platform, without which none of the loan transactions could be effected. Prosper provides mechanisms for attracting lenders and borrowers, facilitating the exchange of information between borrowers and lenders, coordinating bids, and effecting the loans. It provides borrower information to potential lenders via the loan listings, including credit ratings. Prosper provides a matrix for evaluating performance and potential returns in the form of historical loan performance, Prosper Marketplace and individual borrower performance, and delinquency activity, among other things. Prosper manages the bidding and subscription process for every loan and has the sole contractual right to service the loans, including administering the borrower and lender accounts, and providing monthly statements that reflect payments made and received on the loan notes, as well as amounts available for bidding on new notes.

Furthermore, under the terms of the notes, Prosper has the sole right to act as loan servicer of the notes. In this capacity, Prosper collects repayments of loans and interest, contacts delinquent borrowers for repayment, and reports loan payments and delinquencies to credit reporting agencies. Prosper also exclusively manages the process of referring delinquent loans to collection agencies for payment, and selling defaulted loans to debt purchasers. Since the lender does not know the borrower's identity, the lender would be unable in any event to pursue his or her rights as a noteholder in the event of default. Further, if a lender chooses to participate in Prosper's Portfolio Plan, whereby lenders are permitted to choose portfolios that automatically allocate the lender's funds among various loans based on risk and return characteristics categorized by Prosper, Prosper chooses the loans on which a bid is made. Lastly, the continued existence and operation of the Prosper platform is essential to the loan transactions taking place. Prosper lenders are too geographically diverse and diffuse to come together without Prosper.

They lack the requisite experience to run a loan auction or to create and service a loan package. Rather, the Prosper lenders rely on Prosper's continued operation of the platform in order to transact and to recoup any gain on their investments.

Legal Discussion

The notes offered by Prosper are securities pursuant to Section 2(a)(1) of the Securities Act and under the Supreme Court's decisions in both *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), and *Reves v. Ernst & Young, Inc.*, 494 U.S. 56 (1990).

A. Application of the *Howey* Investment Contract Analysis

Pursuant to *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), an investment contract exists if there is present "an investment of money in a common enterprise with profits to come solely from the efforts of others." *Id.* at 301. An investment contract is a security under Section 2(a)(1) of the Securities Act, the offer or sale of which must be registered pursuant to Section 5 of the Securities Act.

The financial instrument offered by Prosper meets the definition of an investment contract as set forth in *Howey*. As discussed above, there is an investment of money when lenders invest money to purchase a loan. The lenders bear one-hundred percent of the risk of loss each time they fund a Prosper loan because the Prosper loans are non-recourse.

There is a common enterprise for several reasons. For example, a common enterprise exists because lenders and borrowers are dependent on Prosper in order to engage in new loans or to complete the timely repayment of loans already funded. A common enterprise also exists because the vast majority of Prosper loans are funded by more than one lender and because the majority of lenders fund more than one loan. All lenders would be negatively affected if Prosper were unable to operate the platform. In addition, there is a common enterprise between Prosper and its members because borrowers pay Prosper an origination fee of one to three percent of the loan, and each lender pays annual servicing fees to Prosper of one percent of the outstanding principal balance of the notes.

Further, lenders are dependent upon the efforts of Prosper to realize any return on their investment. As discussed above, borrowers and lenders are prohibited from transacting directly and must rely on Prosper to execute each element of the loan creation and repayment process.

B. Application of the *Reves* Note Analysis

A note is presumed to be a security under the Supreme Court's opinion in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), unless it is of a type specifically identified as a non-security. The types of non-security notes identified in *Reves* include notes delivered in a consumer financing; notes secured by a mortgage on a home; short-term notes secured by a lien on a small business or its assets; short-term notes evidenced by accounts receivable; notes evidencing "character" loans to bank customers; notes formalizing open account debts incurred in the ordinary course of business; and notes evidencing loans from commercial banks for ordinary operations. *Id.* at 65. A note that

is not among the list identified in *Reves* is a security unless it bears a "strong family resemblance" to the non-security notes identified in the opinion. *Id.* at 64-65. *Reves* established a four-part family resemblance test to determine whether a note is a security, which is comprised of the following factors: (i) the motivations of the buyer and seller; (ii) the plan of distribution; (iii) the reasonable expectations of the investing public; and (iv) the existence of an alternate regulatory regime. *Id.* at 66-67. If a note fails the family resemblance test, it is deemed a security and the offer or sale of such security must be registered pursuant to Section 5 of the Securities Act. The Prosper loan notes are securities under *Reves* because they do not fall into any of the enumerated categories of non-security notes, and they fail the family resemblance test.

With regard to the motivations of the buyer and seller, as discussed above, Prosper lenders are motivated by the desire to obtain a better return on their money than they otherwise could in another venue. While some Prosper lenders may be motivated, in part, by altruism, altruistic and profit motives are not mutually exclusive. See *In the Matter of Robin Bruce McNabb*, Rel. No. 34-43411 (Oct. 4, 2000), *aff'd*, 298 F.3d 1126 (9th Cir. 2002).

With respect to the plan of distribution, the Prosper notes are offered and sold on the internet to the public at large. There is no special level of financial sophistication or expertise that Prosper lenders must have. This wide dissemination and solicitation to the public with no attempt to limit investors is indicative of a security. See *Reves*, 494 U.S. at 68 (the notes "were... offered and sold to a broad segment of the public, and that is all we have held to be necessary to establish the requisite 'common trading' in an instrument"); *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808, 814 (2d Cir. 1994) (concluding that the broad-based, unrestricted sales to the general investing public supported a finding that mortgage participations were securities under federal securities laws).

In analyzing the expectations of the investing public, the lenders in this instance, the relevant issue is what a reasonable investor would believe about the character of the transaction, "even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not 'securities' as used in that transaction." *Reves*, 494 U.S. at 66. The manner in which a transaction is characterized in advertisements is illustrative, and whether there is a "valuable return on an investment, which undoubtedly includes interest." *Id.* at 69. As discussed above, Prosper lenders reasonably expect a valuable return on loaned funds and would reasonably believe that the Prosper loans are investments.

Finally, with regard to whether an alternate regulatory scheme exists to reduce risk to potential investors, there are currently no appropriate regulatory safeguards for Prosper lenders, such as those against misleading statements by a borrower about the purpose of a loan, the borrower's employment and income, or even the borrower's identity, or against misleading statements by Prosper.

Thus, the Prosper notes are securities under *Reves* because: (i) Prosper lenders are motivated by an expected return on their funds; (ii) the Prosper loans are offered to the general public; (iii) a reasonable investor would likely expect that the Prosper loans are investments; and

(iv) there is no alternate regulatory scheme that reduces the risks to investors presented by the platform.

As a result of the conduct described above, Prosper violated Section 5(a) of the Securities Act, which states that unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Also as a result of the conduct described above, Prosper violated Section 5(c) of the Securities Act, which states that it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

IV.

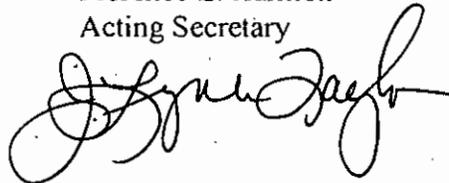
In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Prosper's Offer.

Accordingly, it is hereby ORDERED that:

Pursuant to Section 8A of the Securities Act, Respondent Prosper cease and desist from committing or causing any violations and any future violations of Sections 5(a) and (c) of the Securities Act.

By the Commission.

Florence E. Harmon
Acting Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

November 24, 2008

In the Matter of

**American Custom Components, Inc.,
Creditgroup Com, Inc.
(n/k/a Tradex Global Financial Services, Inc.),
Frederick Brewing Co., and
Infinicall Corp.,**

Respondents.

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 American Custom Components, Inc. because it has not filed any periodic reports since the period ended June 30, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Creditgroup Com, Inc. (n/k/a Tradex Global Financial Services, Inc.) because it has not filed any periodic reports since August 12, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Frederick Brewing Co. 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 Infinicall Corp. because it has not filed any periodic reports since the period ended December 31, 2005.

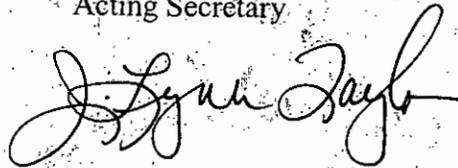
The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

20 of 28

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. EST on November 24, 2008, through 11:59 p.m. EST on December 8, 2008.

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
November 24, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13295

In the Matter of

**American Custom Components, Inc.,
ClearLogic, Inc.,
Creditgroup Com, Inc.
(n/k/a Tradex Global Financial Services, Inc.),
Frederick Brewing Co., and
Infincall 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 American Custom Components, Inc., ClearLogic, Inc., Creditgroup Com, Inc. (n/k/a Tradex Global Financial Services, Inc.), Frederick Brewing Co., and Infincall Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. American Custom Components, Inc. (CIK No. 1053322) is a defaulted Nevada corporation located in Santa Ana, 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-Q for the period ended June 30, 1998. On January 21, 2000, the company filed a Chapter 7 petition with the United States Bankruptcy Court for the Central District of California, which was closed on April 21, 2000. As of November 18, 2008, the company's common stock (symbol "ACCM") was quoted on the Pink Sheets, had seven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

21 of 28

2. ClearLogic, Inc. (CIK No. 925664) is a void Delaware corporation located in Haddonfield, New Jersey 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 September 30, 2000, which reported a net loss of \$135,736.

3. Creditgroup Com, Inc. (n/k/a Tradex Global Financial Services, Inc.) (CIK No. 1084892) is a void Delaware corporation located in San Diego, 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 August 12, 1999, which reported a loss of \$5,425.81 for the three months ended March 31, 1999. During the summer of 2006, the company changed its name with the State of Delaware and the Pink Sheets to Tradex Global Financial Services, Inc., but failed to report that change to the Commission as required by Commission rules. As of November 18, 2008, the company's common stock (symbol "TDXG") 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).

4. Frederick Brewing Co. (CIK No. 926978) is a Maryland corporation located in Frederick, 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 for the period ended September 30, 2002, which reported a net loss of \$1.9 million for the prior nine months. As of November 18, 2008, the company's common stock (symbol "FRBW") was quoted on the Pink Sheets, had seven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Infinicall Corp. (CIK No. 925739) is a void Delaware corporation located in Denver, Colorado 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 December 31, 2005, which reported a \$21 million operating loss from inception in April 2001. As of November 18, 2008, the company's common stock (symbol "INFL") was quoted on the Pink Sheets, had twelve 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 Commission's 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 American Custom Components, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
American Custom Components, Inc.	10-Q	09/30/98	11/16/98	Not filed	120
	10-K	12/31/98	03/31/99	Not filed	116
	10-Q	03/31/99	05/17/99	Not filed	114
	10-Q	06/30/99	08/16/99	Not filed	111
	10-Q	09/30/99	11/15/99	Not filed	108
	10-K	12/31/99	03/30/00	Not filed	104
	10-Q	03/31/00	05/15/00	Not filed	102
	10-Q	06/30/00	08/14/00	Not filed	99
	10-Q	09/30/00	11/14/00	Not filed	96
	10-K	12/31/00	04/02/01	Not filed	91
	10-Q	03/31/01	05/15/01	Not filed	90
	10-Q	06/30/01	08/14/01	Not filed	87
	10-Q	09/30/01	11/14/01	Not filed	84
	10-K	12/31/01	04/01/02	Not filed	79
	10-Q	03/31/02	05/15/02	Not filed	78
	10-Q	06/30/02	08/14/02	Not filed	75
	10-Q	09/30/02	11/14/02	Not filed	72
	10-K	12/31/02	03/31/03	Not filed	68
	10-Q	03/31/03	05/15/03	Not filed	66
	10-Q	06/30/03	08/14/03	Not filed	63
	10-Q	09/30/03	11/14/03	Not filed	60
	10-K	12/31/03	03/30/04	Not filed	56
	10-Q	03/31/04	05/17/04	Not filed	54
	10-Q	06/30/04	08/16/04	Not filed	51
	10-Q	09/30/04	11/15/04	Not filed	48
	10-K	12/31/04	03/31/05	Not filed	44
	10-Q	03/31/05	05/16/05	Not filed	42
	10-Q	06/30/05	08/15/05	Not filed	39
	10-Q	09/30/05	11/14/05	Not filed	36
	10-K	12/31/05	03/31/06	Not filed	32
10-Q	03/31/06	05/15/06	Not filed	30	
10-Q	06/30/06	08/14/06	Not filed	27	
10-Q	09/30/06	11/14/06	Not filed	24	

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
American Custom Components, Inc. (continued)	10-K	12/31/06	04/02/07	Not filed	19
	10-Q	03/31/07	05/15/07	Not filed	18
	10-Q	06/30/07	08/14/07	Not filed	15
	10-Q	09/30/07	11/14/07	Not filed	12
	10-K	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/14/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent		41			

ClearLogic, Inc.

10-K	12/31/00	04/02/01	Not filed	91
10-Q	03/31/01	05/15/01	Not filed	90
10-Q	06/30/01	08/14/01	Not filed	87
10-Q	09/30/01	11/14/01	Not filed	84
10-K	12/31/01	04/01/02	Not filed	79
10-Q	03/31/02	05/15/02	Not filed	78
10-Q	06/30/02	08/14/02	Not filed	75
10-Q	09/30/02	11/14/02	Not filed	72
10-K	12/31/02	03/31/03	Not filed	68
10-Q	03/31/03	05/15/03	Not filed	66
10-Q	06/30/03	08/14/03	Not filed	63
10-Q	09/30/03	11/14/03	Not filed	60
10-K	12/31/03	03/30/04	Not filed	56
10-Q	03/31/04	05/17/04	Not filed	54
10-Q	06/30/04	08/16/04	Not filed	51
10-Q	09/30/04	11/15/04	Not filed	48
10-K	12/31/04	03/31/05	Not filed	44
10-Q	03/31/05	05/16/05	Not filed	42
10-Q	06/30/05	08/15/05	Not filed	39
10-Q	09/30/05	11/14/05	Not filed	36
10-K	12/31/05	03/31/06	Not filed	32
10-Q	03/31/06	05/15/06	Not filed	30
10-Q	06/30/06	08/14/06	Not filed	27
10-Q	09/30/06	11/14/06	Not filed	24
10-K	12/31/06	04/02/07	Not filed	19
10-Q	03/31/07	05/15/07	Not filed	18

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
ClearLogic, Inc. (continued)	10-Q	06/30/07	08/14/07	Not filed	15
	10-Q	09/30/07	11/14/07	Not filed	12
	10-K	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/14/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0

Total Filings Delinquent 32

Creditgroup Com, Inc.
(n/k/a Tradex Global
Financial Services, Inc.)

10-Q	06/30/99	08/16/99	Not filed	111
10-Q	09/30/99	11/15/99	Not filed	108
10-K	12/31/99	03/30/00	Not filed	104
10-Q	03/31/00	05/15/00	Not filed	102
10-Q	06/30/00	08/14/00	Not filed	99
10-Q	09/30/00	11/14/00	Not filed	96
10-K	12/31/00	04/02/01	Not filed	91
10-Q	03/31/01	05/15/01	Not filed	90
10-Q	06/30/01	08/14/01	Not filed	87
10-Q	09/30/01	11/14/01	Not filed	84
10-K	12/31/01	04/01/02	Not filed	79
10-Q	03/31/02	05/15/02	Not filed	78
10-Q	06/30/02	08/14/02	Not filed	75
10-Q	09/30/02	11/14/02	Not filed	72
10-K	12/31/02	03/31/03	Not filed	68
10-Q	03/31/03	05/15/03	Not filed	66
10-Q	06/30/03	08/14/03	Not filed	63
10-Q	09/30/03	11/14/03	Not filed	60
10-K	12/31/03	03/30/04	Not filed	56
10-Q	03/31/04	05/17/04	Not filed	54
10-Q	06/30/04	08/16/04	Not filed	51
10-Q	09/30/04	11/15/04	Not filed	48
10-K	12/31/04	03/31/05	Not filed	44
10-Q	03/31/05	05/16/05	Not filed	42
10-Q	06/30/05	08/15/05	Not filed	39
10-Q	09/30/05	11/14/05	Not filed	36
10-K	12/31/05	03/31/06	Not filed	32
10-Q	03/31/06	05/15/06	Not filed	30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Creditgroup Com, Inc. <i>(n/k/a Tradex Global Financial Services, Inc.)</i> <i>(continued)</i>	10-Q	06/30/06	08/14/06	Not filed	27
	10-Q	09/30/06	11/14/06	Not filed	24
	10-K	12/31/06	04/02/07	Not filed	19
	10-Q	03/31/07	05/15/07	Not filed	18
	10-Q	06/30/07	08/14/07	Not filed	15
	10-Q	09/30/07	11/14/07	Not filed	12
	10-K	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/14/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent	38				

Frederick Brewing Co.

10-K	12/31/02	03/31/03	Not filed	68
10-Q	03/31/03	05/15/03	Not filed	66
10-Q	06/30/03	08/14/03	Not filed	63
10-Q	09/30/03	11/14/03	Not filed	60
10-K	12/31/03	03/30/04	Not filed	56
10-Q	03/31/04	05/17/04	Not filed	54
10-Q	06/30/04	08/16/04	Not filed	51
10-Q	09/30/04	11/15/04	Not filed	48
10-K	12/31/04	03/31/05	Not filed	44
10-Q	03/31/05	05/16/05	Not filed	42
10-Q	06/30/05	08/15/05	Not filed	39
10-Q	09/30/05	11/14/05	Not filed	36
10-K	12/31/05	03/31/06	Not filed	32
10-Q	03/31/06	05/15/06	Not filed	30
10-Q	06/30/06	08/14/06	Not filed	27
10-Q	09/30/06	11/14/06	Not filed	24
10-K	12/31/06	04/02/07	Not filed	19
10-Q	03/31/07	05/15/07	Not filed	18
10-Q	06/30/07	08/14/07	Not filed	15

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Frederick Brewing Co. (continued)	10-Q	09/30/07	11/14/07	Not filed	12
	10-K	12/31/07	03/31/08	Not filed	8
	10-Q	03/31/08	05/15/08	Not filed	6
	10-Q	06/30/08	08/14/08	Not filed	3
	10-Q	09/30/08	11/14/08	Not filed	0
Total Filings Delinquent	24				
Infinicall Corp.	10-KSB	03/31/06	06/29/06	Not filed	29
	10-QSB	06/30/06	08/14/06	Not filed	27
	10-QSB	09/30/06	11/14/06	Not filed	24
	10-QSB	12/31/06	02/14/07	Not filed	21
	10-KSB	03/31/07	06/29/07	Not filed	17
	10-QSB	06/30/07	08/14/07	Not filed	15
	10-QSB	09/30/07	11/14/07	Not filed	12
	10-QSB	12/31/07	02/14/08	Not filed	9
	10-K ¹	03/31/08	05/15/08	Not filed	6
	10-Q ¹	06/30/08	08/14/08	Not filed	3
10-Q ¹	09/30/08	11/14/08	Not filed	0	
Total Filings Delinquent	11				

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.

*Chairman Cox and
Commissioner Walter
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59007 / November 24, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2903 / November 24, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13297

In the Matter of

ANNIE ASTOR-
CARBONELL (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 Annie Astor-Carbonell ("Astor") 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.

22 of 28

II.

In anticipation of the institution of these proceedings, Astor has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Astor 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. Astor, age 50, is and has been a certified public accountant licensed to practice in the Commonwealth of Puerto Rico. She served as a Member of the Board of Directors, Senior Executive Vice President and Chief Financial Officer of First BanCorp during the relevant period. In September 2005, Astor resigned from her management role and as a member of the Board. She retired from First BanCorp effective October 31, 2005.
2. First BanCorp is one of the largest financial holding companies in Puerto Rico. First BanCorp provides commercial banking services through a network of offices in Puerto Rico and the U.S. Virgin Islands. First BanCorp's common stock is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and is listed on the New York Stock Exchange.
3. On October 17, 2008, a final judgment was entered against Astor, permanently enjoining her from future violations of Section 10(b) of the Exchange Act and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, and aiding and abetting violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder, in the civil action entitled Securities and Exchange Commission v. Angel Alvarez-Perez and Annie Astor-Carbonell, Civil Action Number 08-CV-08009 in the United States District Court for the Southern District of New York. Astor was ordered to pay a \$75,000 civil money penalty.
4. The Commission's complaint alleged, among other things, that First BanCorp senior management, including Astor, concealed the true nature of over \$4 billion worth of mortgage-related transactions from the company's independent auditor and the investing public between 2000 and 2005. First BanCorp, which purportedly purchased the mortgages, profited from these transactions by earning over \$100 million in net interest income with minimal risk. The contra-party to the transactions, Doral Financial Corporation, which purportedly sold the mortgages to First BanCorp, improperly recognized income on these transactions during the relevant period. First BanCorp senior management, including Astor, also created and backdated

certain documents and affirmatively misrepresented the terms of certain mortgage-related transactions to First BanCorp's independent auditor to avoid a restatement in November 2004.

IV.

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

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

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

B. After five (5) years from the date of this order, Astor may request that the Commission consider her 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 Astor's work in her practice before the Commission will be reviewed either by the independent audit committee of the public company for which she works or in some other acceptable manner, as long as she practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Astor, or the public accounting firm with which 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) Astor, or the registered public accounting firm with which 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 she will not receive appropriate supervision;

(c) Astor 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) Astor acknowledges her responsibility, as long as she 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 her CPA license is current and she has resolved all other disciplinary issues with the applicable boards of accountancy. However, if 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 Astor'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

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2810 / November 25, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13301

In the Matter of

THOMAS J. SMITH,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Thomas J. Smith ("Smith" 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

23 of 28

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. From February 2001 until December 2004, Smith acted as an investment adviser and managed approximately \$6.15 million in client assets. During this period, Smith's clients were certain of his relatives. Smith, 51 years old, is a resident of Franklin, Tennessee.

2. On October 20, 2008, a final judgment was entered by consent against Smith, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10b-5, and Sections 206(1), (2) and (3) of the Advisers Act, in the civil action entitled *Securities and Exchange Commission v. Thomas J. Smith* Civil Action Number 1:08-cv-01640, in the United States District Court for the District of Columbia. The final judgment also orders Smith to pay a penalty of \$25,000 but does not impose a greater penalty based on Smith's sworn statements in his statement of financial condition and other materials provided to the Commission.

3. The Commission's complaint alleged that, during the period from March 2002 through December 2004, Smith breached the trust of his investment advisory clients, all of whom were Smith's relatives, and fraudulently misappropriated approximately \$676,223 from those clients. Smith orchestrated a fraudulent trading scheme involving at least 554 matched orders in at least 43 different stocks among various brokerage accounts that he controlled and managed as an investment adviser. To accomplish this, Smith used thinly traded stocks, and executed his matched orders in the less liquid after-hours market. Smith placed near-simultaneous matching limit orders to buy and sell the same security between his and his clients' accounts in order to misappropriate his clients' funds. Through these matched orders, Smith engaged in prohibited principal trades with his clients. Smith neither provided written disclosure to his clients before the completion of these transactions nor obtained his clients' consent to these transactions.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Smith be, and hereby is barred from association with any investment adviser.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of

factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Florence E. Harmon
Acting Secretary

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

T-11

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59016 / November 25, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13298

In the Matter of

DENNIS K. McNELL,

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 Dennis K. McNell ("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.

III.

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

24 of 28

III.

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

1. Respondent McNell, age 42, currently resides in Northern California. From at least December 2002 through December 2004, McNell was a principal of Redwood Trading, LLC ("Redwood"), a now defunct broker-dealer, and also served as the Chief Executive Officer, Chief Operations Officer, and a registered representative at the firm.
2. On November 21, 2008, a final judgment was entered by consent against Respondent McNell, permanently enjoining him from violations of Sections 9(a)(2), 10(a)(1), and 10(b) of the Exchange Act and Rule 10b-5 thereunder, and from aiding and abetting violations of Sections 15(c)(3) and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3 and 17a-4(j) thereunder, in the civil action entitled, *Securities and Exchange Commission v. Dennis K. McNell*, Civil Action Number 08-Civ.-10053-BSJ, in the United States District Court for the Southern District of New York.
3. The Commission's complaint alleged that, during the period of October 2003 through September 2004, McNell (i) aided and abetted his customer's fraudulent trading scheme involving the execution of thousands of short sales of securities listed on the New York Stock Exchange with the intent to artificially depress the price of those shares, and (ii) engaged in a scheme to conceal from Redwood substantial trading losses that he had incurred in a Redwood proprietary trading account during July and August 2004. As alleged in the Complaint, McNell also aided and abetted Redwood's violations of the federal securities laws by (a) causing the firm's books and records to be inaccurate, (b) causing the firm to engage in securities business while it was not in compliance with the net capital rule, and (c) failing to produce Redwood's records when requested by the Commission's 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 McNell's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent McNell be, and hereby is, barred from association with any broker or dealer, with the right to reapply for association in a non-supervisory capacity after five (5) 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

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

*Chairman Cox and
Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8985 / November 25, 2008

INVESTMENT COMPANY ACT OF 1940
Release No. 28522 / November 25, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13302

In the Matter of

**5G WIRELESS
COMMUNICATIONS, INC.**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST AND EXEMPTION SUSPENSION
PROCEEDINGS, MAKING FINDINGS,
IMPOSING A CEASE-AND-DESIST
ORDER, AND PERMANENTLY
SUSPENDING THE REGULATION E
EXEMPTION AS TO 5G WIRELESS
COMMUNICATIONS, INC., PURSUANT
TO SECTION 9(f) OF THE INVESTMENT
COMPANY ACT OF 1940 AND RULE
610(c) OF REGULATION E**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist and exemption suspension proceedings be, and hereby are, instituted pursuant to Section 9(f) of the Investment Company Act of 1940 ("Investment Company Act") and Rule 610(c) of Regulation E against 5G Wireless Communications, Inc. ("5G Wireless" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist and Exemption Suspension Proceedings, Making Findings, Imposing a Cease-and-Desist Order, and Permanently Suspending the Regulation E Exemption as to 5G Wireless Communications, Inc., Pursuant to Section 9(f) of the Investment Company Act of 1940 and Rule 610(c) of Regulation E ("Order"), as set forth below.

III.

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

Summary

1. Since electing to be regulated as a business development company ("BDC") on October 19, 2004, 5G Wireless has, among other things, issued rights to purchase its securities without expiration to non-security holders; issued stock with unequal voting rights; issued warrants without authorization of its shareholders which, upon conversion, would represent more than 25% of its outstanding voting securities and be issued at a price below the market value on the date of issuance; and issued securities for services. As a result, 5G Wireless violated Sections 18(d), 18(i), and 23(a), respectively, of the Investment Company Act. In addition, 5G Wireless failed to obtain a fidelity bond as required under Section 17(g) of the Investment Company Act and Rule 17g-1 thereunder, and failed to adopt and implement written compliance procedures as required under Investment Company Act Rule 38a-1. Finally, 5G Wireless failed to comply with Rule 609 of Regulation E because it did not file an offering status report on Form 2-E in connection with a securities offering under Regulation E commenced in October 2004.

Respondent

2. 5G Wireless is a Nevada corporation with principal offices located in Torrance, California. 5G Wireless elected BDC status on October 19, 2004 and withdrew its election on October 21, 2005. Prior to its BDC election, 5G Wireless was an operating company in the telecommunications business. Its common stock is registered under Section 12(g) of the Securities Exchange Act of 1934 and is traded on the Pink Sheets under the symbol FGWI.

Issuing Senior Securities and Convertible Securities with Unequal Voting Rights

3. On September 22, 2004, 5G Wireless issued two convertible notes to private investors in exchange for \$2 million. The notes were convertible into 5G Wireless common stock at a price equal to the lesser of \$0.05 per share or 75% of the average of the five lowest closing bids for the company's stock for the 90 days preceding the conversion date.

4. On October 4, 2004, 5G Wireless issued 3 million shares of Series-A preferred stock to its two officers. Each Series-A preferred share was convertible into 800 common shares for three years from the date of issuance. Each Series-A preferred share was entitled to the same voting rights on all matters as 800 common shares.

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.

5. On March 22, 2005, 5G Wireless issued convertible notes to three private investors in exchange for \$1 million. The notes were convertible into 5G Wireless common stock at a price equal to the lower of \$0.01 per share or 75% of the average of the five lowest bids for the common stock for the 90 trading days preceding a conversion date. Each of these convertible notes also included a Class-A warrant, which was convertible into common shares at a price of \$0.01 per share and was exercisable for five years from the purchase date.

6. Under Section 61(b) of the Investment Company Act, a BDC must comply with Section 61 at the time it becomes subject to Sections 55 through 65 of the Investment Company Act ("the BDC provisions"), "as if it were issuing a security of each class which it has outstanding at such time." 5G Wireless became subject to the BDC provisions on October 19, 2004.

7. Section 18 of the Investment Company Act is made applicable to BDCs by Section 61(a) of the Investment Company Act, subject to certain exceptions. Section 18(d), as applicable to BDCs, generally prohibits them from issuing "any warrant or right to subscribe to or purchase a security of which such company is the issuer, except in the form of warrants or rights to subscribe expiring not later than one hundred and twenty days after their issuance and issued exclusively and ratably to a class or classes of such company's securities holders." 5G Wireless' convertible notes, Class-A warrants, and convertible Series-A preferred stock, which constituted rights to subscribe to or purchase securities, did not provide that the conversion feature would expire within 120 days after their issuance.

8. Section 61(a)(3) allows a BDC, notwithstanding Section 18(d), to issue warrants, options, or rights to subscribe or convert to voting securities that are accompanied by securities if, among other things, the BDC's shareholders authorize, and a majority of the BDC's disinterested directors approves, the proposal to issue such securities; the exercise or conversion price is not less than the current market value at the date of issuance; and the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance does not exceed 25% of the BDC's outstanding voting securities.

9. As of September 30, 2004, 5G Wireless had 641,637,979 shares of common stock outstanding. When issued, the notes were convertible into approximately 200,000,000 shares based upon the 90-day average closing bid price of \$0.01. These shares represented approximately 31% of the outstanding voting shares as of September 30, 2004, exceeding the 25% limit of Section 18(d), as modified by 61(a)(3) of the Investment Company Act. 5G Wireless' financial condition remained essentially unchanged between September 30, 2004 and its election on October 19, 2004. Furthermore, the conversion features on the convertible notes and Series-A preferred shares, as well as the exercise terms of the Class-A warrants attached to the second issue of convertible notes, were not approved by the shareholders and were issued with conversion and exercise provisions based upon prices below the common stock's market price on the dates of issuance.

10. With certain exceptions not relevant here, Section 18(i) of the Company Act provides that every share of stock issued by a BDC shall be a voting stock and have equal voting rights with every other outstanding voting stock. Here, each Series-A preferred shareholder was entitled to vote on all matters at a rate 800 times greater than the common shares.

Issuance of Shares for Services

11. Section 23(a) of the Investment Company Act, which Section 63 makes applicable to BDCs, generally prohibits any closed-end company from issuing securities for services or property other than cash or securities. On November 1, 2004, 5G Wireless issued 3 million restricted shares of common stock valued at \$39,000, or \$0.013 per share, to a consultant in exchange for services. On December 15, 2004, 5G Wireless issued 888,889 shares with an aggregate market value of \$12,000 to two individuals and one law firm for legal services. On January 10, 2005, 5G Wireless issued 8,709,676 restricted shares valued at \$94,500 to seven of its employees, including the chief executive officer for their services to the BDC in the fourth quarter of 2004.

Failure to Adopt and Implement Compliance Policies and Procedures

12. On December 17, 2003, the Commission adopted Rule 38a-1 under the Investment Company Act, which requires each registered investment company and BDC to adopt and implement written policies and procedures reasonably designed to prevent violations of federal securities laws. These policies and procedures must be approved by the BDC's board of directors (including a majority of disinterested directors) and reviewed annually. Furthermore, each BDC must appoint a chief compliance officer to administer the policies and procedures and to fulfill certain reporting duties to the board. The compliance deadline for this rule was October 5, 2004. 5G Wireless failed to adopt and implement written policies and procedures reasonably designed to prevent violations of federal securities laws and failed to appoint a chief compliance officer.

Failure to Provide and Maintain a Fidelity Bond

13. Section 17(g) of the Investment Company Act and Rule 17g-1 thereunder, which Section 59 makes applicable to BDCs, require each BDC to provide and maintain a bond issued by a reputable fidelity insurance company against larceny and embezzlement by officers and employees of the BDC. 5G Wireless did not provide and maintain a fidelity bond.

Violations

14. As a result of the conduct described above, 5G Wireless violated Sections 17(g), 18(d), 18(i), and 23(a) of the Investment Company Act and Rule 17g-1 and Rule 38a-1 thereunder.

Failure to Comply with Rule 609 of Regulation E

15. On October 22, 2004, 5G Wireless filed a Form 1-E notification of stock issuance pursuant to the securities registration exemption under Securities Act of 1933 Regulation E. The filing

included a required offering circular, which provided certain disclosures regarding the offering. Rule 609 of Regulation E requires that, within 30 days after the end of each six-month period following the date of the original offering circular, or upon the termination of the offering, whichever is earlier, an issuer must file a report on Form 2-E, providing certain information regarding the status of the offering. 5G Wireless did not file until June 24, 2005 the Form 2-E that was due within 30 days after April 22, 2005. Therefore, 5G Wireless failed to comply with Rule 609.

16. Under Regulation E, Rule 610(c), the Commission may, at any time after notice of and opportunity for hearing, enter an order permanently suspending the Regulation E exemption, if the Commission has reason to believe, among other things, that any of the terms or conditions of Regulation E have not been complied with, including failure to file any report as required by Rule 609.

Respondent's Remedial Efforts

17. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent 5G Wireless' Offer.

Accordingly, pursuant to Section 9(f) of the Investment Company Act and Rule 610(c) of Regulation E, it is hereby ORDERED that:

A. Respondent 5G Wireless cease and desist from committing or causing any violations and any future violations of Sections 17(g), 18(d), 18(i), and 23(a) of the Investment Company Act and Rules 17g-1 and 38a-1 thereunder.

B. The Regulation E exemption as to Respondent 5G Wireless be, and hereby is, permanently suspended.

By the Commission.

Florence E. Harmon
Acting Secretary

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

F

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59018 / November 25, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13300

In the Matter of

STEPHEN L. HOCHBERG, CPA

Respondent.

**ORDER OF FORTHWITH
SUSPENSION PURSUANT
TO RULE 102(e)(2) OF THE
COMMISSION'S RULES OF
PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Stephen L. Hochberg, CPA ("Hochberg") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(2)].¹

II.

The Commission finds that:

1. From June 1985 to June 1999, Hochberg was a certified public accountant in Massachusetts.
2. On October 21, 2008, an order was entered convicting Hochberg of eight counts of wire fraud in violation of Title 18 United States Code, section 1343 and nine counts of fraud in connection with the purchase or sale of a security in violation of Title 15 United States Code, sections 178j(b) and 78ff before the United States District Court for the District of Massachusetts, in United States v. Stephen L. Hochberg, 08-cr-10126-NMG.

¹ Rule 102(e)(2) provides, in pertinent part, "[A]ny person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

3. As a result of his conviction, Hochberg was sentenced to 63 months in prison to be followed by three years of supervised release. Hochberg was also ordered to pay \$1,791,500 in restitution.

III.

In view of the foregoing, the Commission finds that Hochberg has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Stephen L. Hochberg is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission:

Florence E. Harmon
Acting Secretary

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

*Commissioner Watter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8987 / November 26, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13109

In the Matter of

Lexington Resources, Inc.,
Grant Atkins, and
Gordon Brent Pierce,

Respondents.

ORDER MAKING FINDINGS AND
IMPOSING CEASE-AND-DESIST
ORDERS PURSUANT TO SECTION 8A OF
THE SECURITIES ACT OF 1933 AS TO
LEXINGTON RESOURCES, INC. AND
GRANT ATKINS

I.

In these proceedings, instituted on July 31, 2008 pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), respondents Lexington Resources, Inc. ("Lexington") and Grant Atkins ("Atkins") (collectively "Respondents") both have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Cease-and-Desist Orders Pursuant to Section 8A of the Securities Act of 1933 as to Lexington Resources, Inc. and Grant Atkins ("Order"), as set forth below.

III.

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

A. NATURE OF THE PROCEEDING

1. Between 2003 and 2006, Lexington and its CEO and Chairman Atkins issued or caused to be issued 4.7 million shares² of Lexington common stock to certain consultants who engaged

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.

² All share amounts are adjusted for Lexington's three-for-one stock split on January 29, 2004.

in promotional or capital-raising services for Lexington pursuant to an agreement between Lexington and a consulting firm, and to one individual who did not provide any services at all.

2. Lexington attempted to register these issuances of stock using Form S-8, a short-form registration statement that allows companies to register offerings made to employees, including consultants, using an abbreviated disclosure format. Form S-8 is to be used by issuers to register the issuance of shares to consultants who perform bona fide services for the issuer and are issued by the company for compensatory or incentive purposes. However, Form S-8 expressly prohibits the registration of the issuance of stock as compensation for stock promotion or capital-raising services. Because Lexington issued shares to consultants who engaged in stock promotion or capital-raising services and to an individual who provided no services at all, the attempted registration of these issuances using Form S-8 was invalid, and the issuances consequently were in violation of the registration provisions of the federal securities laws.

B. RESPONDENTS

3. Lexington is a Nevada corporation formed in November 2003 pursuant to a reverse merger between Intergold Corp. ("Intergold"), a public shell company, and Lexington Oil and Gas LLC, a private company owned by an offshore entity. In connection with the reverse merger, Intergold changed its name to Lexington Resources, Inc. and Lexington Oil and Gas became a wholly-owned subsidiary of Lexington Resources, Inc. Lexington's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets") under the symbol "LXRS" (from 2003 to 2007 the stock was quoted on the OTC Bulletin Board). On March 4, 2008, Lexington's primary operating subsidiary, Lexington Oil and Gas, filed for Chapter 11 bankruptcy. The petition was converted to a Chapter 7 liquidation on April 22, 2008. Lexington's only other operating subsidiary filed for Chapter 7 liquidation on June 11, 2008.

4. Grant Atkins has been CEO and Chairman of Lexington since its inception in November 2003 and was CEO and Chairman of Lexington's predecessor, Intergold. Atkins, 48, is a Canadian citizen residing in Vancouver, British Columbia.

C. LEXINGTON AND ATKINS ISSUED 4.7 MILLION SHARES TO CERTAIN INDIVIDUALS USING FORM S-8

5. On November 19, 2003, Lexington Resources was formed through a reverse merger between Intergold (at that point a non-operational shell company) and Lexington Oil and Gas.

6. Within days after the reverse merger, Atkins, who was Lexington's CEO and sole director at the time, caused Lexington to file a registration statement on Form S-8 and begin issuing stock to certain consultants and another individual. Between November 2003 and March 2006, Lexington issued 4.7 million shares to these individuals and attempted to register the issuances on Form S-8. Atkins caused the Form S-8 registration statements to be filed on behalf of Lexington and authorized the issuances of Lexington stock, pursuant to the instructions of the consulting firm. The recipients of these shares sold the majority into the public market less than one year after receiving them.

7. Form S-8 is an abbreviated form of registration statement that may be used to register an issuance of shares to employees and certain types of consultants; Form S-8 does not provide the extensive disclosures or Commission review required for a registration statement used for a public

offering of securities. A company can issue S-8 shares to consultants only if they provide bona fide services to the registrant and such services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

8. Lexington attempted to use Form S-8 to register issuances of shares to consultants who engaged in stock promotion or capital-raising services and to an individual who did not provide any services. The consultants to whom Lexington issued the shares prepared and distributed promotional materials about Lexington to potential investors, directed Lexington's investor relations efforts, and raised capital for Lexington's first year of drilling operations by finding investors to provide capital for the wells.

9. Lexington's attempts to register issuances of stock to these individuals on Form S-8 were invalid because the consultants were performing services expressly disallowed for Form S-8 registrations and the other individual did not provide any services at all. By failing to properly register the issuances of shares to these individuals, Lexington failed to make all of the disclosures to the public for the registration of the issuances of shares for capital-raising transactions as required by law.

D. VIOLATIONS

10. As a result of the conduct described above, the Commission finds that Respondents Lexington and Atkins violated Sections 5(a) and 5(c) of the Securities Act, which, among other things, unless a registration statement is on file or in effect as to a security, prohibit any person, directly or indirectly, from: (i) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; (ii) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or (iii) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

IV.

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

Accordingly, it is hereby ORDERED that:

- A. Pursuant to Section 8A of the Securities Act, Respondent Lexington cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act; and

- B. Pursuant to Section 8A of the Securities Act, Respondent Atkins cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act.

By the Commission.

Florence E. Harmon
Acting Secretary

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

*Chairman Cox and
Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8986 / November 26, 2008

INVESTMENT COMPANY ACT OF 1940
Release No. 28523 / November 26, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13303

In the Matter of

RENEW ENERGY
RESOURCES, INC.,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST AND EXEMPTION SUSPENSION PROCEEDINGS, MAKING FINDINGS, IMPOSING A CEASE-AND-DESIST ORDER, AND PERMANENTLY SUSPENDING THE REGULATION E EXEMPTION AS TO RENEW ENERGY RESOURCES, INC., PURSUANT TO SECTION 9(f) OF THE INVESTMENT COMPANY ACT OF 1940 AND RULE 610(c) OF REGULATION E

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist and exemption suspension proceedings be, and hereby are, instituted pursuant to Section 9(f) of the Investment Company Act of 1940 ("Investment Company Act") and Rule 610(c) of Regulation E against Renew Energy Resources, Inc. ("Renew Energy" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist and Exemption Suspension Proceedings, Making Findings, Imposing a Cease-and-Desist Order, and Permanently Suspending the Regulation E Exemption as to Renew Energy Resources, Inc., Pursuant to Section 9(f) of the Investment Company Act of 1940 and Rule 610(c) of Regulation E ("Order"), as set forth below.

III.

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

Summary

1. Since electing to be regulated as a business development company ("BDC") in August 2004, Renew Energy has, among other things, issued rights to purchase its securities without expiration to non-security holders, issued prohibited non-voting stock, and issued securities for services or property other than cash. As a result, Renew Energy violated Sections 18(d), 18(i), and 23(a), respectively, of the Investment Company Act. In addition, Renew Energy failed to obtain a fidelity bond, as required under Section 17(g) of the Investment Company Act and Rule 17g-1 thereunder. Finally, Renew Energy failed to comply with Rule 609 of Regulation E because it did not file offering-status reports on Form 2-E in connection with securities offerings under Regulation E commenced in August 2004, September 2004 August 2005, and October 2005.

Respondent

2. Renew Energy, formerly known as VitalTrust Business Development Corporation, is a Nevada corporation with its principal offices located in Tampa, Florida. It elected to be regulated as a BDC on August 3, 2004, and withdrew its BDC election on March 14, 2008. Prior to its BDC election, Renew Energy was an operating company known as ACS Holdings, Inc., which provided financial services to retail customers. Renew Energy's securities are registered under Section 12(g) of the Securities Exchange Act of 1934 and are quoted on the OTC Bulletin Board under the symbol VTBD.

Issuing Convertible Securities with Unequal Voting Rights

3. On February 18, 2005, Renew Energy issued 240,000 shares of convertible preferred stock and 260,000 warrants to some of the holders of the notes in exchange for forgiveness of the senior notes. In addition, it issued 240,000 shares of convertible preferred stock and 260,000 warrants to a consultant in return for consulting services. The warrants were convertible into preferred stock at a price of \$.0001 per warrant and were convertible upon a reverse split or six months after issuance. The convertible preferred shares were convertible into common shares on a one-to-one basis. They were entitled to vote on the same basis as common stock and, as a group, were entitled to a dividend of 25% of Renew Energy's net revenues.

4. Between June 13, 2005, and July 13, 2005, Renew Energy issued 8% convertible debentures in exchange for total financing of \$210,000. These eleven debentures were convertible into Renew Energy common stock at a rate of 20% of the principal after 90 days and 20% of the principal every 60 days thereafter, with an exercise price equal to 50% of the stock's closing ask price on the

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.

date of conversion. As of March 31, 2007, Renew Energy had defaulted on the convertible debentures and, on April 4, 2007, reached a compromise with the debenture holders to issue 2.1 million shares of Renew Energy common stock in exchange for forgiveness of the convertible debentures.

5. Section 18 of the Investment Company Act is made applicable to BDCs by Section 61(a) of the Investment Company Act, subject to certain exceptions. Section 18(d), as applicable to BDCs, generally prohibits them from issuing "any warrant or right to subscribe to or purchase a security of which such company is the issuer, except in the form of warrants or rights to subscribe expiring not later than one hundred and twenty days after their issuance and issued exclusively and ratably to a class or classes of such company's securities holders." Renew Energy's convertible debentures and warrants, which constituted rights to subscribe to or purchase its securities, did not provide that the conversion feature would expire within 120 days after their issuance as required under Section 18(d).

6. Section 61(a)(3) allows a BDC, notwithstanding Section 18(d), to issue warrants, options, or rights to subscribe or convert to voting securities that are accompanied by securities if, among other things, the BDC's shareholders authorize, and a majority of the BDC's disinterested directors approves, the proposal to issue such securities. Renew Energy's shareholders did not authorize, and a majority of the BDC's disinterested directors did not approve, the issuance of the convertible debentures or the warrants issued.

7. On March 4, 2007, Renew Energy issued preferred shares and common shares, to a publicly traded company in return for securities in six companies. The preferred were non-voting, except the holder had the right to elect four directors. With certain exceptions not relevant here, Section 18(i) of the Company Act provides that every share of stock issued by a BDC shall be a voting stock and have equal voting rights with every other outstanding voting stock. Here, Renew Energy's preferred stock did not have voting rights equal to that of its common stock as required by Section 18(i).

Issuance of Shares for Services

8. Section 23(a) of the Investment Company Act, which Section 63 makes applicable to BDCs, generally prohibits any closed-end company from issuing securities for services or for property other than cash or securities. In 2004, 2005, and 2006, Renew Energy issued approximately 2.4 million common shares and 240,000 preferred shares for services.

Failure to Provide and Maintain a Fidelity Bond

9. Section 17(g) of the Investment Company Act and Rule 17g-1 thereunder, which Section 59 makes applicable to BDCs, require each BDC to provide and maintain a bond issued by a reputable fidelity insurance company against larceny and embezzlement by officers and employees of the BDC. Renew Energy did not provide and maintain a fidelity bond.

Violations

10. As a result of the conduct described above, Renew Energy violated Sections 17(g), 18(d), 18(i), and 23(a) of the Investment Company Act and Rule 17g-1 thereunder.

Failure to Comply with Rule 609 of Regulation E

11. On August 12, 2004, September 21, 2004, August 26, 2005, and October 24, 2005, Renew Energy filed Form 1-E notification of stock issuance pursuant to the securities-registration exemption under Securities Act of 1933 Regulation E. The filing included a required offering circular, which provided certain disclosures regarding the offering. Rule 609 of Regulation E requires that, within 30 days after the end of each six-month period following the date of the original offering circular, or upon the termination of the offering, whichever is earlier, an issuer must file a report on Form 2-E, providing certain information regarding the status of the offering. Renew Energy did not file the Forms 2-E that were due for the September 21, 2004 Regulation E offering within 30 days after March 21, 2005, and March 21, 2006 and never filed Forms 2-E for the August 12, 2004, August 26, 2005 and the October 24, 2005 Regulation E offerings. Therefore, Renew Energy failed to comply with Rule 609.

12. Under Regulation E, Rule 610(c), the Commission may, at any time after notice of and opportunity for hearing, enter an order permanently suspending the Regulation E exemption, if the Commission has reason to believe, among other things, that any of the terms or conditions of Regulation E have not been complied with, including failure to file any report as required by Rule 609.

Respondent's Remedial Efforts

13. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

IV.

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

Accordingly, pursuant to Section 9(f) of the Investment Company Act and Rule 610(c) of Regulation E, it is hereby ORDERED that:

A. Respondent Renew Energy cease and desist from committing or causing any violations and any future violations of Sections 17(g), 18(d), 18(i), and 23(a) of the Investment Company Act and Rule 17g-1 thereunder.

B. The Regulation E exemption as to Respondent Renew Energy be, and hereby is, permanently suspended.

By the Commission

Florence E. Harmon
Acting Secretary

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