SECURITIES AND EXCHANGE COMMISSION

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Christopher Cox served as the SEC Chairman from August 5, 2005 to January 20, 2009.

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

ELISSE B. WALTER, ACTING CHAIRMAN

KATHLEEN L. CASEY, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

10 Documents

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 243

[Release No. 34-59343; File No. S7-04-09]

RIN 3235-AK14

Re-proposed Rules for Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Proposed rules.

SUMMARY: In conjunction with the publication today, in a separate release, of the Commission's final rule amendments to its existing rules governing the conduct of nationally recognized statistical rating organizations ("NRSROs"), the Commission is proposing amendments which would require the public disclosure of credit rating histories for all outstanding credit ratings issued by an NRSRO on or after June 26, 2007 paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. The Commission also is soliciting detailed information about the issues surrounding the application of a disclosure requirement on subscriber-paid credit ratings. The Commission is re-proposing for comment an amendment to its conflict or interest rule that would prohibit an NRSRO from issuing a rating for a structured finance product paid for by the product's issuer, sponsor, or underwriter unless the information about the product provided to the NRSRO to determine the rating and, thereafter, to monitor the rating is made available to other persons. The Commission is proposing these rules to address concerns about the integrity of the credit rating procedures and methodologies at NRSROs.

DATES: Comments should be received on or before [**insert date 45 days after publication in the Federal Register**].

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-04-09 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 Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-04-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551-5525; Thomas K. McGowan, Assistant Director, at (202) 551-5521; Randall W. Roy, Branch Chief, at (202) 551-5522; Joseph I. Levinson, Special Counsel, at (202) 551-5598; Carrie A. O'Brien, Special Counsel, at (202) 551-5640; Sheila D. Swartz, Special Counsel, at (202) 551-5545; Rose Russo Wells, Special Counsel, at (202) 551-5527; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-6628.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

On June 16, 2008, the Commission, in the first of three related actions, proposed a series of amendments to its existing rules governing the conduct of NRSROs under the Credit Rating Agency Reform Act of 2006 ("Rating Agency Act").[1] The proposed amendments were designed to address concerns about the integrity of the process by which NRSROs rate structured finance products, particularly mortgage related securities. Today, in a separate release, the Commission is adopting, with revisions, a majority of

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[1] Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008) ("June 16, 2008 Proposing Release"). The Commission adopted the existing NRSRO rules in June 2007. See Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007) ("June 5, 2007 Adopting Release"). The second action taken by the Commission (also on June 16, 2008) was to propose a new rule that would require NRSROs to distinguish their ratings for structured finance products from other classes of credit ratings by publishing a report with the rating or using a different rating symbol. See June 16, 2008 Proposing Release. The third action taken by the Commission was to propose a series of amendments to rules under the Exchange Act, Securities Act of 1933 ("Securities Act"), and Investment Company Act of 1940 ("Investment Company Act") that would end the use of NRSRO credit ratings in the rules. See References to Ratings of Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 58070 (July 1, 2008), 73 FR 40088 (July 11, 2008); Securities Ratings, Securities Act Release No. 8940 (July 1, 2008), 73 FR40106 (July 11, 2008); References to Ratings of Nationally Recognized Statistical Rating Organizations, Investment Company Act Release No. 28327 (July 1, 2008), 73 FR 40124 (July 11, 2008).

the proposed rule amendments.[2] In addition, in this release, the Commission is proposing additional amendments to paragraph (d) of Rule 17g-2 and re-proposing with substantial modifications amendments to paragraphs (a) and (b) of Rule 17g-5.

The proposed amendments to paragraph (d) of Rule 17g-2 would add public disclosure requirements to those that are being adopted today. Specifically, the amendments being adopted require an NRSRO to disclose, in eXtensible Business Reporting Language ("XBRL") format and on a six-month delay, ratings action histories for a randomly selected 10% of the ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor being rated ("issuer-paid credit ratings") for each rating class for which it has issued 500 or more issuer-paid credit ratings.[3] In this release, the Commission is proposing to further amend paragraph (d) of Rule 17g-2 to require NRSROs to disclose ratings actions histories for all credit ratings issued on or after June 26, 2007 at the request of the obligor being rated or of the issuer, underwriter, or sponsor of the security being rated. The proposed amendment would allow an NRSRO to delay for up to 12 months publicly disclosing a rating action.

The amendments to paragraphs (a) and (b) of Rule 17g-5 would substantially modify the previous proposal. As originally proposed, the amendments would have prohibited an NRSRO from issuing or maintaining a credit rating for a structured finance product paid for by the product's issuer, sponsor or underwriter unless the information provided to the NRSRO by the issuer, sponsor, or underwriter to determine the rating is disseminated to other persons. The intent behind the proposal was to provide the opportunity for other persons such as credit rating agencies and academics to perform

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2 See Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 34-59342 (February 2, 2009) ("Companion Adopting Release").

3 See Companion Adopting Release.

independent analysis on the securities or money market instruments at the same time the hired NRSRO determines its rating. The goal was to increase competition among NRSROs for rating structured finance products by providing new entrants access to the information necessary to determine credit ratings for these products.

The Commission received 38 comment letters that addressed the Rule 17g-5 proposal on June 16, 2008.[4] While some commenters expressed support for it,[5] the

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[4] Letter dated June 12, 2008 from G. Brooks Euler ("Euler Letter"); letter dated July 14, 2008 from Robert Dobilas, President, CEO, Realpoint LLC ("Realpoint Letter"); letter dated July 21, 2008 from Dottie Cunningham, Chief Executive Officer, Commercial Mortgage Securities Association ("CMSA Letter"); letter dated July 22, 2008 from Richard Metcalf, Director, Corporate Affairs Department, Laborers' International Union of North America ("LIUNA Letter"); letter dated July 23, 2008 from Kent Wideman, Group Managing Director, Policy & Rating Committee and Mary Keogh, Managing Director, Policy & Regulatory Affairs, DBRS ("DBRS Letter"); letter dated July 24, 2008 from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. ("JCR Letter"); "); letter dated July 24, 2008 from Amy Borrus, Deputy Director, Council of Institutional Investors ("Council Letter"); letter dated July 24, 2008 from Joseph A. Hall and Michael Kaplan, Davis Polk, and Wardwell ("DPW Letter"); letter dated July 24, 2008 from Vickie A. Tillman, Executive Vice President, Standard & Poor's Ratings Services ("S&P Letter"); letter dated July 24, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force ("Second SIFMA Letter"); letter dated July 25, 2008 from Sally Scutt, Managing Director, and Pierre de Lauzun, Chairman, Financial Markets Working Group, International Banking Federation ("IBFED Letter"); letter dated July 25, 2008 from Denise L. Nappier, Treasurer, State of Connecticut ("Nappier Letter"); letter dated July 25, 2008 from Suzanne C. Hutchinson, Mortgage Insurance Companies of America ("MICA Letter"); letter dated July 25, 2008 from Kieran P. Quinn, Chairman, Mortgage Bankers Association ("MBA Letter"); letter dated July 25, 2008 from Sean J. Egan, President, Egan–Jones Ratings Co. ("Egan-Jones Letter"); letter dated July 25, 2008 from Charles D. Brown, General Counsel, Fitch Ratings ("Fitch Letter"); letter dated July 25, 2008 from Bill Lockyer, State Treasurer, California ("Lockyer Letter"); letter dated July 25, 2008 from Jeremy Reifsnyder and Richard Johns, Co-Chairs, American Securitization Forum Credit Rating Agency Task Force ("ASF Letter"); letter dated July 25, 2008 from Annemarie G. DiCola, Chief Executive Officer, Trepp, LLC ("Trepp Letter"); letter dated July 25, 2008 from Kurt N. Schacht, Executive Director and Linda L. Rittenhouse, Senior Policy Analyst, CFA Institute Centre for Financial Market Integrity ("CFA Institute Letter"); letter dated July 25, 2008 from Karrie McMillan, General Counsel, Investment Company Institute ("ICI Letter"); letter dated July 25, 2008 from Michael Decker, Co-Chief Executive Officer and Mike Nicholas, Co-Chief Executive Officer, Regional Bond Dealers Association ("RBDA Letter"); letter dated July 25, 2008 from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable ("Roundtable Letter"); letter dated July 25, 2008 from James H. Gellert, Chairman and CEO and Dr. Patrick J. Caragata, Founder and Executive Vice Chairman, Rapid Ratings International Inc.("Rapid Ratings Letter"); letter dated July 25, 2008 from Gregory W. Smith, General Counsel, Colorado Public Employees' Retirement Association ("Colorado PERA Letter"); letter dated July 25, 2008 from Cleary Gottlieb Steen & Hamilton LLP, ("CGSH Letter"); letter dated July 25, 2008 from Keith A. Styrcula, Chairman, Structured Products Association ("SPA Letter"); letter dated July 25, 2008 from Yasuhiro Harada, Chairman and Co-CEO, Rating and Investment Information, Inc. ("R&I Letter"); letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service ("Moody's

majority of commenters raised significant legal and practical issues with the proposal.[6] The Commission is re-proposing the amendment, with substantial modifications, to solicit further comment.

II. PROPOSED AMENDMENTS TO RULE 17g-2

A. Rule 17g-2

The Commission adopted Rule 17g-2, in part, pursuant to authority in Section 17(a)(1) of the Exchange Act requiring NRSROs to make and keep such records, and make and disseminate such reports, as the Commission prescribes by rule as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the Exchange Act.[7] Paragraph (a) of Rule 17g-2 requires an NRSRO to make and retain certain records relating to its business. For example, paragraph (a)(2) requires an NRSRO to make a number of different records with respect to each current credit rating such the identity of any analyst that participated in determining the credit

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Letter"); letter dated July 28, 2008 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities and Vicki O. Tucker, Chair, Committee on Securitization and Structured Finance, American Bar Association ("ABA Business Law Committees Letter"); letter dated July 29, 2008 from Glenn Reynolds, CEO and Peter Petas, President CreditSights, Inc. ("CreditSights Letter"); letter dated July 31, 2008 from Robert S. Khuzami Managing Director and General Counsel, Deutsche Bank Americas ("DBA Letter"); letter dated August 5, 2008 from John Taylor, President and CEO, National Community Reinvestment Coalition ("NCRC Letter"); letter dated August 8, 2008 from Jeffrey A. Perlowitz, Managing Director and Co-Head of Global Securitized Markets, and Myongsu Kong, Director and Counsel, Citigroup Global Markets Inc. ("Citi Letter"); letter dated August 12, 2008 from John J. Niebuhr, Managing Director, Lehman Brothers, Inc. ("Lehman Letter"); "); letter dated August 17, 2008 from Olivier Raingeard, Ph.D ("Raingeard Letter"); letter dated August 22, 2008 from Robert Dobilas, CEO and President, Realpoint LLC ("Second Realpoint Letter"); letter dated August 27, 2008 from Larry G. Mayewski, Executive Vice President & Chief Rating Officer, A.M. Best Company ("A.M. Best Letter"). These comments are available on the Commission's Internet Web site, located at http://www.sec.gov/comments/s7-13-08/s71308.shtml, and in the Commission's Public Reference Room in its Washington DC headquarters.

5 See, e.g., LIUNA Letter; Nappier Letter; ICI Letter; RBDA Letter; NCRC Letter.

6 See, e.g., ASF Letter; CFA Institute Letter; Roundtable Letter; ABA Business Law Committees Letter; Citi Letter; Lehman Letter; Moody's Letter; S&P Letter; DPW Letter; CGSH Letter; DBA Letter; A.M. Best Letter; Realpoint Letter; CMSA Letter; DBRS Letter; Second SIFMA Letter; MBA Letter; Fitch Letter; SPA Letter; R&I Letter; JCR Letter.

7 See Section 5 of the Rating Agency Act and 15 U.S.C 78q(a)(1).

rating.[8] Paragraph (b) of Rule 17g-2 requires an NRSRO to retain certain other business records made in the normal course of business operations such as non-public information and work papers used to form the basis of credit rating.[9] Paragraph (c) of Rule 17g-2 requires that the records identified in paragraphs (a) and (b) be retained for three years.[10] Paragraph (d) of Rule 17g-2 prescribes the manner in which the records must be maintained by the NRSRO.[11] For example, it provides that the records must be maintained in a manner that makes the records easily accessible to the main office of the NRSRO.[12]

B. The Amendments to Rule 17g-2(a) and (d) Adopted Today

In the June 16, 2008 Proposing Release, the Commission proposed amendments to Rule 17g-2 which would create a new paragraph (a)(8) and amend paragraph (d). The new paragraph (a)(8) would require an NRSRO to make and retain a record of the ratings history of each outstanding credit rating it maintains showing all rating actions (initial rating, upgrades, downgrades, placements on watch for upgrade or downgrade, and withdrawals) and the date of such actions identified by the name of the security or obligor rated and, if applicable, the CUSIP for the rated security or the Central Index Key (CIK) number for the rated obligor. This full record of credit rating histories would be maintained by the NRSRO as part of its internal records that are available to Commission staff. In addition, the proposed amendments to paragraph (d) of Rule 17g-2 would require an NRSRO to make that record publicly available on its corporate Web site in

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8 17 CFR 240.17g-2(a)(2)(i).
9 17 CFR 240.17g-2(b).
10 17 CFR 240.17g-2(c).
11 17 CFR 240.17g-2(d).
12 Id.

XBRL format six months after the date of the current rating action.[13] Finally, the proposed amendments also would amend the instructions to Exhibit 1 to Form NRSRO to require the disclosure of the Web address where the XBRL Interactive Data File could be accessed in order to inform persons who use credit ratings where the ratings histories can be obtained.[14]

The Commission noted in the June 16, 2008 Proposing Release that the purpose of this disclosure would be to provide users of credit ratings, investors, and other market participants and observers the raw data with which to compare how the NRSROs initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments.[15] In order to expedite the establishment of a pool of data sufficient to provide a useful basis of comparison, the proposal would have applied this requirement to all outstanding credit rating of securities and obligors as well as to all future credit ratings.

As discussed in more detail in the Companion Adopting Release,[16] several NRSROs offered comments to the proposed amendments to paragraph (d) of Rule 17g-2, raising two significant concerns. First, NRSROs that issue unsolicited ratings accessible only to subscribers ("subscriber-paid credit ratings") and others stated that publicly disclosing all their ratings histories, even with a time delay of six months, would adversely impact their business and, therefore, could prove to be anti-competitive.[17] Second, NRSROs that issue ratings paid for by the obligor being rated or the issuer,

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13 See June 16, 2008 Proposing Release, 73 FR at 36228-36230.

14 See id.

15 See id.

16 See Companion Adopting Release.

17 See ABA Business Law Committee Letter; Realpoint Letter; Pollock Letter; Egan-Jones Letter; Multiple-Markets Letter; Rapid Ratings Letter; AFP Letter; R&I Letter; Moody's Letter.

underwriter or sponsor of the security being rated ("issuer-paid credit ratings") stated that a requirement to make all ratings actions available free of charge in a machine readable format would cause them to lose revenues they derive from selling downloadable packages of their credit ratings.[18] These commenters also questioned whether the requirement would be permitted under the US Constitution, arguing that it could be considered a taking of private property without just compensation.[19]

In the Companion Adopting Release, the Commission is adopting new paragraph (a)(8) as proposed but significantly modifying the proposed amendments to paragraph (d).[20] Specifically, the amendments to paragraph (d) as adopted will require an NRSRO to make publicly available, in an XBRL format and on a six-month delay, ratings action histories for 10% of the outstanding issuer-paid credit ratings required to be retained pursuant to paragraph (a)(8) for each class of credit rating for which it is registered and for which it has issued 500 or more issuer-paid credit ratings. Consequently, the public disclosure requirement only will apply to issuer-paid credit ratings.

As explained in the Companion Adopting Release, the Commission believes it is appropriate at this time to limit the rule's application to issuer-paid credit ratings. NRSROs that sell subscriber-paid credit ratings have suggested that requiring the histories of all these ratings to be publicly disclosed could seriously impact their businesses. This could reduce competition by causing NRSROs to withdraw registrations or discourage credit rating agencies from seeking registration. Accordingly, the Commission wants to gather more data on this issue before deciding on whether the rule should apply to subscriber-paid credit ratings. At the same time, the Commission does

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18 See S&P Letter; Moody's Letter.

19 See S&P Letter; Egan-Jones Letter; Fitch Letter; R&I Letter;

20 See Companion Adopting Release.

not want to delay adopting a final rule, particularly if it could begin providing meaningful information to users of credit ratings. In this regard, the Commission notes that issuer-paid credit ratings account for over 98% of the current credit ratings issued by NRSROs according to information furnished by NRSROs in Form NRSRO. Moreover, seven of the ten registered NRSROs currently maintain 500 or more credit ratings in at least one class of credit ratings for which they are registered. Consequently, applying this rule to issuer-paid credit ratings should result in a substantial amount of new information for users of credit ratings. It also will allow market observers to begin analyzing the information and developing performance metrics based on it.

The Commission is mindful of the potential impact on NRSROs that determine issuer-paid credit ratings and, therefore, the amendments being adopted contain modifications discussed above. The Commission believes that by limiting the ratings actions histories that need to be disclosed to a random selection of 10% of outstanding credit ratings, applying the requirement to issuer-paid credit ratings only, and allowing for a six-month delay before a ratings action is required to be disclosed, the amendment as adopted addresses the concerns among commenters that the rule would cause them to lose revenue. With respect to NRSROs that earn revenues from issuer-paid credit ratings but sell access to packages of the ratings as well, the Commission believes that customers that are willing to pay for full and immediate access to downloadable information for all of an NRSRO's ratings actions are unlikely to reconsider their purchase of that product due to the ability to access ratings histories for 10% of the NRSRO's outstanding issuer-paid credit ratings selected on a random basis and disclosed with a six-month time lag. As indicated below, the Commission is seeking detailed comment on how a ratings

history public disclosure requirement can be tailored to address concerns that disclosing this information would adversely impact the businesses of NRSROs that primarily determine subscriber-paid credit ratings.

In this release, the Commission is seeking comment on whether the requirement to publicly disclose ratings action histories should be applied to subscriber-paid credit ratings. As indicated in questions below, the Commission is soliciting detailed information about the potential impact of applying the rule to subscriber-paid credit ratings. The responses to those questions will inform the Commission's deliberations as to whether this rule ultimately should be expanded to cover subscriber-paid credit ratings.

C. The Proposed Amendments

As discussed above, the Commission believes that the amendments to paragraph (d) of Rule 17g-2 being adopted today will provide users of credit ratings with information to begin assessing the performance of NRSROs subject to the rule. At the same time, the Commission continues to believe that its original proposal to require public disclosure of ratings action histories for all current credit ratings could provide substantial benefits to users of credit ratings. The Commission, therefore, is proposing to amend paragraph (d) of Rule 17g-2. Specifically, the Commission would add subparagraphs (1), (2) and (3) to paragraph (d). Paragraph (d)(1) would contain the record retention requirements of paragraph (d) as it was originally adopted by the Commission on June 5, 2007.[21] Paragraph (d)(2) would contain the ratings history

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[21] See June 5, 2007 Adopting Release. As originally adopted, paragraph (d) provided that "[a]n original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of [Rule 17g-2] must be maintained in a manner that, for the applicable retention period specified in paragraph (c) of [Rule 17g-2], makes the original record or copy easily accessible to the principal office of the [NRSRO] and to any other office that conducted activities causing the record to be made or received." See June 5, 2007 Adopting Release, 72 FR at 33622.

disclosure requirements being adopted by the Commission in the Companion Adopting Release.[22]

Paragraph (d)(3) would contain the disclosure requirements the Commission is proposing in this release. These proposed amendments would require that NRSROs disclose ratings history information for 100% of their current issuer-paid credit ratings in an XBRL format. Further, they only would apply to issuer-paid credit ratings determined on or after June 26, 2007 (the effective date of the Rating Agency Act). Therefore, under new paragraph (d)(3), an NRSRO would not need to disclose ratings action histories for issuer-paid credit ratings that were determined prior to that date (though NRSROs would continue to be required to publicly disclose ratings action histories provided for the randomly selected 10% of outstanding issuer-paid credit ratings in each registration class where there are 500 or more outstanding credit ratings). The prospective nature of the proposed rule is designed to ease the burden of compliance. In addition, to mitigate concerns regarding the loss of revenues NRSROs derive from selling downloads and data feeds to their current outstanding issuer-paid credit ratings, a credit rating action would not need to be disclosed until 12 months after the action is taken.

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22 See Companion Adopting Release. These amendments provide: "[An NRSRO] must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of [Rule 17g-2] and which were paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph is withdrawn or the instrument rated matures, the [NRSRO] must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the [NRSRO] shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site."

The purpose of this proposed amendment is to provide users of credit ratings, investors, and other market participants and observers with the maximum amount of raw data with which to compare how NRSROs subject to the rule initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments. The Commission believes that requiring the disclosure of the ratings action history of each issuer-paid credit rating would create the opportunity for market participants to use the information to develop performance measurement statistics that would supplement those required to be published by the NRSROs themselves in Exhibit 1 to Form NRSRO. The intent is to tap into the expertise and flexibility of credit market observers and participants to create better and more useful means to compare issuer-paid credit ratings. In addition, the Commission believes that the proposed amendment would foster greater accountability for NRSROs that determine issuer-paid credit ratings as well as competition among such NRSROs by making it easier for persons to analyze the actual performance of credit ratings in terms of accuracy in assessing creditworthiness. This could make NRSROs subject to the rule more accountable for their ratings by enhancing the transparency of the results of their rating processes for particular securities and obligors and classes of securities and obligors and encourage competition within the industry by making it easier for users of credit ratings to judge the output of such NRSROs.

The Commission recognizes that releasing information on all ratings actions could cause financial loss for some firms. For that reason, the proposed amendment would provide that a ratings action need not be made publicly available until twelve months after the date of the rating action.

The Commission is proposing these amendments, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[23] The Commission preliminarily believes the proposed new public disclosure requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. Specifically, the proposed amendments would allow market participants to compare credit rating histories for issuer-paid credit ratings on an obligor-by-obligor or instrument-by-instrument basis. Users of credit ratings would be able to compare side-by-side how two or more NRSROs subject to the rule initially rated a particular obligor or security, when the NRSROs took actions to adjust the rating upward or downward, and the degree of those adjustments. Furthermore, users of credit ratings, academics and information venders could use the raw data to perform analyses comparing how the NRSROs subject to the rule differ in initially determining issuer-paid credit ratings and in their monitoring of these ratings. This could identify an NRSRO that is an outlier because it determines particularly high or low issuer-paid credit ratings or is slow or quick to re-adjust outstanding ratings. It also could help identify which NRSROs subject to the rule tend to be more accurate in their issuer-paid credit ratings. This information also may identify NRSROs subject to the rule whose objectivity may be impaired because of the conflicts of interest surrounding issuer-paid credit ratings.

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[23] See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- Is the proposed application of the rule to prospective credit ratings, i.e., credit ratings that are initially determined on or after June 26, 2007, appropriate and do commenters believe it would provide meaningful information if the rule was limited to credit ratings made on or after that date? Should the Commission adopt a final rule that uses another date such as the date the Rating Agency Act was enacted? If June 26, 2007 is the appropriate date, how long would it take for NRSROs to build up ratings history information to permit meaningful comparisons between NRSROs? What are the advantages and disadvantages of applying a disclosure rule on a prospective basis?
- Should the Commission adopt a final rule that applies retrospectively to all outstanding credit ratings? Commenters should explain the benefits of retrospective application and how they would justify the costs.
- Is the twelve-month delay before publicly disclosing a rating action sufficiently long to address concerns regarding the revenues NRSROs derive from selling downloads of, and data feeds to, their current issuer-paid credit ratings? Should the delay be for a longer period such as 18 months, 24 months, 30 months or 36 months or longer? Alternatively, should the Commission adopt a final rule that has a shorter time lag such as three months or six months or no time lag in place?

- In addition to revenues derived from selling data feeds to current issuer-paid credit ratings, do NRSROs derive revenues from selling access to their ratings histories? If so, how material are these revenues when compared to revenues earned by NRSROs from selling downloads of, and data feeds to, current issuer-paid credit ratings and revenues earned from fees paid by obligors, issuers, underwriters and sponsors to determine and monitor credit ratings? Commenters providing information should quantify and breakout the amount of revenues earned by NRSROs issuer-paid credit ratings in dollars and/or percentages for each of the following categories: (1) revenues from fees for determining and monitoring issuer-paid credit ratings; (2) revenues from selling access (by download, data feed or other method) to all current issuer-paid credit ratings; and (3) revenues from selling information about ratings actions histories of issuer-paid credit ratings.
- Should the proposed amendments apply equally to issuer-paid and subscriber-paid credit ratings? For example, in what ways and to what extent might the objectivity of NRSROs in determining subscriber-paid credit ratings be impaired because of conflicts of interest? What would be the benefits for applying the rule's requirements to subscriber-paid credit ratings? What would be the costs of applying the rule's requirements to subscriber-paid credit ratings?
- Are the goals of the rule – greater accountability of NRSROs and promotion of competition – achievable if subscriber-paid credit ratings are

not subject to the rule's requirements? How would these goals be enhanced if subscriber-paid credit ratings were subject to the rule's requirements?

- Do NRSROs derive revenues from selling information about ratings action histories for subscriber-paid credit ratings? If so, are those revenues material as compared to revenues they receive from selling subscriptions to current subscriber-paid credit ratings? Commenters providing information should quantify and breakout the amount of revenues earned by NRSROs in dollars and/or percentages for each of the following: (1) selling subscriptions to all current subscriber-paid credit ratings; and (2) selling information about ratings actions histories of subscriber-paid credit ratings.
- Similarly, do subscribers value ratings action histories for subscriber-paid credit ratings? Do subscribers value the in-depth analysis that is delivered with a rating action? How material is the value that subscribers place on the historical rating action itself as compared to the value they place on the in depth analysis or materials that are delivered along with the rating action? Do commenters believe that the business of an NRSRO that determines subscriber-paid credit ratings would be materially compromised if the ratings action histories for the ratings were required to be publicly disclosed (but not the in-depth analysis or other materials)?
- Do persons who subscribe to NRSROs' subscriber-paid credit ratings value the current ratings only? Alternatively, do they subscribe to the

ratings because subscriber-paid credit ratings identify trends sooner than issuer-paid credit ratings as some suggest? For example, do commenters believe the fact that the determination and monitoring of subscriber-paid credit ratings are funded by subscribers mean the NRSROs act more quickly to adjust the credit ratings? If so, would disclosing a rating action one year after it occurred reveal information that a subscriber otherwise would pay for in order to make a credit assessment or has the rating action become sufficiently stale that its value, if any, is limited to it being an item of historical information. If a credit rating action with respect to a subscriber-paid credit rating has intrinsic value beyond providing historical perspective, would this intrinsic value still exist two years after the rating action? If so, what length of delay would be sufficient to address NRSROs' concerns regarding the loss of revenues from subscribers for access to their subscriber-paid credit ratings, while also achieving the Commission's goals, among others, of increasing accountability and promoting competition among NRSROs? What effect would subjecting subscriber-paid credit ratings to the rule's requirements have on competition? Would it compromise the viability of NRSROs that determine subscriber-paid credit ratings? For example, to what extent, if any, would subjecting subscriber-paid credit ratings to the rule's requirements undercut competition by erecting barriers to entry or otherwise compromise the viability of NRSROs that determine subscriber-paid credit ratings?

- If there is a length of time greater than one year that would better address concerns regarding the revenues NRSROs derive from subscriber-paid credit ratings (e.g., 18 months, 24 months, 30 months, 36 months or longer), should that time lag only apply to subscriber-paid credit ratings or should it apply to both issuer-paid and subscriber-paid credit ratings?
- As an alternative to adopting a final rule that applies to subscriber-paid credit ratings (along with issuer-paid credit ratings), should the Commission adopt a final rule amending paragraph (d) of Rule 17g-2 to require that an NRSRO publicly disclose credit rating actions for a random sample of 10% of the current subscriber-paid credit ratings for each class of credit rating for which they are registered and have issued 500 or more ratings? If the Commission were to adopt such an amendment, would the time lag of six months in the rule being adopted today be sufficient to address concerns regarding the revenues NRSROs earn from selling subscriptions to their subscriber-paid credit ratings. If not, should the Commission adopt an amendment to paragraph (d) of Rule 17g-2 that extends the time lag to a longer period of time for subscriber-paid credit ratings (e.g., 12 months, 18, months, 24 months, 30 months, or 36 months or longer)? Are there other ways that the Commission could adjust the requirements of the proposed rule to apply a public disclosure requirement to ratings action histories of subscriber-paid credit ratings? Commenters should provide reasons and/or data for why a certain time lag is appropriate.

- Similarly, if commenters believe that some form of public disclosure requirement should be applied to the histories of both issuer-paid and subscriber-paid credit ratings, what percentage of the histories should each type of credit rating be required to be disclosed and what time lag should be granted? For example, should both types of credit ratings be subject to the requirement that ratings action histories be publicly disclosed for a random sample of 10% of the outstanding credit ratings in each class of credit ratings with a six month time lag? Alternatively, should ratings action histories of issuer-paid credit ratings be disclosed at a higher percentage with a longer time lag, e.g., 20%, 50% or 100% of the outstanding credit ratings and a 12, 16, or 24 month time lag? Should ratings action histories for subscriber-paid credit ratings be disclosed at a different percentage than issuer-paid credit ratings, e.g., 10%, 20%, or 50%? Commenters should provide reasons and/or data in their responses.
- What diligence do potential subscribers to subscriber-paid credit ratings perform in deciding whether to subscribe to such ratings of a particular NRSRO? To what extent do NRSROs make ratings histories of subscriber-paid credit ratings available to potential subscribers? To what extent and in what ways are NRSROs that determine subscriber-paid credit ratings subject to competitive pressures? To what extent does the interest in developing a reputation for accuracy discipline the accuracy of an NRSRO that determines subscriber-paid credit ratings?

- Do NRSROs issue unsolicited credit ratings that are not paid for by selling subscriptions to access the ratings? For example, do NRSROs that primarily determine issuer-paid credit ratings for most, but not all, securities issued by companies in a particular industry group determine unsolicited ratings for securities issued by the remaining companies to round out coverage of the industry? Do NRSROs issue such unsolicited ratings to establish a track record for rating particular types of obligors or securities?
- If NRSROs issue unsolicited (and not subscriber-paid for) credit ratings, to what extent are these ratings issued relative issuer-paid or subscriber-paid credit ratings? For example, what percentage of an NRSRO's outstanding credit ratings are comprised of unsolicited (and not subscriber paid for) credit ratings?
- Do NRSROs that issue unsolicited (and not subscriber-paid for) credit ratings make the ratings publicly available for free?
- What types of conflicts arise from determining unsolicited (and not subscriber-paid for) credit ratings? For example, is there the potential that an NRSRO would issue a lower than warranted credit rating in order to pressure an obligor or issuer to pay the NRSRO for the rating? Would the public disclosure of ratings histories for unsolicited (but not subscriber-paid for) credit ratings help to mitigate this conflict?

- Should the Commission adopt a final rule that requires the disclosure of the ratings histories of unsolicited (and not subscriber-paid for) credit ratings along with the issuer-paid for credit ratings? What would be the benefits and costs of requiring the disclosure of such credit ratings?
- Should the Commission adopt a final rule that requires unsolicited (and not subscriber-paid for) credit ratings to be included for the purposes of determining whether an NRSRO has issued 500 or more credit ratings in a particular class of credit rating under Rule 17g-2(d) adopted today? What would be the benefits and costs of such a requirement?
- Should the Commission adopt a final rule that requires unsolicited (and not subscriber-paid for) credit ratings to be included in the publicly disclosed ratings histories for a random sample of 10% the credit ratings in a particular class of credit ratings under Rule 17g-2(d) adopted today? What would be the benefits and costs of such a requirement?
- Should the Commission adopt a final rule that requires a sample of unsolicited (and not subscriber-paid for) credit ratings to be separately disclosed from issuer-paid credit ratings? If so, what should be the number of credit ratings in a particular class of credit ratings triggering that public disclosure? What percentage of unsolicited rating should be disclosed? What, if any, time delay should apply to the disclosure of a random sample of unsolicited ratings?

III. RE-PROPOSED AMENDMENTS TO RULE 17g-5

A. Rule 17g-5

Section 15E(h)(1) of the Exchange Act requires an NRSRO to establish, maintain, and enforce policies and procedures reasonably designed, taking into consideration the nature of its business, to address and manage conflicts of interest.[24] Section 15E(h)(2) of the Exchange Act requires the Commission to adopt rules to prohibit or require the management and disclosure of conflicts of interest relating to the issuance of credit ratings.[25] The statute also identifies certain types of conflicts relating to the issuance of credit ratings that the Commission may include in its rules.[26] Furthermore, it contains a catchall provision for any other potential conflict of interest that the Commission deems is necessary or appropriate in the public interest or for the protection of investors to include in its rules.[27] The Commission implemented these statutory provisions through the adoption of Rule 17g-5, which prohibits the conflicts identified in the statute and certain additional conflicts either outright or if the NRSRO has not disclosed them and established policies and procedures to manage them.[28]

Paragraph (a) of Rule 17g-5[29] prohibits a person within an NRSRO from having a conflict of interest relating to the issuance of a credit rating that is identified in paragraph (b) of the rule unless the NRSRO has disclosed the type of conflict of interest in its application for registrations with the Commission in compliance with Rule 17g-1 (i.e., on Form NRSRO) and has implemented policies and procedures to address and manage the type of conflict of interest in accordance with Section 15E(h)(1) of the Exchange Act.[30]

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24 15 U.S.C. 78o-7(h)(1).
25 15 U.S.C. 78o-7(h)(2).
26 See 15 U.S.C. 78o-7(h)(2)(A) – (D).
27 See 15 U.S.C. 78o-7(h)(2)(E).
28 See 17 CFR 240.17g-5.
29 17 CFR 240.17g-5(a).
30 15 U.S.C. 78o-7(h)(1).

Paragraph (b) of Rule 17g-5 currently identifies nine types of conflicts that are subject to the provisions of paragraph (a):

- Being paid by issuers or underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite;[31]
- Being paid by obligors to determine credit ratings with respect to the obligors;[32]
- Being paid for services in addition to determining credit ratings by issuers, underwriters, or obligors that have paid the NRSRO to determine a credit rating;[33]
- Being paid by persons for subscriptions to receive or access the credit ratings of the NRSRO and/or for other services offered by the NRSRO where such persons may use the credit ratings of the NRSRO to comply with, and obtain benefits or relief under, statutes and regulations using the term "NRSRO;"[34]
- Being paid by persons for subscriptions to receive or access the credit ratings of the NRSRO and/or for other services offered by the NRSRO where such persons also may own investments or have entered into transactions that could be favorably or adversely impacted by a credit rating issued by the NRSRO;[35]

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31 17 CFR 240.17g-5(b)(1).
32 17 CFR 240.17g-5(b)(2).
33 17 CFR 240.17g-5(b)(3).
34 17 CFR 240.17g-5(b)(4).
35 17 CFR 240.17g-5(b)(5).

- Allowing persons within the NRSRO to directly own securities or money market instruments of, or having other direct ownership interests in, issuers or obligors subject to a credit rating determined by the NRSRO;[36]
- Allowing persons within the NRSRO to have a business relationship that is more than an arms length ordinary course of business relationship with issuers or obligors subject to a credit rating determined by the NRSRO;[37]
- Having a person associated with the NRSRO that is a broker or dealer engaged in the business of underwriting securities or money market instruments;[38] and
- Any other type of conflict of interest relating to the issuance of credit ratings by the NRSRO that is material to the NRSRO and that is identified by the NRSRO in Exhibit 6 to Form NRSRO in accordance with section 15E(a)(1)(B)(vi) of the Act (15 U.S.C. 78o-7(a)(1)(B)(vi)) and Rule 17g-1.[39]

Paragraph (c) of Rule 17g-5 specifically prohibits outright four types of conflicts of interest.[40] Consequently, an NRSRO would violate the rule regardless of whether it had disclosed them and established procedures reasonably designed to address them. The four prohibited conflicts are:

- The NRSRO issues or maintains a credit rating solicited by a person that, in the most recently ended fiscal year, provided the NRSRO with net

36 17 CFR 240.17g-5(b)(6).
37 17 CFR 240.17g-5(b)(7).
38 17 CFR 240.17g-5(b)(8).
39 17 CFR 240.17g-5(b)(9).
40 17 CFR 240.17g-5(c)(1) - (4).

revenue (as reported under Rule 17g-3) equaling or exceeding 10% of the total net revenue of the NRSRO for the fiscal year;[41]

- The NRSRO issues or maintains a credit rating with respect to a person (excluding a sovereign nation or an agency of a sovereign nation) where the NRSRO, a credit analyst that participated in determining the credit rating, or a person responsible for approving the credit rating, directly owns securities of, or has any other direct ownership interest in, the person that is subject to the credit rating;[42]
- The NRSRO issues or maintains a credit rating with respect to a person associated with the NRSRO;[43] or
- The NRSRO issues or maintains a credit rating where a credit analyst who participated in determining the credit rating, or a person responsible for approving the credit rating is an officer or director of the person that is subject to the credit rating.

B. The Amendments to Paragraphs (a) and (b) of Rule 17g-5 Proposed in the June 16, 2008 Release

In the June 16, 2008 Proposing Release, the Commission proposed to amend paragraph (b) of Rule 17g-5[44] to add to the list of conflicts that must be disclosed and managed the additional conflict of repeatedly being paid by certain issuers, sponsors, or underwriters (hereinafter collectively "arrangers") to rate structured finance products.[45]

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41 17 CFR 240.17g-5(c)(1).

42 17 CFR 240.17g-5(c)(2). In the June 5, 2007 Adopting Release, the Commission stated that the prohibition applied to "direct" ownership of securities and, therefore, would not apply to indirect ownership interests, for example, through mutual funds or blind trusts. See, June 5, 2007 Adopting Release, 72 FR at 33598.

43 17 CFR 240.17g-5(c)(3).

44 17 CFR 240.17g-5.

45 June 16, 2008 Proposing Release, 73 FR at 36219-36226, 36251.

This conflict is a subset of the broader conflict of interest already identified in paragraph (b)(1) of Rule 17g-5; namely, "being paid by issuers and underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite."[46] Specifically, the proposed amendment would have re-designated paragraph (b)(9) of Rule 17g-5 as paragraph (b)(10) and in new paragraph (b)(9) identified the following conflict: issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[47]

Furthermore, the Commission proposed amendments to paragraph (a) of Rule 17g-5 that would have established additional conditions – beyond disclosing the conflict and establishing procedures to manage it – that would need to be met for an NRSRO to issue or maintain a credit rating subject to this conflict.[48] Specifically, the Commission proposed a new paragraph (a)(3) that would have required, as a condition to the NRSRO rating a structured finance product, that the information provided to the NRSRO and used by the NRSRO in determining an initial credit rating and, thereafter, performing surveillance on the credit rating be disclosed through a means designed to provide reasonably broad dissemination of the information.[49] The proposed amendments did not

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46 17 CFR 240.17g-5(b)(1). As the Commission noted when adopting Rule 17g-5, the concern with conflict identified in paragraph (b)(1) "is that an NRSRO may be influenced to issue a more favorable credit rating than warranted in order to obtain or retain the business of the issuer or underwriter." June 5, 2007 Adopting Release, 72 FR at 33595.

47 June 16, 2008 Proposing Release, 73 FR at 36251.

48 June 16, 2008 Proposing Release, 73 FR at 36219-36226, 36251.

49 See id. This proposed requirement would have been in addition to the current requirements of paragraph (a) that an NRSRO disclose the type of conflict of interest in Exhibit 6 to Form NRSRO; and establish, maintain and enforce written policies and procedures to address and manage the conflict of interest. 17 CFR 240 17g-5(a)(1) and (2).

specify which entity – the NRSRO or the arranger – would need to disclose the information.

The proposed amendments would have required further that, for offerings not registered under the Securities Act, the information would need to be disclosed only to investors and credit rating agencies on the day the offering price is set and, subsequently, publicly disclosed on the first business day after the offering closes. These additional conditions in new paragraph (a)(3) only would have applied to the conflict identified in proposed new paragraph (b)(9). The conflicts currently identified in paragraph (b) of Rule 17g-5 would have continued to be subject only to the conditions set forth in paragraphs (a)(1) and (a)(2).

The Commission also provided in the June 16, 2008 Proposing Release three proposed interpretations of how the information could be disclosed under the requirements of the proposed rule in a manner consistent with the provisions of the Securities Act.[50] These interpretations addressed disclosure under the proposed amendment in the context of public, private, and offshore securities offerings.[51]

C. The Comments on the June 16, 2008 Proposed Amendments

The Commission received 38 comment letters in response to the June 16, 2008 Proposing Release that addressed these proposed amendments to Rule 17g-5. The majority of commenters opposed the amendment or raised substantial practical and legal questions about how it would operate when it became effective.[52] Many of these commenters questioned whether the rule would achieve its goal of increasing

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50 See June 16, 2008 Proposing Release, 73 FR at 36222-36226.

51 Id.

52 See id.

competition.[53] For example, some stated that it would not provide credit rating agencies the opportunity to determine unsolicited ratings because they would receive the information too late to issue a timely rating or that they would have a lesser understanding of the transaction and would, therefore, be unable to produce an accurate rating.[54] One commenter stated that the surveillance information called for under the proposed amendment is already available to the public for a fee through third party vendors.[55]

Many commenters were concerned with the disclosure of proprietary information.[56] These commenters were concerned that if issuers and underwriters were forced to disclose proprietary information, they would instead choose not to share this information with the NRSROs, which could affect the accuracy of the rating.[57] Commenters also were concerned that disclosing the information could create liability issues under Sections 11 and 12 of the Securities Act, particularly if the disclosing party is not the issuer or originator or if the information disclosed was not prepared for the purpose of being used as offering materials.[58] At least one commenter was concerned that if the information was presented to investors outside the context of a disclosure document, there would be significant risk that investors might misinterpret the data.[59] Other commenters raised concerns that disclosing the information could violate foreign

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See A.M. Best Letter; Raingeard Letter; Citi Letter; DBA Letter; ABA Business Law Committees Letter; SPA Letter; CHSG Letter.

54 See, e.g., CGSH Letter; Citi Letter; DBA Letter; Egan-Jones Letter; LIUNA Letter; Realpoint Letter.

55 Trepp Letter.

56 See CMSA Letter; IBFED Letter; MICA Letter; MBA Letter; ASF Letter; Roundtable Letter; SPA Letter; Citi Letter; Lehman Letter.

57 See, e.g. Citi Letter; DBA Letter; Lehman Letter; Moody's Letter; ASF Letter

58 See ICI Letter; R&I Letter; Moody's Letter; Fitch Letter; S&P Letter; DBRS Letter; ASF Letter; CGSH Letter; ABA Business Law Committees Letter; DBA Letter; Citi Letter; Lehman Letter.

59 See CGSH Letter.

law or, at the very least, put U.S. credit rating agencies at a disadvantage to compete in foreign markets where other credit rating agencies are not subject to the same disclosure requirements.[60] One NRSRO stated that if it were forced to disclose information on offshore offerings, it would have to withdraw from registration as an NRSRO in certain classes.[61] Some commenters suggested that instead of requiring the information to be disclosed to a range of market participants, it should only be disclosed to other NRSROs that seek to undertake an unsolicited rating.[62] The commenters stated that NRSROs would be subject to the same confidentiality agreements that arrangers make with NRSROs they hire to rate structured finance products.[63]

The Commission specifically asked for comments on which party should be required to disclose the information given to an NRSRO. Some commenters believed that the NRSRO was in the best position to disclose this information.[64] However, many of the NRSROs stated that requiring them to disclose the information would put them at risk and they requested that another party be required to make the disclosure or that NRSROs be given a safe harbor if they were required to disclose the information.[65] Commenters also were split about the type of information that should be disclosed. Some commenters believed that all the information an NRSRO receives from an arranger should be required to be disclosed,[66] while other commenters wanted to prevent a "data dump" and believed only the information the NRSRO uses to determine a rating should

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60 See S&P Letter; Moody's Letter; Fitch Letter; R&I Letter.

61 R&I Letter.

62 See DBRS Letter; ASF Letter; CreditSights Letter.

63 See DBRS Letter; ASF Letter; CreditSights Letter.

64 See Second SIFMA Letter; ICI Letter; Rapid Ratings Letter.

65 See A.M. Best Letter; DBRS Letter; Fitch Letter; S&P Letter; R&I Letter; Moody's Letter. At least one commenter opposed a safe harbor for NRSROs. See Rapid Ratings Letter.

66 See Fitch Letter; ICI Letter; CreditSights Letter; S&P Letter.

be disclosed.[67] At least one commenter wanted the disclosure to include the methodologies and underlying assumptions used by the NRSRO.[68]

Comments supporting the proposal generally argued that the Commission should go farther to address the conflict by, for example, considering whether it should be prohibited outright,[69] extending its application to other classes of ratings such as those for municipal securities,[70] or requiring the dissemination of more information such as each loan pool submitted to the NRSRO regardless of whether it is the ultimate pool used in determining the final rating.[71]

Several commenters offered technical suggestions as to how the rule should be modified. For example, two commenters requested that the timing of the disclosure of information used to determine a credit rating be made prior to the pricing date – one suggested six seeks and the other two weeks – to provide sufficient time to determine an unsolicited rating.[72] Another commenter suggested that the definition of "security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage backed securities transaction" was overly broad and should be clarified.[73]

D. The Re-proposed Amendments

After reviewing these comments, the Commission has made significant changes to the proposed amendments and is re-proposing them, as modified, for further comment. As discussed in more detail below, under the re-proposed amendments: (1) NRSROs that are hired by arrangers to perform credit ratings for structured finance products would

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67 See ASF Letter; CFA Institute Letter.
68 See Council Letter.
69 See RBDA Letter.
70 See e.g., Lockyer Letter; Nappier Letter; ICI Letter.
71 See e.g., LIUNA Letter.
72 See Egan-Jones Letter and Realpoint Letter.
73 ICI Letter; A.M. Best Letter; S&P Letter.

need to disclose to other NRSROs (and only other NRSROs) the deals for which they were in the process of determining such credit ratings; (2) the arrangers would need to provide the NRSROs they hire to rate structured finance products with a representation that they will provide information given to the hired NRSRO to other NRSROs (and only other NRSROs); and (3) NRSROs seeking to access information maintained by the NRSROs and the arrangers would need to furnish the Commission an annual certification that they are accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using the information.

More specifically, under the re-proposed amendments, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password protected Internet Web site that lists each deal they have been hired to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site. NRSROs not hired to determine and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and

that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

The Commission is re-proposing these amendments to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[74] The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.[75] The Commission preliminarily believes the re-proposed amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Generally, the information relied on by the hired NRSROs to rate structured finance products is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (i.e., NRSROs that are subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The goal is to increase the number of ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings

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74 15 U.S.C. 78o-7(h)(2).

75 Id.

by NRSROs that are not hired by the arranger. This would provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument and potentially expose an NRSRO that was unduly influenced by the "issuer-pay" conflict into issuing higher than warranted ratings. Furthermore, the proposal also is designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to more NRSROs, the proposal could make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the ratings issued by other NRSROs.

A paragraph-by-paragraph description of the proposed amendments follows.

1. Proposed New Paragraph (b)(9)

As re-proposed, new paragraph (b)(9) of Rule 17g-5 would be the same as proposed in the June 16, 2008 Proposing Release.[76] Specifically, the amendment would add the following conflict to the types of conflicts identified in paragraph (b) of the rule: issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[77] An NRSRO having this conflict would be subject to the provisions in new paragraph (a)(3) of Rule 17g-5 (as well as the existing disclosure and management provisions in paragraphs (a)(1) and (a)(2)).

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76 See June 16, 2008 Proposing Release, 73 FR at 36251.

77 Id.

Under the proposed rule text, the type of security or money market instrument subject to the conflict would be one that is "issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction." The Commission's intent is to have the definition be sufficiently broad to cover all structured finance products and, therefore, not limit the rule's scope to structured finance products that meet narrower definitions such as the one in Section 3(a)(62)(B)(iv) of the Exchange Act.[78] Moreover, the Commission notes that Section 15E(i)(1)(B) of the Exchange Act (adopted as part of the Rating Agency Act) uses identical language to describe a potentially unfair, coercive or abusive practice relating the ratings of securities or money market instruments.[79] The Commission adopted Rule 17g-6(a)(4), in part, under this statutory authority.[80] This paragraph uses the same language – securities or money market instruments "issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction" – to describe the prohibited practice. As used in Rule 17g-6 and proposed in new paragraph (b)(9) to Rule 17g-5, the Commission intends this definition to cover the broad range of structured finance products, including, but not limited to, securities collateralized by pools of loans or receivables (e.g., mortgages, auto loans, school loans credit card receivables, leases), collateralized debt obligations, synthetic collateralized debt obligations that reference debt securities or indexes, and hybrid collateralized debt obligations.

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78 15 U.S.C. 78c(a)(62)(B)(iv). This provision – a component of the definition of "NRSRO" – refers to issuers of asset-backed securities (as that term is defined in Section 1101(c) of part 229 of Title 17 of the Code of Federal Regulations, as in effect on the date of enactment of this paragraph. Id.

79 15 U.S.C. 78o-7(i)(1)(B).

80 17 CFR 240.17g-6(a)(4).

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Would the definition of the securities and money market instruments covered by this conflict – namely, ones "issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction" – apply to all types of structured finance products? Should the definition be made broader or narrowed?

2. Proposed New Paragraph (a)(3)

As re-proposed, paragraph (a)(3) would be substantially different than proposed in the June 16, 2008 Proposing Release.[81] Specifically, an NRSRO subject to the conflict identified in new paragraph (b)(9) – issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument – would have to take a number of actions described in the following sections.

a. Proposed New Paragraph (a)(3)(i)

Under proposed new paragraph (a)(3)(i) of Rule 17g-5, the NRSRO would be required to maintain on a password-protected Internet Web site a list of each structured finance security or money market instrument for which it currently is in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in

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[81] See June 16, 2008 Proposing Release, 73 FR at 36219-36226, 36251.

paragraphs (a)(3)(iii)(C) and (D) (see below discussion) can be accessed. The NRSRO would need to post this information no later than when the arranger first transmits information to the NRSRO that is to be used in the rating process. Further, the list would need to be maintained in chronological order so NRSROs accessing the Internet Web site would be able to determine the most recently initiated rating processes.

The text of proposed paragraph (a)(3)(i) only refers to transactions where the NRSRO is in the process of determining an "initial" credit rating. The Commission does not intend that the rule require the NRSRO to include on the Internet Web site information about securities or money market instruments for which the NRSRO has issued a final rating and now is monitoring the rating. The proposed amendment is designed to alert other NRSROs about new deals and direct them to the Internet Web site of the arranger where information to determine initial ratings and monitor the ratings can be accessed. Consequently, once a final rating is issued, the NRSRO can remove the information about the security or money market instrument from the list it maintains on the Internet Web site. Similarly, if the arranger decides to terminate the rating process without having a final rating issued, the NRSRO would be permitted to remove the information from the list.

Finally, the Commission intends that the address for the Internet Web site contained in the list would be the portal for accessing information the arranger would be making available for all securities and money market instruments subject to this proposed rule. For example, a particular arranger might be disclosing information about hundreds of different structured finance securities and money market instruments on the Internet Web site it maintains for the purposes of this proposed requirement. The NRSRO only

would need to disclose the address of this Internet Web site and not the actual link to the information, provided an NRSRO using the arranger's Internet Web site can navigate to the specific deal information it is seeking after entering the site.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following questions related to the proposal.

- Would the information required to be maintained on the NRSRO's Internet site be sufficient to alert other NRSROs that the rating process has commenced and where they can locate information to determine an unsolicited rating? For example, should the rule require the NRSRO to alert by email all NRSROs that obtain a password to access the site when new information is posted to the site? Would such a requirement be feasible?
- Are there specific requirements that the Commission could put into the rule text to clarify how the information should be presented on the NRSRO's Internet Web site?

b. Proposed New Paragraph (a)(3)(ii)

Under proposed new paragraph (a)(3)(ii) of Rule 17g-5, the NRSRO would be required to provide free and unlimited access to the password-protected Internet Web site it maintains during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in proposed new paragraph (e) of Rule 17g-5 (see below discussion) that covers that calendar year. The Commission intends that the only prerequisite to an NRSRO obtaining access to the Internet Web site is that the NRSRO

execute the certification described below and furnish it to the Commission. Nonetheless, it would be appropriate for the NRSRO maintaining the Internet Web site to require an NRSRO seeking access to the site to represent that the copy of the certification being submitted to obtain access was a true copy of the certification and that it was, in fact, furnished to the Commission.

Proposed paragraphs (a)(3)(i) and (ii) are designed to create a mechanism to alert other NRSROs seeking to rate finance products that an arranger has initiated the rating process and to inform the other NRSROs where information being provided by the arranger to the hired NRSRO to determine the credit rating may be obtained. The goal is to provide the other NRSROs with the information being provided to the hired NRSRO on a real-time basis so they have sufficient time to develop initial ratings contemporaneously with the hired NRSRO. It would be incumbent on the other NRSROs to routinely monitor the Internet Web sites of the issuer-pay NRSROs to ascertain when new structured finance securities or money market instruments were in the process of being rated.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Should the NRSRO maintaining the Internet Web site be permitted to charge a fee for other NRSROs to access it? For example, should they be permitted a fee to recover some or all of their costs for maintaining the Internet Web site?

c. Proposed New Paragraph (a)(3)(iii)

Under proposed paragraph (a)(3)(iii), the NRSRO would be required obtain from the arranger of each structured finance security or money market instrument four representations described below. The rule would provide that NRSRO could rely on the representations if the reliance was reasonable. Obtaining the representations would provide the NRSRO with a safe harbor if the arranger did not act in accordance with a representation. However, the NRSRO would need to demonstrate that its reliance on the representation was reasonable. For example, if the NRSRO became aware that an arranger breached prior representations a number of times, it would not be reasonable to rely on a future representation.

The four representations are discussed in the sections below.

i. Proposed New Paragraph (a)(3)(iii)(A)

Under proposed new paragraph (a)(3)(iii)(A), the arranger would need to represent that it will maintain the information described in proposed paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of Rule 17g-5 available on an identified pass-word protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating. Under this representation, the arranger would agree, in effect, to make the information it provides to the hired NRSRO available to any other NRSRO at the same time. Thus, the arranger would need to post the information on the Internet Web site at the same time the information is given to the hired NRSRO. Any time this information is updated or new information is given to the hired NRSRO, the information would need to be posted on the Internet Web site contemporaneously.

Furthermore, the arranger must tag the information in a manner that informs NRSROs accessing the Internet Web site which information currently is operative for the purpose of determining the credit rating. The purpose of this "current" requirement is to ensure that NRSROs accessing the Internet Web site would be using the correct information to determine their credit ratings. For example, the Commission understands that the composition of the pool of assets underlying a structured finance product may change during the rating process as some assets are removed from the pool and replaced with other assets. The Internet Web site would need to include each asset pool provided to the NRSRO hired to rate the security or money market instrument. If more than one loan tape has been provided, the arranger would need to identify which loan tape was currently being relied on to determine the credit rating. Moreover, the arranger would need to indicate which information is final and will be used by the NRSRO to determine the credit rating that is published. It would be in the interest of the arranger to ensure that the NRSROs developing credit ratings through accessing the Internet Web site rely on up-to-date and final information. Otherwise, their credit ratings may be based on erroneous information, which could impact the final rating.

The Commission considered only requiring that the final information be posted on the Internet Web site. However, this could put the NRSROs developing ratings using the Internet Web sites at a disadvantage since they might be getting the information shortly before the hired NRSRO issues its initial rating. The Commission preliminarily believes that the inclusion of all iterations of the various components of information (e.g., loan tapes, legal documents) used to determine the credit rating would allow the NRSROs accessing the Internet Web site to more actively participate in the rating process as they

could follow the progression of changes that lead to the final information upon which the credit rating should be based. This could make it easier for them to more quickly issue an initial credit rating when the loan pool, legal documentation and other relevant information is finalized. The goal is to have them issue credit ratings contemporaneously with the hired NRSRO so investors can have the benefit of these ratings before purchasing the securities or money market instruments.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Should the Commission only require that final information be posted on the Internet Web site to avoid the potential that an NRSRO would use erroneous information to determine a credit rating?

ii. Proposed New Paragraph (a)(3)(iii)(B)

Under proposed new paragraph (a)(3)(iii)(B), the arranger would need to represent that it will provide access to its password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in proposed paragraph (e) of Rule 17g-5 that covers that calendar year. The Commission is proposing to limit the access to this information to other NRSROs. The intent is to address concerns that disclosing this information to a broader array of entities would implicate disclosure requirements under the Securities Act. The Commission acknowledges that investors and other market participants may benefit from greater disclosure of this information. However, the Commission believes that the more appropriate mechanism to enhance such disclosure would be to amend rules under the

Securities Act. The Commission notes in particular that Regulation AB, which is a principles-based rule, requires among other things, disclosure of the material characteristics of the asset pool, the structure of the transaction and of any material credit enhancements.[82] When adopting Regulation AB in 2004, the Commission noted that a determination that information would be provided to a credit rating agency should be considered in determining whether information is not material under Regulation AB:

> If an issuer concludes that it need not disclose information in response to a particular disclosure line item because the issuer determines that the information is not material, but agrees to provide the information to credit rating agencies, the issuer should consider its determination regarding materiality in the context of the decision to provide the information to rating agencies.[83]

The amendment, as proposed in the June 16, 2008 Proposing Release, would have allowed credit rating agencies not registered with the Commission to obtain the information about the structured finance products necessary to determine "unsolicited" credit ratings.[84] The Commission preliminarily believes that allowing these entities to access the information could be problematic because the Commission has no authority to examine them and, thereby, review whether they are using the information solely to develop credit ratings. Preliminarily, the Commission believes that the better approach is to limit access to NRSROs. Furthermore, this could provide an incentive for credit rating agencies to register with the Commission, which would benefit users of credit ratings by increasing the number of NRSROs.

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82 See Items 1111, 1113 and 1114 of Regulation AB.

83 Securities Act Release No. 8518 (December 22, 2004).

84 June 16, 2008 Proposing Release, 73 FR at 36251.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Should other entities besides NRSROs be permitted to access the arrangers' Internet Web sites? For example, should credit rating agencies not registered with the Commission be permitted to access the sites? If so, how could the amendment be crafted to ensure that only entities meeting the definition of "credit rating agency" in Section 3(a)(61) of the Exchange Act be permitted to access the arrangers' Internet Web sites?

iii. Proposed New Paragraph (a)(3)(iii)(C)

Under proposed new paragraph (a)(3)(iii)(C), the arranger would need to represent that it will post on its password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the NRSRO.

The Commission anticipates that the information that would be disclosed (i.e., the information provided to the hired NRSRO to determine the initial rating) generally would include the characteristics of the assets in the pool underlying or referenced by the structured finance product and the legal documentation setting forth the capital structure of the trust, payment priorities with respect to the tranche securities issued by the trust (the waterfall), and all applicable covenants regarding the activities of the trust. For

example, for an initial rating for an RMBS, this information generally would include the loan tape (frequently a spreadsheet) that identifies each loan in the pool and its characteristics such as type of loan, principal amount, loan-to-value ratio, borrower's FICO score, and geographic location of the property. In addition, the disclosed information also would include a description of the structure of the trust, the credit enhancement levels for the tranche securities to be issued by the trust, and the waterfall cash flow priorities.

The Commission intends that the proposed amendment only apply to written information provided to the hired NRSRO. However, if the amendment is adopted, the Commission would review whether arrangers started providing information about the structured finance product orally to avoid having to disclose it on their Internet Web sites. The Commission believes that ultimately this would not benefit the arranger since the NRSROs developing credit ratings through using the Internet Web sites would be basing their ratings without the benefit of all of the information. This could adversely impact the ratings and lead to more frequent rating actions during the surveillance process when the securities or money market instruments do not perform as anticipated. Moreover, because the information would be disclosed only to other NRSROs, concerns of arrangers about releasing proprietary information should be mitigated.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Should the amendment require the arranger to represent that it will not provide any information to the hired NRSRO that is material without also disclosing that information on the Internet Web site?
- For the purposes of this amendment, should the Commission provide a standardized list of information that, at a minimum, should be disclosed? If so, what information should the list include? Do any commenters believe that this would have the effect of impermissibly regulating the substance of credit ratings and the methodologies used to determine credit ratings?

iv. Proposed New Paragraph (a)(3)(iii)(D)

Under proposed new paragraph (a)(3)(iii)(D), the arranger would need to represent that it will post on the password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the NRSRO. This would be the information, if any, that the arranger provides to the hired NRSRO to perform any ratings surveillance.[85] The Commission anticipates that generally this information would consist of reports from the trustee describing how the assets in the pool underlying the structured finance product are performing. For an RMBS credit rating, this information likely would include the "trustee report" customarily generated to reflect the performance of the loans constituting the collateral pool. For example, an RMBS trustee may generate reports describing the percentage of loans that are 30, 60,

[85] Re-proposed paragraph (a)(3)(iii)(D) of Rule 17g-5.

and 90 days in arrears, the percentage that have defaulted, the recovery of principal from defaulted loans, and information regarding any modifications to the loans in the asset pool.

The disclosure of this information would allow NRSROs that determined unsolicited initial ratings to monitor on a continuing basis the creditworthiness of the tranche securities issued by the trust. Under the representation, the arranger would need to provide this information at the time it is provided to the NRSRO hired to perform the rating. The Commission notes that the representation only relates to information provided by the arranger to the hired NRSRO. If the hired NRSRO conducts surveillance using information provided by third-party vendors, this information would not need to be disclosed. Instead, the NRSROs monitoring "unsolicited" ratings would need to contract with the third-party vendor to obtain the information.

As with the initial rating information provided under proposed paragraph (a)(3)(iii)(C), the Commission does not intend the rule to require the disclosure of oral communications between the NRSRO and the issuer, sponsor, or underwriter. The information provided on the issuer's Web site only would need to be the written information given to the NRSRO.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- What type of information for monitoring ratings of structured finance products is typically provided by arrangers to NRSROs? What type of

information is typically obtained by NRSROs contracting with third-party vendors?

- For the purposes of this amendment, should the Commission provide a standardized list of information that, at a minimum, should be disclosed? If so, what information should the list include? Do any commenters believe that this would have the effect of impermissibly regulating the substance of credit ratings and the methodologies used to determine credit ratings?

3. Proposed New Paragraph (e)

An NRSRO, in order to access the Internet Web sites maintained by other NRSROs and the arrangers, would need to annually execute and furnish to the Commission the following certification:

> The undersigned hereby certifies that it will access the Internet Web sites described in §240.17g-5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to §240.17g-5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o-7(g)(1)) and §240.17g-4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to §240.17g-5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to §240.17g-5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in §240.17g-5(a)(3) and determined and maintained credit

ratings for [Insert Number] of the such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to §240.17g-5(a)(3) 10 or more times in a calendar year.

The NRSRO would need to furnish this certification to the Commission each calendar year that the NRSRO seeks access to the NRSRO and arranger Internet Web sites. In addition, the NRSRO would be required to certify that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments if it accesses information pursuant to the proposed rule 10 or more times in a calendar year. The use of the term "issued securities and money market instruments" is intended to address potential deals that are posted on the Internet Web sites but that ultimately do not result in final ratings because the arranger decides not to issue the securities or money market instruments. An NRSRO that accessed such information would not need to count it among the final deals that would be used to determine whether it met the 10% threshold.

The 10% threshold is designed to require the NRSRO to determine a meaningful amount of credit ratings without forcing it to undertake work that it may not have the capacity or resources to perform. For example, the NRSRO may access information about a proposed deal that involves a structure or a type of assets that are new and that the NRSRO has not developed a methodology to incorporate into its ratings. It would not be appropriate or prudent to require the NRSRO to determine a credit rating in this case. At the same time, the Commission believes there should be some minimum level of credit ratings issued to demonstrate that the NRSRO is accessing the information for the purpose of determining credit ratings.

An NRSRO that has accessed information under this program for one calendar would be required to report in its next certification the number of times it accessed the information for issued securities and money market instruments and the number of credit ratings determined using that information. This is designed to provide a level of verification that the NRSRO is, in fact, accessing the information for purposes of determining credit ratings.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following questions related to the proposal.

- Should the minimum requirement for the number of credit ratings that must be determined using the information posted on arranger Internet Web sites be higher than 10% of the deals reviewed? For example, should it be 15%, 20%, 50% or a larger percentage? Alternatively, should the requirement be less than 10%? For example, should it be 5% or 2%?
- If an NRSRO accesses information 10 or more times in a calendar year and does not determine credit ratings for 10% or more of the deals reviewed, should the NRSRO be prohibited from accessing the NRSRO and sponsor information in the future? If so, should the NRSRO be prohibited from accessing the information for a prescribed period of time (e.g., 6 months, 12 months, 18 months, 24 months or some longer period)?

E. Proposed Amendment to Regulation FD

The Commission is proposing to amend Regulation FD[86] to accommodate the information disclosure program that would be established under the re-proposed

[86] 17 CFR 243.100, 243.101, 243.102 and 243.103.

amendments to paragraphs (a) and (b) of Rule 17g-5. Regulation FD requires that an issuer or any person acting on an issuer's behalf publicly disclose material non-public information if the information is disclosed to certain persons.[87] Under Rule 100(b)(2)(iii) of Regulation FD, the issuer or person acting on the issuer's behalf need not make the public disclosure if the disclosure of material non-public information is made to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available.[88] Thus, under this provision, the information can be disclosed to a credit rating agency if: (1) it is being disclosed for the purpose of developing a credit rating; and (2) the credit rating agency makes the rating publicly available. The Commission is proposing to amend Rule 100(b)(2)(iii) of Regulation FD to permit the disclosure of material non-public information to NRSROs irrespective of whether they make their ratings publicly available. This would accommodate subscriber-based NRSROs that do not make their ratings publicly available for free and it would accommodate NRSROs that access the information under the proposed Rule 17g-5 disclosure program but ultimately do not issue a credit rating using the information.

Under the re-proposed amendments to paragraphs (a) and (b) of Rule 17g-5, arrangers would agree to disclose information to any credit rating agency registered with the Commission as an NRSRO. The information disclosed likely would include material non-public information and, consequently, the arranger would need to rely on the exclusions to Regulation FD in order to disclose it to NRSROs without simultaneously making a public disclosure of the information. Currently, the exclusions in Regulation

87 See 17 CFR 243.100(a).
88 See 17 CFR 243.100(b)(2)(iii).

FD include disclosing material non-public information "to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available."[89] NRSROs that operate under the issuer-pays model make their ratings available to the public for free because they typically are compensated by the issuer or arranger whose security is being rating. Subscriber-based NRSROs are not compensated by the issuer or arrangers but, rather, by subscribers who pay for access to their ratings. Consequently, their credit ratings are not disclosed to the public free of charge but, instead, only to those persons who agree to pay them for access to the credit ratings.

The Commission preliminarily believes that credit rating agencies that are registered with the Commission as NRSROs should be able to receive material non-public information from arrangers for the purpose of developing unsolicited credit ratings for structured finance products. The Commission recognizes that their credit ratings are not as broadly disseminated as the credit ratings of the issuer-pays credit rating agencies. However, because the proposed amendment would limit the exclusion to NRSROs, the entities receiving the material non-public information would be subject to Section 15E(g) of the Exchange Act and Rule 17g-4 thereunder.[90] These statutory and regulatory provisions require NRSROs to establish, maintain and enforce policies and procedures reasonably designed to prevent the misuse of material non-public information. Furthermore, the Commission has examination authority with respect to NRSROs. Moreover, the proposed disclosure program for Rule 17g-5 would be triggered only when an issuer-pay NRSRO is hired to perform a credit rating. Therefore, a publicly disclosed

89 17 CFR 243.100(b)(2)(iii).

90 15 U.S.C. 78o-7(g).

credit rating for the structured finance product likely would be issued along with any unsolicited ratings from subscriber-based NRSROs. For these reasons, the Commission preliminarily believes it would be appropriate to eliminate the requirement in Regulation FD to make the ratings public for credit rating agencies that are registered with the Commission as NRSROs and who receive the information under the proposed disclosure program under Rule 17g-5.

Finally, the Commission also is proposing to amend the current text in Rule 100(b)(2)(iii) of Regulation FD that identifies credit rating agencies as "an entity whose primary business is the issuance of credit ratings."[91] Since the adoption of Regulation FD, Congress, through the Rating Agency Act, enacted a statutory definition of "credit rating agency."[92] The definition is in Section 3(a)(61) of the Exchange Act.[93] The Commission, therefore, proposes to use the statutory definition of "credit rating agency" in Rule 100(b)(2)(iii) of Regulation FD.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following questions related to the proposal.

- Is the proposed change to Regulation FD necessary or appropriate? Would a different approach work better? For instance, would it be better to revise the exception in Regulation FD to apply to any information given to any NRSRO so long as the ratings of at least one NRSRO are publicly available.

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91 17 CFR 243.100(b)(2)(iii).

92 See 15 U.S.C. 78c(a)(61).

93 15 U.S.C. 78c(a)(61).

- Should the Commission broaden the exclusion to information that is provided to NRSROs beyond the proposed Rule 17g-5 disclosure program (e.g., information provided to develop ratings for corporate issuers)?
- Does disclosure of this information to all NRSROs raise any concerns that Regulation FD was designed to address?
- Would the Commission's use of the statutory definition of "credit rating agency" in Section 3(a)(61) of the Exchange Act in Rule 100(b)(2)(iii) of Regulation FD prevent entities that currently receive information under the exclusion from continuing to receive such information? Commenters that believe it would prevent entities from continuing to receive the information should specifically describe how the entities in question would not meet the statutory definition of "credit rating agency."

IV. GENERAL REQUEST FOR COMMENT

The Commission invites interested persons to submit written comments on any aspect of the proposed amendments, in addition to the specific requests for comments. Further, the Commission invites comment on other matters that might have an effect on the proposals contained in the release, including any competitive impact.

V. PAPERWORK REDUCTION ACT

Certain provisions of the proposed amendment to Rule 17g-2 and the re-proposed amendment to Rule 17g-5 (collectively, the "Proposed Rule Amendments") contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA"). The Commission is submitting these proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA. An agency

may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

(1) Rule 17g-2, Records to be made and retained by nationally recognized statistical rating organizations (OMB Control Number 3235-0628); and

(2) Rule 17g-5, Conflicts of interest (a proposed new collection of information).

A. Collections of Information under the Proposed Rule Amendments

The Commission is proposing for comment rule amendments to prescribe additional requirements for NRSROs. The proposed amendments to Rule 17g-2 would require NRSROs to make publicly available ratings action histories for certain issuer-paid credit ratings. In addition, the re-proposed amendments to Rule 17g-5 would modify rules the Commission adopted in 2007 to implement conflicts of interest requirements under the Rating Agency Act. Both sets of amendments would contain recordkeeping and disclosure requirements that would be subject to the PRA. The collection of information obligations imposed by the Proposed Rule Amendments would be mandatory. The Proposed Rule Amendments, however, would apply only to credit rating agencies that are registered with the Commission as NRSROs. Such registration is voluntary.[94]

In summary, the Proposed Rule Amendments would require an NRSRO to publicly disclose certain ratings actions histories and would require an NRSRO and an

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94 See Section 15E of the Exchange Act (15 U.S.C. 78o-7).

issuer to disclose to other NRSROs certain information required to determine and monitor a credit rating for a structured finance security or money market instrument.[95]

B. Proposed Use of Information

The collections of information in the Proposed Rule Amendments are designed to provide users of credit ratings with information upon which to evaluate the performance of NRSROs and to enhance the accuracy of credit ratings for structured finance products by increasing competition among NRSROs who rate these products.

C. Respondents

In adopting the final rules under the Rating Agency Act, the Commission estimated that approximately 30 credit rating agencies would be registered as NRSROs.[96] The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the amendments. Since the initial set of rules under the Rating Agency Act became effective in June 2007, ten credit rating agencies have registered with the Commission as NRSROs.[97] The registration program has been in effect for over a year; consequently, the Commission expects additional entities will register. While 20 more entities may not ultimately register, the Commission believes the estimate is within reasonable bounds and appropriate given that it adds an element of conservatism to its paperwork burden estimates as well as cost estimates.

In addition, under the re-proposed amendments to Rule 17g-5, arrangers of structured finance products would need to disclose certain information to NRSROs. For purposes of the PRA estimate, based on staff information gained from the NRSRO

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95 See proposed Rule 17g-2(d) and re-proposed Rule 17g-5(a)(3), (b)(9) and (e).

96 See June 5, 2007 Adopting Release, 72 FR at 33607.

97 A.M. Best Company, Inc.; DBRS Ltd.; Fitch.; Japan Credit Rating Agency, Ltd.; Moody's; Rating and Investment Information, Inc.; S&P; LACE Financial Corp.; Egan-Jones Rating Company; and Realpoint LLC.

examination process, the Commission estimates that there would be approximately 200 respondents, which is the same number of respondents the Commission originally proposed would be affected by the amendments. The Commission received no comments on this estimate when originally proposed.

The Commission generally requests comment on all aspects of these estimates for the number of respondents and the number of arrangers. In addition, the Commission requests specific comment on the following items related to these estimates.

- Should the Commission use the number of credit rating agencies currently registered as NRSROs rather the estimated number of 30 ultimate registrants? Alternatively, is there a basis to estimate a different number of likely registrants?
- Should the Commission use different estimates for the number of NRSROs that would be subject to the proposed amendments to Rule 17g-2 and re-proposed amendments to Rule 17g-5. For example, should the Commission develop estimates based on the number of NRSROs that determine issuer-paid credit ratings as opposed to subscriber-paid credit ratings?
- Are there sources that could provide credible information that could be used to determine the number of issuers that would be subject to the proposed paperwork burdens? Commenters should identify any such sources and explain how a given source could be used to either support the Commission's estimate or arrive at a different estimate.

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the Proposed Rule Amendments would be approximately 169,045 hours on an annual basis[98] and 69,315 hours on a one-time basis.[99]

The total annual and one-time hour burden estimates described below are averages across all types of NRSROs expected to be affected by the Proposed Rule Amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. Consequently, the burden hour estimates represent the average time across all NRSROs. The Commission further notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Proposed Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and keep current certain records relating to its business and requires an NRSRO to preserve those and other records for certain prescribed time periods.[100] The version of Rule 17g-2 adopted today ("New Rule 17g-2") requires an NRSRO to make and retain a record showing the ratings action histories and with respect to each current credit rating.[101] New Rule 17g-2 also requires an NRSRO to make public, in XBRL format and with a six-month grace period, the ratings action

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98 This total is derived from the total annual hours set forth in the order that the totals appear in the text: 105 + 14,880 + 4,000 + 150,000 + 60 = 169,045.

99 This total is derived from the total one-time hours set forth in the order that the totals appear in the text: 315 + 9,000 + 60,000 = 69,315.

100 17 CFR 240.17g-2.

101 Paragraph (a)(8) of Rule 17g-2.

histories required under new paragraph (a)(8) for a random sample of 10% of the issuer-paid credit ratings for each ratings class for which it has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated.[102]

When adopting New Rule 17g-2, the Commission determined that, on average, an NRSRO subject to the requirements will spend approximately 30 hours to publicly disclose the rating action histories in XBRL format and, thereafter, 10 hours per year to update this information.[103] Accordingly, the total aggregate one-time burden to the industry to make the rating action histories publicly available in XBRL format will be 210 hours,[104] and the total aggregate annual burden hours will be 70 hours.[105] The Commission based the total estimates on the fact that based on information furnished on Form NRSRO, seven of the ten currently registered NRSROs issue 500 or more ratings under the issuer-pay model in at least one of the classes of ratings for which they are registered. The Commission believed that even as the number of registered NRSROs expands to the 30 ultimately expected to register, this number will remain constant, as new entrants are likely to operate on a subscriber-pay basis, at least in the near future. In addition, the Commission believed that each of the NRSROs affected by this new requirement already has, or will have, an Internet Web site.

The proposed amendments to Rule 17g-2(d) would require NRSROs to publicly disclose ratings action histories of all outstanding issuer-paid credit ratings with up to a

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102 Amendment to Rule 17g-2(d).

103 The Commission also based this estimate on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO. No alternatives to these estimates as proposed were suggested by commenters and the Commission adopted these hour burdens. See Companion Adopting Release.

104 30 hours x 7 NRSROs = 210 hours.

105 10 hours x 7 NRSROs = 70 hours.

12 month time lag before a new rating action must be disclosed. The Commission estimates, based on staff experience, that the hour burdens for an NRSRO to publicly disclose this information would increase 50% from the current estimates for disclosing ratings action histories for a randomly selected sample of 10% of the outstanding issuer-paid credit ratings. Therefore, the Commission estimates that the one time annual hour burden will increase from 30 hours to 45 hours[106] and the annual hour burden will increase from 10 hours to 15 hours.[107] Accordingly, the Commission estimates that the total aggregate one-time burden for NRSROs to comply with this requirement would be approximately 315 hours,[108] and the total aggregate annual burden hours would be approximately 105 hours.[109]

The Commission requests comment on all aspects of these burden estimates for the proposed amendments to Rule 17g-2(d). In addition, the Commission requests specific comment on the following items related to these estimates:

- If the Commission were to adopt a final rule that subjected subscriber-paid credit ratings to the public disclosure requirement, would the hour burden estimates per firm be the same as estimated by the Commission above or would they change. Commenters should give specific hour estimates in their comments.
- If the Commission were to adopt a final rule subjecting subscriber-paid credit ratings to the public disclosure requirements being adopted today (the random sample of 10% of issuer-paid credit ratings in a class of rating), would the hour burden estimates per firm be the same as estimated by the Commission in the

106 50% of 30 hours = 15 hours + 30 hours = 45 hours.
107 50% of 10 hours = 5 hours + 10 hours = 15 hours.
108 45 hours x 7 NRSROs = 315 hours.
109 15 hours x 7 NRSROs = 105 hours.

Adopting Release or would they change. Commenters should give specific hour estimates in their comments.

- Are there publicly available reports or other data sources the Commission should consider in arriving at these burden estimates?
- Are the estimates of the one-time and recurring burdens of the re-proposed additional disclosures accurate? If not, should they be higher or lower?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

2. Re-Proposed Rule 17g-5

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest.[110] The rule also prohibits specific types of conflicts of interest.[111] The re-proposed amendments to Rule 17g-5 would add an additional conflict to paragraph (b) of Rule 17g-5 for NRSROs to manage. This re-proposed conflict of interest would be issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[112] Under the re-proposal, an NRSRO would be prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed.[113]

Specifically, an NRSRO rating such products would need to disclose to other NRSROs the following information on a password protected Internet Web site:

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110 17 CFR 240.17g-5.

111 17 CFR 240.17g-5(c).

112 See re-proposed Rule 17g-5(b)(9). The current paragraph (b)(9) would be renumbered as (b)(10).

113 See re-proposed Rule 17g-5(a)(3).

- a list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of re-proposed Rule 17g-5 can be accessed.[114]

For purposes of this PRA, the Commission estimates that it would take an NRSRO approximately 300 hours, to develop a system, as well as policies and procedures, for the disclosures required by the re-proposed rule. This estimate is based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.[115] Accordingly, the Commission believes, based on staff experience, an NRSRO would take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the proposal in that a respondent would need a set of policies and procedures for disclosing the information, as well as a system for making the information publicly available. This would result in a total one-time hour burden of 9,000 hours for 30 NRSROs.[116]

In addition to the one-time hour burden, the re-proposed amendments would result in an annual hour burden to the NRSRO arising from the requirement to make disclosures for each deal being rated. In the June 18 Proposing Release, the Commission estimated that a large NRSRO would have rated approximately 2,000 new RMBS and

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114 See re-proposed Rule 17g-5(a)(3)(i).

115 See June 5, 2007 Adopting Release, 72 FR at 33609.

116 300 hours x 30 NRSROs = 9,000 hours.

CDO transactions in a given year. The Commission based this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs which rated structured finance transactions. The Commission adjusted this number to 4,000 transactions in order to account for other types of structured finance products, including commercial real estate MBS and other consumer assets. Accordingly, the Commission estimated that a large NRSRO would rate approximately 4,000 new structured finance transactions during a calendar year. The Commission did not receive any comments with respect to that estimate. The Commission recognizes that the number of new structured finance transactions has dropped precipitously since 2006 because of the credit market turmoil. Nonetheless, the Commission preliminarily is retaining the estimate of 4,000 new deals per year as an element of conservatism and to account for future market developments.

Based on the number of outstanding structured finance ratings submitted by the ten registered NRSROs on their Form NRSROs, the Commission estimates that the three largest NRSROs account for 97% of the market for structured finance ratings. Therefore, the Commission estimates that each of the NRSROs in this category would be hired to rate 97% of the 4,000 new deals per year for a total of 11,640 ratings.[117] The Commission further estimates that the NRSROs that are not in this category would each rate 3% of the 4,000 new deals for a total of 3,240 ratings.[118] Thus, the Commission estimates that the total structured finance ratings issued by all NRSROs in a given year would be 14,880.[119] Based on staff experience, the Commission estimates that it would take approximately 1 hour per transaction for the NRSRO to update the lists maintained

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117 (4,000 ratings x .97) x 3 = 11,640.

118 (4,000 ratings x .03) x 27 = 3,240.

119 (3,880 x 3) + (120 x 27) = 14,880 transactions.

on the NRSROs' password protected Internet Web sites. Therefore, the Commission estimates for purposes of the PRA that the total annual hour burden for the industry would be 14,880 hours.[120]

The re-proposed amendments also would require that the arranger disclose the following information:

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and
- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.[121]

The Commission estimates that there would be approximately 200 such respondents. For purposes of this PRA, the Commission estimates that it would take a

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120 14,880 ratings x 1 hour = 14,880 hours.

121 See re-proposed Rule 17g-5(a)(3)(iii).

respondent approximately 300 hours to develop a system, as well as policies and procedures, for the disclosures required by the re-proposed rule. This estimate is based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.[122] Accordingly, the Commission believes, based on staff experience, an arranger would take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the proposal, which includes the estimate that a respondent would need a set of policies and procedures for disclosing the information, as well as a system for making the information publicly available. This would result in a total one-time hour burden of 60,000 hours for 200 respondents.[123] The Commission received no comments on an identical burden estimate in the original proposing release.

In addition to the one-time hour burden, the re-proposed amendments would result in an annual hour burden for arrangers. Specifically, the re-proposed amendments would require disclosure of information on a transaction-by-transaction basis when an initial rating process is commenced. Based on staff experience, the Commission estimates that each respondent would disclose information for approximately 20 new transactions per year and that it would take approximately 1 hour per transaction to post the information to the password protected Internet Web sites. The Commission estimates that a large NRSRO would have rated approximately 2,000 new RMBS and CDO transactions in a given year. The Commission is basing this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs that rated structured finance transactions. The Commission is adjusting this number to 4,000

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122 See June 5, 2007 Adopting Release, 72 FR at 33609.

123 300 hours x 200 respondents = 60,000 hours.

transactions in order to include other types of structured finance products, including commercial MBS and other consumer assets. Therefore, the Commission estimates for purposes of the PRA that each respondent would arrange approximately 20 new transactions per year.[124] The Commission notes that the number of new transactions per year would vary by the size of issuer and that this estimate would be an average across all respondents. Larger respondents may arrange in excess of 20 new deals per year, while a smaller arranger may only initiate one or two new deals on an annual basis. Based on this analysis, the Commission estimates that it would take a respondent approximately 20 hours[125] to disclose this information under the re-proposed rule, on an annual basis, for a total aggregate annual hour burden of 4,000 hours.[126] The Commission received no comments on an identical burden estimate in the original proposing release.

In addition, re-proposed Rule 17g-5(a)(3)(iii)(D) would require disclosure of information provided to an NRSRO to be used for credit rating surveillance on a security or money market instrument. Because surveillance would cover more than just initial ratings, the Commission, in the original proposing release, estimated based on staff information gained from the NRSRO examination process that monthly disclosure would be required with respect to approximately 125 transactions on an ongoing basis. Also based on staff information gained from the NRSRO examination process, the Commission estimated that it would take a respondent approximately 0.5 hours per transaction to disclose the information. Therefore, the Commission estimates that each respondent would spend approximately 750 hours[127] on an annual basis disclosing

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124 4,000 new transactions/200 issuers = 20 new transactions.

125 20 transactions x 1 hour = 20 hours.

126 20 hours x 200 respondents = 4,000 hours.

127 125 transactions x 30 minutes x 12 months = 45,000 minutes/60 minutes = 750 hours.

information under re-proposed Rule 17g-5, for a total aggregate annual burden hours of 150,000 hours.[128] The Commission received no comments on an identical estimate in the original proposing release.

Finally, an NRSRO that wishes to access information on another NRSRO's Web site or on an arranger's Web site would need to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g-5. The Commission estimates that this annual certification would become a matter of routine over time and should take less time than it takes an NRSRO to submit its annual certification under Rule 17g-1(f).[129] The annual certification required under Rule 17g-1(f) involves the disclosure of substantially more information than the certification in proposed paragraph (e) of Rule 17g-5. The Commission estimated that it would take an NRSRO approximately 10 hours to complete the Rule 17g-1(f) annual certification.[130] Given that the proposed paragraph (e) certification would require much less information, the Commission estimates, based on staff experience, that it would take an NRSRO approximately 20% of the time it takes to do the Rule 17g-5 annual certification. Further, for the purposes of the estimate, the Commission is assuming that all 30 NRSROs ultimately registered with the Commission would complete the certification. For these reasons, the Commission estimates it would take an NRSRO approximately 2 hours[131] to complete the proposed paragraph (e) certification for an aggregate annual hour burden to the industry of 60 hours.[132]

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128 750 hours x 200 respondents = 150,000 hours.

129 17 CFR 240.17g-1(f).

130 See June 5, 2007 Adopting Release, 72 FR at 33609.

131 20% of 10 hours = 2 hours.

132 2 hours x 30 NRSROs = 60 hours.

The Commission again requests comment on all aspects of these burden estimates for the amendments to Rule 17g-5 as re-proposed. In addition, the Commission requests specific comment on the following items related to these estimates:

- Are there publicly available reports or other data sources the Commission should consider in arriving at these burden estimates?
- Are the estimates of the one-time and recurring burdens of the re-proposed additional disclosures accurate? If not, should they be higher or lower?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

E. Collection of Information Is Mandatory

The recordkeeping and notice requirements for the Proposed Rule Amendments would be mandatory.

F. Confidentiality

The disclosures that would be required under the proposed amendments to Rule 17g-2(d) would be public. The disclosures that would be required under the re-proposed amendments to Rule 17g-5 would be made available to other NRSROs. The NRSROs would need to provide certifications agreeing to keep the propose Rule 17g-5 information confidential.

G. Record Retention Period

There is no record retention period for the Proposed Rule Amendments.

H. Request for Comment

The Commission requests comment on the proposed collections of information in order to: (1) evaluate whether the proposed collection of information is necessary for the

proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimates of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (4) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and (5) evaluate whether the Proposed Rule Amendments would have any effects on any other collection of information not previously identified in this section.

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 should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, and refer to File No. S7-04-09. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the Federal Register; therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for the materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-04-09, and be submitted to the Securities and Exchange Commission, Records Management Office, 100 F Street, NE, Washington, DC 20549.

VI. COSTS AND BENEFITS OF THE RE-PROPOSED RULES

The Commission is sensitive to the costs and benefits that result from its rules. The Commission has identified certain costs and benefits of the Proposed Rule Amendments and requests comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in the analysis.[133] The Commission seeks comment and data on the value of the benefits identified. The Commission also welcomes comments on the accuracy of its cost estimates in each section of this cost-benefit analysis, and requests those commenters to provide data so the Commission can improve the cost estimates, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission seeks estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of these Proposed Rule Amendments.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating

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133 For the purposes of this cost/benefit analysis, the Commission is using salary data from the Securities Industry and Financial Markets Association ("SIFMA") Report on Management and Professional Earnings in the Securities Industry 2007, which provides base salary and bonus information for middle-management and professional positions within the securities industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. Finally, the salary costs derived from the report and referenced in this cost benefit section, are modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission used comparable assumptions in adopting the final rules implementing the Rating Agency Act in 2007, requested comments on such assumptions, and received no comments in response to its request. See June 5, 2007 Adopting Release, 72 FR at 33611, note 576. Hereinafter, references to data derived from the report as modified in the manner described above will be cited as "SIFMA 2007 Report as Modified."

industry.[134] As the Senate Report states, the Rating Agency Act establishes "fundamental reform and improvement of the designation process" with the goal that "eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs."[135]

The Proposed Rule Amendments are designed to improve the transparency of credit ratings performance by making credit ratings actions publicly available and the accuracy of credit ratings for structured finance products by increasing competition among the NRSROs that rate these securities and money market instruments.

The proposed amendment to Rule 17g-2(d) would require NRSROs to publicly disclose all of their ratings actions histories for issuer-paid credit ratings, in XBRL format and with a one-year grace period. This disclosure would allow the marketplace to better compare the performance of NRSROs determining issuer-paid credit ratings. The Commission preliminarily believes that making this information publicly available will provide users of credit ratings with innovative and potentially more useful metrics with which to compare NRSROs.

In addition, under the re-proposed amendments to Rule 17g-5, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password protected Internet Web site that lists each deal they have been hired to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site. NRSROs not hired to determine

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134 Senate Report, p. 2.

135 Id, p. 7.

and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

The Commission is re-proposing these amendments to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[136] The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.[137] The Commission preliminarily believes the re-proposed amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Generally, the information relied

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136 15 U.S.C. 78o-7(h)(2).

137 Id.

on by the hired NRSROs to rate structured finance products is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (i.e., NRSROs that are subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The goal is to increase the number of ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings by NRSROs that are not hired by the arranger. This would provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument and potentially expose an NRSRO that was unduly influenced by the "issuer-pay" conflict into issuing higher than warranted ratings. Furthermore, the proposal also is designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to more NRSROs, the proposal could make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the ratings issued by other NRSROs.

The Commission generally requests comment on all aspects of these Proposed Rule Amendment benefits. In addition, the Commission requests specific comment on the following items related to these benefits.

- Are there metrics available to quantify these benefits and any other benefits the commenter may identify, including the identification of sources of empirical data that could be used for such metrics?

Commenters should provide specific data and analysis to support any comments they submit with respect to these benefit estimates.

B. Costs

The cost of compliance with the Proposed Rule Amendments to a given NRSRO would depend on its size and the complexity of its business activities. The size and complexity of NRSROs vary significantly. Therefore, the cost could vary significantly across NRSROs. The Commission is providing estimates of the average cost per NRSRO taking into consideration the variance in size and complexity of NRSROs. The cost of compliance would also vary depending on which classes of credit ratings an NRSRO issues and how many outstanding ratings it has in each class. NRSROs which issue credit ratings for structured finance products would incur higher compliance costs than those NRSROs which do not issue such credit ratings or issue very few credit ratings in that class. For these reasons, the cost estimates represent the average cost across all NRSROs.

1. Proposed Amendment to Rule 17g-2

The proposed amendment to Rule 17g-2 would require NRSROs to make 100% of their ratings action histories for issuer-paid credit ratings publicly available in an XBRL Interactive Data File, with a one year grace period.[138] As discussed with respect to the PRA, the Commission estimates that, on average, an NRSRO would spend approximately 45 hours to publicly disclose this information in an XBRL Interactive Data

[138] See proposed amendment to Rule 17g-2(d).

File and, thereafter, 15 hours per year to update the information.[139] Furthermore, as discussed in the PRA the Commission estimates that although there will be 30 NRSROs, this amendment only applies to seven NRSROs. For these reasons, the total aggregate one-time burden to the industry to make the history of its rating actions publicly available in an XBRL Interactive Data File would be 315 hours[140] and the total aggregate annual burden hours would be 105 hours.[141] For cost purposes, the Commission preliminarily believes that a senior programmer would perform these functions. Accordingly, the Commission estimates that an NRSRO would incur an average one-time cost of $13,005 and an average annual cost of $4,335, as a result of the proposed amendment.[142] Consequently, the total aggregate one-time cost to the industry would be $91,035[143] and the total aggregate annual cost to the industry would be $30,345.[144]

In addition, the proposed rules may impose other costs. For example, making some information about ratings action histories available to the public for free may have some impact on the business models of NRSROs, although the proposed rules are designed to minimize any impact. Further, the rule may affect NRSROs with different business models differently, although the Commission seeks comment on how best to promote competition among NRSROs. The rule also may impose costs to purchase software to make this information publicly available.

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139 The Commission also bases this estimate on the estimated one time and annual burden hours it would take an NRSRO to publicly disclose its Form NRSRO on its Web site. No comments were received on these estimates in the final rule release. See June 5, 2007 Adopting Release, 72 FR at 33609.

140 45 hours x 7 NRSROs = 315 hours.

141 15 hours x 7 NRSROs = 105 hours.

142 The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Senior Programmer is $289. Therefore, the average one-time cost would be $13,005 [(45 hours) x ($289 per hour)] and the average annual cost would be $4,335 [(15 hours per year) x ($289 per hour)].

143 315 hours x $289 per hour.

144 105 hours x $289 per hour.

The Commission notes that in the Companion Adopting Release the Commission provided cost estimates for complying with all the final amendments to Rule 17g-2 being adopted. In that release, the Commission used a different methodology based on cost data provided by one large NRSRO.[145] The Commission is not relying exclusively on cost data for the purposes of these amendments to Rule 17g-2 because the NRSRO was discussing cost estimates for complying with all the proposed amendments to Rule 17g-2 (not just the amendment relating to the requirement to publicly disclose certain ratings action histories in an XBRL format).

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendments to Rule 17g-2. In addition, the Commission requests specific comment on the following items related to these cost estimates:
In addition, the Commission requests specific comment on the following items related to these estimates:

- What costs would result from lost revenues incurred because NRSROs subject to the rule may not be able to sell ratings action histories if they are publicly disclosed under the proposed rule?
- If the Commission were to adopt a final rule that subjected subscriber-paid credit ratings to the public disclosure requirement, would the cost estimates per firm be the same as estimated by the Commission above or would they change. Commenters should give specific cost estimates in their comments.
- If the Commission were to adopt a final rule subjecting subscriber-paid credit ratings to the public disclosure requirements being adopted today (the random

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145 See letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service.

sample of 10% of issuer-paid credit ratings in a class of credit rating), would the cost estimates per firm be the same as estimated by the Commission in the Adopting Release or would they change. Commenters should give specific cost estimates in their comments.

- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?
- Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?
- Should the Commission rely more on the cost data provided by the large NRSRO in its comments to the amendments to Rule 17g-2 proposed in the June 16, 2008 Proposing Release? If so, how should the Commission modify that cost data to reflect that the June 16, 2008 Proposing Release proposed several different amendments to Rule 17g-2?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

2. Re-Proposed Rule 17g-5.

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest.[146] The rule also prohibits specific types of conflicts of interest.[147] The re-proposed amendments to Rule 17g-5 would add an additional conflict to paragraph (b) of Rule 17g-5 for NRSROs to manage. This re-proposed conflict of interest would be

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146 17 CFR 240.17g-5.

147 17 CFR 240.17g-5(c).

issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[148] Under the re-proposal, an NRSRO would be prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed.[149]

Specifically, an NRSRO rating such products would need to disclose to other NRSROs the following information on a password protected Internet Web site:

- A list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of re-proposed Rule 17g-5 can be accessed.[150]

The Commission estimates that the average one-time cost to each NRSRO to establish the Internet Web site would be $65,850[151] and the total aggregate one-time cost

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148 See re-proposed Rule 17g-5(b)(9). The current paragraph (b)(9) would be renumbered as (b)(10).

149 See re-proposed Rule 17g-5(a)(3).

150 See re-proposed Rule 17g-5(a)(3)(i).

151 The Commission estimates an NRSRO would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Manager is $245 and the average hourly cost for a Programmer Analyst is 194. Therefore, the average one-time cost to an NRSRO would be ($150 hours x $245) + (150 hours x $194) = $65,850.

to all NRSROs would be $1,975,500.[152] Further, as discussed with respect to the PRA, the Commission estimates that it would take a large NRSRO approximately 3,880 hours[153] and a small NRSRO approximately 120 hours[154] to disclose the information under re-proposed Rule 17g-5(a)(3)(i), on an annual basis, for a total aggregate annual hour burden of 14,880 hours.[155] For these reasons, the Commission estimates that the average annual cost to a large NRSRO would be $795,400, the average annual cost to NRSROs not in that category would be $24,600[156] and the total annual cost to the NRSROs would be $3,050,400.[157]

The Commission received one comment on the proposed costs in the June 16, 2008 Proposing Release.[158] The commenter stated that if the amendments to Rule 17g-5(a)(3) were adopted, as proposed, it would cost the NRSRO approximately $29,750,000 to build, test, and deploy a system to comply with the June proposed amendments, and that the annual ongoing costs would be approximately $8,224,700. These estimates were based on the NRSRO being the entity that is required to disclose the information. The commenter stated it would need to disclose information that came to it in electronic, email, paper, and voice formats, to sort through which information was used to determine the rating, and to then disclose this information. The re-proposed amendments do not require the NRSRO to disclose the information provided to it to determine initial ratings

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152 $65,850 x 30 NRSROs = $1,975,500

153 3,880 transactions x 1 hour = 3,880 hours.

154 120 transactions x 1 hour = 120 hours.

155 (3,880 hours x 3) + (120 hours x 27) = 14,880 hours.

156 The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is $205. Therefore, the average one-time cost to a large NRSRO would be 3,880 hours x $205 = $795,400 and the average one-time cost to NRSROs not in that category would be 120 hours x $205 = $24,600.

157 ($795,400 x 3) + ($24,600 x 27) =$3,050,400.

158 S&P Letter.

and subsequently monitor those ratings (the arranger would need to disclose this information).

In addition, the proposed rule requiring NRSROs and arrangers to share information with other NRSROs may affect the quantity and quality of information they provide. Moreover, the requirement to disclose ratings actions histories for a random sample of 10% of certain outstanding credit ratings may create an incentive not to access the information. The Commission seeks comments on the possible effects and alternatives to mitigate them. The proposed rule also could require an NRSRO to purchase software to implement the public disclosure of the ratings action histories.

The re-proposed amendments also would require that the arranger to disclose the following information:

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and
- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and

performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.[159]

For purposes of the PRA, the Commission estimates that it would take a respondent approximately 300 hours to develop a system, as well as policies and procedures to disclose the information as required under the re-proposed rule. This would result in a total one-time hour burden of 60,000 hours for 200 respondents.[160] For these reasons, the Commission estimates that the average one-time cost to each respondent would be $65,850[161] and the total aggregate one-time cost to the industry would be $13,116,000.[162]

As discussed with respect to the PRA, in addition to the one-time hour burden, respondents also would be required to disclose the required information under re-proposed Rule 17g-5(a)(3) on a transaction by transaction basis. Based on staff information gained from the NRSRO examination process, the Commission estimates that the re-proposed amendments would require each respondent to disclose information with respect to approximately 20 new transactions per year and that it would take approximately 1 hour per transaction to make the information publicly available.[163]

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159 See re-proposed Rule 17g-5(a)(3)(iii).

160 300 hours x 200 respondents = 60,000 hours.

161 The Commission estimates an issuer would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Manager is $245 and the average hourly cost for a Programmer Analyst is 194. Therefore, the average one-time cost to an issuer would be (150 hours x $245) + (150 hours x $194) = $65,850.

162 $65,580 x 200 respondents = $13,116,000.

163 This estimate assumes the respondent has already implemented the system and policies and procedures for disclosure. The Commission cannot estimate the number of initial transactions per year with certainty. The Commission believes that the number of deals that each respondent will disclose information on will vary widely based on the size of the entity. In addition, the Commission preliminarily believes that the number of asset-backed or mortgaged-backed

Therefore, as discussed with respect to the PRA, the Commission estimates that it would take a respondent approximately 20 hours[164] to disclose this information under re-proposed Rule 17g-5(a)(3)(iii), on an annual basis, for a total aggregate annual hour burden of 4,000.[165] For these reasons, the Commission estimates that the average annual cost to a respondent would be $4,100[166] and the total annual cost to the industry would be $820,000.[167]

Re-proposed Rule 17g-5(a)(3)(iii)(D) would require respondents to disclose information provided to an NRSRO to undertake credit rating surveillance on a structured product. Because surveillance would cover more than just initial ratings, the Commission estimates that a respondent would be required to disclose information with respect to approximately 125 transactions on an ongoing basis and that the information would be provided to the NRSRO on a monthly basis. As discussed with respect to the PRA, the Commission estimates that each respondent would spend approximately 750 hours[168] on an annual basis disclosing the information for a total aggregate annual burden hours of 150,000 hours.[169] For these reasons, the Commission estimates that the average annual

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issuances being rated by NRSROs in the next few years would be difficult to predict given the recent credit market turmoil.

164 20 transactions x 1 hour = 20 hours.

165 20 hours x 200 respondents = 4,000 hours.

166 The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is $205. Therefore, the average one-time cost to a respondent would be 20 hours x $205 = $4,100.

167 $4,100 x 200 respondents = $820,000.

168 125 transactions x 30 minutes x 12 months = 45,000 minutes/60 minutes = 750 hours.

169 750 hours x 200 respondents = 150,000 hours.

cost to a respondent would be $153,750[170] and the total annual cost to the industry would be $30,750,000.[171]

Finally, an NRSRO that wishes to access information on another NRSRO's Web site or on an arranger's Web site would need to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g-5. In the PRA, the Commission estimates it would take an NRSRO approximately 2 hours[172] to complete the proposed paragraph (e) certification for an aggregate annual hour burden to the industry of 60 hours.[173] For these reasons, the Commission estimates it would cost an NRSRO approximately $490 dollars per year[174] and the industry $14,700 per year to comply with the proposed requirement.[175]

The Commission generally requests comment on all aspects of these cost estimates for the re-proposed amendments to Rule 17g-5. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?

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170 The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is $205. Therefore, the average one-time cost to a respondent would be 750 hours x $205 = $153,750.

171 $153,750 x 200 respondents = $30,750,000.

172 20% of 10 hours = 2 hours.

173 2 hours x 30 NRSROs = 60 hours.

174 The Commission estimates that an NRSRO would have a Compliance Manager prepare the annual certification. The 2007 SIFMA Report as Modified indicates that the average hourly cost for a Compliance Manager is $245. Therefore, the average annual cost to an NRSRO would be: 2 hours x $245 = $490.

175 30 NRSROs x $490 = $14,700.

- Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

C. Total Estimated Costs of this Rulemaking

Based on the figures discussed above, the Commission estimates that the total one time costs related to this re-proposed rulemaking would be approximately $15,182,535[176] and the total annual costs would be $34,665,445.[177]

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

Under Section 3(f) of the Exchange Act,[178] the Commission shall, when engaging in rulemaking that requires the Commission to consider or determine if an action is necessary or appropriate in the public interest, consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act[179] requires the Commission to consider the anticompetitive effects of any rules the Commission adopts under the Exchange Act. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As discussed below, the Commission's preliminary view is that the Proposed Rule Amendments should promote efficiency, competition, and capital formation.

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176 $91,035 + $1,975,500 + $13,116,000 = $15,182,535.

177 $30,345 + $3,050,400 + $820,000 + $30,750,000 + $14,700 = $34,665,445.

178 15 U.S.C. 78c(f).

179 15 U.S.C. 78w(a)(2).

The proposed amendment to paragraph (d) of Rule 17g-2 is designed to provide the marketplace with additional information for comparing the ratings performance of NRSROs that determine issuer-paid credit ratings and, therefore, provide users of credit ratings with more useful metrics with which to compare these NRSROs. Increased disclosure of ratings history for issuer-paid credit ratings could make the performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job analyzing credit risk. This could cause users of credit ratings to give greater weight to credit ratings of NRSROs that distinguish themselves by determining more accurate credit ratings than their peers. Moreover, to the extent this improves the quality of the credit ratings, persons that use credit ratings to make investment or lending decisions would have better information upon which to base their decisions. As a consequence, the rule could result in a more efficient allocation of capital and loans to issuers and obligors based on the risk appetites of the investors and lenders. The Commission believes that this enhanced disclosure would benefit smaller NRSROs that determine issuer-paid credit ratings to the extent they do a better job of assessing creditworthiness.

The Commission is not proposing to require the public disclosure of ratings action histories for subscriber-paid credit ratings at this time out of competitive concerns. However, as indicated by the detailed solicitations of comment above, the Commission is considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the proposed rule would address concerns about the competitive impact of the public disclosure requirement and at the same time foster greater accountability of NRSROs with respect to their issuer-paid

credit ratings as well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

The re-proposed amendments to paragraphs (a) and (b) of Rule 17g-5 could enhance competition among NRSROs. The goal of these proposals is to provide a mechanism for NRSROs to determine unsolicited credit ratings, which would provide users of credit ratings with more assessments of the creditworthiness of a structured finance product. This mechanism could expose NRSROs whose procedures and methodologies for determining credit ratings are less conservative in order to gain business. It also could mitigate the impact of rating shopping, since NRSROs not hired to rate a deal could nonetheless issue a credit rating. These potential impacts of the re-proposed amendments could help to restore confidence in credit ratings and, thereby, promote capital formation. They also could promote the more efficient allocation of capital by investors to the extent the quality of credit ratings is improved. In addition, by creating a mechanism for determining unsolicited ratings, they could increase competition by allowing smaller NRSROs to demonstrate proficiency in rating structured products.

The Commission generally requests comment on all aspects of this analysis of the burden on competition and promotion of efficiency, competition, and capital formation. In addition, the Commission requests specific comment on the following items related to this analysis:

- Would the Proposed Rule Amendments have an adverse effect on efficiency, competition, and capital formation that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

VIII. CONSIDERATION OF IMPACT ON THE ECONOMY

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"[180] the Commission must advise OMB whether a proposed regulation constitutes a major rule. Under SBREFA, a rule is "major" if it has resulted in, or is likely to result in:

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

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requests comment on the potential impact of the Proposed Rule Amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

IX. INITIAL REGULATORY FLEXIBILITY ANALYSIS

The Commission has prepared the following Initial Regulatory Flexibility Analysis ("IRFA"), in accordance with the provisions of the Regulatory Flexibility Act,[181] regarding the Proposed Rule Amendments to Rules 17g-2 and 17g-5 under the Exchange Act.

The Commission encourages comments with respect to any aspect of this IRFA, including comments with respect to the number of small entities that may be affected by

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180 Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

181 5 U.S.C. 603.

the Proposed Rule Amendments. Comments should specify the costs of compliance with the Proposed Rule Amendments and suggest alternatives that would accomplish the goals of the amendments. Comments will be considered in determining whether a Final Regulatory Flexibility Analysis is required and will be placed in the same public file as comments on the Proposed Rule Amendments. Comments should be submitted to the Commission at the addresses previously indicated.

A. Reasons for the Proposed Action

The Proposed Rule Amendments would prescribe additional requirements for NRSROs to address concerns relating to the transparency of ratings actions and the conflicts of interest at NRSROs.

B. Objectives

The objectives of the Rating Agency Act are "to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry."[182] The Proposed Rule Amendments are designed to improve the transparency of credit ratings performance by making credit ratings actions publicly available and the accuracy of credit ratings for structured finance products by increasing competition among the NRSROs that rate these securities and money market instruments.

C. Legal Basis

Pursuant to the Sections 3(b), 15E, 17(a), 23(a) and 36 of the Exchange Act.[183]

D. Small Entities Subject to the Rule

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182 See Senate Report.

183 15 U.S.C. 78c(b), 78o-7, 78q(a), and 78w.

Paragraph (a) of Rule 0-10 provides that for purposes of the Regulatory Flexibility Act, a small entity "[w]hen used with reference to an 'issuer' or a 'person' other than an investment company" means "an 'issuer' or 'person' that, on the last day of its most recent fiscal year, had total assets of $5 million or less."[184] The Commission believes that an NRSRO with total assets of $5 million or less would qualify as a "small" entity for purposes of the Regulatory Flexibility Act.

As noted in the Adopting Release,[185] the Commission believes that approximately 30 credit rating agencies ultimately would be registered as an NRSRO. Of the approximately 30 credit rating agencies estimated to be registered with the Commission, the Commission estimates that approximately 20 may be "small" entities for purposes of the Regulatory Flexibility Act.[186]

E. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendment would revise paragraph (d) of Rule 17g-2 to require NRSROs to publicly disclose, in XBRL format and with a one year delay, ratings action histories for all outstanding issuer-paid credit ratings.[187] The disclosure of this information could enhance the metrics by which users of credit ratings evaluate the performance of NRSROs determining issuer-paid credit ratings.

The re-proposal would amend paragraphs (a) and (b) of Rule 17g-5 and add new paragraph (e) to the rule. Under the re-proposed amendments, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password protected Internet Web site that lists each deal they have been hired

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184 17 CFR 240.0-10(a).

185 June 5, 2007 Adopting Release, 72 FR at 33618.

186 See 17 CFR 240.0-10(a).

187 Proposed amendment to paragraph (d) of Rule 17g-2.

to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site. NRSROs not hired to determine and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

F. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap, or conflict with the Proposed Rule Amendments.

G. Significant Alternatives

Pursuant to Section 3(a) of the Regulatory Flexibility Act,[188] the Commission must consider certain types of alternatives, including: (1) the establishment of differing

188 5 U.S.C. 603(c).

compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission is considering whether it is necessary or appropriate to establish different compliance or reporting requirements or timetables; or clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities. Because the Proposed Rule Amendments are designed to improve the overall quality of ratings and enhance the Commission's oversight, the Commission preliminarily believes that small entities should be covered by the rule.

H. Request for Comments

The Commission encourages the submission of comments to any aspect of this portion of the IRFA. Comments should specify costs of compliance with the Proposed Rule Amendments and suggest alternatives that would accomplish the objective of the Proposed Rule Amendments.

X. STATUTORY AUTHORITY

The Commission is proposing amendments to Rule 17g–5 pursuant to the authority conferred by the Exchange Act, including Sections 3(b), 15E, 17, 23(a) and 36.[189]

Text of Re-proposed Rules

List of Subjects in 17 CFR Parts 240 and 243

Brokers, Reporting and recordkeeping requirements, Securities.

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189 15 U.S.C. 78c(b), 78o–7, 78q, 78w(a), and 78mm.

In accordance with the foregoing, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. 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, 78u5, 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.

* * * * *

2. Section 240.17g-2, as amended by a final rule published elsewhere in this issue of the Federal Register, is amended by revising paragraph (d) to read as follows:

§ 240.17g-2 Records to be made and retained by nationally recognized statistical rating organizations.

* * * * *

(d)(1) Manner of retention. An original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of this section must be maintained in a manner that, for the applicable retention period specified in paragraph (c) of this section, makes the original record or copy easily accessible to the principal office of the nationally recognized statistical rating organization and to any other office that conducted activities causing the record to be made or received.

(2) A nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the

outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of this section and which were paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d)(2) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph (d)(2) is withdrawn or the instrument rated matures, the nationally recognized statistical rating organization must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the nationally recognized statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

(3) A nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information required to be retained pursuant to paragraph (a)(8) of this section for any rating initially rated by the nationally recognized statistical rating organization on or after June 26, 2007 paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d)(3) need not be made public less than twelve months from the date such ratings action is taken. In making the information available on its corporate Internet Web site, the nationally recognized

statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

* * * * *

3. Section 240.17g–5 is amended by:

a. Removing the word "and" at the end of paragraph (a)(1);

b. Removing the period at the end of paragraph (a)(2) and in its place adding "; and";

c. Adding paragraph (a)(3);

d. Redesignating paragraph (b)(9) as paragraph (b)(10); and

e. Adding new paragraph (b)(9) and paragraph (e);

The additions read as follows:

§ 240.17g-5 Conflicts of interest.

(a) * * *

(3) In the case of the conflict of interest identified in paragraph (b)(9) of this section relating to issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, the nationally recognized statistical rating organization:

(i) Maintains on a password-protected Internet Web site a list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter

of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of this section can be accessed;

(ii) Provides free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year;

(iii) Obtains from the issuer, sponsor, or underwriter of each such security or money market instrument a representation that can reasonably be relied upon that the issuer, sponsor, or underwriter will:

(A) Maintain the information described in paragraphs (a)(3)(iii)(C) and (D) of this section available at an identified pass-word protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating;

(B) Provide access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year;

(C) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal

structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and

(D) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.

* * * * *

(b)(9) Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.

* * * * *

(e) Certification. In order to access a password-protected Internet Web site described in paragraph (a)(3) of this section, a nationally recognized statistical rating organization must furnish to the Commission, for each calendar year for which it is requesting a password, the following certification, signed by a person duly authorized by the certifying entity:

The undersigned hereby certifies that it will access the Internet Web sites described in §240.17g-5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information

it accesses pursuant to §240.17g-5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o-7(g)(1)) and §240.17g-4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to §240.17g-5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to §240.17g-5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in §240.17g-5(a)(3) and determined and maintained credit ratings for [Insert Number] of the such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to §240.17g-5(a)(3) 10 or times in a calendar year.

PART 243 -- REGULATION FD

4. The authority citation for part 243 continues to read as follows:

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29, unless otherwise noted.

* * * * *

5. Section § 243.100 is amended by revising paragraph (b)(2)(iii) to read as follows:

§ 243.100 General rule regarding selective disclosure.

* * * * *

(b) * * *

(2) * * *

(iii) If the information is disclosed solely for the purpose of developing a credit rating, to:

(A) Any nationally recognized statistical rating organization, as that term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)), pursuant to § 240.17g-5(a)(3) of this chapter; or

(B) Any credit rating agency as that term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)) that makes its credit ratings publicly available; or

* * * * *

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: February 2, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 2, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13359

In the Matter of **GLOBAL 1 INVESTMENT HOLDINGS CORPORATION,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Global 1 Investment Holdings Corporation ("Global" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Global (CIK #1262456, 1389210), formerly known as Silver Screen Studios, Inc., is a Georgia corporation based in Atlanta, Georgia. Global's common stock and a class of preferred stock are registered with the Commission pursuant to Exchange Act Section 12(g). In May 2008, Global's common stock was removed from quotation on the OTC Bulletin Board (symbol: GOIH) and became quoted on the Pink Sheets, operated by Pink OTC Markets Inc.

B. DELINQUENT PERIODIC FILINGS

2. Global is delinquent in its periodic filings with the Commission, having not filed: (i) a Form 10-KSB annual report for its fiscal year ended December 31, 2007; (ii) a Form 10-QSB quarterly report for its quarter ended March 31, 2008; (iii) a Form 10-QSB

quarterly report for its quarter ended June 30, 2008; and (iv) a Form 10-QSB quarterly report for its quarter ended September 30, 2008. In addition, Global failed to file a notification of late filing on Form 12b-25 for the delinquent reports. Global's last filing with the Commission is a Form 10-QSB filed on February 14, 2008, purportedly for the company's quarter (rather than fiscal year) ended December 31, 2007.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB). Exchange Act Rule 12b-25 requires an issuer to notify the Commission of an inability to file a periodic report, along with supporting reasons, by filing a Form 12b-25 no later than one business day after the due date for the report.

4. As a result of the foregoing, Respondent failed to comply with Exchange Act Section 13(a) and Exchange Act Rules 12b-25, 13a-1 and 13a-13.

III.

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

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

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

IV.

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

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

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as

provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 2, 2009

In the Matter of **GLOBAL 1 INVESTMENT HOLDINGS CORPORATION,** **Respondent.** **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 Global 1 Investment Holdings Corporation ("Global") because Global is delinquent in filing periodic reports with the Commission and because of questions regarding the accuracy and completeness of Global's representations to investors and prospective investors in Global's public filings with the Commission and Global's publicly-available press releases. Among other things, there are questions regarding the accuracy and completeness of Global's public assertions in its Form 10-QSB report purportedly for the quarter ended December 31, 2007, filed with the Commission on February 14, 2008, indicating by way of example that Global has created $500 million to be used as collateral in structured credit transactions and that Global has the current ability and expertise to develop and produce small feature films and videos for a direct to the consumer distribution model.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in Global's securities.

Therefore, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. EST on February 2, 2009, through 11:59 p.m. EST on February 13, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249b

[Release No. 34-59342; File No. S7-13-08]

RIN 3235-AK14

Amendments to Rules for Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Final rule.

SUMMARY: The Commission is adopting rule amendments that impose additional requirements on nationally recognized statistical rating organizations ("NRSROs") in order to address concerns about the integrity of their credit rating procedures and methodologies.

DATES: Effective Date: [insert 60 days after publication in the Federal Register].

Compliance Date: [insert 60 days after publication in the Federal Register,] except that the compliance date for the amendment to § 240.17g-2(d) is [insert 180 days after publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551-5525; Thomas K. McGowan, Assistant Director, at (202) 551-5521; Randall W. Roy, Branch Chief, at (202) 551-5522; Joseph I. Levinson, Special Counsel, at (202) 551-5598; Carrie A. O'Brien, Special Counsel, at (202) 551-5640; Sheila D. Swartz, Special Counsel, at (202) 551-5545; Rose Russo Wells, Special Counsel, at (202) 551-5527; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-6628

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

On June 16, 2008, the Commission, in the first of three related actions, proposed a series of amendments to its existing rules governing the conduct of NRSROs.[1] The proposed amendments were designed to address concerns about the integrity of the process by which NRSROs rate structured finance products, particularly mortgage related securities.[2] Today, the Commission is adopting, with revisions, a majority of the rule amendments proposed in the first action.[3] These new requirements are designed to address practices identified, in part, by the Commission staff during its examination of the three largest NRSROs.[4] In particular, the requirements are intended to increase the transparency of the NRSROs' rating methodologies, strengthen the NRSROs' disclosure

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1 Proposed Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008) ("June 16, 2008 Proposing Release"). The existing NRSRO rules were adopted by the Commission in 2007. See Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007) ("June 5, 2007 Adopting Release"). The second action taken by the Commission (also on June 16, 2008) was to propose a new rule that would require NRSROs to distinguish their ratings for structured finance products from other classes of credit ratings by publishing a report with the rating or using a different rating symbol. See June 16, 2008 Proposing Release. The third action taken by the Commission was to propose a series of amendments to rules under the Exchange Act, Securities Act of 1933 ("Securities Act"), and Investment Company Act of 1940 ("Investment Company Act") that would end the use of NRSRO credit ratings in the rules. See References to Ratings of Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 58070 (July 1, 2008), 73 FR 40088 (July 11, 2008); Securities Ratings, Securities Act Release No. 8940 (July 1, 2008), 73 FR40106 (July 11, 2008); References to Ratings of Nationally Recognized Statistical Rating Organizations, Investment Company Act Release No. 28327 (July 1, 2008), 73 FR 40124 (July 11, 2008). The second and third actions are not being finalized in this release.

2 The term "structured finance product" as used throughout this release refers broadly to any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This broad category of financial instrument includes, but is not limited to, asset-backed securities such as residential mortgage-backed securities ("RMBS") and to other types of structured debt instruments such as collateralized debt obligations ("CDOs"), including synthetic and hybrid CDOs.

3 The June 16, 2008 Proposing Release included amendments to paragraphs (a) and (b) of Rule 17g-5 that are not being adopted today. Instead, in part, in response to the many comments received on these proposed amendments identifying substantial issues as to how they would operate in practice, the Commission today is re-proposing these amendments in a separate release. In addition, the Commission is also proposing potential additional requirements to the final amendment to paragraph (d) of Rule 17g-2 being adopted today.

4 See June 16, 2008 Proposing Release, 73 FR at 36213; Summary Report of Issues Identified in the Staff's Examinations of Select Credit Rating Agencies (July 2008). The report can be accessed at http://www.sec.gov/news/studies/2008/craexamination070808.pdf

of ratings performance, prohibit the NRSROs from engaging in certain practices that create conflicts of interest, and enhance the NRSROs' recordkeeping and reporting obligations to assist the Commission in performing its regulatory and oversight functions.[5] The Commission received 61 comment letters on the amendments as proposed.[6] Many commenters expressed general support for the proposals and the ends

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5 The June 16, 2008 Proposing Release contains a detailed discussion of concerns the final rules are intended to address, particularly with respect to the NRSROs' role in the credit market turmoil. See June 16, 2008 Proposing Release, 73 FR at 36213-36218.

6 Letter dated June 10, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force ("First SIFMA Letter"); letter dated June 12, 2008 from G. Brooks Euler ("Euler Letter"); letter dated June 19, 2008 from Rupert Schoder, Financial Engineer, Socit Gnrale, France ("SGF Letter"); letter dated July 8, 2008 from William Morris, Principal, The Morris Group ("Morris Letter"); letter dated July 8, 2008 from Elaine Wieche ("Wieche Letter"); letter dated July 13, 2008 from Walter C. Hamscher, Member, XBRL International Board of Directors ("Hamscher Letter"); letter dated July 14, 2008 from Robert Dobilas, President, CEO, Realpoint LLC ("Realpoint Letter"); letter dated July 21, 2008 from Dottie Cunningham, Chief Executive Officer, Commercial Mortgage Securities Association ("CMSA Letter"); letter dated July 21, 2008 from Bruce Goldstein, SunTrust Robinson Humphrey ("STRH Letter"); letter dated July 21, 2008 from Raymond E. Petersen, President, Inland Mortgage Capital Corporation ("Inland Letter"); letter dated July 21, 2008 from Leonard W. Cotton, Vice Chairman, Centerline Capital Group ("Centerline Letter"); letter dated July 21, 2008 from Gregg Rademacher, Chief Executive Officer, Los Angeles County Employees Retirement Association ("LACERA Letter"); letter dated July 22, 2008 from Kevin Kohler, VP - Levered Finance, Capmark Investments LP ("Capmark Letter"); letter dated July 22, 2008 from Richard Metcalf, Director, Corporate Affairs Department, Laborers' International Union of North America ("LIUNA Letter"); letter dated July 22, 2008 from Mary A. Downing, Director -Surveillance and Due Diligence, Hillenbrand Partners ("Hillenbrand Letter"); letter dated July 23, 2008 from Kent Wideman, Group Managing Director, Policy & Rating Committee and Mary Keogh, Managing Director, Policy & Regulatory Affairs, DBRS ("DBRS Letter"); letter dated July 24, 2008 from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. ("JCR Letter"); letter dated July 24, 2008 from J. Douglas Adamson, Executive Vice President, Technical Services, American Bankers Association ("ABA Letter"); letter dated July 24, 2008 from Amy Borrus, Deputy Director, Council of Institutional Investors ("Council Letter"); letter dated July 24, 2008 from Joseph A. Hall and Michael Kaplan, Davis Polk, and Wardwell ("DPW Letter"); letter dated July 24, 2008 from Vickie A. Tillman, Executive Vice President, Standard & Poor's Ratings Services ("S&P Letter"); letter dated July 24, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force ("Second SIFMA Letter"); letter dated July 24, 2008 from Alex J. Pollock, Resident Fellow, American Enterprise Institute ("Pollock Letter"); letter dated July 25, 2008 from Sally Scutt, Managing Director, and Pierre de Lauzun, Chairman, Financial Markets Working Group, International Banking Federation ("IBFED Letter"); letter dated July 25, 2008 from Eric Sanitas, President, Association federative internationale des porteurs d'emprunts russe ("AFIPER Letter"); letter dated July 25, 2008 from Denise L. Nappier, Treasurer, State of Connecticut ("Nappier Letter"); letter dated July 25, 2008 from Suzanne C. Hutchinson, Mortgage Insurance Companies of America ("MICA Letter"); letter dated July 25, 2008 from Kieran P. Quinn, Chairman, Mortgage Bankers Association ("MBA Letter"); letter dated July 25, 2008 from Sean J. Egan, President, Egan–Jones Ratings Co. ("Egan-Jones Letter"); letter dated July 25, 2008 from Frank Chin, Chairman, Municipal Securities Rulemaking Board ("MSRB Letter"); letter dated July 25, 2008

they were designed to achieve.[7] At the same time, commenters raised concerns about the practicality and costs of the proposals.[8] The rules being adopted today incorporate many aspects of the rules as proposed, but also include significant revisions based on the

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from Charles D. Brown, General Counsel, Fitch Ratings ("Fitch Letter"); letter dated July 25, 2008 from Bill Lockyer, State Treasurer, California ("Lockyer Letter"); letter dated July 25, 2008 from Jeremy Reifsnyder and Richard Johns, Co-Chairs, American Securitization Forum Credit Rating Agency Task Force ("ASF Letter"); letter dated July 25, 2008 from Annemarie G. DiCola, Chief Executive Officer, Trepp, LLC ("Trepp Letter"); letter dated July 25, 2008 from Francisco Paez, Metropolitan Life Insurance Company ("MetLife Letter"); letter dated July 25, 2008 from Cate Long, Multiple-Markets ("Multiple-Markets Letter"); letter dated July 25, 2008 from Kurt N. Schacht, Executive Director and Linda L. Rittenhouse, Senior Policy Analyst, CFA Institute Centre for Financial Market Integrity ("CFA Institute Letter"); letter dated July 25, 2008 from Lawrence J. White, Professor of Economics, Stern School of Business, New York University ("White Letter"); letter dated July 25, 2008 from Jack Davis, Head of Fixed Income Research, Schroder Investment Management North America Inc. ("Schroders Letter"); letter dated July 25, 2008 from Karrie McMillan, General Counsel, Investment Company Institute ("ICI Letter"); letter dated July 25, 2008 from Michael Decker, Co-Chief Executive Officer and Mike Nicholas, Co-Chief Executive Officer, Regional Bond Dealers Association ("RBDA Letter"); letter dated July 25, 2008 from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable ("Roundtable Letter"); letter dated July 25, 2008 from James H. Gellert, Chairman and CEO and Dr. Patrick J. Caragata, Founder and Executive Vice Chairman, Rapid Ratings International Inc.("Rapid Ratings Letter"); letter dated July 25, 2008 from Alan P. Kress, Counsel, Principal Global Investors, LLC ("Principal Global Letter"); letter dated July 25, 2008 from James A. Kaitz, President and CEO, Association for Financial Professionals ("AFP Letter"); letter dated July 25, 2008 from Gregory W. Smith, General Counsel, Colorado Public Employees' Retirement Association ("Colorado PERA Letter"); letter dated July 25, 2008 from Cleary Gottlieb Steen & Hamilton LLP, "CGSH Letter"); letter dated July 25, 2008 from Keith A. Styrcula, Chairman, Structured Products Association ("SPA Letter"); letter dated July 25, 2008 from Yasuhiro Harada, Chairman and Co-CEO, Rating and Investment Information, Inc. ("R&I Letter"); letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service ("Moody's Letter"); letter dated July 28, 2008 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities and Vicki O. Tucker, Chair, Committee on Securitization and Structured Finance, American Bar Association ("ABA Business Law Committees Letter"); letter dated July 28, 2008 from Morris C. Foutch ("Foutch Letter"); letter dated July 29, 2008 from Glenn Reynolds, CEO and Peter Petas, President CreditSights, Inc. ("CreditSights Letter"); letter dated July 31, 2008 from Robert S. Khuzami Managing Director and General Counsel, Deutsche Bank Americas ("DBA Letter"); letter dated August 5, 2008 from John Taylor, President and CEO, National Community Reinvestment Coalition ("NCRC Letter"); letter dated August 8, 2008 from Jeffrey A. Perlowitz, Managing Director and Co-Head of Global Securitized Markets, and Myongsu Kong, Director and Counsel, Citigroup Global Markets Inc. ("Citi Letter"); letter dated August 12, 2008 from John J. Niebuhr, Managing Director, Lehman Brothers, Inc. ("Lehman Letter"); letter dated August 15, 2008 from Steve Linehan, Executive Vice-President and Treasurer, Capital One Financial Corporation ("Capital One Letter"); letter dated August 17, 2008 from Olivier Raingeard, Ph.D ("Raingeard Letter"); letter dated August 22, 2008 from Robert Dobilas, CEO and President, Realpoint LLC ("Second Realpoint Letter"); letter dated August 27, 2008 from Larry G. Mayewski, Executive Vice President & Chief Rating Officer, A.M. Best Company ("A.M. Best Letter").

7 See, e.g., LACERA Letter; LIUNA Letter; Council Letter; Second SIFMA Letter; Nappier Letter; RBDA Letter; Colorado PERA Letter; CGSH Letter; SPA Letter; R&I Letter; Moody's Letter; CreditSights Letter; DBA Letter; NCRC Letter; Lehman Letter; Capital One Letter.

8 See, e.g., White Letter; Roundtable Letter; Rapid Ratings Letter; ABA Business Law Committees Letter; Raingeard Letter.

comments received.[9] The revisions seek to address practical impediments identified by commenters while at the same time continuing to promote the substantive goals of the proposed rules (increasing transparency and disclosure, diminishing conflicts, and strengthening oversight) and of the Credit Rating Agency Reform Act of 2006 ("Rating Agency Act").[10]

In summary, the rule amendments require: (1) an NRSRO to provide enhanced disclosure of performance measurements statistics and the procedures and methodologies used by the NRSRO in determining credit ratings for structured finance products and other debt securities on Form NRSRO;[11] (2) an NRSRO to make, keep and preserve additional records under Rule 17g-2;[12] (3) an NRSRO to make publicly available on its Internet Web site in XBRL format a random sample of 10% of the ratings histories of credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated ("issuer-paid credit ratings") in each class of credit ratings for which it is registered and has issued 500 or more issuer-paid credit ratings, with each new ratings action to be reflected in such histories no later than six months after they are taken;[13] and (4) an NRSRO to furnish the Commission with an additional annual report.[14]

II. THE FINAL RULE AMENDMENTS

A. Amendments to the Instructions for Form NRSRO

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9 These comments are available on the Commission's Internet Web site, located at http://www.sec.gov/comments/s7-13-08/s71308.shtml, and in the Commission's Public Reference Room in its Washington DC headquarters.

10 See Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 3850, Credit Rating Agency Reform Act of 2006, S. Report No. 109-326, 109th Cong., 2d Sess. (Sept. 6, 2006) ("Senate Report"), p. 2.

11 See amendments to Form NRSRO.

12 17 CFR 240.17g-2.

13 See Rule 17g-2(a)(8) and (d).

14 See Rule 17g-3(a)(6).

Form NRSRO contains 8 line items and requires 13 Exhibits. The line items elicit information about the applicant credit rating agency or NRSRO such as: its address; corporate form; credit rating affiliates that would be, or are, a part of its registration; the classes of credit ratings for which it is seeking, or is, registered as an NRSRO; the number of credit ratings it has issued in each class and the date it began issuing credit ratings in each class; and whether it or a person associated with it has committed or omitted any act, been convicted of any crime, or is subject to any order identified in Section 15(d) of the Exchange Act. The 13 Exhibits to Form NRSRO elicit the information required under Sections 15E(a)(1)(B)(i) through (ix) of the Exchange Act and additional information the Commission prescribed under authority in Section 15E(a)(1)(B)(x) of the Exchange Act.[15]

The Commission proposed amending the instructions to Form NRSRO to enhance the disclosures NRSROs make in Exhibits 1 and 2. As discussed below, the Commission is adopting the changes with certain modifications that respond, in part, to points raised by commenters.

1. Enhanced Ratings Performance Measurement Statistics on Form NRSRO

Exhibit 1 to Form NRSRO elicits the information required by Section 15E(a)(1)(B)(i) of the Exchange Act: credit ratings performance measurement statistics over short-term, mid-term, and long-term periods (as applicable) of the credit rating agency.[16] The instructions for the Exhibit provide that an applicant and NRSRO must include in the Exhibit definitions of the credit ratings (i.e., an explanation of each

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15 15 U.S.C. 78o-7(a)(1)(B)(i) – (x).

16 15 U.S.C. 78o-7(a)(1)(B)(i).

category and notch) and explanations of the performance measurement statistics, including the metrics used to derive the statistics.

The first proposed amendment to the Exhibit 1 instructions would enhance the disclosure by requiring separate sets of default and transition statistics for different classes of credit ratings. Specifically, as proposed, the instructions would require separate sets of statistics for each class of credit rating for which an applicant is seeking registration as an NRSRO or an NRSRO is registered as well as for any other broad class of credit ratings issued by the NRSRO.

The Commission received eight comment letters on this amendment.[17] One commenter noted that separating performance measurements by classes of credit ratings would help market participants make informed decisions.[18] Commenters suggested that the Commission refine the classes of credit ratings and raised concerns about how to interpret the catchall phrase in the rule "any other broad class of credit rating." For example, one commenter argued that such a category "would capture a variety of operational and qualitative scales, such as servicer and bank support ratings, for which default and/or transition studies are of limited or no value."[19] The same commenter suggested that the single category encompassing government securities, municipal securities and foreign government securities be divided into three separate classes (sovereigns, United States public finance, and international public finance) to account for the different types of investors each such class of securities attracts as well as the potential for the much greater amount of data on public finance issuance in the United

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17 See Second SIFMA Letter; Fitch Letter; Lockyer Letter; Multiple-Markets Letter; ICI Letter; AFP Letter; ABA Business Law Committees Letter; Raingeard Letter.

18 See AFP Letter.

19 See Fitch Letter.

States to overwhelm the sovereign and international public finance data, thus making the statistics less useful to investors.[20]

In response to commenters' concerns, the Commission is adopting the proposed amendments to the instructions but not adopting the "catchall" requirement to which commenters objected. Eliminating the catchall will remove ambiguity in the rule. In addition, the Commission is adding language to the instructions as amended that divide government securities into three classes: sovereigns, United States public finance, and international public finance. This will make the performance statistics for these classes of credit ratings more meaningful, since the types of rated obligors and instruments in each class will be more similar.

As proposed, the first amendment to the Exhibit 1 instructions also would require an NRSRO registered in the class of credit ratings described in Section 3(a)(62)(B)(iv) of the Rating Agency Act[21] (or an applicant seeking registration in that class) when generating the performance statistics for that class to include credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This was designed to include ratings actions for credit ratings of structured finance products that do not meet the narrower statutory definition of "issuers of asset-backed securities (as that term is defined is section 1101(c) of part 229 of title 17, Code of Federal Regulations)."[22] The Commission received no comment on this aspect of the amendment and is adopting it as proposed.

This first amendment to the Exhibit 1 instructions, modified as described above, will result in the generation of performance statistics that will make it easier for users of

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20 Id.

21 15 U.S.C. 78c(a)(62)(B)(iv).

22 See id.

credit ratings to compare the accuracy of NRSRO credit ratings on a class-by-class basis. For the reasons discussed, the Commission is adopting the amendment to the instructions with the modifications described above.

As proposed, the second amendment to the Exhibit 1 instructions would require that the class-by-class disclosures be broken out over 1, 3 and 10-year periods. Section 15E(a)(1)(B)(i) of the Exchange Act requires that the performance statistics be over short, mid, and long-term periods, which is also the language currently used in Form NRSRO.[23] The purpose of this amendment was to prescribe periods in specific years so that the performance statistics generated by the NRSROs are more easily comparable.

The Commission received 12 comments on the amendment.[24] Most of the commenters supported the amendment, including the 1, 3, and 10 year time frames. These comments supported the Commission's view that 1, 3, and 10 year periods are reasonable definitions of the terms "short-term, mid-term, and long-term periods" as used in Section 15E(a)(1)(B)(i) of the Exchange Act.[25] Commenters believed the proposed statistics would provide investors additional information to make informed investment decisions.[26] Several commenters asked that the Commission clarify whether the default rates were for the most recent 1, 3, and 10 year periods or the average over multiple 1, 3, and 10 year periods.[27] The Commission intended the default statistics to be for the most recent 1, 3, and 10 year periods. The Commission is adopting the amendment to the instructions as proposed.

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23 15 U.S.C. 78o-7(a)(1)(B)(i).

24 See LIUNA Letter; JCR Letter; Council Letter; S&P Letter; Second SIFMA Letter; Fitch Letter; Multiple-Markets Letter; AFP Letter; Colorado PERA Letter; ABA Business Law Committees Letter; NCRC Letter; Raingeard Letter.

25 15 U.S.C. 78o-7(a)(1)(B)(i).

26 See LIUNA Letter; AFP Letter.

27 See JCR Letter; S&P Letter.

As proposed, the third amendment to the Exhibit 1 instructions would clarify the type of ratings actions that are required to be included in these performance measurement statistics. Specifically, it would change the instruction requiring that the performance statistics show "down-grade and default rates" with an instruction that they show "ratings transition and default rates." The switch to "ratings transition" rates from "downgrade" rates was designed to clarify that upgrades (as well as downgrades) should be included when generating the statistics. The Commission did not receive any comments on this amendment to the instructions and is adopting it as proposed.

Finally, the Commission proposed an amendment to the instructions of Exhibit 1 that would specify that the default statistics required under the exhibit must show defaults relative to the initial rating and incorporate defaults that occur after a credit rating is withdrawn. The proposed amendment was designed to prevent an NRSRO from manipulating the performance statistics by not including defaults when generating statistics for a category of credit ratings (e.g., AA) because the defaults occur after the rating is downgraded to a lower category (e.g., CC) or withdrawn.

Commenters raised a number of concerns about how this proposal would operate in practice.[28] Several commenters expressed concern that the requirement to include defaults occurring after a rating is withdrawn could obligate an NRSRO to monitor ratings for an indefinite period of time after the NRSRO stops rating such instruments, and that an NRSRO may not be able to provide such statistics after a rating is withdrawn.[29] Two NRSROs noted that the ability to monitor ratings depends on the ability of the NRSRO to obtain information that an event of default has occurred and that

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28 See DBRS Letter; S&P Letter; Fitch Letter; Moody's Letter.

29 See DBRS Letter; S&P Letter.

this may be impractical given limited access to information once a rating is withdrawn.[30] Another NRSRO believed that the proposal was overbroad and outside the scope of the Commission's authority, asserting that it intrudes upon the substance of the NRSRO's rating procedures.[31] The Commission agrees that, given the limited information available to NRSROs following the withdrawal of a rating, requiring the inclusion in these statistics of defaults occurring after a rating is withdrawn may be problematic. Therefore, the Commission is not adopting this provision at this time. While the instructions to Exhibit 1 will continue to require default statistics that are relative to initial rating on a class-by-class basis, for the reasons discussed above, the amendment as adopted does not require the inclusion of defaults that occur after a credit rating is withdrawn in those statistics. As an alternative means of achieving the Commission's goals in proposing this amendment, the Commission notes that, as discussed below, ratings withdrawals must be included among the ratings actions to be disclosed under the Commission's amendment to Rule 17g-3,[32] which requires an annual report of all ratings actions taken during the year within a class of credit ratings. This information will be useful in determining whether the number of ratings actions in a given class is unusually large and, if so, the need for a review of the causes of any significant changes to that number – including, potentially, a disproportionate amount of ratings withdrawals.

2. Enhanced Disclosure of Ratings Methodologies

Exhibit 2 to Form NRSRO elicits the information required by Section 15E(a)(1)(B)(ii) of the Exchange Act: information regarding the procedures and

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30 See S&P Letter; Fitch Letter.

31 See Moody's Letter.

32 17 CFR 240.17g-3.

methodologies used by the credit rating agency to determine credit ratings.[33] The instructions for the Exhibit require a description of the procedures and methodologies (not the submission and disclosure of each actual procedure and methodology). The instructions further provide that the description must be sufficiently detailed to provide users of credit ratings with an understanding of the processes the applicant or NRSRO employs to determine credit ratings. The instructions also identify a number of areas that must be addressed in the description to the extent they are applicable.[34]

The Commission proposed amending the instructions to Exhibit 2 to add three additional areas that an applicant and a registered NRSRO would need to address in the descriptions of its procedures and methodologies in Exhibit 2 to the extent they are applicable. The three proposed areas that would need to be addressed by an applicant and NRSRO were:

- Whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings;

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33 15 U.S.C. 78o-7(a)(1)(B)(ii).

34 Specifically, the instructions require an NRSRO to provide descriptions of the following areas (as applicable): "policies for determining whether to initiate a credit rating; a description of the public and non-public sources of information used in determining credit ratings, including information and analysis provided by third-party vendors; the quantitative and qualitative models and metrics used to determine credit ratings; the methodologies by which credit ratings of other credit rating agencies are treated to determine credit ratings for securities or money market instruments issued by an asset pool or as part of any asset-backed or mortgaged-backed securities transaction; the procedures for interacting with the management of a rated obligor or issuer of rated securities or money market instruments; the structure and voting process of committees that review or approve credit ratings; procedures for informing rated obligors or issuers of rated securities or money market instruments about credit rating decisions and for appeals of final or pending credit rating decisions; procedures for monitoring, reviewing, and updating credit ratings; and procedures to withdraw, or suspend the maintenance of, a credit rating." See Form NRSRO Instructions for Exhibit 2.

- Whether and, if so, how assessments of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction play a part in the determination of credit ratings; and
- How frequently credit ratings are reviewed, whether different models or criteria are used for ratings surveillance than for determining initial ratings, whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings, and whether changes made to models and criteria for performing ratings surveillance are incorporated into the models and criteria for determining initial ratings.

The comments submitted on the first proposed amendment to the instructions to Exhibit 2 were supportive of the proposal.[35] Commenters generally supported the second proposed amendment as well.[36] Likewise, commenters were supportive of the third proposed amendment. They stated that it would be particularly helpful to retail investors and that all investors would benefit from knowing what ratings have undergone surveillance by the NRSRO.[37]

The Commission is adopting the first amendment to the instructions to Exhibit 2 as proposed. This amendment requires an NRSRO to disclose whether and, if so, how information about verification performed on the assets is relied on in determining credit ratings for structured finance products. The Commission believes this disclosure will benefit users of credit ratings by providing information about the potential accuracy of an

35 See NCRC Letter; Second SIFMA Letter; MICA Letter; ASF Letter.
36 See Second SIFMA Letter; ASF Letter.
37 See ASF Letter; Multiple-Markets Letter; NCRC Letter.

NRSRO's credit ratings. NRSROs determine credit ratings for structured finance products based on assumptions in their models as to how the assets underlying the instruments will perform under varying levels of stress. These assumptions are based on the characteristics of the assets (e.g., value of the property, income of the borrower) as reported by the arranger of the structured finance product. If this information is inaccurate, the capacity of the model to predict the potential future performance of the assets may be significantly impaired. Consequently, information about whether an NRSRO requires that some level of verification be performed or takes other steps to account for the lack of verification or a low level of verification will be useful to users of credit ratings in assessing the potential for an NRSRO's credit ratings to be adversely impacted by inaccurate information about the assets underlying a rated structured finance product.

The Commission is adopting the second amendment to the instructions to Exhibit 2 as proposed. This amendment requires an NRSRO to disclose whether it considers qualitative assessments of the originator of assets underlying a structured finance product in the rating process for such products. The Commission believes that certain qualities of an asset originator, such as its experience and underwriting standards, may impact the quality of the loans it originates and the accuracy of the associated loan documentation. This, in turn, could influence how the assets ultimately perform and the ability of the NRSRO's models to predict their performance. Consequently, the failure to perform any assessment of the loan originators could increase the risk that an NRSRO's credit ratings may not be accurate. Therefore, disclosures as to whether the NRSRO performs any

qualitative assessments of the originators would be useful in comparing the efficacy of the NRSROs' procedures and methodologies.

The Commission is adopting the third amendment to the instructions to Exhibit 2 as proposed. This amendment requires an NRSRO to disclose the frequency of its surveillance efforts and how changes to its quantitative and qualitative ratings models are incorporated into the surveillance process. The Commission believes that users of credit ratings will find information about these matters useful in comparing the ratings methodologies of different NRSROs. For example, how often and with what models an NRSRO monitors its credit ratings would be relevant to assessing the accuracy of the ratings inasmuch as ratings based on stale information and outdated models may not be as accurate as ratings of like products using newer data and models. Moreover, with respect to new types of rated obligors and debt securities, the NRSROs refine their models as more information about the performance of these obligors and debt securities is observed and incorporated into their assumptions. Consequently, as the models evolve based on more robust performance data, credit ratings of obligors or debt securities determined using older models may be at greater risk for being inaccurate than the newer ratings. Therefore, whether the NRSRO verifies the older ratings using the newer methodologies would be useful to users of credit ratings in assessing the accuracy of the credit ratings.

The Commission notes that, unlike the prior two changes, this new instruction applies to all classes of credit ratings for which the NRSRO determines credit ratings (not solely to structured products). For the reasons noted above, the Commission is adopting this amendment as proposed.

The Commission is adopting these amendments to the instructions to Exhibit 2 to Form NRSRO, in part, under authority to require such additional information in the application as it finds necessary or appropriate in the public interest or for the protection of investors.[38] The Commission believes the new disclosure requirements are necessary and appropriate and in the public interest or for the protection of investors. Specifically, they are designed to provide greater clarity around three areas of the NRSROs' rating processes where questions have been raised, particularly for structured finance products, in the context of the credit market turmoil: namely, the verification performed on information provided in loan documents; the quality of loan originators; and the surveillance of existing ratings and how changes to models are applied to existing ratings. The amendments are designed to enhance the disclosures NRSROs make in these areas and, thereby, allow users of credit ratings to better evaluate the quality of their ratings processes.

B. Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and retain certain records relating to its business and to retain certain other business records made in the normal course of business operations.[39] The rule also prescribes the time periods and manner in which these records are required to be retained. The Commission is adopting amendments to Rule 17g-2 to require NRSROs to make and retain certain additional records and to require that a portion of these new records be made publicly available.

1. A Record of Rating Actions and the Requirement that they be made Publicly Available

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38 See Section 15E(a)(1)(B)(x) of the Exchange Act (15 U.S.C. 78o–7(a)(1)(B)(x)).

39 See 17 CFR 240.17g-2.

The Commission proposed an amendment that would require an NRSRO to make and retain a record of the ratings history of each outstanding credit rating as well as an amendment that would require the NRSRO to make the ratings histories contained in the record publicly available on its corporate Web site in eXtensible Business Reporting Language ("XBRL") electronic format, with each new ratings action to be made public no later than six months after the date of the rating action. The Commission is adopting the amendment with substantial changes in part to address concerns raised by commenters.

As adopted, paragraph (a)(8) to Rule 17g-2 requires an NRSRO to make and retain a record for each outstanding credit rating it maintains showing all rating actions (initial rating, upgrades, downgrades, placements on watch for upgrade or downgrade, and withdrawals) and the date of such actions identified by the name of the security or obligor rated and, if applicable, the CUSIP for the rated security or the Central Index Key (CIK) number for the rated obligor. This full record of credit rating histories will be maintained by the NRSRO as part of its internal records that are available to Commission staff.

In addition, paragraph (d) to Rule 17g-2, as amended, requires that an NRSRO make publicly available, on a six-month delayed basis, a random sample of 10% of the issuer-paid credit ratings and their histories documented pursuant to paragraph (a)(8) for each class of credit rating for which the NRSRO is registered and has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Consequently, the final rule only requires the disclosure of ratings histories for a limited number of outstanding credit ratings and only if they are issuer-

paid credit ratings. Generally, NRSROs make their issuer-paid credit ratings publicly available for free.

NRSROs also obtain revenues by selling subscriptions to their credit ratings. Certain NRSROs derive their credit rating revenues solely or predominantly from selling subscriptions to their credit ratings. These NRSROs determine credit ratings that are not paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated ("subscriber-paid credit ratings"). Generally, NRSROs do not make their subscriber-paid credit ratings publicly available for free.

The Commission believes it is appropriate at this time to adopt a rule that will accomplish much of what the Commission sought to achieve in the proposal, mindful of the many comments about the proposal's potential impact. In addition, in a companion release[40], the Commission is proposing additional means of accomplishing even more of the Commission's objective of providing information to the marketplace in order to gauge the accuracy of ratings over time. Both the rule adopted today and the re-proposal are designed to foster accountability and comparability – and hence, competition – among NRSROs.

As noted above, NRSROs generally make their issuer-paid credit ratings publicly available for free. Currently, while these rating actions are made public free of charge, it may be difficult to compile the actions and compare them across NRSROs. Therefore, the Commission expects that making this information more accessible will advance the Commission's goal of fostering accountability and comparability among NRSROs with respect to their issuer-paid credit ratings. Furthermore, the Commission notes that issuer-

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40 See Re-proposed Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 34-59343 (February 2, 2009) ("Companion Proposing Release").

paid credit ratings account for over 98% of the outstanding credit ratings issued by NRSROs, according to information furnished by NRSROs in Form NRSRO. Moreover, seven of the ten registered NRSROs currently maintain 500 or more issuer-paid credit ratings in at least one class of credit ratings for which they are registered. Consequently, applying this rule to issuer-paid ratings should result in a substantial amount of new information for users of credit ratings. It also will allow market observers to begin analyzing the information and developing performance metrics based on it.

The Commission is mindful of the potential impact on NRSROs that determine issuer-paid credit ratings. Therefore, the Commission has taken a number of steps to minimize the impact on NRSROs and enable them to be able to continue to sell downloads and data feeds of their current credit ratings. For example, an NRSRO subject to the disclosure requirement would not be required to disclose a rating action taken with respect to an outstanding credit rating until six months after the action occurs.

In addition, by requiring NRSROs to publicly disclose ratings action histories for a limited percentage of their outstanding issuer-paid credit ratings, market participants, academics and others should still be able to use the information to perform analysis comparing how the NRSROs subject to the disclosure rule perform in the classes of credit ratings for which they are registered. This process will be facilitated by the requirement that the ratings actions data be provided in XBRL format, which will provide a uniform standard format for presenting the information and allow users to dynamically search and analyze the information. This should facilitate the processing of the information and enhance the ability of users to compare information across different NRSROs subject to the disclosure by ratings classes. The Commission believes the random 10% of ratings

histories and 500 ratings per class thresholds will result in the disclosure of a sample suitable for performing statistical analyses of NRSRO performance generally with respect to issuer-paid credit ratings.

NRSROs that sell subscriber-paid credit ratings have suggested that requiring all the histories of these ratings to be publicly disclosed could reduce competition by putting them out of business or adversely impacting their business.[41] They stated that this would be the case even with a substantial time lag between the date a rating action is taken and the date the action must be publicly disclosed. An NRSRO that determines issuer-paid credit ratings stated that ratings history data has substantial commercial value even after 6 months.[42] The Commission wants further input on this issue before deciding on whether the rule should also apply to subscriber-paid credit ratings. As noted above, the Commission, in a separate release, is seeking comment on whether to impose additional means of increasing the amount of information publicly available with respect to the ratings histories of subscriber-paid credit ratings. The Commission wants to carefully balance the commercial and competitive concerns expressed by NRSROs that determine subscriber-paid credit ratings with the Commission's objective of fostering accountability and comparability among all NRSROs. Therefore, in that release, the Commission asks detailed questions about the potential impact of applying the rule to subscriber-paid credit ratings. The responses to those questions will inform the Commission's deliberations as to whether this rule ultimately should be expanded to cover subscriber-paid credit ratings.

The amended rule further provides that the information must be made public on the NRSRO's corporate Internet Web site in XBRL format. The rule provides that in

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41 See Realpoint Letter; Rapid Ratings Letter.

42 See S&P Letter.

preparing the XBRL disclosure, an NRSRO must use the List of XBRL Tags for NRSROs as specified on the Commission's Web site. In order to allow NRSROs subject to this requirement sufficient time to implement this new disclosure requirement and the Commission time to develop the List of XBRL Tags for NRSROs, the compliance date of the amendment to paragraph (d) is delayed until 180 days after publication in the Federal Register.[43]

The Commission is adopting these amendments, in part, under authority to require NRSROs to make and keep for specified periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[44] The Commission believes the new recordkeeping and disclosure requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. The internal record of the complete ratings histories of each outstanding credit rating required under new paragraph (a)(8) of Rule 17g-2 will be useful to the Commission in performing its examination and oversight functions. The data could be analyzed to determine if NRSROs are following their own methodologies in their ratings actions and whether additional disclosure is necessary. This could provide valuable information that could be indicative of problems in the ratings process unrelated to the analytical process, such as conflicts of interest. The Commission notes that this recordkeeping requirement applies to all credit ratings regardless of whether they are issuer-paid or subscriber-paid. The disclosure

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43 The Commission notes that the ability of NRSROs to comply with the amended rule depends on the availability of the List of XBRL Tags for NRSROs on the Commission's Web page. If the publication of those materials is delayed, the Commission will consider delaying compliance with the rule.

44 See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

requirements will assist users of credit ratings to compare the relative performance of NRSROs that determine issuer-paid credit ratings. This could enhance competition by making it easier for smaller NRSROs to develop proven track records of determining accurate credit ratings.

The Commission received numerous comments on the proposed amendments to paragraphs (a)(8) and (d)to Rule 17g-2 as proposed.[45] Many commenters expressed support for the proposal, stating that the proposed rule would be a meaningful step in furthering competition in the credit rating industry and could benefit the investor community.[46] One commenter suggested that the proposed rule should require the sorting of records by classes of credit ratings and that the six month time lag should be reduced.[47] Other commenters suggested either reducing[48] or lengthening[49] the proposed six month time lag.

One NRSRO supported the proposal but believed the record of ratings histories should be limited to 10 years.[50] The Commission notes that in order to make the information more meaningful, users seeking to analyze NRSRO performance should be able to review the entire history of a given rating. Imposing a time limit – and therefore eliminating the ability to compare a current rating against the initial rating – would curtail the usefulness of this information.

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45 See Nappier Letter; ICI Letter; RBDA Letter; R&I Letter; Moody's Letter; ABA Business Law Committee Letter; Realpoint Letter; CMSA Letter; DBRS Letter; ABA Letter; Council Letter; S&P Letter; Second SIFMA Letter; Pollock Letter; IBFED Letter; Egan Jones Letter; Fitch Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; R&I Letter; DBA Letter; NCRC Letter; Citi Letter; Raingeard Letter.

46 See, e.g., AFP Letter; Colorado PERA Letter.

47 See Second SIFMA Letter.

48 See Multiple-Markets Letter; CFA Institute Letter; ICI Letter; RBDA Letter; NCRC Letter.

49 See Realpoint Letter; S&P Letter; Pollock Letter; Multiple-Markets Letter.

50 See DBRS Letter.

A number of commenters raised substantial concerns with the proposal.[51] For example, NRSROs and others noted that NRSROs that determine subscriber-paid credit ratings make the ratings available for a fee.[52] These commenters argued that requiring them to make all the ratings publicly available for free – even with a six month time lag – could cause them to lose subscribers.

Commenters also raised concerns that requiring an NRSRO that determines issuer-paid credit ratings to make all ratings actions available free of charge in a machine readable format would cause them to lose revenues they derive from selling downloadable packages of their credit ratings.[53] These commenters also questioned whether the requirement would be permitted under the US Constitution, arguing that it could be considered a taking of private property without compensation.[54]

The Commission is adopting paragraph (a)(8) to Rule 17g-2, the recordkeeping provision, substantially as proposed, but, as noted above, has made substantial changes to paragraph (d), the public disclosure provision. Specifically, rather than disclose the ratings history for each outstanding credit rating, an NRSRO must disclose, in XBRL format and on a six-month delay, ratings action histories for a randomly selected sample of 10% of the outstanding credit ratings for each rating class for which the NRSRO has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated.

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51 See R&I Letter; ABA Business Law Committee Letter; DBRS Letter; S&P Letter; Fitch Letter; ASF Letter; Multiple-Markets Letter; AFP Letter; Moody's Letter.

52 See ABA Business Law Committee Letter; Realpoint Letter; Pollock Letter; Egan-Jones Letter; Multiple-Markets Letter; Rapid Ratings Letter; AFP Letter; R&I Letter; Moody's Letter.

53 See S&P Letter; Moody's Letter.

54 See S&P Letter; Egan-Jones Letter; Fitch Letter; R&I Letter;

The Commission believes that by limiting the ratings actions histories that need to be disclosed to a random selection of 10% of outstanding credit ratings, applying the requirement to issuer-paid credit ratings only, and allowing for a six-month delay before a ratings action is required to be disclosed, the amendment as adopted addresses the concerns among commenters that the rule would cause them to lose revenue. With respect to NRSROs that earn revenues from issuer-paid credit ratings but sell access to packages of the ratings as well, the Commission believes that customers that are willing to pay for full and immediate access to downloadable information for all of an NRSRO's ratings actions are unlikely to reconsider their purchase of that product due to the ability to access ratings histories for 10% of the NRSRO's outstanding issuer-paid credit ratings selected on a random basis and disclosed with a six-month time lag. The 500 ratings threshold and random selection are designed to provide a sufficient sample of data upon which to draw reasonable inferences about the quality of ratings generally issued by NRSROs. The random 10% sample of issuer-paid credit ratings and six month time lag are designed to make it less likely that current purchasers of data about issuer-paid credit ratings could reliably find the information they want, and so NRSROs could continue to sell downloads and data feeds of the credit ratings. As such, the Commission believes that the changes made to the amendment address the commenters' concerns while still facilitating greater accountability for issuer-paid NRSROs, enhanced third-party development of performance measurement statistics for issuer-paid credit ratings, and increased competition among all NRSROs.

The Commission has decided not to impose the same disclosure obligation on subscriber-paid credit ratings at this time out of competitive concerns raised, but is still

considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the rule as adopted will address the concerns expressed by commenters and at the same time foster greater accountability of NRSROs with respect to their issuer-paid credit ratings as well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

The amendment as adopted also will require that the data be made available in XBRL format, using the List of XBRL Tags for NRSROs as specified on the Commission's Web site. Several NRSROs provided information arguing that an XBRL format could be particularly costly and that the burden on smaller NRSROs could be particularly acute.[55] They suggested that if the Commission adopted the rule as proposed, that the Commission allow NRSROs sufficient time to develop the necessary systems to implement the XBRL format or, in the alternative, to implement this required disclosure as a pilot program.[56]

The Commission believes, however, that the XBRL format will benefit market participants seeking to develop their own performance statistics using the ratings history data to be made public by the NRSROs. Requiring NRSROs to make histories of ratings actions for issuer-paid credit ratings publicly available using the interactive data format rather than using other machine readable format will enable market participants, academics and others to analyze this information more quickly, more accurately, and at a lower cost. The Commission believes that this will enhance the ability of end-users to

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55 See, e.g., DBRS Letter, Moody's Letter.

56 See Fitch Letter; DBRS Letter; Multiple-Markers Letter; CFA Institute Letter; ICI Letter; R&I Letter; Moody's Letter.

compare the rating performance of different NRSROs, which will foster NRSRO competition.

For purposes of the internal records required by new paragraph (a)(8), the NRSRO will be required to keep its records up to date to reflect the complete ratings history of each outstanding credit rating (including the current rating). However, for purposes of the requirement to make publicly available ratings action histories for a random sample of 10% of outstanding issuer-paid credit ratings in each class of credit rating for which the NRSRO is registered and has 500 or more such credit ratings outstanding, the NRSRO will be permitted to delay disclosure of a rating action for six months. As noted above, this limited disclosure and the six month time lag is expected to mitigate the concerns regarding the loss of revenues that NRSROs derive from selling data feeds and downloadable packages of their current outstanding issuer-paid credit ratings and histories of the ratings.

Because NRSROs withdraw ratings and rated instruments mature, the number of ratings made public in a particular class may fall below the 10% threshold. In order to continue to make a large sample of information publicly available, the Commission is requiring NRSROs to replenish the sample when it falls below 10%. Consequently, paragraph (d) of Rule 17g-2 provides that the NRSRO must replace a rating that rolls off for these reasons with a new randomly selected rating from the impacted class of credit ratings. In order to protect against the possibility of "cherry picking" ratings that may make the performance of the NRSRO more favorable, the Commission believes it is important that both the initial selection and any replenishment of ratings be randomly selected. The Commission is not specifying how the NRSROs must randomly select the

initial ratings disclosed under paragraph (d) of Rule 17g-2 or how they must randomly select ratings going forward to maintain the 10% sample. The Commission believes the NRSROs should develop a selection process that they can demonstrate to be random.

Finally, the Commission is adopting amendments to the instructions to Exhibit 1 of Form NRSRO to require that NRSROs subject to the new requirements of Rule 17g-2(d) as amended disclose the Web address where the XBRL Interactive Data File with the required information can be accessed. The Commission did not receive any comments on this aspect of the proposal and is adopting the requirement with modifications to reflect the modifications to the final rule discussed above. This rule amendment is designed to inform persons who use credit ratings where the sample of ratings histories for each class of issuer-paid credit ratings for which the NRSRO is registered can be obtained.

2. A Record of Material Deviation from Model Output

The Commission proposed amending paragraph (a)(2) of Rule 17g-2 to require NRSROs to make a record documenting the rationale when a final credit rating materially deviates from the rating implied by a quantitative model used in the rating process if the model was a substantial component of the rating process. Under this paragraph, as amended, if a quantitative model was a substantial component in the process of determining the credit rating of a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, the NRSRO is required to make a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued. The purpose of this rule is to enhance the recordkeeping process in order to enable Commission staff, as

well as an NRSRO's internal auditors, to understand the methodologies through which analysts developed the credit rating issued by the NRSRO.

The Commission is adopting this amendment, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[57] The Commission believes this new recordkeeping requirement is necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

Specifically, the Commission believes that maintaining records identifying the rationale for material divergences from the ratings implied by qualitative models used as a substantial component in the ratings process will assist the Commission in evaluating whether an NRSRO is adhering to its disclosed procedures for determining ratings. As the Commission has noted, "books and records rules have proven integral to the Commission's investor protection function because the preserved records are the primary means of monitoring compliance with applicable securities laws."[58] In the absence of such a recordkeeping requirement, there may be no way to determine whether an NRSRO adhered to its stated methodologies for obtaining a certain category of credit rating (e.g. AAA) as indicated by the model results, that is, whether adjustments to the result implied by the model were made by applying appropriate qualitative factors permitted under the NRSRO's documented procedures or because of undue influence from the person seeking the credit rating or other inappropriate reasons such as those prohibited by Rule 17g-6,

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57 See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

58 June 5, 2007 Adopting Release, 72 FR at 33582.

including the prohibition on issuing or modifying credit ratings for unfair, abusive or coercive reasons. The new recordkeeping requirement will allow Commission staff to review whether an NRSRO is adhering to its disclosed procedures for determining structured finance ratings and complying with Rule 17g-6.[59]

The Commission received 18 comments addressing this proposal.[60] Many commenters strongly supported the proposal.[61] NRSROs and others, however, expressed concern over the possibility that the rule could lead to the regulation of the substance of ratings and the overemphasis of quantitative models at the expense of applying qualitative factors.[62] These commenters argued that the model is just one tool in the rating process and that the proposal may lead to generalizations of models in order to avoid material differences.[63] One commenter noted that this record may cause examiners to ignore the role qualitative factors play in developing ratings.[64] Another commenter noted that models are not as integral to the process of rating commercial mortgage-backed securities.[65]

In part in response to these comments, the Commission has narrowed the application of the rule to ratings of structured finance products. This will lessen the recordkeeping burden on an NRSRO and address commenters' concerns that the

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59 17 CFR 240.17g-6. Rule 17g-6 prohibits an NRSRO from engaging in certain unfair, abusive or coercive practices such as issuing a credit rating that is not determined in accordance with the NRSRO's established procedures and methodologies for determining credit ratings based on whether the rated person will purchase the credit rating. See 17 CRF 240.17g-6(a)(2).

60 See CMSA Letter; DBRS Letter; Council Letter; S&P Letter; Second SIFMA Letter; Fitch Letter; Lockyer Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; R&I Letter; Moody's Letter; ABA Business Law Committee Letter; DBA Letter; NCRC Letter.

61 See Council Letter; Second SIFMA Letter; CFA Institute Letter; AFP Letter; Colorado PERA Letter; DBA Letter NCRC Letter.

62 See DBRS Letter; S&P Letter; Rapid Ratings Letter; R&I Letter; Moody's Letter; ABA Business Law Committee Letter.

63 See, e.g., DBRS Letter.

64 See Moody's Letter.

65 See CMSA Letter.

requirement could have negative effects on the ratings process for other classes of credit ratings where qualitative analysis is predominant and models have a more marginal role.

Further, the Commission does not believe that the requirement will cause NRSROs to abandon qualitative analysis when determining credit ratings for structured finance products. The Commission does not believe that the record-making required by the amendment will be extensive. For example, if the NRSRO's methodologies permit an analyst to adjust required credit enhancement levels up or down for the various tranches of a structured finance issuer based on certain qualitative factors, the NRSRO could document the rationale for any material difference between the credit rating implied by the model and the final rating by describing the qualitative factor or factors that were relied on. In addition to benefiting the Commission's regulatory and oversight functions, this requirement may serve to assist analysts in ensuring that their use of qualitative factors follows the procedures documented in the NRSRO's methodologies.

The Commission also notes that the NRSROs will be responsible for making the determination of when a model constitutes a "substantial component" of the rating process as well as when a difference between the rating issued and the rating implied by the model is "material." NRSROs should document in their ratings methodologies the models they deem to be substantial components of a ratings process for structured finance products and the magnitude of deviation from the rating implied by the model and rating issued that they deem material.[66]

For the foregoing reasons, the Commission is adopting the rule with the modification discussed above.

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[66] For example, the Commission believes the expected loss and cash flow models used by the NRSROs to rate RMBS and CDOs are substantial components of the rating process.

3. Records Concerning Third-Party Analyst Complaints

The Commission proposed adding a new paragraph (b)(8) to Rule 17g-2 requiring NRSROs to retain records of any complaints about the performance of a credit analyst. The Commission is adopting this amendment with the modifications discussed below. Under this paragraph, an NRSRO is required to retain any written communications received from persons not associated with the NRSRO that contain complaints about the performance of a credit analyst in initiating, determining, maintaining, monitoring, changing, or withdrawing a credit rating. The purpose of this rule is to allow Commission examiners the opportunity to review external complaints and how the NRSRO addressed them.

The Commission is adopting this amendment, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the Exchange Act.[67] The Commission believes this requirement is necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the Exchange Act, because it will assist Commission examiners in reviewing how NRSROs handle the conflicts inherent in the issuer-pay and subscriber-pay models: namely, that clients have an economic interest in the ratings issued by the NRSRO and may seek to influence the rating process by complaining about an analyst who does not issue ratings favorable to that interest. Commission examiners will be able to review the complaint file and follow-up with the relevant persons within the NRSRO as to how a particular complaint was handled. The

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[67] See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

potential for such a review by Commission examiners could reduce the willingness of an NRSRO to re-assign or terminate a credit analyst to placate a client that desires a different rating.

Commenters generally supported the proposal.[68] Some commenters requested clarification that rule does not require the retention of oral communications.[69] The Commission did not intend the rule to apply to oral communications. Consequently, the rule text has been modified to clarify that it only applies to "written" communications. One NRSRO expressed concern that privacy and labor laws in some non-U.S. jurisdictions would prevent monitoring of an employee's electronic communications.[70] The Commission intended the rule to apply to communications received by the NRSRO from outside parties such as subscribers or persons who pay to obtain credit ratings. The amendment was not intended to require the retention of complaints sent internally between, for example, employees of the NRSRO. The Commission has clarified the rule's scope in this regard by specifying that it only applies to complaints from persons not associated with the NRSRO.

For the foregoing reasons, the Commission is adopting the proposed rule with the modifications discussed above.

4. Clarifying Amendment to Rule 17g-2(b)(7)

Paragraph (b)(7) of Rule 17g-2 currently requires an NRSRO to retain all internal and external communications that relate to "initiating, determining, maintaining,

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68 See Council Letter; S&P Letter; MBA Letter; Fitch Letter; CFA Institute Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; Moody's Letter.

69 See Moody's Letter; S&P Letter.

70 See S&P Letter.

changing, or withdrawing a credit rating."[71] The Commission proposed to add the word "monitoring" to this list. The intent was to clarify that NRSRO recordkeeping rules extend to all aspects of the credit rating surveillance process as well as the initial rating process. This was the intent when the Commission originally adopted the rule as indicated by the use of the term "maintaining." The Commission believes that adding the term "monitoring" – a term of art in the credit rating industry – will better clarify this requirement. The Commission received 5 comments on this proposed amendment, all of which were supportive of the change.[72] The Commission is adopting this amendment as proposed.

C. Amendment to Rule 17g-3 (Report of Credit Rating Actions)

Rule 17g-3 requires an NRSRO to furnish the Commission on an annual basis the following reports: audited financial statements; unaudited consolidated financial statements of the parent of the NRSRO, if applicable; an unaudited report concerning revenue categories of the NRSRO; an unaudited report concerning compensation of the NRSRO's credit analysts; and an unaudited report listing the largest customers of the NRSRO. The rule further requires an NRSRO to furnish the Commission these reports within 90 days of the end of its fiscal year. The Commission proposed amending the rule to require a report showing the number of rating actions taken by the NRSRO during the fiscal year in each class of credit rating for which the NRSRO is registered. In the June 16, 2008 Proposing Release, the Commission indicated that a "credit rating action"

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71 17 CFR 240.17g-2(b)(7).

72 See S&P Letter; Multiple-Markets Letter; CFA Institute Letter; Rapid Ratings Letter; Moody's Letter.

includes upgrades, downgrades, or placements of the rating on watch for an upgrade or downgrade.[73]

The Commission received 10 comments on this proposal.[74] Commenters were generally supportive of the proposal. One commenter recommended that the final rule should make clear what is meant by "class of credit rating" and establish a measurement period.[75] The Commission notes that the rule requires the report to cover each of the classes of credit rating identified in Section 3(a)(62)(B)(iv) of the Rating Agency Act[76] for which the NRSRO is applying for registration or is registered. Further, as discussed below, the note to the paragraph clarifies that for the purposes of this requirement, the asset-backed securities class must include all structured finance products. The Commission further notes that the measurement period is on a fiscal year basis.

One commenter believed that the proposal is unclear or overbroad regarding the scope of a report on "credit rating actions." This commenter also noted its belief that the proposed rule was inappropriate because ratings changes are not financial statements, and stated that the proposed requirement should be relocated to Rule 17g-2.[77] In response, the Commission notes that it is adopting this requirement, in part, under authority to require an NRSRO to "make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]."[78]

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73 June 16, 2008 Proposing Release, 73 FR at 36234.

74 See S&P Letter; Fitch Letter; Multiple-Markets Letter; ICI Letter; Rapid Ratings Letter; AFP Letter; Moody's Letter; ABA Business Law Committee Letter; NCRC Letter; Raingeard Letter.

75 See Fitch Letter.

76 15 U.S.C. 78c(a)(62)(B)(iv).

77 See Moody's Letter.

78 See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

The Commission is adopting this amendment by adding paragraph (a)(6) to Rule 17g-3. Paragraph (a)(6) requires an NRSRO to provide the Commission with an unaudited report of the number of credit rating actions (upgrades, downgrades, placements on credit watch, and withdrawals) during the fiscal year in each class of credit rating for which the NRSRO is registered with the Commission. As proposed, the Commission did not identify the types of credit rating actions that should be used to generate the report. Instead, it identified them in the preamble as being upgrades of credit ratings, downgrades of credit ratings, placements of credit ratings on watch for an upgrade or downgrade. The final rule text identifies the types of ratings actions that should be included in order to provide greater clarity. In addition, the Commission is adding "withdrawals" to the types of credit rating actions that must be included in the "credit ratings actions" reported by the NRSRO. The Commission views a withdrawal as a "credit rating action" since ceasing to monitor a credit rating is a significant change to the rating and, as such, is comparable to a downgrade, upgrade and placement on watch in terms of the potential impact on the rated obligor or security. Moreover, the inclusion of withdrawals in the report addresses the concerns that led the Commission to propose requiring that withdrawals be included in the default statistics generated for Exhibit 1 to Form NRSRO. As discussed above, NRSROs raised substantial compliance concerns with the proposal to require withdrawals in the performance statistics. This change is intended to address their concerns regarding that proposed amendment while at the same time ensuring that any disproportionate amount of ratings withdrawals in a class of ratings will be captured in the ratings action information provided to the Commission for examination and oversight purposes.

The new rule includes a note to paragraph (a)(6) clarifying that for the purposes of reporting credit rating actions in the asset-backed security class of credit ratings described in Section 3(a)(62)(B)(iv) of the Rating Agency Act[79] an NRSRO must include credit rating actions on any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. As discussed in the June 16, 2008 Proposing Release, this note is designed to ensure the inclusion of information about ratings actions for credit ratings of structured finance products that do not meet the narrower statutory definition of "issuers of asset-backed securities (as that term is defined is section 1101(c) of part 229 of title 17, Code of Federal Regulations)."[80] The Commission also notes that the report required under paragraph (a)(6) to Rule 17g-3 will be furnished to the Commission on a confidential basis, to the extend permitted by law, consistent with the other reports furnished to the Commission under Rule 17g-3.[81]

The Commission believes this amendment is necessary and appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act because it will assist the Commission in its examination function of NRSROs. Large spikes in ratings actions within a class of credit ratings could indicate the processes for determining the ratings may be compromised by inappropriate factors. For example, a substantial increase in the number of downgrades in a particular class of credit rating may be indicative of the fact that the initial ratings were higher than the NRSRO's procedures and methodologies would have implied because the NRSRO sought to gain favor with issuers and underwriters by issuing higher ratings. A

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79 15 U.S.C. 78c(a)(62)(B)(iv).

80 See June 16, 2008 Proposing Release, 73 FR at 36234.

81 17 CFR 240.17g-3; see also, June 5, 2007 Adopting Release, 72 FR at 33592.

substantial increase in upgrades also could be the result of the NRSRO attempting to gain favor with issuers and underwriters.

As discussed in the June 16, 2008 Proposing Release, the Commission recognizes that an increase in the number of ratings actions in a particular class of credit rating may be the result of macroeconomic factors broadly impacting the rated obligors or securities.[82] In this case, the ratings actions are presumably the result of appropriate credit analysis and not inappropriate extraneous factors. On the other hand, large numbers of actions could be a signal that the process for rating and monitoring ratings in the impacted class has been compromised by improper practices such as failing to adhere to disclosed and internally documented ratings procedures and methodologies, having prohibited conflicts, failing to establish reasonable procedures to manage conflicts, or engaging in unfair, coercive, or abusive conduct. Consequently, the Commission expects that the report will be a valuable tool to improve the focus of examination resources. For these reasons, the Commission is adopting the amendment with the modifications described above.

D. Amendments to Rule 17g-5

Rule 17g-5 identifies a series of conflicts arising from the business of determining credit ratings. Under the rule, some of these conflicts must be disclosed and managed, while others are prohibited outright. In the June 16, 2008 Proposing Release, the Commission identified three additional conflicts that would be prohibited under paragraph (c) of the rule.[83] The Commission received a number of comments on the

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82 See June 16, 2008 Proposing Release, 73 FR at 36235.

83 Id, 73 FR at 36226-36228. The Commission also proposed amendments to paragraphs (a) and (b) of Rule 17g-5 that would require an NRSRO to manage the conflict of being repeatedly paid by arrangers of structured finance products by prohibiting the NRSRO from rating such a product

proposed amendments.[84] As discussed below, the Commission is adopting the amendments but with revisions designed in part to address concerns raised by commenters.

1. Rule 17g-5 Prohibition on Conflict of Interest Related to Rating an Obligor or Debt Security where the Obligor or Issuer Received Ratings Recommendations from the NRSRO or Person Associated with the NRSRO

The Commission proposed adding a new paragraph (c)(5) to Rule 17g-5 prohibiting the conflict that arises when an NRSRO or its affiliate makes recommendations on how to achieve a desired rating and then rates the obligor or debt instrument that was the subject of the recommendations. The final rule being adopted adds this new paragraph to Rule 17g-5. Under this paragraph, an NRSRO is prohibited from issuing or maintaining a credit rating with respect to an obligor or security where the NRSRO or a person associated with the NRSRO made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security. The purpose of this rule is to address the potential lack of impartiality that could arise when an NRSRO determines a credit rating based on a corporate structure that was developed after consultations with the NRSRO or its affiliate on how to achieve a desired credit

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unless, among other things, information about the underlying assets was disseminated to persons not involved in the rating process. Id, 73 FR at 36219-36226. The Commission received many thoughtful comments on the proposal that identified substantial issues as to how the proposed amendments would operate in practice. The Commission is re-proposing the amendments in a separate release. See Companion Proposing Release.

84 See MICA Letter; ICI Letter; Rapid Ratings Letter; ABA Business Law Committees Letter; NCRC Letter; Nappier Letter; Egan-Jones Letter; Lockyer Letter; RBDA Letter; Moody's Letter; A.M. Best Letter; Euler Letter; Realpoint Letter; CMSA Letter; LIUNA Letter; DBRS Letter; Council Letter; DPW Letter; S&P Letter; Second SIFMA Letter; IBFED Letter; MBA Letter; Fitch Letter; ASF Letter; Trepp Letter; CFA Institute Letter; Roundtable Letter; Colorado PERA Letter; CGSH Letter; SPA Letter; R&I Letter; CreditSights Letter; DBA Letter; Citi Letter; Lehman Letter; Raingeard Letter; JCR Letter; Second Realpoint Letter.

rating. In simple terms, the rule prohibits an NRSRO from rating its own work or the work of an affiliate.

The Commission is adopting this amendment to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[85] This section of the statute provides the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.[86] The Commission believes this amendment is necessary and appropriate in the public interest and for the protection of investors because it addresses a practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating. It has been suggested that during the process of rating structured finance products the NRSROs have recommended to arrangers how to structure a trust or complete an asset pool to receive a desired credit rating and then rated the securities issued by the trust – in effect, rating their own work.[87] This amendment will prohibit this conduct based on the Commission's belief that it creates a conflict that cannot be effectively managed insomuch as it would be very difficult for an NRSRO to remain objective when assessing the creditworthiness of an obligor or debt security where the NRSRO or person associated with the NRSRO made recommendations about steps the obligor or issuer of the security could take to obtain a desired credit rating.

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85 15 U.S.C. 78o-7(h)(2).

86 Id.

87 See e.g., Testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (September 26, 2007), pp. 2-3.

The Commission received 33 comments addressing this proposal.[88] Most of the comments supported the proposal, although some commenters expressed concern that the provision may limit appropriate dialogue between an NRSRO and a person seeking a credit rating or subject to an existing rating.[89] Several commenters asked that the Commission clarify the type of communications that would be acceptable feedback during the ratings process. As stated in the June 16, 2008 Proposing Release, it is not the Commission's intent to prohibit the flow of information between an NRSRO and the obligor, issuer, underwriter, or sponsor during the rating process.[90] For example, the Commission does not view an explanation by an NRSRO of the assumptions and rationales it uses to arrive at ratings decisions and how they apply to a given rating transaction as a recommendation. Consequently, in the case of a residential mortgage-backed security, an NRSRO, after putting the underlying assets through an expected loss model run, may communicate the results to the sponsor and discuss how loan characteristics such as FICO scores, geographic concentrations, or loan-to-value ratios may have driven the results.

The Commission recognizes that providing this type of information during the rating process allows the person seeking the rating to make adjustments in response to the information provided by the NRSRO. However, the free flow of information between the NRSRO and the person increases the transparency of the rating process. Moreover,

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88 See Realpoint Letter; CMSA Letter; LIUNA Letter; DBRS Letter; JCR Letter; Council Letter; DPW Letter; S&P Letter; Second SIFMA Letter; IBFED Letter; Nappier Letter; MBA Letter; Fitch Letter; Lockyer Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; ICI Letter; RBDA Letter; Roundtable Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; CGSH Letter; SPA Letter; R&I Letter; Moody's Letter; ABA Business Law Committees Letter; DBA Letter; NCRC Letter; Raingeard Letter; A.M. Best Letter.

89 See, e.g., CMSA Letter; LIUNA Letter; DBRS Letter; JCR Letter; Second SIFMA Letter; IBFED Letter; MBA Letter; Fitch Letter; Roundtable Letter; AFP Letter.

90 June 16, 2008 Proposing Release, 73 FR at 36226.

NRSROs generally make their models available to persons seeking ratings. Sponsors of structured finance securities can run potential asset pools through the models before bringing the transactions to the NRSRO to be rated. This gives them an understanding of the rating that the NRSRO likely will determine, particularly with respect to more standardized structured finance products. The Commission believes this level of transparency before and during the rating process benefits the credit markets by allowing participants to gain an understanding and, ultimately, to assess the methodologies used by the NRSROs. The alternative – restricting the flow of information – would make the rating process more opaque.

The Commission notes, however, that if the feedback process turns into recommendations by the NRSRO about changes to the structure, assets, liabilities or activities of the obligor or security that the person seeking the rating potentially could make to obtain a desired credit rating, the NRSRO would be in violation of the new rule. For example, in the case of a residential mortgage-backed security, the NRSRO would not be prohibited from informing the sponsor that the expected loss model indicated that the underlying loan pool was too concentrated in a certain geographic region to receive the desired rating given the level of credit enhancement proposed. On the other hand, if an analyst recommends how to change the composition of the loans in the pool to achieve the desired rating, the NRSRO would be making a recommendation about the assets of the issuer and, consequently violate the rule. The sponsor must take the model results from the NRSRO and decide independently how to adjust the asset pool to achieve the desired rating. If changes are made, the NRSRO will run the new pool through the model as if it were a new transaction and report the results to the sponsor.

Some argue that even this process of providing sponsors with information they can use to make adjustments during the rating process should be prohibited. The Commission disagrees because locking down the structure prior to the rating process could have serious adverse consequences. Investors seek securities with specific credit ratings. If sponsors cannot make adjustments to obtain those ratings, then the securities ultimately issued and rated may not be marketable.

The Commission understands that NRSROs are concerned about how to draw the line between permissible and unlawful communication of information.[91] In response, the Commission notes that NRSROs who provide the greatest clarity to the marketplace about their ratings methodologies will need to provide less explanation during the ratings process. Thus, NRSROs can mitigate the risk that communications during the rating process will violate the rule by enhancing their disclosures about their ratings methodologies, including about the qualitative factors they consider and the quantitative models and the assumptions underlying those models they employ. For these reasons, the Commission believes the new prohibition creates a strong incentive for NRSROs to improve their disclosures, which, in turn, will benefit the users of credit ratings and, by extension, the credit markets.

Some commenters stated that this conflict should not be prohibited but, instead, included among the conflicts that must be disclosed and managed.[92] Several commenters also suggested that the conflict should not be prohibited when the affiliate (as opposed to the NRSRO) makes the recommendation. The commenters suggested that measures such as information barriers could address the conflict adequately without the need to prohibit

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91 See, e.g., Fitch Letter, JCR Letter.

92 See, e.g., Realpoint Letter; DPW Letter; S&P Letter; ICI Letter; Colorado PERA Letter; R&I Letter; Moody's Letter.

it outright.[93] The Commission believes that an NRSRO cannot remain objective when rating its own work or that of an affiliate. As stated in the June 16, 2008 Proposing Release, the Commission believes it would be difficult for the NRSRO to remain objective if an affiliate were providing advice to obligors, issuers and sponsors about how to obtain desired credit ratings because the financial success of the affiliate would depend on issuers getting the ratings they sought after taking steps recommended by the affiliate.[94] This may create undue pressure on the NRSRO's credit analysts to determine credit ratings that favored the affiliate. The Commission believes this pressure may undermine protective measures such as information barriers between the NRSRO and the affiliate as they both would be under the common control of a group that benefited from the affiliate's financial success.

Finally, several commenters requested that the Commission clarify whether this conflict applies only to structured finance ratings or whether it applies to all ratings classes.[95] The Commission intends that this prohibited conflict would apply across all ratings classes.

For the reasons discussed above, the Commission is adopting the amendment as proposed.

2. Rule 17g-5 Prohibition on Conflict of Interest Related to the Participation of Certain Personnel in Fee Discussions

The Commission proposed prohibiting the conflict that arises when persons within an NRSRO responsible for determining credit ratings or developing methodologies for determining credit ratings participate in fee discussions. The final rule

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93 See, e.g., Fitch Letter; Moody's Letter.

94 See June 16, 2008 Proposing Release, 73 FR at 36226.

95 See, e.g., Lockyer Letter, RBDA Letter, A.M. Best Letter.

being adopted adds a new paragraph (c)(6) to Rule 17g-5.[96] Under this paragraph, an NRSRO is prohibited from issuing or maintaining a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a person within the NRSRO who has responsibility for participating in determining or approving credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models. The purpose of this rule is to remove the persons most directly involved in making the judgments that credit ratings are based on from fee negotiations and, thereby, insulate them from a process that could make them more or less favorably disposed toward a client or class of clients.

As proposed, the rule did not explicitly mention persons involved in approving credit ratings, although it implicitly included them by including persons involved in "determining" credit ratings.[97] The Commission notes that both determiners and approvers engage in analysis that results in a final rating, and the Commission intends them both to be covered by prohibitions aimed at protecting the integrity of this process. Therefore, the Commission is clarifying today that for the purposes of Rule 17g-5, the terms "determine," "determined," and "determining" include both persons who develop credit ratings and persons who approve credit ratings. This clarification reflects the Commission's intent when it proposed the rule and is designed to remove any potential ambiguity that could arise if some of the Rule 17g-5 prohibitions cover persons who determine and approve credit ratings and others only cover persons who determine credit ratings.

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96 17 CFR 240.17g-5.

97 June 16, 2008 Proposing Release, 73 FR at 36226-36228.

The Commission is adopting this amendment to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[98] This section of the statute provides the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.[99] The Commission believes this amendment is necessary and appropriate in the public interest or for the protection of investors because it addresses a potential practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating. This amendment is designed to effectuate the separation within the NRSRO of persons involved in fee discussions from persons involved in the credit rating analytical process. While the incentives of the persons discussing fees could be based primarily on generating revenues for the NRSRO; the incentives of the persons involved in the analytical process should be based on determining accurate credit ratings. There is a significant potential for these distinct incentive structures to conflict with one another when persons within the NRSRO are engaged in both activities.

The potential consequences are that a credit analyst or person responsible for approving credit ratings or credit rating methodologies could, in the context of negotiating fees, let business considerations undermine the objectivity of rating process. For example, an individual involved in a fee negotiation with an issuer might not be impartial when it comes to rating the issuer's securities. In addition, persons involved in approving the methodologies and processes used to determine credit ratings could be reluctant to adjust a model to make it more conservative if doing so would make it more

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98 15 U.S.C. 78o-7(h)(2).

99 Id.

difficult to negotiate fees with issuers. For these reasons, the Commission believes that this conflict should be prohibited.

The Commission received 19 comments addressing this proposal, most of which supported its goal.[100] NRSROs, while agreeing in principle with the rule, raised a number of questions. First, several NRSROs suggested that the Commission revise the language of the amendment to conform to the International Organization of Securities Commissions' "Code of Conduct Fundamentals for Credit Rating Agencies" (the "IOSCO Code").[101] The IOSCO Code provides that credit rating agencies "should not have employees who are directly involved in the rating process initiate, or participate in, discussions regarding fees or payments with any entity they rate." The Commission believes, however, that the IOSCO Code provision would be insufficient to accomplish the goal of fully effectuating the separation within NRSROs of persons involved in fee discussions from persons involved in the credit rating analytical process. In particular, the IOSCO Code's language would allow persons involved in approving the methodologies and processes used to determine credit ratings to negotiate ratings fees, which could make them reluctant to adjust a model to make it more conservative if doing so would make it more difficult to negotiate fees with issuers.

In addition, other commenters, including the NRSROs, asked that the Commission clarify that the prohibition does not apply to internal communications.[102] They stated that senior managers (some of whom may be covered by the prohibition)

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100 See Realpoint Letter; CMSA Letter; LIUNA Letter; DBRS Letter; S&P Letter; Nappier Letter; Fitch Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; ICI Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; Moody's Letter; ABA Business Law Committees Letter; NCRC Letter; Raingeard Letter; A.M. Best Letter.

101 See, e.g., S&P Letter; Fitch Letter; A.M Best Letter. A copy of the IOSCO code is available at www.iosco.org.

102 See, e.g., S&P Letter; Fitch Letter; A.M. Best Letter.

participate in internal discussions relating to fees to ensure that a fee charged is in proportion to the work performed by the NRSRO. The Commission recognizes that credit analysts may need to provide information on expected staffing and resource requirements to the persons involved in fee discussions so the latter can factor such information into the fees charged.

Some commenters stated that this conflict should be subject to the requirement to disclose and manage, as opposed to being prohibited.[103] The Commission disagrees for several reasons. There does not appear to be a compelling reason for credit analysts and model developers to participate in fee discussions. Furthermore, their involvement in that process creates greater risk that they will develop a favorable or negative view of the client or a class of clients based on how the negotiations proceed. This could influence the judgment they exercise in determining credit ratings or developing credit rating methodologies.

Several commenters noted that small NRSROs may need to have some analysts or model developers participate in fee discussions given their staffing levels.[104] These commenters suggested that the rule should include an exemption for such NRSROs.[105] The Commission agrees that the rule could potentially raise difficulties in certain circumstances for an NRSRO with a small staff. Consequently, the Commission will review requests by small NRSROs for exemptions from the rule under Section 36 of the Exchange Act based on their specific circumstances. The Commission notes that it has

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103 See, e.g., DBRS Letter; ASF Letter; Multiple-Markets Letter; Moody's Letter.

104 See, e.g., DBRS Letter; Multiple-Markets Letter; CFA Institute Letter; Colorado PERA Letter; ABA Business Law Committees Letter.

105 See, e.g., Fitch Letter; Rapid Ratings Letter; Moody's Letter.

provided two small NRSROs with temporary exemptive relief from the prohibition in Rule 17g-5 against receiving 10% or more of their net revenues from a single client.[106]

For the reasons discussed, the Commission is adopting the amendment as proposed and clarifies, as noted above, that persons responsible for "approving" credit ratings are covered by the prohibition as well as the provisions of Rule 17g-5 as a whole.

3. Rule 17g-5 Prohibition of Conflict of Interest Related to Receipt of Gifts

The Commission proposed adding a new paragraph (c)(7) to Rule 17g-5[107] prohibiting the conflict that arises when persons responsible for determining or approving credit ratings receive gifts from the persons being rated or the sponsors of the persons being rated.[108] The final rule being adopted includes this new paragraph. Under this paragraph, an NRSRO is prohibited from issuing or maintaining a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than $25. The purpose of this rule is to eliminate the potential undue influence that gifts can have on those responsible for determining credit ratings.

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106 See Order Granting Temporary Exemption of LACE Financial Corp. from the Conflict of Interest Prohibition in Rule 17a-5(c)(1) of the Securities Exchange Act of 1934, Exchange Act Release No. 57301 (February 11, 2008); Order Granting Temporary Exemption of Realpoint LLC from the Conflict of Interest Prohibition in Rule 17a-5(c)(1) under the Securities Exchange Act of 1934, Exchange Act Release No. 58001 (June 23, 2008).

107 17 CFR 240.17g-5.

108 See June 16, 2008 Proposing Release, 73 FR at 36227-36228.

The Commission is adopting this amendment to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[109] This section of the statute provides the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO as the Commission deems necessary or appropriate in the public interest or for the protection of investors.[110] The Commission believes the amendment is necessary and appropriate in the public interest or for the protection of investors because it addresses a potential practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating.

The Commission received 18 comments on the proposed amendment, most of which agreed in principle with the proposal.[111] One commenter suggested that this conflict should be disclosed and managed instead of prohibited.[112] The Commission disagrees because other than in the most obvious cases it would be very difficult to determine whether an analyst was swayed by gifts to adjust a rating. Persons seeking credit ratings for an obligor or debt security could use gifts in an attempt to gain favor with the analyst. In the case of a substantial gift, the potential to impact the analyst's objectivity could be immediate. With smaller gifts, the danger is that over time the cumulative effect of repeated gifts can impact the analyst's objectivity. In either case, there is little ability to "manage" the analyst's motivations. Therefore, the Commission

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109 15 U.S.C. 78o-7(h)(2).

110 Id.

111 See S&P Letter; Nappier Letter; Lockyer Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; ICI Letter; Roundtable Letter; Rapid Ratings Letter; AFP Letter; R&I Letter; Moody's Letter; ABA Business Law Committees Letter; Foutch Letter; DBA Letter; NCRC Letter; Raingeard Letter; A.M. Best Letter.

112 See Moody's Letter.

believes that an absolute prohibition on gifts, with the exception of minor incidentals such as those provided in business meetings, is appropriate.

Several NRSROs noted the potential for cultural misunderstandings over the proposed gift limit, noting that issuers from other countries may be embarrassed or offended by the prohibition. One NRSRO suggested in response that the Commission include an exemption or higher dollar threshold for gifts from foreign issuers, while another cited such potential misunderstandings in support of its suggestion that the conflict be disclosed and managed instead of prohibited.[113] The Commission recognizes that a prohibition may pose initial difficulties with certain foreign issuers but believes that over time, and given the uniformity of the rule across NRSROs, such issuers will come to understand and accept the prohibition.

Several commenters asked that the Commission clarify how the $25 limit would operate[114] and some suggested a higher limit such as $50 or $100.[115] The $25 limit is not designed to be an exception to the prohibition on giving gifts. Rather, it is intended to permit the exchange of items that are incidental to routine business interactions such as meetings. For example, if an analyst meets with an issuer to discuss a credit rating, the issuer could provide the analyst with note pads, pens and light refreshments, provided they did not have an aggregate value exceeding $25. The Commission notes that the rule is not intended to allow an analyst to accept a gift, regardless of its value, that has no use in conducting the meeting. In addition, the Commission wishes to clarify that the $25 limit is per analyst and per interaction and not a one-time or annual limit.

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113 See, e.g., S&P Letter, Moody's Letter.

114 See, e.g., S&P Letter; Roundtable Letter; R&I Letter; Moody's Letter.

115 See, e.g., S&P Letter; CFA Institute Letter; Roundtable Letter; ABA Business Law Committees Letter; A.M. Best Letter.

The Commission also intends that the rule be prospective. Therefore, the fact that an analyst received a gift from a person seeking a credit rating prior to the rule's effective date will not preclude the NRSRO from issuing a credit rating determined by the analyst.

Finally, a few commenters asked the Commission to clarify whether this amendment applied only to structured finance ratings or whether it applied to all ratings classes.[116] The Commission believes that there is no reason to limit this prohibition to structured finance ratings: any person seeking a credit rating could attempt to gain favor with an analyst responsible for determining the credit rating by using gifts. Therefore, this prohibition applies across all classes of credit ratings.

For the reasons discussed, the Commission is adopting the amendment as proposed.

III. PAPERWORK REDUCTION ACT

Certain provisions of the rule amendments contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[117] The Commission published a notice requesting comment on the collection of information requirements in the June 16, 2008 Proposing Release and submitted the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[118] An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

(1) Rule 17g-1, Application for registration as a nationally recognized statistical rating agency; Form NRSRO and the Instructions for Form NRSRO (OMB Control Number 3235-0625);

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116 See, e.g., Lockyer Letter.

117 44 U.S.C. 3501 et seq.; 5 CFR 1320.11.

118 See June 16, 2008 Proposing Release, 73 FR at 36236-36241.

(2) Rule 17g-2, Records to be made and retained by national recognized statistical rating organizations (OMB Control Number 3235-0628); and

(3) Rule 17g-3, Annual reports to be furnished by nationally recognized statistical rating organizations (OMB Control Number 3235-0626).

A. Collections of Information under the Amended Rules

The Commission is adopting rule amendments to prescribe additional requirements for NRSROs to address concerns that have arisen with respect to their role in the credit market turmoil. These amendments modify rules the Commission adopted in 2007 to implement registration, recordkeeping, financial reporting, and oversight rules under the Rating Agency Act. Certain of the amendments contain recordkeeping and disclosure requirements that will be subject to the PRA. The collection of information obligations imposed by the amendments is mandatory. The amendments, however, will apply only to credit rating agencies that are registered with the Commission as NRSROs. Such registration is voluntary.[119]

In summary, the rule amendments require: (1) an NRSRO to provide enhanced disclosure of performance measurements statistics and the procedures and methodologies used by the NRSRO in determining credit ratings for structured finance products and other debt securities on Form NRSRO;[120] (2) an NRSRO to make, keep and preserve additional records under Rule 17g-2;[121] (3) an NRSRO to make publicly available on its Internet Web site in XBRL format a random sample of 10% of the ratings histories in each ratings class for which it is registered and has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being

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119 See Section 15E of the Exchange Act (15 U.S.C. 78o-7).

120 See amendments to Form NRSRO.

121 17 CFR 240.17g-2.

rated, with each new ratings action to be reflected in such histories no later than six months after they are taken;[122] and (4) an NRSRO to furnish the Commission with an additional annual report.[123]

B. Proposed Use of Information

The amendments enhance the framework for Commission oversight of NRSROs, in part in response to the recent credit market turmoil.[124] The collections of information in the rule amendments are designed to further assist the Commission in effectively monitoring, through its examination function, whether an NRSRO is conducting its activities in accordance with Section 15E of the Exchange Act[125] and the rules thereunder. In addition, these rule amendments are designed to further assist users of credit ratings by requiring the disclosure of additional information with respect to an NRSRO that could be used to compare the credit ratings quality of different NRSROs, particularly with respect to structured finance products. The Commission believes that the information that NRSROs will be required to make public as a result of the amendments will advance one of the primary objectives of the Rating Agency Act, as noted in the accompanying Senate Report, to "facilitate informed decisions by giving investors the opportunity to compare ratings quality of different firms."[126]

C. Respondents

In adopting the final rules under the Rating Agency Act, the Commission estimated that approximately 30 credit rating agencies would be registered as

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122 See Rule 17g-2(a)(8) and (d).
123 See Rule 17g-3(a)(6).
124 See 17 CFR 17g-1 through 17g-6, and Form NRSRO.
125 15 U.S.C. 78o-7.
126 See Senate Report, p. 8.

NRSROs.[127] The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the amendments. Since the initial set of rules under the Rating Agency Act became effective in June 2007, ten credit rating agencies have registered with the Commission as NRSROs.[128] The registration program has been in effect for over a year; consequently, the Commission expects additional entities will register. While 20 more entities may not ultimately register, the Commission believes the estimate is within reasonable bounds and appropriate given that it adds an element of conservatism to its paperwork burden estimates as well as cost estimates.

The Commission requested comment on all aspects of the proposed estimate for the number of respondents. The Commission did not receive any comments in response to the proposed estimate. As discussed above, the Commission continues to estimate, for purposes of this PRA, that approximately 30 credit rating agencies will be registered as NRSROs and thus will be required to comply.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the amendments will be approximately 820 hours on an annual basis[129] and 4,560 hours on a one-time basis.[130]

The total annual and one-time hour burden estimates described below are averages across all types of NRSROs expected to be impacted by the rule amendments. The size and complexity of NRSROs range from small entities to entities that are part of

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127 See June 5, 2007 Adopting Release, 72 FR at 33607.

128 A.M. Best Company, Inc.; DBRS Ltd.; Fitch.; Japan Credit Rating Agency, Ltd.; Moody's; Rating and Investment Information, Inc.; S&P; LACE Financial Corp.; Egan-Jones Rating Company; and Realpoint LLC.

129 This total is derived from the total annual hours set forth in the order that the totals appear in the text: 750 + 70 + 1000 = 1,820.

130 This total is derived from the total one-time hours set forth in the order that the totals appear in the text: 3,000 + 1,350 + 210 = 4,560.

complex global organizations employing thousands of credit analysts. Consequently, the burden hour estimates represent the average time across all NRSROs. The Commission further notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Amendments to Form NRSRO

The amendments to Form NRSRO change the instructions for the Form to require that NRSROs provide more detailed credit ratings performance statistics in Exhibit 1 and disclose with greater specificity information about the procedures and methodologies used to determine structured finance and other credit ratings in Exhibit 2.[131] The total annual burden hours currently approved by OMB is 2,100, and the total one-time burden hours is 10,000. In the June 16, 2008 Proposing Release, the Commission stated that it expected that the proposed amendments would not have a material effect on the respondents' hour burden because the additional disclosures would be included within the overall preparation of the initial Form NRSRO for new applicants.[132] Additionally, in that release, the Commission stated it believed that the NRSROs currently registered would be required to prepare and furnish an amended Form NRSRO to update their registration applications as a result of the adoption of the proposed amendments (i.e., as of today that would be ten amended Form NRSROs).[133] However, the Commission stated that it believed these potential furnishings of Form NRSRO were accounted for in the currently approved PRA collection for Rule 17g-1, which includes an estimate that each NRSRO would file two amendments to Form NRSRO per year.

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131 17 CFR 240.17g-1 and Form NRSRO.

132 June 16, 2008 Proposing Release, 73 FR at 36237-36238.

133 Id.

The Commission requested comment on all aspects of the burden estimates for Rule 17g-1 and Form NRSRO, as amended.[134] One commenter disagreed with the Commission that there would be no additional one-time or ongoing collection of information burdens for NRSROs to provide the additional information required in Exhibit 2 to Form NRSRO.[135] The commenter stated that it would need to conduct a survey of its practices, synthesize and summarize the results of the survey, and incorporate the results into Exhibit 2 of Form NRSRO.[136] The commenter estimated that it would take at least 100 hours to complete a global survey, involving compliance personnel, as well as senior analysts and their supervisors. In addition, the commenter estimated that it would take at least 24 hours per year on average to collect information and another 12 hours per year to incorporate descriptions of changes into Form NRSRO, as well as an additional 24 hours per year conducting compliance assessments.[137] The commenter noted, however, that it did not consider such one-time and ongoing compliance burdens to be excessive.[138]

As adopted, the amendments to the instructions to Exhibit 2 to Form NRSRO add three additional areas that an applicant and a registered NRSRO must address in the descriptions of its procedures and methodologies in Exhibit 2 to the extent they are applicable.[139] Because the additional requirements, as adopted, require only a description

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134 Id.

135 See Moody's Letter.

136 Id.

137 Id.

138 Id.

139 These additional areas are: whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings; whether and, if so, how assessments of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction play a part in the determination of credit ratings; and how frequently credit ratings are reviewed, whether different models or criteria are used for ratings surveillance than for determining initial ratings, whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings,

of the procedures and methodologies, the Commission believes that there may have been some misinterpretation with respect to the actual requirements regarding the amendments to Exhibit 2. As stated above, the Commission notes that the instructions for Exhibit 2 to Form NRSRO require only a description of the procedures and methodologies that the NRSRO actually employs and it does not require an NRSRO to adopt specific procedures. In addition, it only requires a description of the NRSRO's general ratings procedures and methodologies as opposed to the submission and disclosure of the actual procedures and methodologies used to determine credit ratings.[140]

Based on clarifications discussed above, the Commission believes that the actual time expenditures of NRSROs in complying with the rules will be less than the commenter's estimates. Nonetheless, the Commission is revising the one-time hourly burden estimate upward in response to the comment. The Commission, based on the comment received and staff experience, estimates that the average time necessary for an applicant or NRSRO to gather the information on a one-time basis in order to complete the additional disclosures required by the amendments to Exhibit 2 to Form NRSRO will be 100 hours per NRSRO, which would be a one-time hour burden to the industry of 3,000 hours.[141] The Commission is not revising its annual burden because it believes that once an NRSRO has updated Exhibit 2 to Form NRSRO to include descriptions of these aspects of its methodologies, any further updates would be incremental and the time

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and whether changes made to models and criteria for performing ratings surveillance are incorporated into the models and criteria for determining initial ratings.

140 The instructions further provide that the description must be sufficiently detailed to provide users of credit ratings with an understanding of the processes the applicant or NRSRO employs to determine credit ratings.

141 100 hours x 30 NRSROs = 3,000 hours.

burdens associated with completing the updates are reflected in the current annual burdens discussed above.

2. Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and keep current certain records relating to its business and requires an NRSRO to preserve those and other records for certain prescribed time periods.[142] The amendments to Rule 17g-2 require an NRSRO to make and retain two additional records and to retain a third type of record. The records to be made and retained are: (1) a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating of a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction;[143] and (2) a record showing the history and dates of all previous rating actions with respect to each outstanding credit rating.[144] The amendments to Rule 17g-2 also require an NRSRO to make public, in XBRL format and with a six-month grace period, the ratings action information required under new paragraph (a)(8) for a random sample of 10% of the issuer paid credit ratings for each ratings class for which it has issued 500 or more issuer-paid credit ratings.[145] In addition, the amendments require an NRSRO to retain communications from persons not associated with the NRSRO that contain any complaints by an obligor, issuer, underwriter, or sponsor about the performance of a credit analyst.[146]

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142 17 CFR 240.17g-2.
143 Paragraph (a)(2)(iii) of Rule 17g-2.
144 Paragraph (a)(8) of Rule 17g-2.
145 Amendment to Rule 17g-2(d).
146 Paragraph (b)(8) of Rule 17g-2.

The Commission requested comment in the June 16, 2008 Proposing Release on the burdens that would result from the proposed amendments to Rule 17g-2.[147] The Commission received one comment regarding the PRA estimate for Rule 17g-2.[148] This commenter, a large NRSRO, stated that the Commission has significantly underestimated the initial and ongoing recordkeeping burdens associated with its proposed changes to NRSROs' recordkeeping requirements.[149]

The same large NRSRO submitted comments specific to the proposed amendment to Rule 17g-2(d) which would have required disclosure of the histories of rating actions for outstanding credit ratings in an XBRL format. The commenter stated that developing and agreeing upon the taxonomy and tags for an XBRL data file would take at least several hundred hours over several months or even longer and that ongoing maintenance of the database could easily exceed two months per year.[150] The Commission notes that the amendment as adopted specifies that in making the required information available on its Web site, an NRSRO will use the List of XBRL Tags for NRSROs as specified on the Commission's Web site, thus eliminating the need for an NRSRO to develop its own taxonomy and tags. In addition, as adopted, the amendment to Rule 17g-2(d) limits the requirement to the disclosure of a random sample of 10% of the issuer-paid credit rating histories for each ratings class for which an NRSRO has issued 500 or more issuer-paid credit ratings. This is a substantial reduction from the amount of information that would have been required by the amendment as proposed. Consequently, the amount of time required to comply with the amendment to Rule 17g-2(d), as adopted, will be

147 See June 16, 2008 Proposing Release, 73 FR at 36238-36239.
148 See Moody's Letter.
149 Id.
150 Id.

significantly reduced for what would have been required under the proposal. Finally, the Commission notes that, in order to allow NRSROs sufficient time to implement the new disclosure requirement of Rule 17g-2(d), as amended, the compliance date for that amendment will be 180 days after publication in the Federal Register.

In addition to its comments on the XBRL portion of the proposed amendments to Rule 17g-2, the same large NRSRO submitted comments on the proposed amendment to Rule 17g-2 regarding records of material deviation from model output and the recording of complaints relating to analysts. With respect to the record of material deviation from model output, the commenter stated it would take analysts, supervisors, and senior management more than 150 hours to determine which quantitative models were a "substantial component" in determining ratings; 200 hours for compliance, legal and IT staff to develop policies, amend schedules and modify systems to comply with the rule; and 1,500 hours to develop compliance procedures and training materials. On an ongoing basis, the commenter estimated that it would take approximately 60-90 minutes to create, approve and file each record related to this amendment. Finally, the commenter estimated that, on an annual basis, it would spend 40 to 80 hours per year on compliance reviews and 200 hours per year on training.[151] In response to comments on the proposed rule language, the Commission narrowed the application of Rule 17g-2(a)(2)(iii) to ratings of structured finance products only. This will lessen the recordkeeping burden on an NRSRO and be responsive to commenters' concerns that the requirement could have negative effects on the ratings process for other classes of credit ratings where qualitative analysis is predominant and models have a more marginal role.

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151 Id.

Finally, the same NRSRO commenter estimated that with respect to the records of complaints about analysts under Rule 17g-2(b)(8), it would take approximately 100 hours to implement the proposed rule, draft a policy, and change its systems to capture the required records, as well as 1,500 hours to develop compliance procedures and a training module. On an ongoing basis, the commenter estimated it would take approximately 10 to 100 hours to follow-up and document each complaint. Finally, on an annual basis, the commenter estimated it would spend approximately 40 to 80 hours per year on compliance reviews and 150 hours per year on training.[152] With respect to this requirement, the Commission notes that it intends the rule to apply only to communications received by the NRSRO from outside parties such as subscribers or entities that pay to obtain credit ratings. The amendment was not intended to require the retention of complaints sent internally between, for example, employees of the NRSRO. Further, the Commission has clarified that the rule does not apply to oral communications.

Based on the modifications and clarifications discussed above, the Commission believes that the actual time expenditures of NRSROs in complying with the rules will be less than the commenter's estimates. Nonetheless, the Commission is revising its hourly burden estimates upward in response to the comment.

With respect to the amendments to Rule 17g-2, the Commission estimates, based on staff information gained from the NRSRO examination process and in response to comments received, that the total one-time and annual recordkeeping burdens will increase approximately 15% and 10%, respectively. The Commission believes that the one-time burden to set up and/or modify a recordkeeping system to comply with the

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152 Id.

amendments would be greater than the ongoing annual burden. Once an NRSRO has set up or modified its recordkeeping system to comply with the amendments, its annual hour burden would be increased only to the extent it would be required to make and retain additional records. In the June 16, 2008 Proposing Release, the Commission estimated that the total one-time and annual recordkeeping burdens would increase approximately 10% and 5%, respectively.[153] Thus, the Commission estimates that the one-time burden that each NRSRO will spend implementing a recordkeeping system to comply with Rule 17g-2, as amended, will be approximately 345 hours,[154] for a total one-time burden of 10,350 hours for 30 NRSROs,[155] which represents an increase in the currently approved PRA burden under Rule 17g-2 of 1,350 total one-time burden hours.[156] The Commission estimates that an NRSRO would spend an average of 279 hours per year[157] to make and retain records under Rule 17g-2 as amended, for a total annual hour burden under Rule 17g-2 of 8,370 hours.[158] This estimate will result in an increase in the currently approved PRA burden under Rule 17g-2 of 750 annual burden hours.[159] As discussed above, the increase in annual burden hours will result from the increase in the number of records an NRSRO will be required to make and retain under the amendments to Rule 17g-2. The Commission notes that the PRA estimates for Rule 17g-2 are averages across all types of NRSROs expected to be affected by the rule amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global

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153 See June 16, 2008 Proposing Release, 73 FR at 36238-36239.

154 300 hours x 1.15 = 345 hours. This will result in an increase of approximately 45 hours per NRSRO for the one-time hour burden.

155 345 hours x 30 respondents = 10,350 hours.

156 10,350 hours – 9,000 hours = 1,350 hours.

157 254 hours x 1.10 = 279 hours. The amendments would result in an increase of approximately 25 annual burden hours per NRSRO for Rule 17g-2.

158 279 hours x 30 respondents = 8,370 hours.

159 8,370 hours – 7,620 hours = 750 hours.

organizations employing thousands of credit analysts. Consequently, the burden hour estimates for Rule 17g-2 represent the average time across all NRSROs.

In addition, the amendments to Rule 17g-2 require an NRSRO to make publicly available on its Web site in XBRL format ratings action histories for a random sample of 10% of its outstanding issuer-paid credit ratings in each class of credit rating for which it is registered and has determined 500 or more issuer-paid credit ratings.[160] Based on information furnished on Form NRSRO, seven of the ten currently registered NRSROs issue 500 or more issuer-paid credit ratings in at least one of the classes of credit ratings for which they are registered. The Commission believes that even as the number of registered NRSROs expands to the 30 ultimately expected to register, this number will remain relatively constant, as new entrants are likely to predominantly determine subscriber-paid credit ratings, at least in the near future. In addition, the Commission believes that each of the NRSROs affected by this new requirement already has, or will have, an Internet Web site. As noted above, the amendment as adopted specifies that in making the required information available on its Web site, an NRSRO will use the List of XBRL Tags for NRSROs as specified on the Commission's Web site, thus eliminating the need for an NRSRO to develop its own taxonomy and tags and significantly reducing the amount of time required to comply with the amendment.

Therefore, based on staff experience, the Commission estimates that, on average, an NRSRO subject to the requirement will spend approximately 30 hours to publicly disclose the required information in an XBRL format and, thereafter, 10 hours per year to

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160 See amendment to Rule 17g-2(d).

update this information.[161] Accordingly, the total aggregate one-time burden to the industry to make the history of rating actions publicly available in an XBRL format will be 210 hours,[162] and the total aggregate annual burden hours will be 70 hours.[163]

Under the currently approved PRA collection for Rule 17g-2, the Commission estimated that an NRSRO may need to purchase recordkeeping system software to establish a recordkeeping system in conformance with Rule 17g-2.[164] The Commission estimated that the cost of the software would vary based on the size and complexity of the NRSRO. Also, the Commission estimated that some NRSROs would not need such software because they already have adequate recordkeeping systems or, given their small size, such software would not be necessary. Based on these estimates, the Commission estimated that the average cost for recordkeeping software across all NRSROs would be approximately $1,000 per firm, with an aggregate one-time cost to the industry of $30,000.[165] In response to comments discussed above, the Commission estimates that the amendments to Rule 17g-2 would alter this per firm estimate upward by approximately $800.[166] For example, in the PRA for the proposed rules requiring the submission of risk/return summary information using interactive data, the Commission estimated that software and consulting services would be used by mutual funds for an increase of approximately $803 per mutual fund.[167] The Commission believes that the requirement

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161 The Commission also bases this estimate on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO. No alternatives to these estimates as proposed were suggested by commenters. See June 5, 2007 Adopting Release, 72 FR at 33609.

162 30 hours x 7 NRSROs = 210 hours.

163 10 hours x 7 NRSROs = 70 hours.

164 See June 5, 2007 Adopting Release, 72 FR at 33609, 33610.

165 Id.

166 See Interactive Data for Mutual Fund Risk/Return Summary, Securities Act Release No. 8929 (June 10, 2008), 73 FR 35442 (June 23, 2008).

167 Id.

to publicly disclose certain ratings action histories in an XBRL format would result in a similar cost.

3. Amendment to Rule 17g-3

Rule 17g-3 requires an NRSRO to furnish certain financial reports to the Commission on an annual basis, including audited financial statements as well as other financial reports.[168] The Commission is amending Rule 17g-3 to require an NRSRO to furnish the Commission with an additional report: an unaudited report of the number of credit ratings actions (upgrades, downgrades, placements on credit watch, and withdrawals) taken during the fiscal year in each class of credit ratings identified in section 3(a)(62)(B) of the Act (15 U.S.C. 78c(a)(62)(B)) for which the NRSRO is registered with the Commission.[169]

The total annual burden currently approved by OMB for Rule 17g-3 is 6,000 hours, based on the fact that it will take an NRSRO, on average, approximately 200 hours to prepare for and file the annual reports.[170] In addition, the total annual cost burden currently approved by OMB is $450,000 to engage the services of an independent public accountant to conduct the annual audit as part of the preparation of the first report required by Rule 17g-3.[171] This estimate is based on 30 NRSROs hiring an independent public accountant on an annual basis for an average of $15,000.[172]

The Commission requested comment in the June 16, 2008 Proposing Release on the burdens that would result from the proposed amendments to Rule 17g-3.[173] One

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168 17 CFR 240.17g-3.

169 See Rule 17g-3(a)(6).

170 200 hours x 30 NRSROs = 6,000 hours. See June 5, 2007 Adopting Release, 72 FR at 33610.

171 Rule 17g-3 currently requires six reports. Only the first report – financial statements – need be audited.

172 $15,000 x 30 NRSROs = $450,000. See June 5, 2007 Adopting Release, 72 FR at 33610.

173 See June 16, 2008 Proposing Release, 73 FR at 36239.

commenter, a large NRSRO, estimated that it would cost $300,000 to build and test a system to comply with this amendment and that its ongoing costs would be $70,000 per year.[174] The commenter did not provide specific data and analysis to support the estimates.[175] The Commission believes that most NRSROs already will have the information that it needs in order to comply with the amendment to Rule 17g-3 with respect to each class of credit ratings for which it is registered. In addition, the Commission emphasizes that this amendment does not prescribe a specific format for the report. Consequently, the Commission believes that the actual time expenditures of NRSROs in complying with the rule amendment will be less than the commenter's estimates. Nonetheless, the Commission is revising its PRA estimate for Rule 17g-3 upward in response to the comment.

The Commission, based on the comment received and staff experience, estimates that the average time necessary for an applicant or NRSRO to establish an internal process to conform its systems to generate a report in compliance with the amendment will be 100 hours per NRSRO, for a total one-time hour burden to the industry of 3,000 hours.[176] The Commission believes that once an NRSRO complies with the amendment to Rule 17g-3 in the first year, that preparation of the new annual report will become routine. To account for this one-time burden of 3,000 hours and the possibility that new credit rating agencies will register as NRSROs, the Commission is averaging this burden estimate over the three year approval period. Consequently, the Commission is increasing the annual burden estimate by 1,000 hours for a total annual burden estimate for Rule 17g-3 of 7,000 hours.

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174 See S&P Letter.

175 Id.

176 100 hours x 30 NRSROs = 3,000 hours.

E. Collection of Information Is Mandatory

The recordkeeping requirements for the rule amendments are mandatory.

F. Confidentiality

The disclosures required under the amendments to Rule 17g-1 and Form NRSRO will be made publicly available on Form NRSRO. The books and records information to be collected under the amendments to Rule 17g-2 will be stored by the NRSRO and made available to the Commission and its representatives as required in connection with examinations, investigations, and enforcement proceedings. However, an NRSRO will be required to make public, in XBRL format and with a six-month grace period, the ratings action histories for a random sample of 10% of the issuer-paid credit ratings for each ratings class for which it has issued 500 or more issuer-paid credit ratings.[177] The information collected under the amendment to Rule 17g-3 will be generated from the internal records of the NRSRO and will be furnished to the Commission on a confidential basis, to the extent permitted by law.[178]

IV. COSTS AND BENEFITS OF THE AMENDED RULES

The Commission is sensitive to the costs and benefits that result from its rules. The Commission identified certain costs and benefits arising from these amendments and requested comment on all aspects of the cost-benefit analysis contained therein, including identification and assessment of any costs and benefits not discussed in the analysis.[179]

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177 Amendment to Rule 17g-2(d).

178 15 U.S.C. 78o-7(k).

179 For the purposes of this cost/benefit analysis, the Commission is using salary data from the Securities Industry and Financial Markets Association ("SIFMA") Report on Management and Professional Earnings in the Securities Industry 2007, which provides base salary and bonus information for middle-management and professional positions within the securities industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. Finally, the salary costs derived from the report and referenced in this cost benefit section, are modified to account for an 1800-

The Commission sought comment and data on the value of the benefits identified. The Commission also requested comment on the accuracy of the cost estimates in each section of the cost-benefit analysis, and requested those commenters to provide data so the Commission could improve the cost estimates, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission requested estimates and views regarding the costs and benefits for particular types of market participants, as well as any other costs or benefits that might result from the adoption of the rule amendments.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.[180] As the Senate Report states, the Rating Agency Act establishes "fundamental reform and improvement of the designation process" to further the belief that "eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs."[181]

The Commission requested comment on all aspects of the benefits of the amendments as proposed.[182] In addition, the Commission requested specific comment on available metrics to quantify these benefits and any other benefits the commenter may

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hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission used comparable assumptions in adopting the final rules implementing the Rating Agency Act in 2007, requested comments on such assumptions, and received no comments in response to its request. See June 5, 2007 Adopting Release, 72 FR at 33611, note 576. Hereinafter, references to data derived from the report as modified in the manner described above will be cited as "SIFMA 2007 Report as Modified."

180 Senate Report, p. 2.

181 Id, p. 7.

182 See June 16, 2008 Proposing Release, 73 FR at 36241-36243.

identify, including he identification of sources of empirical data that could be used for such metrics.[183] The Commission did not receive any comments in response to this request.

The amendments are designed to further the goals of the Rating Agency Act, including fostering transparency in the credit rating agency industry. Since the adoption of the final rules implementing the Rating Agency Act in 2007,[184] the Commission has identified a number of areas where it is appropriate to enhance the current regulatory program for NRSROs.

Consequently, the Commission is adopting amendments that enhance the disclosure of credit ratings performance measurement statistics; increase the disclosure of information about the assets underlying structured finance products; require more information about the procedures and methodologies used to determine structured finance ratings; and address conflicts of interest arising from the structured finance rating process. As discussed below, the Commission believes that these amendments will further the purpose of the Rating Agency Act to improve the quality of credit ratings by fostering accountability, transparency, and competition in the credit rating industry, particularly with respect to credit ratings for structured finance products.[185]

Rule 17g-1 prescribes a process for a credit rating agency to register with the Commission as an NRSRO using Form NRSRO, [186] and requires that a credit rating agency provide information required under Section 15E(a)(1)(B) of the Exchange Act

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183 Id.

184 See June 5, 2007 Adopting Release.

185 See Senate Report, p. 2.

186 See Rule 17g-1.

and certain additional information.[187] Form NRSRO is also the means by which NRSROs update the information they must publicly disclose. The amendments to the instructions to Exhibit 1 to Form NRSRO will require NRSROs to provide more detailed performance statistics and, thereby, make it easier for users of credit ratings to compare the ratings performance of the NRSROs.[188] In addition, these amendments will make it easier for an NRSRO to demonstrate that it has a superior ratings methodology or competence and, thereby, attract clients.

The amendments to the instructions to Exhibit 2 of Form NRSRO are designed to provide greater clarity around three areas of the NRSROs' rating processes that have raised concerns in the context of the recent credit market turmoil: the level of verification performed on information provided in loan documents; the quality of loan originators; and the on-going surveillance of existing ratings and how changes made to a model used for initial ratings are applied to existing ratings. The additional information provided by the amendments will assist users of credit ratings in making more informed decisions about the quality of an NRSRO's ratings processes, particularly with regard to structured finance products.

The Commission believes that these enhanced disclosures in the Exhibits to Form NRSRO will make it easier for market participants to select the NRSROs that are performing well and have the highest quality processes for determining credit ratings. The Commission expects that providing market participants with enhanced disclosures will lead to increased competition and the promotion of capital formation through a restoration of confidence in credit ratings.

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187 See Section 15E(a)(1)(B) of the Exchange Act. 15 U.S.C. 78o-7(a)(1)(B).

188 17 CFR 240.17g-1 and Form NRSRO.

The amendments to Rule 17g-2 are designed to provide greater documentation of the ratings process to assist Commission staff in its examination function as well as to provide greater information to users of issuer-paid credit ratings about the performance of an NRSRO's issuer-paid credit ratings. The additional records will be: (1) a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating for a structured finance product;[189] (2) a record showing the history and dates of all previous rating actions with respect to each outstanding credit rating; (3) a record, to be made publicly available, showing the history and dates of a 10% random sample of issuer-paid credit ratings, for each ratings class for which an NRSRO is registered and has issued 500 or more issuer-paid credit ratings, of all previous rating actions with respect to each outstanding credit rating;[190] and (4) any written complaints regarding the performance of a credit analyst in determining credit ratings.[191] These records will assist the Commission in monitoring whether an NRSRO is complying with provisions of Section 15E of the Exchange Act and the rules thereunder. The Commission will be better able to monitor whether an NRSRO is operating consistently with the methodologies and procedures it establishes (and discloses) to determine credit ratings and its policies and procedures designed to ensure the impartiality of its credit ratings, including its ratings of structured finance products.

In addition, the amendment to Rule 17g-2(d) will require an NRSRO to make publicly available a random sample of 10% of the issuer-paid credit ratings actions

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189 Paragraph (a)(2)(iii) of Rule 17g-2.
190 Paragraph (a)(8) of Rule 17g-2.
191 Paragraph (b)(8) of Rule 17g-2.

histories, in an XBRL format and with a six-month grace period, for each ratings class for which it has issued 500 or more issuer-paid credit ratings. This XBRL disclosure requirement will allow the marketplace to better compare the performance of different NRSROs that determine issuer-paid credit ratings, since it will shift the source of data formatting from end-users to NRSROs submitting interactive data, thus eliminating the need for end-users to make interpretive decisions on how to compare data fields across NRSROs' reported rating histories. This additional disclosure also may make NRSROs more accountable for their issuer-paid credit ratings by enhancing the transparency of their ratings performance. The Commission believes the XBRL format will benefit market participants seeking to develop their own performance statistics using the ratings history data to be made public by the NRSROs because it will require them to present the information in a standard format. Making the information available in an XBRL format will facilitate the process of creating better and more useful means to analyze how a given NRSRO performed in a certain class of issuer-paid credit ratings and compare that broader performance across NRSROs subject to the public disclosure rule, increasing the transparency of the results of their rating processes and encouraging competition within the industry by making it easier for users of issuer-paid credit ratings to judge the output of such NRSROs. As noted above, the Commission believes that the XBRL format will increase access to information in the financial marketplace and transform the manner in which individual investors, financial intermediaries, analysts, the financial media, and others access, use, and ultimately understand the wealth of available data. Requiring NRSROs to provide this disclosure in a single industry standard format will offer market

participants the benefits of simplification, increased transparency, and ease of comparisons.

The amendment to Rule 17g-3 will require an NRSRO to furnish an additional annual report to the Commission: an unaudited report of the number of credit ratings actions (upgrades, downgrades, placements on credit watch, and withdrawals) taken during the fiscal year in each class of credit ratings identified in section 3(a)(62)(B) of the Act (15 U.S.C. 78c(a)(62)(B)) for which the NRSRO is registered with the Commission..[192] The new report is designed to enhance the Commission's oversight of NRSROs by providing the Commission with additional information to assist in the monitoring of NRSROs for compliance with their stated policies and procedures. For example, the proposed new report will allow examiners to target potential problem areas in an NRSRO's rating processes by highlighting spikes in rating actions within a particular class of credit rating.

The amendments to Rule 17g-5 will prohibit an NRSRO from issuing or maintaining a credit rating where the NRSRO or an affiliate provided recommendations on the structure of the transaction being rated; a credit analyst or person involved in the ratings process participated in fee negotiations; or a credit analyst or a person responsible for approving a credit rating received gifts from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than $25.[193] The Commission believes that the amendments to Rule 17g-5 will promote the disclosure and management of conflicts of interest and mitigate potential

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192 See Rule 17g-3(a)(6).

193 See Rule 17 CFR 240.17g-5(c)(5)-(7).

undue influences on an NRSRO's credit rating process, particularly with respect to credit ratings for structured finance products.[194] These amendments will, in turn, increase confidence in the integrity of NRSRO ratings and, thereby, promote capital formation.

B. Costs

The cost of compliance to a given NRSRO will depend on its size and the complexity of its business activities. The size and complexity of the ten NRSROs vary significantly. For example, the three largest NRSROs account for approximately 98% of all outstanding credit ratings as reported on their most recent Form NRSROs. In addition, these three NRSROs also employ approximately 92% of the credit analysts among the ten registered NRSROs. In the June 16, 2008 Proposing Release, the Commission provided estimates of the average cost per NRSRO as a result of the proposed amendments, taking into consideration the range in size and complexity of NRSROs and the fact that many already may have established policies, procedures and recordkeeping systems and processes that would comply substantially with the amendments.[195]

The Commission also sought comment on its cost estimates and the assumptions behind the estimates. One of the largest NRSROs provided cost data for the proposed rules but, significantly, only in summary form.[196] That is, the NRSRO provided estimates for the total one-time and on-going costs to comply with each proposed rule but did not identify the particular components of each total cost estimate. For example, the NRSRO did not identify the amount of each cost estimate that would be due to internal costs such as employee salaries and internal systems developments; nor the amount of

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194 See 15 U.S.C. 78o-7(a)(1)(B)(vi) and (h).

195 See June 16, 2008 Proposing Release, 73 FR at 36243-36247.

196 See S&P Letter.

each cost that would be due to external costs such as the need to purchase software to comply with a recordkeeping requirement in a rule. Nonetheless, the Commission believes that the summary form cost estimates provided by the NRSRO do provide some basis for revising the Commission's earlier cost estimates because they reflect the experience of a large highly complex NRSRO that has been subject to existing Commission rules. However, the Commission does note that, because the cost estimates were provided in summary form, the Commission cannot identify specific components of the cost estimates that are linked to a recordkeeping requirement and, therefore, subject to the PRA. Consequently, the Commission continued to analyze the PRA burden estimates separately from these summary cost estimates.

For the reasons discussed above, the cost estimates below are calculated for two categories of NRSROs. The first category is comprised of the three largest NRSROs in terms of the number of credit ratings outstanding. As noted above, these three firms account for 98% of the credit ratings outstanding. The second category is comprised of the seven smaller NRSROs currently registered with the Commission. These NRSROs account for the remaining 2% of credit ratings outstanding. The theory behind this analysis is that the total cost to the NRSRO industry resulting from an amendment will be incurred by each NRSRO in approximate proportion to the percentage of the total credit ratings it issues. As discussed below, the Commission is determining a total cost to the industry using the summary cost figures provided by the large NRSRO by estimating that, since this firm accounts for 47% of the credit ratings outstanding, its summary cost estimate is 47% of the total cost to the industry. Having derived a total cost to the industry using this NRSRO's summary cost estimates, the Commission allocates a

percentage of that total cost to the two different categories of NRSROs: 98% for the first category and 2% for the second category. Further, the Commission estimates an average cost per NRSRO by dividing the amount of the total cost allocated to the first category by the three NRSROs in that category and the amount of the total cost allocated to the second category of NRSROs by the seven NRSROs in that category.

The Commission continues to estimate that 30 NRSROs ultimately may register. However, because the Commission assumes the total number of ratings extant would remain stable, the total cost to the industry likely would remain stable and be reallocated among new entrants. Therefore, for the purposes of cost estimates derived using this analysis, the Commission is not including the potential 20 new entrants in either the first or second categories of NRSROs for the purposes of determining the cost per NRSRO.

Additionally, the Commission notes that ten credit rating agencies are currently registered with the Commission as NRSROs and subject to the statutory and regulatory requirements for NRSROs. The cost of compliance to these firms will vary depending on which classes of credit ratings an NRSRO issues. For example, NRSROs that issue credit ratings for structured finance products – the focus of many of these new requirements – will incur higher compliance costs than NRSROs that do not issue credit ratings or that issue relatively few credit ratings in that class. The Commission notes that the bulk of the structured finance credit ratings outstanding are issued by NRSROs in the first category.

This method of calculating costs also differs from the one used in the June 16, 2008 Proposing Release in that it is not derived by multiplying the number of burden hours estimated for purposes of the PRA by hourly costs of personnel expected to

undertake the responsibilities for complying with the amendment. As noted above, the Commission received summary cost data from the NRSRO in its comments that did not separate internal costs from external costs or paperwork burdens from other economic impacts. Nonetheless, the Commission believes that using the summary cost information provided by the NRSRO allows for a more robust method of estimating the total economic impact of the amendments. The Commission believes that for purposes of the cost-benefit analysis this methodology provides a more conservative method for estimating costs because it is based on the experience of an NRSRO that has been subject to existing Commission rules and it accounts for the substantial variance in size and complexity of the 10 registered NRSROs. For example, the methodology provides a basis for assessing the different cost impacts the rules will have on the largest NRSROs, which skew the total costs to the industry.

1. Amendments to Form NRSRO

The Commission is amending the instructions to Exhibit 1 to Form NRSRO to require the disclosure of more detailed performance statistics. Currently, the instructions require the disclosure of performance measurement statistics of the credit ratings of the "Applicant/NRSRO over the short-term, mid-term and long-term periods (as applicable) through the most recent calendar year end." The new amendments refine these instructions to require the disclosure of separate sets of default and transition statistics for each class of credit ratings. In addition, the class-by-class disclosures need to be broken out over 1, 3 and 10 year periods.[197]

The Commission also is amending the instructions to Exhibit 2 to Form NRSRO to require enhanced disclosures about the procedures and methodologies an NRSRO uses

[197] See instructions to Exhibit 1, Form NRSRO.

to determine credit ratings, including whether and, if so, how information about verification performed on assets underlying a structured finance transaction is relied on in determining credit ratings; whether and, if so, how assessments of the quality of originators of assets underlying a structured finance transaction factor into the determination of credit ratings; and how frequently credit ratings are reviewed, whether different models are used for ratings surveillance than for determining credit ratings, and whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings.

In the June 16, 2008 Proposing Release, the Commission preliminarily stated that it believed NRSROs may incur a cost of compliance in updating their performance metric statistics to conform to the new requirements set forth in the proposed rule amendments.[198] Specifically, the Commission estimated that it would take each NRSRO currently registered with the Commission approximately 50 hours to review its performance measurement statistics and to develop and implement any changes necessary to comply with the proposed amendment.[199] For these reasons, the Commission originally estimated that the average one-time cost to an NRSRO would be $12,740[200] and the total aggregate cost to the currently registered NRSROs would be $114,660.[201]

The Commission received one comment on these proposed costs. The commenter, a large NRSRO, estimated that it would have to build systems to comply with each new amendment to Form NRSRO, resulting in a one-time cost to the NRSRO

198 See June 16, 2008 Proposing Release, 73 FR at 36244.

199 Id.

200 The Commission estimated that a Compliance Attorney (40 hours) and a Programmer Analyst (10 hours) would perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly rates for a Compliance Attorney and a Programmer Analyst are $270 and $194 per hour, respectively. Therefore, the average one-time cost to an NRSRO would be $12,740 [(40 hours x $270) + (10 hours x $194)].

201 $12,740 x 9 NRSROs = $114,660.

of $6,710,000.[202] The commenter further estimated that its costs on an annual basis would be $1,860,000.[203] The commenter did not break down these cost estimates or provide supporting data. Although the Commission believes existing systems could be adjusted instead of rebuilt to comply with the new Exhibit instructions, the Commission is taking into account the comment received regarding the cost and, therefore, is revising its cost estimates.

The Commission believes the costs incurred by the NRSROs will be in approximate proportion to the number of credit ratings they issue. The commenter that provided cost estimates for this rule amendment is the largest NRSRO in terms of credit ratings outstanding. As such, it accounts for approximately 47% of the total outstanding credit ratings reported by all registered NRSROs on their most recent Form NRSROs. The Commission estimates that this NRSRO will incur 47% of the total costs to the NRSROs from this amendment. Consequently, the total one time cost to the industry will be approximately $14,276,600[204] and the total annual cost to the industry will be $3,957,400.[205] Furthermore, the three largest NRSROs constituting the first category account for approximately 98% of the total credit ratings outstanding among all NRSROs and, therefore, the Commission estimates they will incur approximately $13,991,100[206] of the total one-time cost to the industry and approximately $3,878,300[207] of the total annual cost to the industry. Consequently, the Commission estimates that they will incur approximately $4,663,700[208] per firm in one time costs and approximately $1,292,800[209]

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202 See S&P Letter.

203 Id.

204 $6,710,000 x 100 = $671,000,000; $671,000,000/47 = $14,276,600.

205 $1,860,000 x 100 = $186,000,000; $186,000,000/47 = $3,957,400.

206 $14,276,600 x .98 = $13,991,100.

207 $3,957,400 x .98 = $3,878,300

208 $13,991,100/3 = $4,663,700.

per firm in annual costs. The seven remaining NRSROs account for 2% of the credit ratings outstanding among all NRSROs and, therefore, the Commission estimates they will incur approximately $285,500[210] of the total one time costs to the industry and approximately $79,100[211] the total annual costs to the industry. Consequently, the Commission estimates that they will incur approximately $40,790[212] per firm in one time costs and $11,300[213] per firm in annual costs. The Commission further estimates that the cost per NRSRO within each category will vary based on their relative sizes.

Finally, the Commission has made changes to the final amendments to Form NRSRO that will minimize the burdens. Therefore, the Commission anticipates that the costs could be lower than those estimated here for NRSROs in both the first and second categories.

2. Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and preserve specified records related to its credit rating business as well as to make a portion of those records available publicly.[214] The amendments to Rule 17g-2 will require an NRSRO to make and retain two additional records and retain a third type of record. The records to be made and retained are: (1) a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating;[215] and (2) a record showing the history and dates of all previous rating actions with respect to each

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209 $3,878,300/3 = $1,292,800.
210 $14,276,600 x .02 = $285,500.
211 $3,957,400 x .02 = $79,100.
212 $285,500/7 = $40,790.
213 $79,100/7 = $11,300.
214 17 CFR 240.17g-2.
215 Paragraph (a)(2)(iii) of Rule 17g-2.

outstanding credit rating.[216] In addition, the amendments will require an NRSRO to make publicly available a random sample of 10% of the issuer-paid credit ratings actions histories, in an XBRL format and with a six-month grace period, for each ratings class for which it has issued 500 or more ratings under the issuer-pay model.[217] Finally, the amendments will require an NRSRO to retain written communications that contain any complaints by an obligor, issuer, underwriter, or sponsor about the performance of a credit analyst.[218]

The Commission requested comment in the June 16, 2008 Proposing Release on the costs that would result from the proposed amendments to Rule 17g-2.[219] In addition, the Commission requested specific comment on whether the proposals imposed costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs.[220] The Commission asked that commenters provide specific data and analysis to support any comments they submit with respect to the burden estimates.[221] The Commission received two comments on the proposed amendments.[222] The first commenter, a large NRSRO, stated that the comment period did not provide time to fully assess the costs and benefits of the proposed rule.[223] The second commenter, also a large NRSRO, stated that its one-time cost would be $10,660,000 and its annual cost would be $3,260,000.[224] The commenter did not provide any data or analysis to support this view.

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216 Paragraph (a)(8) of Rule 17g-2.
217 Paragraph (d) of Rule 17g-2.
218 Paragraph (b)(8) of Rule 17g-2.
219 See June 16, 2008 Proposing Release, 73 FR at 36244-36245.
220 Id.
221 Id.
222 See Moody's Letter; S&P Letter.
223 See Moody's Letter.
224 See S&P Letter.

The Commission is sensitive to the costs of the new amendments to NRSROs. The Commission is therefore revising its cost estimates based on the comments received.[225] The Commission believes the costs incurred by the NRSROs will be in approximate proportion to the number of credit ratings they issue. The commenter that provided cost estimates for this rule amendment is the largest NRSRO in terms of credit ratings outstanding, accounting for approximately 47% of the total outstanding credit ratings reported by all registered NRSROs on their most recent Form NRSROs. The Commission estimates that this NRSRO will incur 47% of the total costs to the NRSROs from this amendment. Consequently, the total one time cost to the industry will be approximately $22,680,900[226] and the total annual cost to the industry will be $6,936,200.[227] Furthermore, the three largest NRSROs constituting the first category account for approximately 98% of the total credit ratings outstanding among all NRSROs and, therefore, the Commission estimates they will incur approximately $22,227,300[228] of the total one-time cost to the industry and approximately $6,797,500[229] of the total annual cost to the industry. Consequently, the Commission estimates that they will incur approximately $7,409,100[230] per firm in one time costs and $2,265,800[231] per firm in annual costs.

The seven remaining NRSROs account for 2% of the credit ratings outstanding among all NRSROs and, therefore, the Commission estimates they will incur

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225 To address commenter concerns, the Commission has employed a different methodology for these cost estimates than that used in the June 16, 2008 Proposing Release. For a discussion of the Commission's original cost estimates, see June 16, 2008 Proposing Release, 73 FR at 36244 – 36245.

226 $10,660,000 x 100 = $1,066,000,000; $1,066,000,000/47 = $22,680,900.

227 $3,260,000 x 100 = $326,000,000; $326,000,000/47 = $6,936,200.

228 $22,680,900 x. 98 = $22,227,300.

229 $6,936,200 x .98 = $6,797,500.

230 $22,227,300/3 = $7,409,100.

231 $6,797,500/3 = $2,265,800.

approximately $453,600[232] of the total one time costs to the industry and approximately $138,700[233] of the total annual costs to the industry. Consequently, the Commission estimates that they will incur approximately $64,800[234] per firm in one time costs and $19,810[235] per firm in annual costs. The Commission further estimates that the cost per NRSRO within each category will vary based on their relative sizes.

New paragraph (a)(8) to Rule 17g-2 requires an NRSRO to create and maintain a record showing all rating actions and the date of such actions from the initial rating to the current rating identified by the name or rated security or obligor, and, if applicable, the CUSIP of the rated security or the Central Index Key (CIK) number of the rated obligor.[236] In the June 16, 2008 Proposing Release, the Commission estimated that an NRSRO may choose to purchase a license from the CUSIP Service Bureau in order to access CUSIP numbers for the securities it rates.[237] The CUSIP Service Bureau's operations are covered by fees paid by issuers and licensees of the CUSIP Service Bureau's data. Issuers pay a one-time fee for each new CUSIP assigned, and licensees pay a renewable subscription or a license fee for access and use of the CUSIP Service Bureau's various database services. The CUSIP Service Bureau's license fees vary based

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232 $22,680,900 x .02 = $453,600.

233 $6,936,200 x .02 = $138,700.

234 $453,600/7 = $64,800.

235 $138,700/7 = $19,810.

236 See Rule 17g-2(a)(8). The Central Index Key (CIK) is used on the Commission's computer systems to identify corporations and individual people who have filed disclosure with the Commission. Anyone may search www.edgarcompany.sec.gov for a company, fund, or individual CIK. There is no fee for this service. CUSIP stands for Committee on Uniform Securities Identification Procedures. A CUSIP number identifies most securities, including: stocks of all registered U.S. and Canadian companies, U.S. government and municipal bonds, as well as structured finance issuances. The CUSIP system—owned by the American Bankers Association and operated by Standard & Poor's—facilitates the clearing and settlement process of securities. The CUSIP number consists of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of security.

237 See June 16, 2008 Proposing Release, 73 FR at 36245.

on usage, i.e., how many securities or by type of security or business line.[238] In the June 16, 2008 Proposing Release, the Commission estimated that the license fees incurred by an NRSRO that chose to purchase a license would vary depending on the size of the NRSRO and the number of credit ratings it issues.[239] For purposes of this cost estimate, the Commission estimates that an NRSRO opting to purchase a license would incur a fee of $100,000 to obtain access to the CUSIP numbers for the securities it rates. Consequently, the estimated total one-time cost to the industry would be $3,000,000.[240] The Commission believes that this estimate continues to be valid for the purposes of new paragraph (a)(8) to Rule 17g-2.

Under paragraph (d) of Rule 17g-2, as amended, NRSROs are required to publicly provide the histories of 10% of their issuer-paid credit ratings, in each class of ratings for which they have issued 500 or more such ratings, in XBRL format and with a six month grace period. The main cost of mandated use of the XBRL format likely will be the incremental cost of developing the systems to make the information available on the NRSROs' websites in interactive format rather than machine readable format. The Commission recognizes that new systems will have to be developed regardless of the reporting format. The Commission expects that the incremental cost of reporting credit rating information in XBRL format relative to other machine readable format will not be large. The Commission bases this assessment on the responses collected through voluntary program questionnaires on the direct costs of submitting interactive data-formatted risk/return summary information by mutual funds and interactive data-formatted financial statements by reporting companies. Participating mutual funds

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238 See https://www.cusip.com/static/html/webpage/service_fees.html#lic_fees.

239 See June 16, 2008 Proposing Release, 73 FR at 36245.

240 $100,000 x 30 NRSROs = $3,000,000.

indicated that the estimated direct costs of Web posting of their risk/return summary in interactive data are $23,450 for the first submission and $3,350 for each subsequent submission.[241] Reporting companies, which participated in the voluntary program questionnaire, estimated their direct reporting costs at $40,509 for the first submission and $13,452 for each subsequent submission.[242] The Commission expects that the costs to NRSROs will be closer to those for mutual funds' risk/return summary reporting, since the reporting complexity (and therefore tagging) of credit rating actions is closer to that of risk/return summaries than to quarterly financial reports. The Commission believes the incremental costs allocable to the XBRL requirement are accounted for in the per-firm one-time and annual costs described above for the two categories of NRSROs.

The Commission anticipates that the changes made to the final amendments to Rule 17g-2 will result, for NRSROs in both the first and second categories, in lower costs overall than those estimated in the June 16, 2008 Proposing Release. For example, the Commission is instead requiring that NRSROs provide a 10% sample of their issuer-paid credit ratings histories for each ratings class for which they have issued 500 or more ratings under the issuer-pay model instead of the history for all outstanding credit ratings. In addition, the Commission is specifying that this data be provided in XBRL format using the List of XBRL Tags for NRSROs as specified on the Commission's Web site, thus eliminating the need for an NRSRO to develop its own taxonomy and tags for the data. Finally, the Commission is only requiring that the record of the rationale for any material difference between the credit rating implied by the model and the final credit

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241 Interactive Data for Mutual Fund Risk/Return Summary, Securities Act Release No. 8929 (June 10, 2008), 73 FR 35442 (June 23, 2008).

242 Interactive Data to Improve Financial Reporting, Securities Act Release No. 8924 (May 30, 2008), 73 FR 35442 (June 10, 2008).

rating be kept for structured finance products only, rather than for all classes of ratings. These changes to the amendments to Rule 17g-2 were designed in part to reduce the costs associated with implementing the new amendments.

Finally, one commenter, an NRSRO, suggested that the requirement to post their ratings histories would destroy a revenue stream at the company.[243] Currently, the company charges subscribers a fee to access historical data and information on ratings actions. The Commission believes that the changes to the amendments to Rule 17g-2(d) from those that were proposed address this concern. The amendment now requires NRSROs provide a random 10% sample of their issuer-paid credit ratings histories for each ratings class for which they have issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated with a six-month grace period for posting new ratings actions. The Commission believes the disclosure of 10% of the issuer-paid credit ratings, selected randomly and disclosed with a six-month time lag, will not cause persons who pay for ratings downloads to cease purchasing this service, as customers that are willing to pay for full and immediate access to all of an NRSRO's ratings actions are unlikely to reconsider their purchase of that product due to the ability to access 10% of the ratings on a six-month delayed basis free of charge. In addition, the Commission has decided not to impose the same disclosure obligation on subscriber-paid credit ratings at this time out of competitive concerns raised, but is still considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the rule as adopted will address the concerns expressed by commenters and at the same time foster greater accountability of NRSROs with respect to their issuer-paid credit ratings as

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243 See S&P Letter.

well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

3. Amendment to Rule 17g-3

Rule 17g-3 requires an NRSRO to furnish audited annual financial statements to the Commission, including certain specified schedules.[244] The amendment to Rule 17g-3 will require an NRSRO to furnish the Commission with an additional annual report: an unaudited report of the number of credit ratings that were changed during the fiscal year in each class of credit ratings for which the NRSRO is registered with the Commission. As stated in the June 16, 2008 Proposing Release, the Commission believed that the annual costs to NRSROs to comply with the proposed amendment to Rule 17g-3 would be de minimis.[245] The Commission preliminarily believed that an NRSRO already would have this information with respect to each class of credit ratings for which it is registered.[246] In addition, the amendment does not prescribe a format for the report. Consequently, the Commission estimated that proposed Rule 17g-3(a)(6) would not have a significant effect on the total average annual cost burden currently estimated for Rule 17g-3.[247]

The Commission requested comment in the June 16, 2008 Proposing Release on the costs that would result from the proposed amendments to Rule 17g-3.[248] In addition, the Commission requested specific comment on whether this proposal imposed costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products

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244 17 CFR 240.17g-3.

245 See June 16, 2008 Proposing Release, 73 FR at 36245-36246.

246 Id.

247 Id.

248 Id.

from NRSROs.[249] The Commission asked that commenters provide specific data and analysis to support any comments they submit with respect to these burden estimates. The Commission received one comment on this cost estimate.[250] The commenter, a large NRSRO, estimated that it would cost $300,000 to build and test a system to comply with this amendment and that its ongoing costs would be $70,000 per year.[251] The commenter did not provide specific data and analysis to support the estimates.[252]

The Commission is revising its cost estimates based on the specific costs included in the comments received. The commenter that provided cost estimates for this rule amendment is the largest NRSRO in terms of credit ratings outstanding. As such, it accounts for approximately 47% of the total outstanding credit ratings reported by all registered NRSROs on their most recent Form NRSROs. The Commission estimates that this NRSRO will incur 47% of the total costs to the NRSROs from this amendment. Consequently, the total one time cost to the industry will be approximately $638,300[253] and the total annual cost to the industry will be $148,900.[254] Furthermore, the three largest NRSROs in the first category account for approximately 98% of the total credit ratings issued by the NRSROs and, therefore, the Commission estimates they will incur approximately $625,500[255] of the total one-time cost to the industry and approximately $145,900[256] of the total annual cost to the industry. Consequently, the Commission

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249 Id.
250 Id.
251 See S&P Letter.
252 Id.
253 $300,000 x 100 = $30,000,000; $30,000,000 /47 = $638,300.
254 $70,000 x 100 = $7,000,000; $7,000,000/47 = $148,900.
255 $638,300 x 0.98 = $625,500.
256 $148,900 x 0.98 = $145,900.

estimates that they will incur approximately $208,500[257] per firm in one time costs and $48,600[258] per firm in annual costs.

The seven remaining NRSROs account for 2% of the credit ratings outstanding and, therefore, the Commission estimates they will incur approximately $12,800[259] of the total one time costs to the industry and approximately $3,000[260] of the total annual costs to the industry. Consequently, the Commission estimates that they will incur approximately $1,830[261] per firm in one time costs and $430[262] per firm in annual costs. The Commission further estimates that the cost per NRSRO within each category will vary based on their relative sizes.

4. Amendments to Rule 17g-5

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest and prohibits other conflicts outright.[263] The Commission is amending paragraph (c) to Rule 17g-5 to add three additional prohibited conflicts of interest.[264] In the June 16, 2008 Proposing Release, the Commission estimated that the amendments to paragraph (c) to Rule 17g-5 generally would impose de minimis costs on an NRSRO.[265] However, the Commission recognized that an NRSRO may incur costs related to training employees about the new requirements.[266] The Commission also recognized that it was

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257 $625,500/3 = $208,500.
258 $145,900/3 = $48,600.
259 $638,300 x .02 = $12,800.
260 $148,900 x .02 = $3,000.
261 $12,800/7 = $1,830.
262 $3,000/7 = $430.
263 17 CFR 240.17g-5.
264 See Rule 17g-5(c)(5)-(7).
265 See June 16, 2008 Proposing Release, 73 FR at 36246-36247.
266 Id.

possible that the proposed amendments could require some NRSROs to restructure their business models or activities, in particular with respect to their consulting services.[267]

The Commission requested comment in the June 16, 2008 Proposing Release on the costs that would result from the proposed amendments to Rule 17g-5.[268] In addition, the Commission requested specific comment on whether the proposed amendments to paragraph (c) of Rule 17g-5 would impose training and restructuring costs, would impose personnel costs, or would impose any additional costs on an NRSRO that is part of a large conglomerate related to monitoring the business activities of persons associated with the NRSRO, such as affiliates located in other countries.[269] The Commission asked that commenters provide specific data and analysis to support any comments they submit with respect to these cost estimates.[270] The Commission received two comments on the proposed amendment, both from large NRSROs.[271]

One commenter said that paragraph (c)(6) would cause the NRSRO to create a number of new positions for senior chief credit officers so that drafting, approving and implementing methodologies could be handled exclusively by individuals with no involvement in the business of running an NRSRO.[272] The commenter also stated that it would be necessary for the NRSRO to create additional, senior positions in its issuer and intermediary relations team for individuals, such as former analysts, who were deeply familiar with the NRSRO's methodologies and procedures and could assist with fee negotiations.[273] The NRSRO further stated that it would have to transfer former credit

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267 Id.
268 Id.
269 Id.
270 Id.
271 See Moody's Letter; S&P Letter.
272 See Moody's Letter.
273 Id.

analysts to this team regularly and on an ongoing basis so that this team retained sufficient and current technical knowledge to handle fees.[274] The NRSRO did not provide specific cost estimates. Another commenter stated that it would cost $7,830,000 for personnel time, system modifications, and training to implement the new amendments.[275] In addition, the NRSRO estimated that its annual, ongoing costs would be $2,250,000.[276] The NRSRO did not provide a breakdown of costs with its estimate.

The Commission is revising its cost estimates based on the specific comments received. The Commission believes the costs incurred by the NRSROs will be in approximate proportion to the number of credit ratings they issue. The commenter that provided cost estimates for this rule amendment is the largest NRSRO in terms of credit ratings outstanding. As such, it accounts for approximately 47% of the total outstanding credit ratings reported by all registered NRSROs on their most recent Form NRSROs. The Commission estimates that this NRSRO will incur 47% of the total costs to the NRSROs from this amendment. Consequently, the total one time cost to the industry will be approximately $16,659,600[277] and the total annual cost to the industry will be $4,787,200.[278] Furthermore, the three largest NRSROs in the first category account for approximately 98% of the total credit ratings issued by the NRSROs and, therefore, the Commission estimates they will incur approximately $16,326,400[279] of the total one-time cost to the industry and approximately $4,691,500[280] of the total annual cost to the

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274 Id.
275 See S&P Letter.
276 See id.
277 $7,830,000 x 100 = $783,000,000; $783,000,000/47 = $16,659,600.
278 $2,250,000 x 100 = $225,000,000; $225,000,000/47 = $4,787,200.
279 $16,659,600 x 0.98 = $16,326,400.
280 $4,787,200 x 0.98 = $4,691,500

industry. Consequently, the Commission estimates that they will incur approximately $5,442,100[281] per firm in one time costs and $1,563,800[282] per firm in annual costs.

The seven remaining NRSROs account for 2% of the credit ratings outstanding and, therefore, the Commission estimates they will incur approximately $333,200[283] of the total one time costs to the industry and approximately $95,700[284] of the total annual costs to the industry. Consequently, the Commission estimates that they will incur approximately $47,600[285] per firm in one time costs and $13,760[286] per firm in annual costs. The Commission further estimates that the cost per NRSRO within each category will vary based on their relative sizes.

C. Total Estimated Costs of this Rulemaking

Based on the figures discussed above, the Commission estimates that the first year quantifiable costs related to this proposed rulemaking will be approximately $73,085,100.[287]

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

Under Section 3(f) of the Exchange Act,[288] the Commission shall, when engaging in rulemaking that requires the Commission to consider or determine if an action is necessary or appropriate in the public interest, consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act[289] requires the Commission to consider the anticompetitive effects of any rules the

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281 $16,326,400/3 = $5,442,100.
282 $4,691,500/3 = $1,563,800.
283 $16,659,600 x .02 = $333,200.
284 $4,787,200 x .02 = $95,700.
285 $333,200/7 = $47,600.
286 $95,700/7 = $13,671 = $13,670.
287 $57,255,400 (total one-time costs) + $15,829,700 (total annual costs) = $73,085,100.
288 15 U.S.C. 78c(f).
289 15 U.S.C. 78w(a)(2).

Commission adopts under the Exchange Act. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As discussed below, the Commission believes that the amendments will promote efficiency, competition, and capital formation.

The amendments to the Instructions to Exhibit 1 to Form NRSRO will require NRSROs to make more comparable disclosures about the performance of their credit ratings. These disclosures will provide more information to users of credit ratings about the relative performance of the NRSROs and, thereby, promote competition. In addition, the amendments to the instructions to Exhibit 2 are designed to enhance the disclosures NRSROs make with respect to their methodologies for determining credit ratings. The Commission believes these enhanced disclosures will make it easier for users of credit ratings to compare the quality of the NRSRO's procedures and methodologies for determining credit ratings. The greater transparency that will result from all these enhanced disclosures will make it easier for market participants to select the NRSROs that have the highest quality processes for determining credit ratings. This transparency is designed to increase competition and promote capital formation by restoring confidence in the credit ratings, which are an integral part of the capital formation process.

The amendments to Rule 17g-2 are designed to enhance the Commission's oversight of NRSROs and, with respect to the public disclosure of a percentage of the histories of their issuer-paid credit ratings, provide the marketplace with information for comparing the ratings performance of NRSROs subject to the requirement. Enhancing

the Commission's oversight will help enhance confidence in credit ratings and, thereby, promote capital formation. Increased disclosure of the histories of issuer-paid credit ratings could make the ratings performance of the NRSROs subject to this requirement more transparent to the marketplace and, thereby, highlight those firms that analyze credit risk better. The Commission believes that this enhanced disclosure will benefit smaller NRSROs to the extent they have performed better in determining issuer-paid credit ratings than other NRSROs by alerting the market to their superior performance.

The amendment to Rule 17g-3 is designed to enhance the Commission's oversight of NRSROs. Enhancing the Commission's oversight will help enhance confidence in credit ratings and, thereby, promote capital formation.

The amendments to Rule 17g-5 will prohibit NRSROs from determining credit ratings where they or their affiliate provided recommendations about the corporate or legal structure, assets, liabilities, or activities of the obligor being rated or the issuer of the security being rated, prohibit analysts from participating in fee negotiations, and prohibit credit analysts or persons responsible for approving a credit rating from receiving gifts from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than $25. These proposals are designed to increase confidence in the integrity of NRSROs and the credit ratings they issue and, thereby, enhance confidence in credit ratings and, by extension, promote capital formation.

The Commission received one comment specifically on the Commission's analysis of the whether the amendments would promote efficiency, competition, and

capital formation.[290] The commenter argued that the requirement to publish all ratings histories free of charge would be a "new barrier to entry" and would create "a significant disincentive to apply for the NRSRO designation" thereby reducing competition among NRSROs.[291] The commenter stated that if these amendments were passed, the estimate that there would be 30 NRSROs would need to be revised.

As discussed more fully in section II.B.1, in response to this comment and similar concerns raised by other commenters, the Commission has balanced the many competitive concerns expressed by commenters. The rule is designed to foster competition, by making ratings histories more accessible. However, the Commission has taken a number of steps to minimize the potential competitive effects. First, the amendments do not apply to subscriber-paid credit ratings. Second, with respect to issuer-paid credit ratings, the Commission notes that NRSROs generally make these ratings public. This publicly available, historical information currently is difficult to access and compare. The Commission expects that making this information more accessible will advance the Commission's goal of fostering accountability and comparability among NRSROs. The Commission does not, however, expect that requiring NRSROs to make publicly available ratings action histories for a random sample of 10% of their outstanding issuer-paid credit ratings in a more accessible form six months after the rating action has been taken will have a material effect on their business. Because the Commission is requiring only a small portion of the ratings histories to be made available in a more accessible format, the Commission expects NRSROs will still be able to realize economic value from the information.

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290 See Rapid Ratings Letter.

291 Id.

The Commission has decided not to impose the same disclosure obligation on subscriber-paid credit ratings at this time out of competitive concerns raised, but is still considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the rule as adopted will address the concerns expressed by commenters and at the same time foster greater accountability of NRSROs with respect to their issuer-paid credit ratings as well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

The Commission proposed amendments to Form NRSRO, Rule 17g-2, Rule 17g-3, and Rule 17g-5 under the Exchange Act. An Initial Regulatory Flexibility Analysis ("IRFA") was published in the June 16, 2008 Proposing Release.[292] The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA"), in accordance with the provisions of the Regulatory Flexibility Act,[293] regarding amendments to Form NRSRO, Rule 17g-2, Rule 17g-3, and Rule 17g-5 under the Exchange Act.

A. Need for and Objective of the Amendments

The amendments will prescribe additional requirements for NRSROs to address concerns raised about the role of credit rating agencies in the recent credit market turmoil. The amendments are designed to enhance and strengthen the rules the Commission adopted in 2007 to implement specific provisions of the Rating Agency Act.[294] The objectives of the Rating Agency Act are "to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency,

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292 See June 16, 2008 Proposing Release, 73 FR at 36248-36250.

293 5 U.S.C. 603.

294 Pub. L. No. 109-291 (2006); see also June 5, 2007 Adopting Release.

and competition in the credit rating industry."[295] The amendments are designed to further achieve these objectives and further assist the Commission in monitoring whether an NRSRO complies with the statutes and regulations applicable to NRSROs.

B. Significant Issues Raised by Commenters

The Commission sought comment with respect to every aspect of the IRFA, including comments with respect to the number of small entities that may be affected by the proposed amendments.[296] Commenters were asked to specify the costs of compliance with the proposed rules and suggest alternatives that would accomplish the goals of the rules.[297] The Commission did not receive any comments on the IRFA. The Commission did, however, receive a limited number of comments that discussed the effect the rules might have on smaller credit rating agencies, although these commenters did not address whether their comments pertained to entities that would be small businesses for purposes of Regulatory Flexibility Act analysis. For example, a commenter stated that the proposed amendments, if adopted, would create a barrier to entry for new NRSROs.[298] In addition, several commenters suggested that small NRSROs would not be able to comply with Rule 17g-5(c)(6), which prohibits persons within an NRSRO that are responsible for determining or approving credit ratings or developing the methodologies for determining credit ratings from participating in fee discussions.[299] In response to these comments, the Commission will review requests by small NRSROs for exemptions from the rule under Section 36 of the Exchange Act based on their specific circumstances.

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295 See Senate Report.

296 See June 16, 2008 Proposing Release, 73 FR 36250.

297 Id.

298 See Rapid Ratings Letter.

299 See, e.g., DBRS Letter; Multiple-Markets Letter; CFA Institute Letter; Colorado PERA Letter; ABA Business Law Committees Letter.

C. Small Entities Subject to the Rule

Paragraph (a) of Rule 0-10 provides that for purposes of the Regulatory Flexibility Act, a small entity "[w]hen used with reference to an 'issuer' or a 'person' other than an investment company" means "an 'issuer' or 'person' that, on the last day of its most recent fiscal year, had total assets of $5 million or less."[300] The Commission believes that an NRSRO with total assets of $5 million or less would qualify as a "small" entity for purposes of the Regulatory Flexibility Act.

As noted in the June 5, 2007 Adopting Release, the Commission believes that approximately 30 credit rating agencies ultimately may register as an NRSRO.[301] Of the approximately 30 credit rating agencies that may register with the Commission, the Commission estimates that approximately 20 may be "small" entities for purposes of the Regulatory Flexibility Act.[302]

D. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments will revise Form NRSRO to elicit certain additional information regarding the performance data for the credit ratings and the methods used by an NRSRO for issuing credit ratings.[303]

The amendments will revise Rule 17g-2 to establish additional recordkeeping requirements for NRSROs.[304] The amendments will require an NRSRO to make and retain two additional records and retain a third type of record. The records would be: (1) a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial

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300 17 CFR 240.0-10(a).

301 June 5, 2007 Adopting Release, 72 FR at 33618.

302 See 17 CFR 240.0-10(a).

303 See amendments to Form NRSRO.

304 See amendments to Rule 17g-2.

component in the process of determining a credit rating;[305] and (2) a record showing the history and dates of all previous rating actions with respect to each outstanding credit rating. An NRSRO also will be required to publicly disclose, in XBRL format and on a six month delay, a record showing the history and dates of all previous rating actions with respect to a random sample of 10% of the issuer-paid credit ratings for each ratings class for which an NRSRO is registered and has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated.[306] In addition, the NRSRO will be required to retain any complaints about the performance of a credit analyst.[307] These records will assist the Commission, through its examination process, in monitoring whether the NRSRO continues to maintain adequate financial and managerial resources to consistently produce credit ratings with integrity (as required under the Rating Agency Act) and whether the NRSRO was complying with the provisions of the Exchange Act including the provisions of the Rating Agency Act, the rules adopted thereunder, and the NRSRO's disclosed policies and procedures.

The amendments will revise Rule 17g-3 to require an NRSRO to furnish the Commission with an additional annual report: the number of ratings actions in each class of credit rating for which it is registered.[308] This requirement is designed to further assist the Commission in its examination function.

The amendments will revise Rule 17g-5 to prohibit NRSROs and their affiliates from providing consulting or advisory services, prohibit analysts from participating in fee negotiations, and prohibit credit analysts or persons responsible for approving a credit

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305 Paragraph (a)(2)(iii) of Rule 17g-2.
306 Paragraph (a)(8) of Rule 17g-2.
307 Paragraph (b)(8) of Rule 17g-2.
308 See amendment to Rule 17g-3.

rating from receiving gifts from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than $25.[309]

E. Significant Alternatives

Pursuant to Section 3(a) of the RFA,[310] the Commission must consider certain types of alternatives, including: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission is not establishing different compliance or reporting requirements or timetables. The Commission believes that obtaining comparable information from NRSROs regardless of size is important. Moreover, because the rules are relatively straightforward, the Commission does not believe it necessary to clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities at this time. Because the amendments are designed to improve the overall quality of ratings and enhance the Commission's oversight, the Commission is not proposing to exempt any specific small entities from coverage of the rule, or any part of the rule. However, the Commission would be willing to consider requests for exemptive relief from smaller NRSROs for which the prohibition on participating in fee discussions may

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309 See amendment to Rule 17g-5.

310 5 U.S.C. 603(c).

be more difficult to comply with than for larger NRSROs. The other prohibited conflicts do not appear to impose any disproportionate impact on smaller NRSROs. The amendments are designed to allow NRSROs the flexibility to develop procedures tailored to their specific organizational structure and business models.

VII. STATUTORY AUTHORITY

The Commission is adopting amendments to Form NRSRO and Rules 17g–2, 17g–3, and 17g–5 pursuant to the authority conferred by the Exchange Act, including Sections 3(b), 15E, 17, 23(a) and 36.[311]

Text of the Amendments

List of Subjects in 17 CFR Parts 240 and 249b

Brokers, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. 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, 78u5, 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.

* * * * *

2. Section 240.17g–2 is amended by:

a. Removing paragraph (a)(2)(iv);

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311 15 U.S.C. 78c(b), 78o–7, 78q, 78w, and 78mm.

b. Redesignating paragraph (a)(2)(iii) as paragraph (a)(2)(iv);

c. In newly redesignated paragraph (a)(2)(iv), removing "; and" and in its place adding a period;

d. Adding new paragraph (a)(2)(iii);

e. Adding paragraph (a)(8);

f. In paragraph (b)(7), removing the phrase "maintaining, changing," and in its place adding "maintaining, monitoring, changing,";

g. Redesignating paragraphs (b)(8), (b)(9), and (b)(10) as paragraphs (b)(9), (b)(10), and (b)(11), respectively;

h. Adding new paragraph (b)(8); and

i. In paragraph (d), adding four sentences to the end of the paragraph.

The additions read as follows:

§ 240.17g–2 Records to be made and retained by nationally recognized statistical rating organizations.

(a) * * *

(2) * * *

(iii) If a quantitative model was a substantial component in the process of determining the credit rating of a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued; and

* * * * *

(8) For each outstanding credit rating, a record showing all rating actions and the date of such actions from the initial credit rating to the current credit rating identified by

the name of the rated security or obligor and, if applicable, the CUSIP of the rated security or the Central Index Key (CIK) number of the rated obligor.

(b) * * *

(8) Any written communications received from persons not associated with the nationally recognized statistical rating organization that contain complaints about the performance of a credit analyst in initiating, determining, maintaining, monitoring, changing, or withdrawing a credit rating.

* * * * *

(d) * * * In addition, a nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of this section and which were paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph (d) is withdrawn or the instrument rated matures, the nationally recognized statistical rating organization must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the nationally recognized

statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

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3. Section 240.17g–3 is amended by:

a. Adding paragraph (a)(6); and

b. Revising paragraph (b).

The addition and revision read as follows:

§ 240.17g-3 Annual financial reports to be furnished by nationally recognized statistical rating organizations.

(a) * * *

(6) An unaudited report of the number of credit ratings actions (upgrades, downgrades, placements on credit watch, and withdrawals) taken during the fiscal year in each class of credit ratings identified in section 3(a)(62)(B) of the Act (15 U.S.C. 78c(a)(62)(B)) for which the nationally recognized statistical rating organization is registered with the Commission.

Note to paragraph (a)(6): A nationally recognized statistical rating organization registered in the class of credit ratings described in section 3(a)(62)(B)(iv) of the Act (15 U.S.C. 78c(a)(62)(B)(iv)) must include credit ratings actions taken on credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction for purposes of reporting the number of credit ratings actions in this class.

(b) The nationally recognized statistical rating organization must attach to the financial reports furnished pursuant to paragraphs (a)(1) through (a)(6) of this section a signed statement by a duly authorized person associated with the nationally recognized

statistical rating organization stating that the person has responsibility for the financial reports and, to the best knowledge of the person, the financial reports fairly present, in all material respects, the financial condition, results of operations, cash flows, revenues, analyst compensation, and credit rating actions of the nationally recognized statistical rating organization for the period presented.

* * * * *

4. Section 240.17g–5 is amended by:

a. Removing the word "or" at the end of paragraph (c)(3);

b. Removing the period at the end of paragraph (c)(4) and in its place adding a semi-colon; and

c. Adding paragraphs (c)(5), (c)(6), and (c)(7).

The additions read as follows:

§ 240.17g-5 Conflicts of interest.

* * * * *

(c) * * *

(5) The nationally recognized statistical rating organization issues or maintains a credit rating with respect to an obligor or security where the nationally recognized statistical rating organization or a person associated with the nationally recognized statistical rating organization made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security;

(6) The nationally recognized statistical rating organization issues or maintains a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a

person within the nationally recognized statistical rating organization who has responsibility for participating in determining credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models; or

(7) The nationally recognized statistical rating organization issues or maintains a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than $25.

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PART 249b—FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

6. The authority citation for part 249b continues to read in part as follows:

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

* * * * *

7. Form NRSRO (referenced in § 249b.300) is amended by revising Exhibits 1 and 2 in section H, Item 9 of the Form NRSRO Instructions to read as follows:

Note: The text of Form NRSRO and this amendment does not appear in the Code of Federal Regulations.

Form NRSRO

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Form NRSRO Instructions

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H. INSTRUCTIONS FOR SPECIFIC LINE ITEMS

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Item 9. Exhibits. * * *

Exhibit 1. Provide in this Exhibit performance measurement statistics of the credit ratings of the Applicant/NRSRO, including performance measurement statistics of the credit ratings separately for each class of credit rating for which the Applicant/NRSRO is seeking registration or is registered (as indicated in Item 6 and/or 7 of Form NRSRO). For the purposes of this Exhibit, an Applicant/NRSRO registered in the class of credit ratings described in Section 3(a)(62)(B)(iv) of the Act (15 U.S.C. 78c(a)(62)(B)(iv)) must include credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction for purposes of reporting the performance measurement statistics for this class. In addition, the class of government securities should be separated into three additional classes: sovereigns, United States public finance, and international public finance. The performance measurement statistics must at a minimum show the performance of credit ratings in each class over 1 year, 3 year, and 10 year periods (as applicable) through the most recent calendar year-end, including, as applicable: historical ratings transition and default rates within each of the credit rating categories, notches, grades, or rankings used by the Applicant/NRSRO as an indicator of the assessment of the creditworthiness of an obligor, security, or money market instrument in each class of credit rating. The default statistics must include defaults relative to the initial rating. As part of this Exhibit, define the credit rating categories, notches, grades, and rankings used by the Applicant/NRSRO and explain the performance measurement statistics, including the inputs, time horizons, and metrics used to determine the statistics. If the

Applicant/NRSRO is required to make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format a sample of ratings action information pursuant to the requirements of 17 CFR 240.17g-2(d), provide in this Exhibit the Web site address where this information is, or will be, made publicly available.

Exhibit 2. Provide in this Exhibit a general description of the procedures and methodologies used by the Applicant/NRSRO to determine credit ratings, including unsolicited credit ratings within the classes of credit ratings for which the Applicant/NRSRO is seeking registration or is registered. The description must be sufficiently detailed to provide users of credit ratings with an understanding of the processes employed by the Applicant/NRSRO in determining credit ratings, including, as applicable, descriptions of: policies for determining whether to initiate a credit rating; a description of the public and non-public sources of information used in determining credit ratings, including information and analysis provided by third-party vendors; whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings; the quantitative and qualitative models and metrics used to determine credit ratings, including whether and, if so, how assessments of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction factor into the determination of credit ratings; the methodologies by which credit ratings of other credit rating agencies are treated to determine credit ratings for securities or money

market instruments issued by an asset pool or as part of any asset-backed or mortgaged-backed securities transaction; the procedures for interacting with the management of a rated obligor or issuer of rated securities or money market instruments; the structure and voting process of committees that review or approve credit ratings; procedures for informing rated obligors or issuers of rated securities or money market instruments about credit rating decisions and for appeals of final or pending credit rating decisions; procedures for monitoring, reviewing, and updating credit ratings, including how frequently credit ratings are reviewed, whether different models or criteria are used for ratings surveillance than for determining initial ratings, whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings, and whether changes made to models and criteria for performing ratings surveillance are incorporated into the models and criteria for determining initial ratings; and procedures to withdraw, or suspend the maintenance of, a credit rating. An Applicant/NRSRO may provide in Exhibit 2 the location on its Web site where additional information about the procedures and methodologies is located.

* * * * *

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: February 2, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59371 / February 9, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13363

In the Matter of **CARLOS JAVIER SPINELLI-NOSEDA, Esq.** **Respondent.**	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate to issue an order of forthwith suspension of Carlos Javier Spinelli-Noseda 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. Spinelli was an attorney admitted to practice law in the state of New York.

2. Spinelli regularly appeared and practiced before the Commission as an attorney on behalf of issuers and underwriters.

3. On June 30, 2008, the Chief Counsel for the Departmental Disciplinary Committee for the First Judicial Department of the New York Supreme Court, Appellate Division ("Disciplinary Counsel"), moved for an order accepting Spinelli's resignation from the practice of law in New York and formally striking his name from the New York roll of attorneys.

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[1]Rule 102(e)(2) provides in pertinent part: "Any attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as a[] . . . professional or expert has been revoked or suspended in any State . . . shall be forthwith suspended from appearing or practicing before the Commission."

4. In a notarized affidavit filed with the First Judicial Department of the New York Supreme Court, Appellate Division ("New York Court"), Spinelli admitted that between July 1998 and February 2008, he improperly billed his clients and his former law firm for more than $500,000 in expenses that were either personal, inflated or false.

5. Spinelli also affirmed in his affidavit filed with the New York Court that his conduct involved dishonesty, fraud, deceit and misrepresentation in violation of DR 1-102(A)(4), and that such conduct adversely reflected on his fitness and integrity to practice law in violation of DR 1-102(A)(7).

6. The New York Court on September 23, 2008, duly granted the Disciplinary Counsel's motion and issued an order directing that: (i) Spinelli's resignation from the practice of law be accepted, and (ii) Spinelli's name be struck from the New York roll of attorneys.

III.

In view of the foregoing, the Commission finds that Spinelli is an attorney who has been disbarred from practicing law within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice. Accordingly, it is ORDERED that Carlos Javier Spinelli-Noseda 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.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59390 / February 11, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2933 / February 11, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13369

In the Matter of	
Ronald M. Bandyk, CPA,	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**
Respondent.	

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Ronald M. Bandyk ("Bandyk") 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. Bandyk is a Registered Certified Public Accountant in Illinois.

2. On August 21, 2007, a judgment of conviction was entered against Bandyk in *United States v. Putnam, et al.*, No. 03-CR-268-5, in the United States District Court for the Northern District of Illinois, finding him guilty of one count of securities fraud. The conduct occurred while Bandyk was a vice-president of Anicom, Inc., a publicly traded company.

[1] Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

3. As a result of this conviction, Bandyk was sentenced to 30 days imprisonment in a federal penitentiary and two years of supervised release, and ordered to pay a fine in the amount of $10,000.

III.

In view of the foregoing, the Commission finds that Bandyk 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 Ronald M. Bandyk 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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 11, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13368

In the Matter of	
Jansko, Inc., **JG Industries, Inc.,** **JMXI, Inc. (f/k/a Jupiter Communications, Inc.),** **The Jockey Club, Inc.,** **Juina Mining Corp., Inc. (n/k/a AC Energy, Inc.),** **JumboSports, Inc.,** **Jumpin' Jax Corp.,** **Just Like Home, Inc., and** **Just Toys, 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 Jansko, Inc., JG Industries, Inc., JMXI, Inc. (f/k/a Jupiter Communications, Inc.), The Jockey Club, Inc., Juina Mining Corp., Inc. (n/k/a AC Energy, Inc.), JumboSports, Inc., Jumpin' Jax Corp., Just Like Home, Inc., and Just Toys, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Jansko, Inc. (CIK No. 880433) is a dissolved Florida corporation located in Fort Lauderdale, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Jansko is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB/A for the period ended February 28, 1995, which reported a net loss of $400,000 for the prior nine months.

2. JG Industries, Inc. (CIK No. 42179) is a dissolved Illinois corporation located in Chicago, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). JG is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended January 29, 2000. On November 30, 2001, the company filed a Form 8-K stating that it had sold all of its assets, filed a dissolution certificate, and halted trading.

3. JMXI, Inc. (CIK No. 1039446) (f/k/a Jupiter Communications, Inc.) (CIK No. 1091908) is a dissolved Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). JMXI 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, 2002. JMXI is the result of a merger between Jupiter Communications, Inc. and Media Metrix, Inc., which was also a reporting company with its own CIK number (CIK No. 1039446). The newly merged company, which eventually was renamed JMXI, Inc., started filing its reports under Media Metrix's CIK number and so should also have filed a Form 15 on behalf of Jupiter Communications, but it did not. Thus, this proceeding is brought against both Jupiter Communications and JMXI. The last periodic report filed by JMXI was the Form 10-Q for the period ended September 30, 2002 and the last periodic report filed by Jupiter Communications was the Form 10-Q for the period ended June 30, 2000.

4. The Jockey Club, Inc. (CIK No. 893656) is a dissolved Florida corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Jockey Club is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the period ended July 31, 1995, which reported a net loss of over $3.4 million for the prior nine months. As of February 9, 2009, the company's common stock (symbol "JKCL") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Juina Mining Corp., Inc. (n/k/a AC Energy, Inc.) (CIK No. 1057321) is a revoked Nevada corporation located in Reno, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Sections 12(g). Juina 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 October 1, 1999, which reported a net loss of $481,057 from August 4, 1997 to December 31, 1998. As of February 9, 2009, the company's stock (symbol "ACEN") was quoted on the Pink Sheets, had ten market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

6. JumboSports, Inc. (CIK No. 890093) is a Florida corporation located in Tampa, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Jumbosports 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 July 30, 1999, which reported a net loss of over $10 million for the prior twenty-six weeks. On December 27, 1998, the company filed a Chapter 11 petition with

the U.S. Bankruptcy Court for the Middle District of Florida, and the case was terminated on December 13, 2006. As of February 9, 2009, the company's common stock (symbol "JSIBQ") was quoted on the Pink Sheets, had three market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

7. Jumpin' Jax Corp. (CIK No. 878149) is a Nevada corporation located in Golden Valley, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Jumpin' Jax 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, 1996, which reported a net loss of over $3 million for the prior nine months. As of February 9, 2009, the company's common stock (symbol "JJAX") was traded on the over-the-counter markets.

8. Just Like Home, Inc. (CIK No. 934380) is a dissolved Florida corporation located in Pittsburgh, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Just Like Home 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, 2001, which reported a net loss of $324,512 for the prior six months. As of February 9, 2009, the company's common stock (symbol "JLHC") was quoted on the Pink Sheets, had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

9. Just Toys, Inc. (CIK No. 890639) is a void Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Just Toys 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 $1.8 million for the prior nine months.

B. DELINQUENT PERIODIC FILINGS

10. 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.

11. 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.

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Appendix 1

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

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Jansko, Inc.					
	10-KSB	05/31/95	08/29/95	Not filed	162
	10-QSB	08/31/95	10/16/95	Not filed	160
	10-QSB	11/30/95	01/15/96	Not filed	157
	10-QSB	02/28/96	04/15/96	Not filed	154
	10-KSB	05/31/96	08/29/96	Not filed	150
	10-QSB	08/31/96	10/15/96	Not filed	148
	10-QSB	11/30/96	01/14/97	Not filed	145
	10-QSB	02/28/97	04/14/97	Not filed	142
	10-KSB	05/31/97	08/29/97	Not filed	138
	10-QSB	08/31/97	10/15/97	Not filed	136
	10-QSB	11/30/97	01/14/98	Not filed	133
	10-QSB	02/28/98	04/14/98	Not filed	130
	10-KSB	05/31/98	08/31/98	Not filed	126
	10-QSB	08/31/98	10/15/98	Not filed	124
	10-QSB	11/30/98	01/14/99	Not filed	121
	10-QSB	02/28/99	04/14/99	Not filed	118
	10-KSB	05/31/99	08/30/99	Not filed	114
	10-QSB	08/31/99	10/15/99	Not filed	112
	10-QSB	11/30/99	01/14/00	Not filed	109
	10-QSB	02/29/00	04/14/00	Not filed	106
	10-KSB	05/31/00	08/29/00	Not filed	102
	10-QSB	08/31/00	10/16/00	Not filed	100
	10-QSB	11/30/00	01/15/01	Not filed	97
	10-QSB	02/28/01	04/16/01	Not filed	94
	10-KSB	05/31/01	08/29/01	Not filed	90
	10-QSB	08/31/01	10/15/01	Not filed	88
	10-QSB	11/30/01	01/14/02	Not filed	85
	10-QSB	02/28/02	04/15/02	Not filed	82
	10-KSB	05/31/02	08/29/02	Not filed	78
	10-QSB	08/31/02	10/15/02	Not filed	76
	10-QSB	11/30/02	01/14/03	Not filed	73
	10-QSB	02/28/03	04/14/03	Not filed	70

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Jansko, Inc. (Continued)					
	10-KSB	05/31/03	08/29/03	Not filed	66
	10-QSB	08/31/03	10/15/03	Not filed	64
	10-QSB	11/30/03	01/14/04	Not filed	61
	10-QSB	02/28/04	04/13/04	Not filed	58
	10-KSB	05/31/04	08/30/04	Not filed	54
	10-QSB	08/31/04	10/15/04	Not filed	52
	10-QSB	11/30/04	01/14/05	Not filed	49
	10-QSB	02/28/05	04/14/05	Not filed	46
	10-KSB	05/31/05	08/29/05	Not filed	42
	10-QSB	08/31/05	10/17/05	Not filed	40
	10-QSB	11/30/05	01/16/06	Not filed	37
	10-QSB	02/28/06	04/14/06	Not filed	34
	10-KSB	05/31/06	08/29/06	Not filed	30
	10-QSB	08/31/06	10/16/06	Not filed	28
	10-QSB	11/30/06	01/15/07	Not filed	25
	10-QSB	02/28/07	04/16/07	Not filed	22
	10-KSB	05/31/07	08/29/07	Not filed	18
	10-QSB	08/31/07	10/15/07	Not filed	16
	10-QSB	11/30/07	01/14/08	Not filed	13
	10-QSB	02/28/08	04/14/08	Not filed	10
	10-KSB	05/31/08	08/29/08	Not filed	6
	10-Q[1]	08/31/08	10/15/08	Not filed	4
Total Filings Delinquent	54				
JG Industries, Inc.					
	10-Q	04/29/00	06/13/00	Not filed	104
	10-Q	07/29/00	09/12/00	Not filed	101
	10-Q	10/28/00	12/12/00	Not filed	98
	10-K	02/03/01	05/04/01	Not filed	93
	10-Q	04/28/01	06/12/01	Not filed	92
	10-Q	07/28/01	09/11/01	Not filed	89
	10-Q	11/03/01	12/18/01	Not filed	86
	10-K	02/02/02	05/03/02	Not filed	81
	10-Q	04/27/02	06/11/02	Not filed	80
	10-Q	08/03/02	09/17/02	Not filed	77
	10-Q	11/02/02	12/18/02	Not filed	74

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
JG Industries, Inc. (Continued)	*10-K*	02/01/03	05/02/03	Not filed	69
	10-Q	05/03/03	06/17/03	Not filed	68
	10-Q	08/02/03	09/16/03	Not filed	65
	10-Q	11/01/03	12/16/03	Not filed	62
	10-K	01/31/04	04/30/04	Not filed	58
	10-Q	05/01/04	06/15/04	Not filed	56
	10-Q	07/31/04	09/14/04	Not filed	53
	10-Q	10/30/04	12/14/04	Not filed	50
	10-K	01/29/05	04/29/05	Not filed	46
	10-Q	04/30/05	06/14/05	Not filed	44
	10-Q	07/30/05	09/13/05	Not filed	41
	10-Q	10/29/05	12/13/05	Not filed	38
	10-K	01/28/06	04/28/06	Not filed	34
	10-Q	04/29/06	06/13/06	Not filed	32
	10-Q	07/29/06	09/12/06	Not filed	29
	10-Q	10/28/06	12/12/06	Not filed	26
	10-K	02/03/07	05/04/07	Not filed	21
	10-Q	04/28/07	06/12/07	Not filed	20
	10-Q	07/28/07	09/11/07	Not filed	17
	10-Q	11/03/07	12/18/07	Not filed	14
	10-K	02/02/08	05/02/08	Not filed	9
	10-Q	05/03/08	06/17/08	Not filed	8
	10-Q	08/02/08	09/16/08	Not filed	5
Total Filings Delinquent	34				
JMXI, Inc. (f/k/a Jupiter Communications, Inc.)					
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
JMXI, Inc. (f/k/a Jupiter Communications, Inc.) (Continued)					
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	19				
The Jockey Club, Inc.					
	10-K	10/31/95	01/29/96	Not filed	157
	10-Q	01/31/96	03/18/96	Not filed	155
	10-Q	04/30/96	06/14/96	Not filed	152
	10-Q	07/31/96	09/16/96	Not filed	149
	10-K	10/31/96	01/29/97	Not filed	145
	10-Q	01/31/97	03/17/97	Not filed	143
	10-Q	04/30/97	06/16/97	Not filed	140
	10-Q	07/31/97	09/15/97	Not filed	137
	10-K	10/31/97	01/29/98	Not filed	133
	10-Q	01/31/98	03/17/98	Not filed	131
	10-Q	04/30/98	06/15/98	Not filed	128
	10-Q	07/31/98	09/14/98	Not filed	125
	10-K	10/31/98	01/29/99	Not filed	121
	10-Q	01/31/99	03/17/99	Not filed	119
	10-Q	04/30/99	06/14/99	Not filed	116
	10-Q	07/31/99	09/14/99	Not filed	113
	10-K	10/31/99	01/31/00	Not filed	109
	10-Q	01/31/00	03/16/00	Not filed	107
	10-Q	04/30/00	06/14/00	Not filed	104

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
The Jockey Club, Inc. (Continued)					
	10-Q	07/31/00	09/14/00	Not filed	101
	10-K	10/31/00	01/29/01	Not filed	97
	10-Q	01/31/01	03/19/01	Not filed	95
	10-Q	04/30/01	06/14/01	Not filed	92
	10-Q	07/31/01	09/14/01	Not filed	89
	10-K	10/31/01	01/29/02	Not filed	85
	10-Q	01/31/02	03/18/02	Not filed	83
	10-Q	04/30/02	06/14/02	Not filed	80
	10-Q	07/31/02	09/16/02	Not filed	77
	10-K	10/31/02	01/29/03	Not filed	73
	10-Q	01/31/03	03/17/03	Not filed	71
	10-Q	04/30/03	06/16/03	Not filed	68
	10-Q	07/31/03	09/15/03	Not filed	65
	10-K	10/31/03	01/29/04	Not filed	61
	10-Q	01/31/04	03/16/04	Not filed	59
	10-Q	04/30/04	06/14/04	Not filed	56
	10-Q	07/31/04	09/14/04	Not filed	53
	10-K	10/31/04	01/31/05	Not filed	49
	10-Q	01/31/05	03/17/05	Not filed	47
	10-Q	04/30/05	06/14/05	Not filed	44
	10-K	10/31/05	01/30/06	Not filed	37
	10-Q	01/31/06	03/17/06	Not filed	35
	10-Q	04/30/06	06/14/06	Not filed	32
	10-Q	07/31/06	09/14/06	Not filed	29
	10-K	10/31/06	01/29/07	Not filed	25
	10-Q	01/31/07	03/19/07	Not filed	23
	10-Q	04/30/07	06/14/07	Not filed	20
	10-Q	07/31/07	09/14/07	Not filed	17
	10-K	10/31/07	01/29/08	Not filed	13
	10-Q	01/31/08	03/17/08	Not filed	11
	10-Q	04/30/08	06/16/08	Not filed	8
	10-Q	07/31/08	09/15/08	Not filed	5
Total Filings Delinquent	51				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Juina Mining Corp., Inc. (n/k/a AC Energy, Inc.)					
	10-QSB	03/31/99	01/14/00	Not filed	109
	10-QSB	06/30/99	01/14/00	Not filed	109
	10-QSB	09/30/99	01/14/00	Not filed	109
	10-KSB	12/31/99	03/30/00	Not filed	107
	10-QSB	03/31/00	05/15/00	Not filed	105
	10-QSB	06/30/00	08/14/00	Not filed	102
	10-QSB	09/30/00	11/14/00	Not filed	99
	10-KSB	12/31/00	04/02/01	Not filed	94
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Juina Mining Corp., Inc. (n/k/a AC Energy, Inc.) (Continued)	*10-KSB*	12/31/07	03/31/08	Not filed	11
	10-Q[1]	03/31/08	05/15/08	Not filed	9
	10-Q[1]	06/30/08	08/14/08	Not filed	6
	10-Q[1]	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	39				
JumboSports, Inc.					
	10-Q	10/29/99	12/13/99	Not filed	110
	10-K	01/28/00	04/27/00	Not filed	106
	10-Q	04/28/00	06/12/00	Not filed	104
	10-Q	07/28/00	09/11/00	Not filed	101
	10-Q	10/27/00	12/11/00	Not filed	98
	10-K	01/26/01	04/26/01	Not filed	94
	10-Q	04/27/01	06/11/01	Not filed	92
	10-Q	07/27/01	09/10/01	Not filed	89
	10-Q	10/26/01	12/10/01	Not filed	86
	10-K	01/25/02	04/25/02	Not filed	82
	10-Q	04/26/02	06/10/02	Not filed	80
	10-Q	07/26/02	09/09/02	Not filed	77
	10-Q	10/25/02	12/10/02	Not filed	74
	10-K	01/31/03	05/01/03	Not filed	69
	10-Q	04/25/03	06/09/03	Not filed	68
	10-Q	07/25/03	09/08/03	Not filed	65
	10-Q	10/31/03	12/15/03	Not filed	62
	10-K	01/30/04	04/29/04	Not filed	58
	10-Q	04/30/04	06/14/04	Not filed	56
	10-Q	07/30/04	09/13/04	Not filed	53
	10-Q	10/29/04	12/13/04	Not filed	50
	10-K	01/28/05	04/28/05	Not filed	46
	10-Q	04/29/05	06/13/05	Not filed	44
	10-Q	07/29/05	09/12/05	Not filed	41
	10-Q	10/28/05	12/12/05	Not filed	38
	10-K	01/27/06	04/27/06	Not filed	34
	10-Q	04/28/06	06/12/06	Not filed	32
	10-Q	07/28/06	09/11/06	Not filed	29

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
JumboSports, Inc. (Continued)					
	10-Q	10/27/06	12/11/06	Not filed	26
	10-K	01/26/07	04/26/07	Not filed	22
	10-Q	04/27/07	06/11/07	Not filed	20
	10-Q	07/27/07	09/10/07	Not filed	17
	10-Q	10/26/07	12/10/07	Not filed	14
	10-K	01/25/08	04/24/08	Not filed	10
	10-Q	04/25/08	06/09/08	Not filed	8
	10-Q	07/25/08	09/08/08	Not filed	5
Total Filings Delinquent	36				
Jumpin' Jax Corp.					
	10-K	12/31/96	03/31/97	Not filed	143
	10-Q	03/31/97	05/15/97	Not filed	141
	10-Q	06/30/97	08/14/97	Not filed	138
	10-Q	09/30/97	11/14/97	Not filed	135
	10-K	12/31/97	03/31/98	Not filed	131
	10-Q	03/31/98	05/15/98	Not filed	129
	10-Q	06/30/98	08/14/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Jumpin' Jax Corp. (Continued)	*10-Q*	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	48				
Jupiter Communications, Inc.					
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Jupiter Communications, Inc. (Continued)					
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	33				
Just Like Home, Inc.					
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Just Like Home, Inc. (Continued)	*10-QSB*	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-KSB	12/31/07	03/31/08	Not filed	11
	10-Q[1]	03/31/08	05/15/08	Not filed	9
	10-Q[1]	06/30/08	08/14/08	Not filed	6
	10-Q[1]	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	29				
Just Toys, Inc. (n/k/a Pachinko, Inc.)	*10-K*	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Just Toys, Inc. (n/k/a Pachinko, Inc.) (Continued)	*10-K*	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/03	11/14/03	Not filed	63
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	10-Q	09/30/05	11/14/05	Not filed	39
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	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	29				

[1]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.

Commissioner Aguilar
Disapproved

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 232, 239, and 274

[Release Nos. 33-9006, 34-59391, 39-2462, IC-28617; File Number S7-12-08]

RIN 3235-AK13

INTERACTIVE DATA FOR MUTUAL FUND RISK/RETURN SUMMARY

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting rule amendments requiring mutual funds to provide risk/return summary information in a form that is intended to improve its usefulness to investors. Under the rules, risk/return summary information could be downloaded directly into spreadsheets, analyzed in a variety of ways using commercial off-the-shelf software, and used within investment models in other software formats. Mutual funds will provide the risk/return summary section of their prospectuses to the Commission and on their Web sites in interactive data format using the eXtensible Business Reporting Language ("XBRL"). The interactive data will be provided as exhibits to registration statements and as exhibits to prospectuses with risk/return summary information that varies from the registration statement. The rules are intended not only to make risk/return summary information easier for investors to analyze but also to assist in automating regulatory filings and business information processing. Interactive data has the potential to increase the speed, accuracy, and usability of mutual fund disclosure, and eventually reduce costs. We also are adopting rules to permit investment companies to submit portfolio holdings information in our interactive data voluntary program without being required to submit other financial information.

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DATES: Effective Date: July 15, 2009. Compliance Date: January 1, 2011. Section II.H. of this release contains information on the effective date and the compliance date.

FOR FURTHER INFORMATION CONTACT: Brent J. Fields, Assistant Director, Office of Disclosure and Review, Mark H. Berman, Senior Special Counsel, Office of Special Projects, Tara R. Buckley, Senior Counsel, Office of Chief Counsel, Deborah D. Skeens, Senior Counsel, and Alberto H. Zapata, Senior Counsel, Office of Disclosure Regulation, Division of Investment Management, at (202) 551-6784, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5720.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") is adopting amendments to rules 485[1] and 497[2] under the Securities Act of 1933 ("Securities Act"), rules 11,[3] 202,[4] 401,[5] and 405[6] of Regulation S-T,[7] and Form N-1A[8] under the Securities Act and the Investment Company Act of 1940 ("Investment Company Act").[9]

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1 17 CFR 230.485.

2 17 CFR 230.497.

3 17 CFR 232.11.

4 17 CFR 232.202.

5 17 CFR 232.401.

6 The Commission recently added new rule 405 to Regulation S-T [17 CFR 232.405] in a separate release. See Securities Act Release No. 9002 (Jan. 30, 2009) [74 FR 6776 (Feb. 10, 2009)] ("Interactive Data Adopting Release").

7 17 CFR 232.10 et seq.

8 17 CFR 239.15A and 274.11A.

9 The Commission proposed these rule and form amendments in June 2008. See Securities Act Release No. 8929 (June 10, 2008) [73 FR 35442 (June 23, 2008)] ("Proposing Release").

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Executive Summary

The principal elements of the rule amendments we are adopting today are as follows:

- Open-end management investment companies ("mutual funds")[10] must submit to the Commission a new exhibit with their risk/return summary information in interactive data format, beginning with initial registration statements, and post-effective amendments that are annual updates to effective registration statements that become effective after January 1, 2011.[11]
- An interactive data file submitted with a registration statement must be filed as a post-effective amendment under rule 485(b) under the Securities Act[12] and must be filed after effectiveness of the related filing, but no later than 15 business days after the effective date of the related filing. An interactive data file required to be submitted with a form of prospectus filed pursuant to rule 497(c) or (e) under the Securities Act may be submitted with the filing or subsequent thereto, but no

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10 An open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer. See Sections 4 and 5(a)(1) of the Investment Company Act [15 U.S.C. 80a-4 and 80a-5(a)(1)].

11 We have adjusted the compliance date to provide mutual funds sufficient time to become familiar with interactive data. See infra Section II.H. Interactive data will be required as an exhibit to a registration statement or post-effective amendment thereto that contains risk/return summary information and to any form of prospectus filed pursuant to rule 497(c) or (e) under the Securities Act [17 CFR 230.497(c) or (e)] that contains risk/return summary information that varies from the registration statement. Interactive data will not be required as an exhibit to a post-effective amendment that does not contain risk/return summary information or to a form of prospectus filed pursuant to rule 497(c) or (e) that does not contain risk/return summary information that varies from the registration statement.

12 A post-effective amendment filed under rule 485(b) under the Securities Act [17 CFR 230.485(b)] may become effective immediately upon filing. A post-effective amendment may only be filed under rule 485(b) if it is filed for one or more specified purposes, including to make non-material changes to the registration statement.

later than 15 business days after the filing made pursuant to rule 497.

- Risk/return summary information in interactive data format must be provided as an exhibit identified in General Instruction C.3.(g).(iv) of Form N-1A.[13]
- The rules do not alter the requirements to provide risk/return summary information with the traditional format filings.[14]
- A mutual fund required to provide risk/return summary information in interactive data format to the Commission also is required to post that information in interactive data format on its Web site not later than the end of the calendar day it submitted or was required to submit the interactive data exhibit to the Commission, whichever is earlier.[15]
- If a mutual fund does not submit or post interactive data as required, the fund's ability to file post-effective amendments to its registration statement under rule 485(b) under the Securities Act will be automatically suspended until the fund submits and posts the interactive data as required.
- Mutual funds providing risk/return summary information in interactive data format are required to use the most recent list of tags released by XBRL U.S.[16] as

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13 Form N-1A is the form used by mutual funds to register under the Investment Company Act and to offer securities under the Securities Act.

14 When we extended the voluntary program to the mutual fund risk/return summary, we stated in the adopting release that the interactive data submission would be supplemental to filings and not replace the required traditional electronic format of the information it contains. We also said that volunteers would be required to continue to file their traditional electronic filings. See Part II.A. of Securities Act Release No. 8823 (July 11, 2007) [72 FR 39290, 39292 (July 17, 2007)].

15 The Web site posting requirement applies only to the extent a mutual fund already maintains a Web site.

16 The appropriate list of tags for document and entity identifier elements will be a list released by XBRL U.S., see infra note 46, and will be required to be used by all issuers required to submit interactive data.

required by Regulation S-T and the EDGAR Filer Manual.[17] Mutual funds also are required to tag a limited number of document and entity identifier elements, such as the form type and the fund's name. As with interactive data for the risk/return summary, these document and entity identifier elements must be formatted using the appropriate list of tags as required by Regulation S-T and the EDGAR Filer Manual.

- New rule 406T of Regulation S-T[18] addresses the liability for an interactive data file and provides that an interactive data file is:
    - Subject to the anti-fraud provisions of Section 17(a)(1) of the Securities Act, Section 10(b) of and rule 10b-5 under the Securities Exchange Act of 1934 ("Exchange Act"), and Section 206(1) of the Investment Advisers Act of 1940 ("Investment Advisers Act"), except as provided below;
    - Deemed not filed or part of a registration statement or prospectus for purposes of Sections 11 or 12 of the Securities Act, is deemed not filed for purposes of Section 18 of the Exchange Act or Section 34(b) of the Investment Company Act, and otherwise is not subject to liability under these sections;

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17 Rule 405 of Regulation S-T directly sets forth the basic tagging requirements and indirectly sets forth the rest of the tagging requirements through the requirement to comply with the EDGAR Filer Manual, which is available on the Commission's Web site at: http://www.sec.gov/info/edgar/edmanuals.htm. Consistent with rule 405, the EDGAR Filer Manual contains the technical tagging requirements. See Interactive Data Adopting Release, supra note 6 (adopting rule 405 of Regulation S-T). Currently, we are in the process of updating the EDGAR Filer Manual to reflect changes in the tagging requirements applicable to financial statements. See Interactive Data Adopting Release, supra note 6. We anticipate that similar updates to address revisions in the tagging requirements applicable to fund risk/return summary information and portfolio holdings will be finalized during 2009.

18 See Interactive Data Adopting Release, supra note 6 (adopting rule 406T of Regulation S-T).

- Deemed filed for purposes of (and, as a result, benefit from) rule 103 of Regulation S-T;[19] and
- Subject to liability for a failure to comply with rule 405 of Regulation S-T,[20] but shall be deemed to have complied with rule 405 and would not be subject to liability under the anti-fraud provisions set forth above or under any other liability provision if the electronic filer:
  - makes a good faith attempt to comply with rule 405; and
  - after the electronic filer becomes aware that the interactive data file fails to comply with rule 405, promptly amends the interactive data file to comply with rule 405.

- These liability provisions will apply only until October 31, 2014, and, thereafter, an interactive data file will be subject to the same liability provisions as the related official filing.
- The voluntary program is being modified to allow for participation by mutual funds with respect to risk/return summary information up until January 1, 2011, but continue to permit investment companies to participate with respect to financial statement information thereafter. As a result, the voluntary program

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19 The interactive data file is deemed filed for purposes of rule 103 of Regulation S-T [17 CFR 232.103] and, as a result, in general, the mutual fund would not be subject to liability for electronic transmission errors beyond its control if the mutual fund corrects the problem through an amendment as soon as reasonably practicable after the fund becomes aware of the problem. Interactive data files are deemed filed for purposes of rule 103 regardless of whether they are eligible for the modified treatment provided by rule 406T at the time submitted. Rule 406T expressly provides that interactive data files are deemed filed for purposes of rule 103 to remove any negative inference that otherwise might be drawn due to the fact that rule 406T deems interactive data files to be not filed for other specified purposes.

20 See supra note 17.

will continue after the compliance date of these rule amendments for the financial statements of investment companies that are registered under the Investment Company Act, business development companies,[21] and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X.

- Registered investment companies, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X are permitted to submit exhibits under the voluntary program containing a tagged schedule of portfolio holdings without having to submit other financial information in interactive data format.

We intend to monitor implementation and, if necessary, make appropriate adjustments to the adopted amendments.

I. INTRODUCTION AND BACKGROUND

A. Commission Initiatives to Update the Public Disclosure Process

Over the last several decades, developments in technology and electronic data communication have facilitated greater transparency in the form of easier access to, and analysis of, financial reporting and disclosures. Technological developments also have significantly decreased the time and cost of filing disclosure documents with us. Most notably, in 1993 we began to require electronic filing on our Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR").[22] Since then, widespread use of the Internet

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21 Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act. See Section 2(a)(48) of the Investment Company Act [15 U.S.C. 80a-2(a)(48)].

22 In 1993, we began to require domestic issuers to file most documents electronically. Securities Act Release No. 6977 (Feb. 23, 1993) [58 FR 14628 (Mar. 18, 1993)].

has vastly decreased the time and expense of accessing disclosure filed with us.

We continue to update our filing standards and systems as technologies improve, consistent with our goal to promote efficient and transparent capital markets. Most recently, we unveiled the Interactive Data Electronic Applications database ("IDEA"), which will initially supplement and eventually replace EDGAR, and which is designed to take full advantage of interactive technology in order to provide investors with better and more useful financial disclosures.[23] Also, since 2003 we have required electronic filing of certain ownership reports filed on Forms 3,[24] 4,[25] and 5[26] in a format that provides interactive data, and recently we adopted similar rules governing the filing of Form D.[27] In addition, recently we have encouraged, and in some cases required, mutual funds and public reporting companies to provide disclosures and communicate with investors using the Internet.[28]

In addition, we also implemented a voluntary filer program, started in 2005,[29] that

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Electronic filing began with a pilot program in 1984. Securities Act Release No. 6539 (June 27, 1984) [49 FR 28044 (July 10, 1984)].

23 See SEC Announces Successor to EDGAR Database, Securities and Exchange Commission Press Release, Aug. 19, 2008, available at: http://www.sec.gov/news/press/2008/2008-179.htm.

24 17 CFR 249.103 and 274.202.

25 17 CFR 249.104 and 274.203.

26 17 CFR 249.105.

27 17 CFR 239.500.

28 See, e.g., Investment Company Act Release No. 28584 (Jan. 13, 2009) [74 FR 4546 (Jan. 26, 2009)] ("Summary Prospectus Adopting Release"); Exchange Act Release No. 57172 (Jan. 18, 2008) [73 FR 4450 (Jan. 25, 2008)]; Exchange Act Release No. 56135 (July 26, 2007) [72 FR 42222 (Aug. 1, 2007)]; Exchange Act Release No. 55146 (Jan. 22, 2007) [72 FR 4148 (Jan. 29, 2007)]; Securities Act Release No. 8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)].

29 Securities Act Release No. 8529 (Feb. 3, 2005) [70 FR 6556 (Feb. 8, 2005)] ("Voluntary Program Adopting Release").

has allowed us to evaluate certain uses of interactive data. The voluntary program allows companies to submit financial statements on a supplemental basis in interactive format as exhibits to specified filings under the Exchange Act and the Investment Company Act. Over 100 operating companies participated in the voluntary program. These companies span a wide range of industries and company characteristics, and have a total market capitalization of over $2 trillion. Companies that participated in the program were still required to file their financial statements in American Standard Code for Information Interchange ("ASCII") or HyperText Markup Language ("HTML").[30] Four mutual fund complexes participated in the voluntary program and have submitted financial statement information in interactive data format.[31]

In 2007, we extended the program to enable mutual funds voluntarily to submit in interactive data format supplemental information contained in the risk/return summary section of their prospectuses.[32] The risk/return summary contains information about a fund's investment objectives and strategies, costs, risks, and past performance.[33] Twenty-five mutual funds from a variety of fund families have submitted risk/return summary information in interactive data format. These funds represent 15 fund complexes, and consist of a range of fund types, including 14 equity funds, two balanced

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30 HTML is a standardized language commonly used to present text and other information on Web sites.

31 These four fund complexes made 23 submissions representing 12 mutual funds.

32 Securities Act Release No. 8823 (July 11, 2007) [72 FR 39290 (July 17, 2007)] ("Risk/Return Voluntary Program Adopting Release").

33 Items 2, 3, and 4 of Form N-1A.

funds, five bond funds, and four money market funds. The funds participating in the voluntary program also include larger and smaller funds.[34]

Since the establishment of the voluntary program for mutual fund risk/return summary information, the Commission has continued its evaluation of interactive data, including interactive data submitted by mutual funds. The Commission's evaluation of interactive data has included the hosting of three roundtables on the topic of interactive data reporting,[35] as well as the creation, in April 2008 of a viewer that allowed investors to read, analyze, and compare the interactive risk/return summary data submitted by mutual funds.[36]

Additionally, prior to launching the risk/return viewer, Commission staff reviewed all of the interactive data files submitted to the Commission to help ensure the accuracy of the interactive risk/return summary data displayed on the Commission's Web site, and the staff communicated with the filers in order to identify and correct any technical issues with the submissions.[37] Further, as noted below, Commission staff also surveyed voluntary program participants for specific data regarding the costs of preparing and submitting risk/return summary information in interactive data, including software

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34 Based on industry assets as of September 2008, four of the five largest fund complexes have submitted tagged risk/return summary information as part of the voluntary filing program. Lipper-Directors' Analytical Data, Reuters Sept. 2008. As of September 2008, the two smallest mutual funds participating in the voluntary program had net assets of approximately $41 million and $17 million. Id.

35 See materials available at http://www.sec.gov/spotlight/xbrl/xbrl-meetings.shtml.

36 As discussed in Section I.B. infra, information in interactive data format is intended to be processed by software applications and is not readable by humans without a viewer.

37 See infra Section II.E.3. (discussing the Commission's risk/return summary interactive data viewer).

costs and internal and external labor costs.[38] Six of the participating mutual funds responded, providing data in response to this voluntary program questionnaire. These six respondents represent mutual fund complexes whose assets comprise a range of approximately .01% to 12% of all the assets of the mutual funds that will be required to submit interactive data.[39]

In a companion release, we recently adopted rules requiring companies, other than investment companies that are registered under the Investment Company Act, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X, to submit financial information to the Commission in interactive data format.[40] In this release, as part of our continuing efforts to assist investors who use Commission disclosures, as well as filers of that disclosure, we are adopting rule amendments to require that mutual fund risk/return summary information be provided in a format that makes the information interactive.

B. Current Filing Technology and Interactive Data

Companies filing electronically are required to file their registration statements and periodic reports in ASCII or HTML format.[41] Also, to a limited degree, our

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38 See Section III. below. Of the 22 mutual funds that participated in the voluntary program at the time the Commission proposed these amendments, nine were provided questionnaires on the details of their cost experience, and six responses were collected representing the cost data for ten funds.

39 Based on total mutual fund assets of $10.6 trillion. Lipper-Directors' Analytical Data, Reuters Sept. 2008.

40 Interactive Data Adopting Release, supra, note 6.

41 Rule 301 of Regulation S-T [17 CFR 232.301] requires electronic filings to comply with the EDGAR Filer Manual, and Section 5.2 of the EDGAR Filer Manual requires that electronic filings be in ASCII or HTML format. Rule 104 of Regulation S-T [17 CFR 232.104] permits filers to submit voluntarily as an adjunct to their official filings in

electronic filing system uses other formats for internal processing and document-type identification. For example, our system uses eXtensible Markup Language ("XML") to process reports of beneficial ownership of equity securities on Forms 3, 4, and 5 under Section 16(a) of the Exchange Act.[42]

Electronic formats such as HTML, XML, and XBRL are open standards[43] that define or "tag" data using standard definitions. The tags establish a consistent structure of identity and context. This consistent structure can be recognized and processed by a variety of different software applications. In the case of HTML, the standardized tags enable Web browsers to present Web sites' embedded text and information in a predictable format. In the case of XBRL, software applications, such as databases, financial reporting systems, and spreadsheets, recognize and process tagged information.

XBRL was derived from the XML standard. It was developed and continues to be supported by XBRL International, a consortium of approximately 550 organizations representing many elements of the financial reporting community worldwide in more than 20 jurisdictions, national and regional. XBRL U.S., the international organization's U.S. jurisdiction representative, is a non- profit organization[44] that includes companies, public accounting firms, software developers, filing agents, data aggregators, stock

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ASCII or HTML unofficial PDF copies of filed documents. Unless otherwise stated, we refer to filings in ASCII or HTML as traditional format filings.

42 15 U.S.C. 78p(a).

43 The term "open standard" is generally applied to technological specifications that are widely available to the public, royalty-free, at minimal or no cost.

44 XBRL U.S. is a 501(c)(6) organization. Internal Revenue Code Section 501(c)(6) applies to "Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." See 26 U.S.C 501(c)(6).

exchanges, regulators, financial services companies, and industry associations.[45]

Risk/return summary information in interactive format requires a standard list of tags. These tags are similar to definitions in an ordinary dictionary, and they cover a variety of concepts that can be read and understood by software applications. For the risk/return summary, a mutual fund will use the most recent list of tags for risk/return summary information released by XBRL U.S.[46] This list of tags contains descriptive labels, authoritative references to Commission regulations where applicable, and other elements, all of which provide the contextual information necessary for interactive data[47] to be recognized and processed by software.[48]

The initial risk/return summary list of tags received acknowledgement from

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45 XBRL U.S. supports efforts to promote interactive financial and business data specific to the U.S.

46 Unless stated otherwise, when we refer to the "list of tags for risk/return summary information" we mean the interactive data list of tags released and maintained by XBRL U.S., including any modifications. This list was initially developed by the Investment Company Institute ("ICI"), which is a national association of the U.S. investment company industry.

47 The rules define the interactive data in machine-readable format required to be submitted as the "interactive data file," which will be required with every interactive data submission. See Interactive Data Adopting Release, supra note 6 (adopting new definitions under 17 CFR 232.11).

48 For example, contextual information identifies the entity to which it relates, usually by using the filer's Central Index Key ("CIK") number. A hypothetical filer converting its traditional electronic disclosure of total annual fund operating expenses of 0.73% must create interactive data that identifies what the 0.73% represents, total annual fund operating expenses, and that the number is a percentage. The contextual information includes other information as necessary; for example, the date of the prospectus to which it relates and the series and class to which it applies.

A mutual fund may issue multiple "series" of shares, each of which is preferred over all other series in respect of assets specifically allocated to that series. Rule 18f-2 under the Investment Company Act [17 CFR 270.18f-2]. Each series is, in effect, a separate investment portfolio.

A mutual fund may issue more than one class of shares that represent interests in the same portfolio of securities with each class, among other things, having a different arrangement for shareholder services or the distribution of securities, or both. Rule 18f-3 under the Investment Company Act [17 CFR 270.18f-3].

XBRL International in June 2007,[49] and was used by mutual funds participating in the Commission's voluntary program. More recently, XBRL U.S. has updated the architecture of the list of tags for risk/return summary information and conformed the list of tags to changes we recently adopted to the risk/return summary disclosure requirements.[50] The list was recently issued for public comment,[51] and it is expected to be finalized and submitted to XBRL International for acknowledgement by the end of January 2009. Related documents, such as the architecture and technical guides, also are due to be released publicly by the end of January 2009.

Data tags are applied to risk/return summary information by using commercially available software that guides a preparer to tag information in the risk/return summary, such as line item costs in a mutual fund's fee table, with the appropriate tags in the standard list. This involves locating an element in the list of tags that represents the particular disclosure that is to be tagged. Occasionally, because mutual funds have some

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49 The list of tags is available on XBRL International's Web site at: http://xbrl.org/Taxonomy/rr-summarydocument-20070516-acknowledged.htm.

There are two levels of XBRL tag recognition: (1) "acknowledgement" is formal recognition that a list of tags complies with XBRL specifications, including testing by a defined set of validation tools; and (2) "approval" is a formal recognition requiring more detailed quality assurance and testing, including compliance with official XBRL guidelines for the type of tag list under review, creation of a number of instance documents, and an open review period after acknowledgement. For more information regarding the XBRL tag list recognition process, see "Taxonomy Recognition Process" on the XBRL International Web site available at: http://www.xbrl.org/TaxonomyRecognition/.

50 See infra Section II.E.1. (discussing the list of tags for risk/return summary information); Summary Prospectus Adopting Release, supra note 28.

51 XBRL U.S. released the updated list of tags for risk/return summary information for public comment on October 21, 2008. The list is available on the XBRL U.S. Web site at: http://xbrl.us/imtaxonomies/Pages/default.aspx. See XBRL U.S. Announces Public Review of Data Tags for Mutual Fund Risk/Return Summary and Schedule of Investments, available on the XBRL U.S. Web site at: http://xbrl.us/press/Pages/20081021.aspx. The comment period closed on November 24, 2008.

flexibility in preparing the risk/return summary, particularly the narrative portions, it is possible that a mutual fund may wish to use a non-standard disclosure that is not included in the standard list of tags. In this situation, a fund will create a company-specific element, called an extension. Alternatively, a mutual fund may choose to outsource the tagging process.

Because mutual fund risk/return summary information in interactive data format is intended to be processed by software applications, the unprocessed interactive data is not readable by humans. Thus, viewers are necessary to convert, or "render," the interactive data file to human readable format. Some viewers, for example, may be compared to Web browsers that are used to read HTML files.

The Commission's Web site currently provides links to viewers that allow the public to read mutual fund and other company disclosures submitted using interactive data. One of these viewers allows users to view and compare mutual fund risk/return summary information, including investment objectives and strategies, costs, risks, and past performance, that is submitted in interactive data format.[52] These viewers are intended to demonstrate the capability of software to present interactive data in human-readable form and to provide open source software to give developers a free resource they can use as is or build upon. As noted above, software also is able to process interactive data so as to automate and, as a result, facilitate access to and analysis of tagged data. In addition, we are aware of other applications under development that may

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52 A mutual fund information viewer for the voluntary program is available at: http://a.viewerprototype1.com/viewer.

provide additional and advanced functionality.[53]

II. DISCUSSION

The Commission received 16 comment letters on the proposed rule amendments, including comments from trade associations, fund complexes, a data aggregator, technology service providers, and individual investors and professionals.[54] The commenters generally supported both the use of technology to better inform mutual fund investors and the Commission's goal of providing risk/return summary information in interactive data format.[55] Most commenters, however, stated that requiring mutual funds to provide tagged risk/return summary information is premature.[56] As discussed below, commenters also raised other concerns regarding the proposal, including concerns regarding the adequacy of the existing technology necessary to create and submit

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53 A list of interactive data products and service providers is available at: http://xbrl.us/Vendors/Pages/default-expand.aspx.

54 See comment letters of the American Bar Association ("ABA") (Aug. 18, 2008); James J. Angel, Ph.D, C.F.A. ("Angel") (Aug. 4, 2008); Gary J. Coles ("Coles") (July 25, 2008); Committee of Annuity Insurers ("Annuity Insurers") (July 23, 2008); Confluence (Aug. 1, 2008); Data Communiqué, Inc. ("Data Communiqué") (July 31, 2008); Federated Investors, Inc. ("Federated") (Aug. 12, 2008); Robert Gilmore, C.P.A. ("Gilmore") (July 31, 2008); Walter C. Hamscher ("Hamscher") (July 31, 2008); ICI (Aug. 1, 2008); Lipper (July 29, 2008); OppenheimerFunds, Inc. ("Oppenheimer") (Aug. 4, 2008); Lorna A. Schnase ("Schnase") (July 25, 2008); Jay Starkman, C.P.A. ("Starkman") (July 30, 2008); T. Rowe Price Associates, Inc. ("T. Rowe Price") (Aug. 1, 2008); and The Vanguard Group, Inc. ("Vanguard") (Aug. 1, 2008). Comment letters received in response to the Proposing Release are available at: http://www.sec.gov/comments/s7-12-08/s71208.shtml or from our Public Reference Room at 100 F Street, NE, Washington, DC 20549.

55 Twelve commenters generally supported tagging risk/return summary information in interactive data format. See letters of ABA, Angel, Annuity Insurers, Confluence, Data Communiqué, Gilmore, Hamscher, ICI, Lipper, Oppenheimer, T. Rowe Price, and Vanguard. Three commenters did not support requiring interactive disclosure of risk/return summary data. See letters of Federated, Schnase, and Starkman. One commenter expressed no explicit opinion on the matter. See letter of Coles.

56 See letters of ABA, Confluence, Data Communiqué, Federated, Gilmore, ICI, Oppenheimer, Schnase, T. Rowe Price, and Vanguard.

interactive data files,[57] what information should be required to be tagged,[58] the proposed compliance date,[59] and the potential liability of mutual funds under the federal securities laws related to tagged risk/return summary information.[60]

For the reasons discussed below, we continue to believe that the enormous potential of interactive data for enhancing investors' access to mutual fund information justifies implementation of this initiative. Therefore, we are adopting the proposed amendments with some modifications to address commenters' concerns. The rule amendments are intended to make risk/return summary information easier for investors to analyze and to assist in automating regulatory filings and business information processing.

A. Submission of Risk/Return Summary Information Using Interactive Data

We are adopting, as proposed, rule amendments that require mutual funds to submit a complete set of their risk/return summary information, set forth in Items 2, 3, and 4 of Form N-1A,[61] in interactive data format.[62] In addition, mutual funds are required to provide document and entity identifier tags, such as the form type and the fund's name. As was the case in the voluntary program, the new requirement for

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57 See letters of Confluence, Federated, Gilmore, ICI, Oppenheimer, Schnase, Starkman, and T. Rowe Price.

58 See letters of ABA, Confluence, Data Communiqué, Federated, and Schnase.

59 See letters of Confluence, Data Communiqué, Federated, Gilmore, ICI, Oppenheimer, Schnase, T. Rowe Price, and Vanguard.

60 See letters of ABA, Federated, ICI, Oppenheimer, and Schnase.

61 Recently, the Commission adopted amendments to Form N-1A, see Summary Prospectus Adopting Release, supra note 28, under which the risk/return summary information, formerly contained in Items 2 and 3 of Form N-1A, was reconfigured in Items 2, 3, and 4 of Form N-1A. We apply the tagging rules to the information required by amended Form N-1A.

62 See Item 405(b)(2) of Regulation S-T.

interactive data reporting is intended to be disclosure neutral in that we do not intend the rules to result in mutual funds providing more, less, or different disclosure for any given disclosure item, regardless of whether the format is ASCII, HTML, or XBRL.

We are adopting these rule amendments because the submission of interactive risk/return summary information at this time is an important next step in increasing the accessibility of this information to mutual fund investors and others. Requiring mutual funds to submit the risk/return summary section of their prospectuses using interactive data format will enable investors, analysts, and the Commission staff to capture and analyze that information more quickly and at less cost than is possible using the same information provided in a static format. Any investor with a computer and an Internet connection will have the ability to acquire and download interactive data that have generally been available only to intermediaries and third-party analysts. The interactive data rule amendments do not change disclosure requirements under the federal securities laws and regulations, but will add a requirement to include risk/return summary information in an interactive data format as an exhibit. Thus, requiring that filers provide risk/return summary information using interactive data will not otherwise alter at all the disclosure or formatting standards of mutual fund prospectuses. These filings will continue to be available as they are today for those who prefer to view the traditional text-based document.

Interactive data can create new ways for investors, analysts, and others to retrieve and use the information. For example, users of risk/return summary information will be able to download cost and performance information directly into spreadsheets, analyze it using commercial off-the-shelf software, or use it within investment models in other

software formats. Through interactive data, what is currently static, text-based information can be dynamically searched and analyzed, facilitating the comparison of mutual fund cost, performance, and other information across multiple classes of the same fund and across the more than 8,000 mutual funds currently available.[63]

Interactive data also provides an opportunity to automate regulatory filings and business information processing, with the potential to increase the speed, accuracy, and usability of mutual fund disclosure. Such automation may eventually reduce costs. A mutual fund that uses a standardized interactive data format at earlier stages of its reporting cycle may reduce the need for repetitive data entry and, therefore, the likelihood of human error. In this way, interactive data may improve the quality of information while reducing its cost. Also, to the extent investors currently are required to pay for access to mutual fund risk/return summary information that has been extracted and reformatted into an interactive data format by third-party sources, the availability of interactive data in Commission filings may allow investors to avoid additional costs associated with third-party sources.

As noted above, although most commenters generally supported the concept of interactive disclosure of risk/return summary information,[64] they also asserted that this initiative is premature.[65] In particular, several commenters urged the Commission to defer requiring mutual funds to submit interactive risk/return summary information because pending Commission proposals related to a mutual fund summary prospectus

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63 Investment Company Institute, 2008 Investment Company Fact Book, at 15 (2008), available at: http://www.icifactbook.org/pdf/2008_factbook.pdf (as of year-end 2007, there were 8,752 mutual funds).

64 See supra note 55.

65 See supra note 56.

and exchange-traded funds ("ETFs") would change the information in the risk/return summary.[66] Related to those comments, commenters also asserted that: (1) the list of tags for risk/return summary information would require updating if the proposed changes to the risk/return summary are adopted; (2) the list of tags' architecture needed to be updated; and (3) related tools are not sufficiently developed.[67] Commenters also stated that implementation is premature because more information needs to be collected from the current voluntary program.[68]

While we are sensitive to these commenters' concerns, they do not warrant delay in this important initiative, particularly given recent progress related to these comments. First, the Commission recently adopted amendments to Form N-1A related to the Summary Prospectus Initiative and the ETF Initiative.[69] These amendments do not

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66 See letters of Data Communiqué, Federated, ICI, Oppenheimer, Schnase, T. Rowe Price, and Vanguard. The Commission proposed revisions to Form N-1A's risk/return summary disclosure requirements as part of two separate rulemaking initiatives. See Investment Company Act Release No. 28064 (Nov. 21, 2007) [72 FR 67790 (Nov. 30, 2007)] (proposing amendments intended to enhance mutual fund disclosure of certain key information, including risk/return summary information, by, among other things, permitting mutual funds to provide such information in the form of a summary prospectus if certain conditions are satisfied) ("Summary Prospectus Initiative"); and Investment Company Act Release No. 28193 (Mar. 11, 2008) [73 FR 14618 (Mar. 18, 2008)] (proposing amendments to the mutual fund risk/return summary to provide certain information relating specifically to ETFs) ("ETF Initiative").

67 See letters of Confluence, Federated, ICI, Oppenheimer, Schnase, and T. Rowe Price.

68 See letters of Federated, ICI, and Schnase.

69 These amendments were presented to the Commission at an open meeting on November 19, 2008. See Summary Prospectus Adopting Release, supra note 28. Form N-1A changes related to both the Summary Prospectus Initiative and the ETF Initiative were adopted together in the Summary Prospectus Adopting Release.

In the Summary Prospectus Initiative, we requested comment on whether the proposed linking requirements for documents posted on an Internet Web site should be modified. See Summary Prospectus Initiative, supra note 66. We received one comment on this issue opposing the modification of the proposed linking requirements. See letter of Data Communiqué. The linking requirements were adopted as proposed. See Summary Prospectus Adopting Release, supra note 28.

significantly alter the content requirements of the risk/return summary section, consisting of limited modifications to the disclosure in the Fee Table.[70] Mutual funds will not be required to comply with these new Form N-1A disclosure requirements until January 1, 2010,[71] providing almost one year for them to revise their disclosure. Second, as discussed further below,[72] revisions to the list of tags for risk/return summary information to account for these limited disclosure changes and revisions to the architecture have been issued for public comment and are expected to be finalized by the end of January 2009. Again, this will provide mutual funds with substantial time to prepare to tag their risk/return summary information. Third, while the Commission's current viewer permits the rendering of tagged risk/return summary information, progress has been made to develop a more advanced tool that will allow issuers to test their tagged exhibits prior to submitting them to the Commission.[73] This upgrade to the viewer will be phased in, but should be completed during mid-2009.

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70 These amendments include: (1) requiring mutual funds that offer discounts on front-end sales charges for volume purchases (so-called "breakpoint discounts") to include a brief narrative disclosure alerting investors to the availability of those discounts, see Item 3 of Form N-1A; Instruction 1(b) to Item 3 of Form N-1A; (2) revising the parenthetical heading for "Annual Fund Operating Expenses" in the Fee Table to read "expenses that you pay each year as a percentage of the value of your investment," see Item 3 of Form N-1A; (3) requiring mutual funds, other than money market funds, to include brief disclosure regarding portfolio turnover immediately following the fee table example, see Instruction 5 to Item 3 of Form N-1A; and (4) permitting mutual funds to place two additional captions in the Fee Table directly below the "Total Annual Fund Operating Expenses" caption in cases where there are expense reimbursement or fee waiver arrangements that will reduce any fund operating expenses, see Instruction 3(e) to Item 3 of Form N-1A. The amendments also require modification for ETFs to the narrative explanation preceding the Fee Table to clarify that investors may pay brokerage commissions not reflected in the Fee Table. Instruction 1(e)(i) and (ii) to Item 3 of Form N-1A.

71 See Summary Prospectus Adopting Release, supra note 28.

72 See infra Section II.E.1. (discussing the list of tags for risk/return summary information).

73 See infra Section II.E.3. (discussing the Commission's risk/return summary interactive data viewer).

Finally, the Commission has been exploring, via the voluntary program, the use of interactive data for several years, including the submission of tagged financial information and risk/return summary information. Twenty-five mutual funds have submitted over 40 exhibits tagged with interactive data, giving the Commission experience in adapting to the technology. In addition, over 100 operating companies have submitted financial statements tagged in interactive data format. Each submission has enabled issuers to gain experience with submitting tagged documents and enabled the Commission to refine its technology infrastructure to accept and efficiently render these interactive exhibits. Moreover, given the extended compliance date discussed below, mutual funds will have almost two years to resolve technical issues and may continue participating in the voluntary program in the interim to gain more experience submitting interactive data.

In addition to the recommendations to delay this initiative, some commenters expressed concern that limiting the interactive data filing requirement to only risk/return summary information could lead investors to place undue emphasis on this information,[74] and several commenters suggested that the Commission consider expanding this tagging requirement to include non-risk/return disclosures in the new mutual fund summary prospectus.[75] Two of these commenters recommended that all items in the summary prospectus should be tagged.[76] We believe that implementation of our interactive data

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74 See letters of ABA, Data Communiqué, and Federated. See also related discussion concerning commenters' suggestion that cautionary legends be permitted, infra Section II.B.

75 See letters of Confluence, Data Communiqué, and Schnase; see also discussion of Summary Prospectus Initiative, supra note 66, and Summary Prospectus Adopting Release, supra note 28.

76 See letters of Confluence and Schnase.

initiative should begin with the mutual fund risk/return summary, but we will continue to evaluate the benefits of tagging all items in the summary prospectus, as well as other information.

Several commenters questioned whether XBRL is the appropriate standard format for interactive data disclosure, asserting that it is not sufficiently developed at this time.[77] Specifically, commenters asserted that there are a limited number of commercial software products that are compatible with XBRL,[78] and that rendering and validating are still expensive and problematic issues.[79] One commenter also expressed concern that endorsing XBRL could have the effect of stifling competition for other languages, although this commenter acknowledged that she was unaware of other languages that are likely to become competitive with XBRL.[80]

While we acknowledge that XBRL is an evolving technology, we believe it is the appropriate interactive data format with which to supplement ASCII and HTML. Our experience with the voluntary program, including feedback from company, accounting, and software communities, points to XBRL as the appropriate open standard for the purposes of this rule.[81] XBRL data will be compatible with a wide range of open source and proprietary XBRL software applications. As discussed above, many XBRL-related products exist for analysts, investors, filers, and others to create and compare disclosures more easily, the development process will likely be hastened by mutual fund disclosure using interactive data.

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77 See letters of Gilmore, Schnase, and Starkman.

78 See letter of Starkman.

79 See letter of Gilmore.

80 See letter of Schnase.

81 See note 58 of the Proposing Release, supra note 9.

Several other factors support our views regarding XBRL's broad and growing acceptance, internationally as well as in the U.S. For example, the Advisory Committee on Improvements to Financial Reporting ("CIFiR")[82] presented its final recommendations to the Commission in its final report issued in August 2008,[83] which includes a recommendation that the Commission, over the long term, require the filing of financial and non-financial information using XBRL once specified conditions are satisfied.[84] We believe that sufficient progress has been made regarding each of these conditions.[85] Also, XBRL has been used by other U.S. agencies,[86] and several foreign securities regulators

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82 The Commission established CIFiR to examine the U.S. financial reporting system, with the goals of reducing unnecessary complexity and making information more useful and understandable for investors. See SEC Establishes Advisory Committee to Make U.S. Financial Reporting System More User-Friendly for Investors, Securities and Exchange Commission Press Release, June 27, 2007, available at: http://www.sec.gov/news/press/2007/2007-123.htm.

CIFiR conducted open meetings on March 13-14, 2008 and May 2, 2008, in which it heard reactions from an invited panel of participants to CIFiR's proposal regarding required filing of financial information using interactive data. Archived Webcasts of the meetings are available at http://sec.gov/about/offices/oca/acifr.shtml. The panelists presented their views and engaged with CIFiR members regarding issues relating to requiring interactive data tagged financial statements, including tag list and technological developments, implications for large and small public companies, needs of investors, necessity of assurance and verification of such tagged financial statements, and legal implications arising from such tagging.

83 See Final Report of the Advisory Committee on Improvements to Financial Reporting to the United States Securities and Exchange Commission (August 1, 2008), ("CIFiR Report"), available at: http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf.

84 Id. at 98. The recommendation appears in chapter 4 of the CIFiR Report.

85 See discussion at note 135, and accompanying text, of Interactive Data Adopting Release, supra note 6.

86 Since 2005, the Federal Deposit Insurance Corporation ("FDIC"), the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency have required the insured institutions that they oversee to file their quarterly Consolidated Reports of Condition and Income (called "Call Reports") in interactive data format using XBRL. Call Reports, which include data about an institution's balance sheet and income statement, are used by these federal agencies to assess the financial health and risk profile of the financial institution.

have adopted voluntary or required XBRL reporting.[87]

B. Content and Submission Requirements for Interactive Risk/Return Summary Information

We are adopting, as proposed, the requirement that an interactive data file must be submitted to the Commission for any registration statement or post-effective amendment thereto on Form N-1A that includes or amends information provided in response to Items 2, 3, or 4.[88] In response to commenters' concerns,[89] however, we are modifying our rules to encompass changes to risk/return summary information that mutual funds may make pursuant to rule 497 under the Securities Act.[90] Specifically, in the Proposing Release, we asked for comment on whether mutual funds should be required to submit tagged risk/return summary information for prospectuses submitted pursuant to rule 497 under the Securities Act. Rule 497 sets out general filing requirements for fund prospectuses and provides, among other things, that funds must file any prospectus that contains information that varies from that in the registration statement.[91] Commenters addressing

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87 For example, such countries include Canada, China, Israel, Japan, Korea, and Thailand.

88 See rule 405(b)(2) of Regulation S-T; General Instruction C.3.(g).(i) of Form N-1A. We are also adopting technical amendments to rule 405 that reflect this requirement. As previously noted, rule 405 of Regulation S-T directly sets forth the basic tagging requirements and indirectly sets forth the rest of the tagging requirements through the requirement to comply with the EDGAR Filer Manual. Consistent with rule 405, the EDGAR Filer Manual will contain the detailed tagging requirements.

89 See infra note 96 and accompanying discussion.

90 17 CFR 230.497.

91 Specifically, (1) rule 497(c) under the Securities Act requires mutual funds to file, within five days after the effective date of a registration statement or the commencement of a public offering after the effective date of a registration statement, whichever occurs later, ten copies of each form of prospectus and form of statement of additional information ("SAI") used after the effective date; and (2) rule 497(e) under the Securities Act provides that, after the effective date of a registration statement, no prospectus that purports to comply with Section 10 of the Securities Act [15 U.S.C. 77j] or SAI that varies from any form of prospectus or form of SAI filed pursuant to rule 497(c) shall be used until filed with the Commission.

the matter uniformly recommended that updates to interactive risk/return summary information should be required when such information is revised in a filing made pursuant to rule 497 under the Securities Act,[92] asserting that failure to do so could: (1) compromise the integrity of the entire interactive data program;[93] (2) result in a rendered file containing different information from the current prospectus, potentially leading to liability;[94] and (3) result in investors accessing stale tagged data.[95]

We agree with commenters' concerns that failure to include changes to risk/return summary information in filings made pursuant to rule 497 could result in investors and others accessing outdated interactive data. For that reason we are modifying the proposed rules, in response to the commenters' recommendations, to require that an interactive data file must be submitted to the Commission for any form of prospectus filed pursuant to rule 497(c) or (e) under the Securities Act that includes information provided in response to Items 2, 3, or 4 that varies from the registration statement.[96]

We also are adopting, as proposed, the requirement that an interactive data file to a Form N-1A filing, whether the filing is an initial registration statement or a post-effective amendment thereto, must be submitted as an amendment to the registration statement to which the interactive data file relates and must be submitted after the registration statement or post-effective amendment that contains the related information becomes effective but not later than 15 business days after the effective date of that

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92 See letters of Data Communiqué, ICI, and Schnase.

93 See letter of Data Communiqué.

94 See letter of ICI.

95 See letter of Schnase.

96 See General Instruction C.3.(g).(ii) of Form N-1A. We also revised paragraphs (c) and (e) of rule 497 to clarify that mutual funds must, if applicable pursuant to General Instruction C.3.(g) of Form N-1A, include an interactive data file.

registration statement or post-effective amendment.[97] Our requirement that the interactive data file be submitted within 15 business days is intended both to provide funds with adequate time to prepare the exhibit and to make the interactive data available promptly. An exhibit containing interactive data format risk/return summary information can be submitted under rule 485(b) of the Securities Act, which provides for immediate effectiveness of amendments that make non-material changes, and will only need to contain the new exhibit, a facing page, a signature page, a cover letter explaining the nature of the amendment, and a revised exhibit index.

To address the inclusion of tagged risk/return summary information submitted with rule 497 filings discussed above, our amendments provide that tagged risk/return summary exhibits must be submitted with or after the filing of a form of prospectus pursuant to rule 497(c) or (e) under the Securities Act. The tagged exhibits may be submitted concurrently with the rule 497 filing or up to 15 business days subsequent to the filing made pursuant to rule 497.[98] Similar to the submissions under rule 485(b), the 15 business days is intended to provide funds adequate time to prepare their interactive data exhibits.

We also are adopting, as proposed, the requirement that an interactive data file be submitted as an exhibit to Form N-1A, but also include a modification to address submissions made with rule 497 filings, providing that an interactive data file must be

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97 See General Instruction C.3.(g).(i) to Form N-1A.

98 See General Instruction C.3.(g).(ii) to Form N-1A. Pursuant to the EDGAR Filer Manual, mutual funds should include an interactive data file as an exhibit (EX-101) contained in an EDGAR 497 submission. Funds submitting their exhibit subsequent to their initial rule 497 filing should make a second EDGAR 497 submission that includes (1) a 497 document (this 497 document may, in accordance with rule 411 under the Securities Act, incorporate by reference the first rule 497 filing and should include the accession number of that first rule 497 filing), and (2) any related interactive data exhibit.

submitted as an exhibit to the filing made pursuant to rule 497.[99] Similar to the voluntary program, the rules require that the information contained in the risk/return summary section in the traditional format filing be the same as in the interactive data format.[100] We have not changed this equivalency standard for risk/return summary information provided in interactive data format as required by the rules. As proposed, we also are adopting the requirement that an interactive data file be submitted in such a manner that will permit the information for each series and, for any information that does not relate to all of the classes in a filing, each class of the fund to be separately identified.[101] However, information that is not class-specific, such as investment objectives, is not required to be separately identified by class.

The rules do not eliminate or alter existing substantive disclosure requirements for risk/return summary information. The rules also do not eliminate or alter existing ASCII or HTML filing requirements. We believe investors and other users may wish to obtain an electronic or printed copy of the entire registration statement in ASCII or HTML, either in addition to or instead of disclosure formatted using interactive data. To clarify the intent of the rules, we have included an instruction to rule 405 of Regulation S-T stating that the rules require a disclosure format, but do not change substantive disclosure requirements.[102] The rules also state clearly that the information in interactive data format should not be more or less than the information in the ASCII or HTML part of the

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99 See General Instruction C.3.(g).(iv) of Form N-1A.

100 See rule 405(b)(2) of Regulation S-T.

101 See General Instruction C.3.(g).(iv) of Form N-1A.

102 See Interactive Data Adopting Release, supra note 6 (adopting Preliminary Note 2 to rule 405).

Form N-1A filing.[103]

As noted previously, several commenters expressed concern that tagging only a fund's risk/return summary information may give such information too much emphasis, and may encourage some investors to act on incomplete information.[104] These commenters suggested that registrants be permitted to include a legend similar to that required as part of the voluntary program, cautioning investors, before making an investment decision, to read and consider the full prospectus or other filing from which the information was taken.[105] Because we believe it is inappropriate for the interactive data files to alter or differ from the information included in the related official filing, we have not included any provision permitting the inclusion of additional cautionary language in the interactive data file. Pursuant to commenters' recommendations, however, we intend to modify the Commission's interactive data viewer to include a legend recommending that users review a fund's full prospectus.[106] This legend on the viewer serves a similar goal as the tagged cautionary language within an interactive data file.[107]

While one commenter asserted that interactive data should be embedded in HTML filings,[108] two other commenters stated that such a requirement should be deferred

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103 See rule 405(b)(2) of Regulation S-T.

104 See letters of ABA, Federated, ICI, Oppenheimer, and Schnase.

105 Id.

106 See infra Section II.E.3. (discussing the Commission's risk/return summary interactive data viewer).

107 The Commission encourages third-party viewers also to include this legend, however, we note that the liability provisions we have adopted attach only to interactive data as viewed on the Commission's viewer. See infra Section II.F. (discussing liability).

108 See letter of Hamscher.

until embedding technology is sufficiently developed.[109] We agree that it is necessary to monitor the usefulness of interactive data reporting to investors and the cost and ease of providing interactive data before attempting further integration of the interactive data format. However, the rules will treat interactive data as part of the official filing, instead of as only a supplement as is the case in the voluntary program.[110]

C. Web Site Posting of Interactive Data

In the Proposing Release, we proposed to require that each mutual fund provide the same interactive data that would be required to be provided to the Commission on its Web site, if it has one. Several commenters opposed this requirement,[111] with some asserting that posting interactive data files on the Web without a tool to convert them to viewable format may confuse and frustrate investors.[112]

We continue to believe that interactive data, consistent with our rules, should be easily accessible for all investors and other market participants. As such disclosure becomes more widely available, advances in interactive data software, online viewers, search engines, and other Web tools may in turn facilitate improved access to and usability of the data, promoting its awareness and use. Encouraging widespread accessibility to mutual funds' risk/return summary information furthers our mission to promote fair, orderly, and efficient markets, and facilitates capital formation. Web site availability of the interactive data will encourage its widespread dissemination, contributing to lower access costs for users. We therefore are adopting the requirement

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109 See letters of Data Communiqué and Schnase.

110 As further discussed below in Section II.F., however, for a specified period, interactive data generally will be deemed not filed for purposes of specified liability provisions.

111 See letters of ABA, ICI, Schnase, Starkman, T. Rowe Price, and Vanguard.

112 See letters of ICI and T. Rowe Price.

that each mutual fund provide its interactive data files on the fund's Web site, if it has one.[113] The interactive data is required to be posted on a fund's Web site no later than the end of the calendar day it is submitted to the Commission or is required to be submitted to the Commission, whichever is earlier.[114] As proposed, funds would have been required to post the interactive data on their Web sites by the end of the business day on the earlier of the date the interactive data is submitted or is required to be submitted to the Commission. In order to make it easier for mutual funds to satisfy the posting requirement by providing several more hours in which to comply but still have the posted information available in a timely manner, the rule amendments, as adopted, will require posting by the end of the calendar rather than business day specified.

We also are revising the proposed rule to require that the interactive data be posted on a fund's Web site as long as the registration statement to which it relates remains current.[115] We believe that such a period strikes an appropriate balance between the fund effort needed to post and the investor benefit from having access to the posted

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113 See General Instruction C.3.(g).(i) and (ii) of Form N-1A.

114 See Interactive Data Adopting Release, supra note 6 (adopting rule 405(g)); rule 405(a). Rule 405(a) requires posting to a "corporate" Web site. For mutual funds, this would require posting to the fund's Web site.

The day the interactive data is submitted electronically to the Commission may not be the business day on which it was deemed officially filed. For example, a filing submitted after 5:30 p.m. generally is not deemed officially filed until the following business day. Under the rules, the Web posting would be required at any time on the same calendar day that the interactive data exhibit to a mutual fund filing is deemed officially filed or required to be filed, whichever is earlier.

115 See rule 405(a)(4) of Regulation S-T; see also General Instruction C.3.(g).(iii) of Form N-1A. Section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)] generally requires that when a prospectus is used more than nine months after the effective date of the registration statement, the information in the prospectus must be as of a date not more than sixteen months prior to such use. The effect of this provision is to require mutual funds to update their prospectuses annually to reflect current cost, performance, and other financial information. A mutual fund updates its registration statement by filing a post-effective amendment to the registration statement.

material through the additional source of the mutual fund's Web site. In this regard, we note that the interactive data will be available on the Commission's Web site.

One commenter, who opposed the proposal to require Web site posting, recommended that funds instead be required to post a link to the Commission's Web site to access the XBRL files.[116] However, we believe that access to the interactive data on mutual fund Web sites will enable search engines and other data aggregators to more quickly and cheaply aggregate the data and make them available to investors because the data will be available directly from the filer, instead of through third-party sources that may charge a fee. It could also transfer reliability costs of data availability to the public sector by reducing the likelihood that investors cannot access the data through the Commission's Web site due to down-time for maintenance or to increased network traffic. We also believe that the availability of interactive data on mutual fund Web sites will make it easier and faster for investors to collect information on a particular fund, rather than if investors were required to visit separately (for example, by hyperlink) and search the Commission's Web site for information, particularly if the investor is already searching the mutual fund's Web site. Therefore, to help further our goals of decreasing user cost and increasing information availability over the long term, our rules do not allow mutual funds to comply with the Web posting requirement by including a hyperlink to the Commission's Web site.

This requirement is consistent with the increasing role that mutual fund Web sites perform in supplementing the information filed electronically with the Commission by delivering risk/return summary information and other disclosure directly to investors.

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116 See letter of Data Communiqué.

We also believe that this requirement can provide an incentive for mutual funds to add content to or otherwise enhance their Web sites thereby improving investor experience. For example, we recently adopted amendments that would permit a person to satisfy the mutual fund prospectus delivery obligations under the Securities Act by sending or giving key information directly to investors in the form of a summary prospectus and providing the statutory prospectus on an Internet Web site.[117] Mutual funds may also satisfy certain disclosure obligations by posting required disclosures on their Web sites.[118] In addition, many mutual funds provide on their Web sites access to their prospectuses, statements of additional information, and other Commission filings.[119] This rule will expand such Web site posting by requiring mutual funds with Web sites to post their interactive data as well.

D. Consequences of Non-Compliance and Hardship Exemption

We are adopting, as proposed, a rule amendment providing that, if a filer does not provide the required interactive data submission, or post the interactive data on its Web site, by the required due date, the filer's ability to file post-effective amendments under

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117 See Summary Prospectus Adopting Release, supra note 28. Upon an investor's request, a mutual fund also would be required to send the statutory prospectus to the investor in paper or by e-mail.

118 See, e.g., Securities Act Release No. 8458 (Aug. 23, 2004) [69 FR 52788 (Aug. 27, 2004)] (disclosure regarding portfolio managers); Securities Act Release No. 8408 (April 19, 2004) [69 FR 22300 (April 23, 2004)] (disclosure regarding market timing and selective disclosure of portfolio holdings); Securities Act Release No. 8393 (Feb. 27, 2004) [69 FR 11244 (Mar. 9, 2004)] (shareholder reports and quarterly portfolio disclosure); Securities Act Release No. 8188 (Jan. 31, 2003) [68 FR 6564 (Feb. 7, 2003)] (disclosure of proxy voting policies and records); Exchange Act Release No. 47262 (Jan. 27, 2003) [68 FR 5348 (Feb. 3, 2003)] (disclosure of code of ethics).

119 Mutual funds filing registration statements are required to disclose whether or not they make available free of charge on or through their Web site, if they have one, their SAI and shareholder reports. Funds that do not make their reports available in that manner also must disclose the reasons that they do not. See Item 1(b)(1) of Form N-1A.

rule 485(b), which provides for immediate effectiveness of amendments that make non-material and other changes, will be automatically suspended.[120] Any suspension becomes effective at the time that the filer fails to meet the requirement to submit or post interactive data and terminates as soon as the filer has submitted and posted that data. The suspension applies to a failure to submit and post interactive data as an exhibit to a registration statement or as an exhibit to a filing under rule 497 under the Securities Act.

The suspension applies to post-effective amendments filed after the suspension becomes effective, but does not apply to post-effective amendments that were filed before the suspension became effective. The suspension does not apply to post-effective amendments filed solely for purposes of submitting interactive data, which will enable a filer to cure its failure to submit interactive data by filing an amendment under rule 485(b) and posting the information on its Web site. Similarly, a filer may cure a failure to submit an interactive data file that is required to be submitted with a rule 497 filing by making a subsequent rule 497 filing with the interactive data exhibit and also posting the information on its Web site.

Several commenters opposed this automatic suspension as unnecessary, particularly given Commission authority to punish those who violate its rules.[121] Some commenters asserted that it could lead to potential penalties for minor violations of the interactive filing requirements.[122] We continue to believe that precluding the use of immediate effectiveness of post-effective amendments during any period of failure to comply is an appropriate means to direct attention to the interactive data requirement

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120 See rule 485(c)(3) under the Securities Act.

121 See letters of ABA, Federated, ICI, and Oppenheimer.

122 See letters of Federated and ICI.

without permanently suspending a mutual fund's ability to file post-effective amendments under rule 485(b) once the fund has remedied the failure. The provision strikes an appropriate balance between limiting non-compliant mutual funds from using the immediate effectiveness provision, yet also providing an easy remedy to diminish any risk of any undue penalty to funds.

We previously proposed conditioning a fund using rule 485(b) upon the fund having on file with the Commission a current report on Form N-SAR.[123] We ultimately did not adopt that proposal in response to commenters' criticisms that the proposal was unnecessary and potentially unfair to funds, and their recommendation that the Commission rely upon its enforcement remedies to punish late filers.[124] One commenter urged us to take a similar approach related to our proposed suspension for failure to comply with the interactive data requirements.[125] Unlike that prior proposal, which linked a fund's ability to rely upon rule 485(b) to Form N-SAR, a form separate from the registration statement, the suspension that we are adopting today relates to a specific requirement in Form N-1A. We believe that it is appropriate to link a fund's ability to receive immediate effectiveness with a requirement that the fund be current in its filing obligations with respect to that form.

Several commenters also raised concerns over the language of the suspension in proposed rule 485(c), which would apply to any "registrant."[126] The commenters asserted that a fund that is part of a series fund may be prevented from filing a post-

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123 17 CFR 274.101. See Securities Act Release No. 7015 (Sept. 21, 1993) [58 FR 50291 (Sept. 27, 1993)].

124 See Securities Act Release No. 7083 (Aug. 17, 2004) [59 FR 43460 (August 24, 1994)].

125 See letter of Federated.

126 See letters of ICI, Oppenheimer, and Schnase.

effective amendment to its registration statement under rule 485(b) if another fund in that series had an issue with an interactive data file.

One of those commenters recommended that, if the proposal is adopted, the Commission clarify that "registrant" means the specific series at issue.[127] We do not believe that the commenter's recommendation is workable. Specifically, multi-series funds are generally contained within the same prospectus in a registration statement, and post-effective amendments are typically filed concurrently for multiple series. In such a case, it is generally unworkable to permit automatic effectiveness for certain series while prohibiting reliance upon rule 485(b) for other series in the same filing. Further, the requirement that a fund's registration statement is compliant with its interactive data obligations should apply to all of the risk/return summary information in that registration statement, and, thus, if a registrant is not current in its obligations, the ability to rely upon rule 485(b) should be suspended until remedied.

As noted in the Proposing Release, the failure to provide the required interactive data submission will not affect a mutual fund's ability to incorporate by reference the mutual fund's prospectus or statement of additional information ("SAI") into another document, such as the summary prospectus.[128] We received no comments regarding this issue.

Consistent with the treatment of other applicable reporting obligations, we are adopting, as proposed, a continuing hardship exemption for the inability timely to submit

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127 See letter of Schnase.

128 Rule 303(a)(3) of Regulation S-T [17 CFR 232.303(a)(3)] restricts the ability of registered investment companies to incorporate by reference into an electronic filing documents that have not been filed in electronic format. We will not interpret rule 303 to apply to the failure to file interactive data files.

electronically interactive data. Rule 202 of Regulation S-T provides for continuing hardship exemptions.[129]

Rule 202 permits a filer to apply in writing for a continuing hardship exemption if information otherwise required to be submitted in electronic format cannot be so filed without undue burden or expense. If the Commission or the staff, through authority delegated from the Commission, grants the request, the filer must file the information in paper by the applicable due date and file a confirming electronic copy if and when specified in the grant of the request.

As proposed, we are revising rule 202 to provide that a grant of a continuing hardship exemption for interactive data will not require a paper submission.[130] If the filer did not electronically submit the interactive data by the end of the period for which the exemption was granted, the filer's ability to file post-effective amendments under rule 485(b) will be suspended until it does electronically submit the interactive data.[131] Similarly, we are revising rule 202 to provide an essentially mirror-image exemption from the requirement for a mutual fund that has a Web site to post the interactive data on its Web site.[132] We did not receive any comments addressing this issue.

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129 Rule 201 of Regulation S-T [17 CFR 232.201] provides for temporary hardship exemptions. We are not adopting a temporary hardship exemption because our rules provide a mutual fund with a 15-business day period for submitting the interactive data file for a related official filing.

130 See rule 202 as adopted in Interactive Data Adopting Release, supra note 6.

131 Amendment to Note 4 to rule 202 as adopted in Interactive Data Adopting Release, supra note 6; rule 485(c)(3).

132 Id.

E. Interactive Data List of Tags and Commission Viewer

1. Data Tags

Under the rule, mutual funds are required to submit their risk/return summary information in an interactive data file using the most recent list of tags released by XBRL U.S. for risk/return summary information, as approved for use by the Commission.[133] Interactive data is required for the entirety of the risk/return summary information, including information for all series and all classes.[134]

The submission also must include any supporting files as prescribed by the EDGAR Filer Manual.[135] Mutual funds are required to tag a limited number of document and entity identifier elements, such as the form type and the fund's name. As with interactive data for the risk/return summary, these document and identity identifiers are formatted using the appropriate list of tags as required by Regulation S-T and the EDGAR Filer Manual.[136]

Several commenters asserted that the list of tags for risk/return summary information required additional development before the Commission mandates filing of risk/return summaries in interactive data format.[137] Three commenters asserted that there are significant technical difficulties relating to the current list of tags,[138] noting, for

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133 See Interactive Data Adopting Release, supra note 6 (adopting amendments to rule 11 of Regulation S-T and adopting new rule 405(a)) and amendments to rule 405(a).

134 See General Instruction C.3.(g) of Form N-1A.

135 As discussed supra note 17, rule 405 of Regulation S-T directly sets forth the basic tagging requirements and indirectly sets forth the rest of the tagging requirements, which are contained in the EDGAR Filer Manual. See Interactive Data Adopting Release, supra note 6 (adopting rule 405 of Regulation S-T).

136 Id.

137 See letters of Federated, Gilmore, ICI, Oppenheimer, Schnase, and Vanguard.

138 See letters of Federated, ICI, and Vanguard.

example, that the current tagging software did not provide a way to accurately replicate footnotes to the fee table, or special symbols such as registered marks.[139] Commenters further asserted that mutual funds would not have sufficient time to resolve these technical issues,[140] to test the final list of tags,[141] or to review the various software options for compliance with the rules.[142] Several commenters also asserted that currently-available tagging software has yet to be finalized for use in rendering interactive versions of risk/return summary information.[143] These commenters urged that required use of the list of tags be delayed until these deficiencies have been remedied,[144] and the list has been acknowledged by XBRL International.[145] One commenter expressed concern that the revisions to the list would not be finalized and acknowledged by XBRL International in a brief enough time period to allow thorough evaluation and implementation prior to the proposed compliance date.[146]

Given the status of the list of tags for risk/return summary information, we do not believe the issues raised by commenters warrant delay of the initiative. As previously noted, XBRL U.S. has updated the architecture of the list of tags developed by the ICI and conformed the list to the changes in the risk/return summary that we adopted as part of our Summary Prospectus Initiative.[147] Among other things, the updates are intended to

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139 See letters of Federated and Vanguard.

140 See letter of Federated.

141 See letter of ICI.

142 See letters of ICI and Oppenheimer.

143 See letters of Federated, Gilmore, ICI, and Oppenheimer.

144 See letters of Federated and Vanguard.

145 See letters of ICI and Schnase.

146 See letter of Oppenheimer.

147 See Summary Prospectus Adopting Release, supra note 28.

address technical problems, such as the difficulty of tagging footnotes that were cited by commenters. It is anticipated that these changes related to the architecture and addition of new tags will be finalized by the end of January 2009,[148] almost two years before the compliance date for submission of tagged risk/return summary information. Further, the contract with XBRL U.S. requires that the list of tags receive acknowledgement prior to finalization.

Furthermore, there are a growing number of software applications available to preparers and consumers that are designed to help make interactive data increasingly useful to both retail and institutional investors, as well as to other participants in the U.S. and global capital markets. On this basis, we believe interactive data, and in particular the XBRL standard, are growing and that the list of tags for risk/return summary information is now sufficiently comprehensive to require that mutual funds provide their risk/return summary information in interactive data format.

Updates to the list of tags for risk/return summary reporting may be posted and available for downloading from time to time to reflect changes in the risk/return summary requirements, refinements to the list of tags, or for other reasons. To provide mutual funds sufficient time to become familiar with any such updates, we anticipate giving advance notice before requiring use of an updated list of tags. Based on experience to date with the list of tags for risk/return summary information, we believe that, with the enhancements to the list of tags that XBRL U.S. is developing, the list of tags will be sufficiently developed to support the interactive data disclosure requirements in the rules.

One of the useful aspects of interactive data is its extensibility – that is, the ability

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148 See supra note 51 and accompanying text.

to add to the standard list of tags in order to accommodate unique circumstances in a mutual fund's particular disclosures. The use of customized tags, however, may also serve to reduce the ability of users to compare similar information across mutual funds. In order to promote comparability across funds, we are adopting, as proposed, the rule provision that limits the use of extensions to circumstances where the appropriate element does not exist in the standard list of tags.[149] Wherever possible and when a standard element is appropriate, preparers are required to change the label for an element that exists in the standard list of tags, instead of creating a new customized tag.[150] We received no comments concerning this issue.

2. Regulation S-T and the EDGAR Filer Manual

We are adopting, as proposed, the requirement that mutual funds provide interactive data in the form of exhibits to the related registration statement on Form N-1A, and we are also adopting a requirement that mutual funds provide interactive data in the form of exhibits to any related form of prospectus filed pursuant to rule 497(c) or (e) under the Securities Act that includes risk/return summary information that varies from the registration statement.[151] Interactive data will be required to comply with our Regulation S-T[152] and the EDGAR Filer Manual. The EDGAR Filer Manual is available

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149 Rule 405(c)(1)(iii)(B) as adopted in Interactive Data Adopting Release, supra note 6.

150 Rule 405(c)(1)(iii)(A) as adopted in Interactive Data Adopting Release, supra note 6.

151 The requirement to submit interactive data as an exhibit appears in General Instruction C.3.(g).(iv) of Form N-1A.

152 Rule 405 of Regulation S-T directly sets forth the basic tagging and posting requirements for the XBRL data and requires compliance with the EDGAR Filer Manual. Consistent with rule 405, the EDGAR Filer Manual contains the detailed tagging requirements.

on our Web site.[153] It includes technical information for making electronic filings with the Commission. Volume II of this manual includes guidance on the preparation, submission, and validation of interactive data submitted under the voluntary program.[154]

In addition to both Regulation S-T, which includes the rules we are adopting, and the instructions in our EDGAR Filer Manual, filers may access other sources for guidance in tagging their financial information. These include the XBRL U.S. Preparers Guide; user guidance accompanying tagging software; and financial printers and other service providers. New software and other forms of third-party support for tagging risk/return summary information using interactive data are also becoming available.

3. Commission Viewer

Some commenters asserted that the Commission's mutual fund viewer required more development before the Commission requires filings in interactive data format.[155] Specifically, commenters expressed concern that the viewer was too narrow and uncomfortable to read,[156] that filers in the voluntary program were unable to view an interactive data exhibit prior to submitting the exhibit,[157] and that existing viewers, including the Commission's, do not display the tagged files consistently.[158]

While, as discussed above, the Commission's current viewer permits the rendering of tagged risk/return summary information, we are in the process of

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153 The EDGAR Filer Manual is available at: http://www.sec.gov/info/edgar/edmanuals.htm.

154 As previously noted, the EDGAR Filer Manual is currently being updated to incorporate changes to the tagging requirements applicable to financial data and to fund risk/return summary information. See supra note 17.

155 See letters of ICI, Oppenheimer, Schnase, Starkman, and Vanguard.

156 See letter of Starkman.

157 See letter of Vanguard.

158 See letter of ICI.

implementing changes to develop a more advanced tool that should address many of these concerns. The upgraded viewer will permit filers to conduct test filings and view rendered documents prior to submitting their exhibits. We expect these upgrades to be completed during mid-2009.

Further evaluation will be useful with respect to the availability of inexpensive and sophisticated interactive data viewers. Currently software providers are developing interactive data viewers, and we anticipate that these will become widely available and increasingly useful to investors.

As noted previously, commenters also expressed concern about the potential risks to investors of providing them with only the risk/return summary without a reference to the additional information that is contained in the registration statement.[159] In order to avoid confusion, three of these commenters suggested that the viewable interactive data be accompanied by a cautionary legend encouraging investors to read and consider the full prospectus or other filing from which the information is taken.[160] Specifically, one commenter suggested that the viewable interactive data be accompanied by a cautionary legend similar to that required to be included in fund advertisements by rule 482 under the Securities Act.[161] We agree that it is appropriate to place context on the information presented in the viewer, and to encourage investors to review a fund's prospectus.

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159 See letters of ABA, Federated, ICI, Oppenheimer, and Schnase. See also discussion at Section II.B. supra, note 104 and accompanying text.

160 See letters of ABA, ICI, and Schnase.

161 See letter of ICI. See also rule 482(b)(1) under the Securities Act [17 CFR 230.482]. Rule 482(b)(1) requires a mutual fund advertisement to include a statement that "[a]dvises an investor to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing; explains that the prospectus contains this and other information about the investment company; identifies a source from which an investor may obtain a prospectus; and states that the prospectus should be read carefully before investing."

Accordingly, we will include language within any rendered risk/return summary information on the Commission's upgraded mutual fund viewer to: (1) inform users that the information is derived from a portion of the fund's prospectus; (2) explain that the prospectus contains additional information about the mutual fund; and (3) state that a fund's prospectus should be read carefully before investing.

Commenters also raised concerns about potential liability under the federal securities laws relating to rendered interactive data filings.[162] These concerns are addressed in Section II.F., below.

F. Application of Federal Securities Laws

Complete, accurate, and reliable disclosures are essential to investors and the proper functioning of the securities markets. Our requirement to submit interactive data with mutual fund registration statements is designed to provide investors with new tools to obtain, review, and analyze information from mutual funds more efficiently and effectively. To satisfy these goals, interactive data must meet investor expectations of reliability and accuracy. Many factors, including mutual fund policies and procedures buttressed by incentives provided by the Commission's application of technology, market forces, and the liability provisions of the federal securities laws, help further those goals.

New rule 406T of Regulation S-T[163] addresses the liability for an interactive data file and provides that an interactive data file is:

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162 See letters of ABA, ICI, Oppenheimer, and Schnase.

163 See Interactive Data Adopting Release, supra note 6 (adopting rule 406T of Regulation S-T).

- Subject to the anti-fraud provisions of Section 17(a)(1) of the Securities Act, Section 10(b) of and rule 10b-5 under the Exchange Act, and Section 206(1) of the Investment Advisers Act except as provided below;
- Deemed not filed or part of a registration statement or prospectus for purposes of Sections 11 or 12 of the Securities Act, is deemed not filed for purposes of Section 18 of the Exchange Act or Section 34(b) of the Investment Company Act, and otherwise is not subject to liability under these sections;
- Deemed filed for purposes of rule 103 of Regulation S-T; and
- Subject to liability for a failure to comply with rule 405 of Regulation S-T, but shall be deemed to have complied with rule 405 and would not be subject to liability under the anti-fraud provisions set forth above or under any other liability provision if the electronic filer:
    - makes a good faith attempt to comply with rule 405; and
    - after the electronic filer becomes aware that the interactive data file fails to comply with rule 405, promptly amends the interactive data file to comply with rule 405.

In regard to correcting an interactive data file, the Commission added the term "promptly" to the list of defined terms in Rule 11 under Regulation S-T.[164] Rule 11 defines "promptly" as "as soon as reasonably practicable under the facts and circumstances at the time." The definition is followed by a non-exclusive safe harbor. The safe harbor generally provides that a correction made by the later of 24 hours or 9:30 a.m. on the next business day after the filer becomes aware of the need for the correction

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164 See Interactive Data Adopting Release, supra note 6 (amending Rule 11).

is deemed promptly made. If a fund fails to comply with the safe harbor, the fund still may have corrected promptly depending on the applicable facts and circumstances.

As adopted, the liability provisions of new Rule 406T will apply only until October 31, 2014. We believe that limiting the modified application of the federal securities laws to a specified period improves the balance between avoiding unnecessary cost and expense and encouraging accuracy in regard to interactive data because it recognizes that issuers and service providers likely will grow increasingly skilled at and comfortable with the tagging requirements.

Except for the period limitation, this provision is substantially the same as the proposed treatment of interactive data files under the proposed rules.[165] In the Proposing Release, the Commission sought comment on this topic, and commenters generally supported limiting the liability of mutual funds for good faith errors in tagging or formatting interactive data submissions.[166] As adopted, however, we include a provision that, after October 31, 2014, these liability provisions will no longer apply and an interactive data file will be subject to the same liability provisions as the related official filing.[167] We adopt this provision because we believe, over time, information in interactive data should be subject to the same liability as all other information in a fund's filing. The provision, however, provides funds with protections over a substantial period to become comfortable with ensuring the accuracy of their interactive data files.

As proposed, rule 406 of Regulation S-T also provided that the usual liability provisions of the federal securities laws would apply to human-readable interactive data

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165 See Proposing Release, supra note 9 (proposing rule 406).

166 See letters of ABA, Angel, ICI, and Schnase.

167 See rule 406T(d) of Regulation S-T.

that is identical in all material respects to the corresponding data in the traditional format filing[168] as displayed by a viewer that the Commission provides. Commenters raised substantial concerns over this proposal, including: (1) seeking clarification of the liability applicable to situations not intended to be addressed explicitly by the proposed rules, such as for errors arising as a result of the Commission's interactive data rendering software,[169] or as a result of comparative applications provided by either the Commission or a third party;[170] (2) requesting clarifications that funds should not be held responsible for information converted into viewable form by non-Commission viewers,[171] or for interactive data posted on fund Web sites;[172] and (3) requesting that a mutual fund be able to incorporate by reference the fund's full prospectus and SAI into the viewable interactive data exhibit.[173]

In response to commenters' concerns we believe that interactive data in viewable form are best addressed in relation to interactive data files and traditional concepts of liability. Interactive data in viewable form that are displayed on the Commission's Web site will reflect the related interactive data file and, as a result, such interactive data in viewable form should be treated in the same manner as the related interactive data file in

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168 As proposed, the human-readable interactive data would have been identical to the corresponding data in the traditional format filing if the mutual fund complied with the interactive data tagging requirements of proposed rule 405.

169 See letter of ABA.

170 See letter of Oppenheimer.

171 See letters of ABA, ICI, and Oppenheimer.

172 See letters of ABA and ICI.

173 See letters of Federated, ICI, and Schnase. One commenter noted that the risk/return summary information in a prospectus is subject to liability under Sections 11 or 12 of the Securities Act, but only in connection with the full prospectus in which it is contained, and the SAI that is typically incorporated therein. See letter of ICI. The commenter asserted that it would not be appropriate to isolate the risk/return summary information from the context of the entire registration statement and impose liability.

regard to a fund's failure to correctly tag an interactive data file that results in a failure of the interactive data in viewable form to reflect the related official filing. Interactive data in viewable form that are displayed on other Web sites would be subject to general anti-fraud principles applicable to republication of another person's statements.[174] Consistent with traditional concepts of liability, a fund could not be liable twice for a failure that occurs in both an interactive data file and the related interactive data in viewable form.

We believe that this change is appropriate to address commenters' concerns and provide certainty as to the parameters of their liability related to interactive data. We also believe that it is appropriate given other protections that investors will receive related to the interactive data, including that the risk/return summary information and other disclosures in the traditional format related official filing to which the interactive data relate would continue to be subject to the usual liability provisions of the federal securities laws. For example, the traditional format related official filing would continue to be subject to Section 10(b) and rule 10b-5 of the Exchange Act and, in the appropriate circumstance, to Section 11 of the Securities Act.

In the Interactive Data Adopting Release, we elaborate further upon interactive data in viewable form and our decision not to impose any separate liability for such data.[175] Given that the rules do not include such provisions, we do not address further commenters' requests for clarification related to liability for rendered documents. Further, we do not believe it is needed to provide funds with the ability to incorporate by

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174 These general anti-fraud principles relate to, among other areas, aiding and abetting, control persons, entanglement, and adoption.

175 See Interactive Data Adopting Release, supra note 6.

reference into rendered documents, given that liability is not imposed separately upon interactive data in viewable form.

In the Proposing Release, we did not propose to permit or require cautionary legends for interactive risk/return summary information. Several commenters expressed concern about the potential consequences of investor reliance on incomplete information.[176] Two commenters suggested that the Commission require viewable interactive risk/return disclosures to include a cautionary disclosure similar to the legend we recently required for the new mutual fund summary prospectus, which advises investors where to locate additional information about the fund in the fund's prospectus and SAI, and permits a fund to incorporate certain information by reference into the summary prospectus.[177] As noted in Section II.E. above, we agree with commenters that it is appropriate to alert investors about the availability of additional information in a fund's prospectus. Therefore, we will include cautionary language on the Commission's mutual fund viewer encouraging investors to review a fund's full prospectus.

We believe, however, that attempting to place in interactive data legends of the type suggested would be impracticable because interactive data will often be accessed in its machine-readable form and, even if it were accessed in viewable form, might not be accessed in a place where the legend would appear. As to a legend that states people should not rely on the interactive data in particular, such a legend would be inappropriate

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176 See letters of ABA, Federated, ICI, Oppenheimer, and Schnase.

177 See letters of ICI and Schnase; see also Summary Prospectus Adopting Release, supra note 28.

because there is no reason the data should not be reliable and, were it not reliable, it would have little value.[178]

We are adopting, as proposed, the requirement that an interactive data file consist of "no more and no less" than the corresponding risk/return summary information in the related official filing.[179] One commenter expressed concern that submitting interactive risk/return summary information for multiple funds may confuse some investors who seek data about only a single fund.[180] However, as a result of our Summary Prospectus Initiative, multiple fund prospectuses must present the summary information for each fund sequentially and not integrate the information for more than one fund.[181] Since risk/return summary information for multiple funds will no longer be permitted to be combined in the prospectus, this information will also, in accordance with rule 405, be presented separately in interactive format. In view of this requirement, interactive risk/return summary information for multiple funds should be as easy for investors to locate and understand as similar information for a single-fund prospectus.

To assist mutual funds in ensuring the accuracy of their XBRL filings, we plan, in the future, to make available to mutual funds the opportunity to make a test submission with the Commission to create viewable interactive data.[182] If the validation system finds an error, it will advise the filer of the nature of the error and whether the error was major

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178 We reach a different conclusion regarding a tagged legend in the voluntary program and continue to require such legends to provide investors with limited additional notice because that information is not part of the official filing and was intended for experimental submissions.

179 Rule 405(b)(2) of Regulation S-T.

180 See letter of ICI.

181 See Summary Prospectus Adopting Release, supra note 28.

182 The EDGAR Filer Manual addresses test submissions primarily at Section 6.6.5 of Volume II.

or minor. As occurs in the voluntary program, a major error in an interactive data exhibit that is part of a live filing will cause the exhibit to be held in suspense in the electronic filing system. The rest of the filing will be accepted and disseminated if there are no major errors outside of the interactive data exhibit. If that happens, the filer will need to revise the interactive data exhibit to eliminate the major error and submit the exhibit as an amendment to the filing to which it is intended to appear as an exhibit. A minor error in an interactive data exhibit that is part of a live filing will not prevent the interactive data exhibit from being accepted and disseminated together with the rest of the filing if there are no major errors in the rest of the filing. We believe it is appropriate to accept and disseminate a filing without the interactive data exhibit submitted with it if only the exhibit has a major error, in order to disseminate at least as much information at least as timely as would have been disseminated were there no interactive data requirement.

The rule does not require mutual funds to involve third parties, such as auditors or consultants, in the creation of the interactive data provided as an exhibit to a mutual fund's Form N-1A filing, including assurance.[183] We are taking this approach after considering various factors, including:

- commenters' views;
- the availability of a comprehensive list of tags for risk/return summary information from which appropriate tags can be selected, thus reducing a mutual fund's need to develop new elements;

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183 With respect to registration statements, SAS 37 (AU Section 711) was issued in April 1981 to address the auditor's responsibilities in connection with filings under the federal securities statutes. With respect to our rule, an auditor will not be required to apply AU Section 711 to the interactive data provided as an exhibit in a fund's registration statement, or to the viewable interactive data.

- the availability of user-friendly software with which to create the interactive data file;
- the delayed compliance date, prior to which mutual funds may become familiar with the tagging of risk/return summary information;
- the availability of interactive data technology specifications, and of other XBRL U.S., XBRL International, and Commission resources for preparers of tagged data;[184]
- the advances in rendering/presentation software and validation tools for use by preparers of tagged data that can identify the existence of certain tagging errors;
- the expectation that preparers of tagged data will take the initiative to develop practices to promote accurate and consistent tagging; and
- the mutual fund's and preparer's liability for the accuracy of the traditional format version of the risk/return summary information.

G. Changes to the Voluntary Program

Mutual funds will no longer be able to submit risk/return summary information in interactive data format through the voluntary program after the compliance date for the mandatory rules. We are amending rule 401 of Regulation S-T to remove risk/return summary information as a category of information permitted to be submitted under the voluntary program effective after the compliance date for the mandatory rules.[185] This amendment differs from our proposal which would have removed the option to file

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184 An example of Commission resources includes the EDGAR Filer Manual.

185 See rule 401(b)(iv).

risk/return summary information under the voluntary program altogether. This change makes explicitly clear that mutual funds may continue to experiment with the submission of risk/return summary information in interactive data format up until the compliance date for these rule amendments. For this same reason, we are not adopting proposed changes to rule 8b-33 under the Investment Company Act and certain technical amendments to rule 401 of Regulation S-T.[186]

Further, in order to encourage participation in the voluntary program for tagging investment company financial information, we are adopting, substantially as proposed, amendments to enable investment companies that are registered under the Investment Company Act, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X to submit exhibits containing a tagged schedule of portfolio holdings without having to submit other financial information in interactive data format.[187] As with the current voluntary program, volunteers will be able to participate merely by submitting a tagged Schedule I - Investments in Securities of Unaffiliated Issuers ("Schedule I").[188] To facilitate this, XBRL U.S. developed a list of tags that could be used to tag portfolio holdings. On October 21, 2008, XBRL U.S. issued its Schedule of

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186 See proposed rule 8b-33; proposed rule 401(b)(1)(iv); proposed rule 401(d)(1)(i); and proposed rule 401(d)(2)(i) in the Proposing Release, supra note 9.

187 Rule 401(b)(1)(v) (designating Schedule I - Investments in securities of unaffiliated issuers as mandatory content under the voluntary program). The voluntary program will be modified to permit participation only by registered investment companies, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X. See Interactive Data Adopting Release, supra note 6 (rule 401(a)).

188 Rule 12-12 of Regulation S-X [17 CFR 210.12-12].

Investments Taxonomy for public comment.[189] The taxonomy is expected to be finalized by XBRL U.S. by the end of January 2009.

Currently, the interactive data furnished under the voluntary program must consist of at least one item from a list of enumerated mandatory content ("Mandatory Content"), including financial statements, earnings information, and, for registered management investment companies, financial highlights or condensed financial information and risk/return summary information set forth in Form N-1A.[190] We are adding Schedule I information as a separate item of Mandatory Content that participants can submit in order to give volunteers greater flexibility in tagging fund data.

Several commenters asserted that expanding the voluntary program to include fund portfolio holdings information was premature.[191] These commenters stated that (1) the information would not be meaningful to individual investors;[192] (2) the taxonomy does not yet exist;[193] and (3) more experience with the technology is necessary before expansion of the program.[194] Given that participants may already provide portfolio holdings information as part of their financial statements under the voluntary program, we disagree with these comments. The expansion of the voluntary program to permit the submission of portfolio holdings information simply provides volunteers with an alternative to submitting complete financial statement information and increases the options for participation in the program. Investors, financial intermediaries, and third-

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189 See supra note 51.

190 Rule 401(b)(1) of Regulation S-T [17 CFR 232.401(b)(1)].

191 See letters of Data Communiqué, ICI, and Vanguard.

192 See letter of Data Communiqué.

193 See letter of ICI.

194 See letter of Vanguard.

party information providers, among others, use the portfolio holdings data contained in Schedule I to make decisions concerning the purchase and continued holding of funds and for other purposes. Portfolio holdings data may be even more useful to these various stakeholders if such data is interactive.

Under the current voluntary program, any official filing with which tagged exhibits are submitted must disclose that the financial information is "unaudited" or "unreviewed," as applicable and that the purpose of submitting the tagged exhibits is to test the related format and technology and, as a result, investors should not rely on the exhibits in making investment decisions.[195] We believe that this cautionary disclosure should also be tagged and included within each interactive data exhibit, in order to help alert investors and other users that the exhibits should not be relied on in making investment decisions. Accordingly, we are requiring, as proposed, that this disclosure be included in the exhibits submitted pursuant to the voluntary program as a tagged data element,[196] consistent with how the cautionary disclosure is presented in risk/return summary exhibits under the current voluntary program.

H. Compliance Date

The rules require all mutual funds to submit interactive data with any registration statement or post-effective amendment on Form N-1A that includes or amends risk/return summary information and with any form of prospectus filed pursuant to rule 497(c) or (e) under the Securities Act that contains risk/return summary information that varies from the registration statement.[197] The first required submissions will be for initial registration

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195 Rule 401(d)(1)(ii) of Regulation S-T [17 CFR 232.401(d)(1)(ii)].

196 See rule 401(d)(2).

197 See General Instruction C.3.(g) to Form N-1A.

statements and post-effective amendments that are annual updates to effective registration statements[198] and that become effective after January 1, 2011. Further, no mutual fund is required to comply with the provision to submit a tagged risk/return summary exhibit with any form of prospectus filed pursuant to rule 497(c) or (e) under the Securities Act until that fund has first submitted an exhibit with its registration statement.

In the Proposing Release, we asked for comment on an anticipated compliance date that would require submissions for initial registration statements and post-effective amendments that are annual updates to effective registration statements and that become effective after December 31, 2009. Commenters generally objected to this compliance date, asserting that adoption of the requirement to tag risk/return summary information is premature, given that the Commission's pending Summary Prospectus Initiative and ETF Initiative would change the required information in the risk/return summary.[199]

Commenters also asserted that the proposed schedule for implementation of interactive data tagging should be delayed because it did not allow mutual funds sufficient time to resolve outstanding technical issues or to review the various options for compliance with the rule.[200] Others asserted that more information is needed to be collected from the current voluntary program, including costs and benefits.[201] Two commenters supported phasing in the interactive data requirements based on the size of a mutual fund's total net assets, with larger funds becoming subject to the rules first.[202] Finally, commenters also noted that implementing tagging of the current risk/return

198 See supra note 11 and accompanying text.

199 See supra note 69 and accompanying text.

200 See letters of Federated, ICI, and Oppenheimer.

201 See letters of Federated, ICI, and Schnase.

202 See letters of Data Communiqué and Schnase.

summary is premature given that the risk/return summary and the taxonomy could potentially change as a result of the Summary Prospectus Initiative and the ETF Initiative.[203]

While we believe that these comments warrant a change in the compliance date to ensure funds have sufficient time to prepare their first risk/return summary submissions in interactive data format, they do not justify a substantial delay in implementation of this initiative. First, as we discussed above, we recently adopted final amendments to Form N-1A in the Summary Prospectus Adopting Release,[204] and, therefore, do not believe those commenter concerns warrant delaying implementation of this tagged risk/return summary information.[205]

Second, for the reasons we discussed in Section II.A., we believe that the compliance date we are adopting will allow mutual funds sufficient time to prepare risk/return summary information in interactive data format. As we noted previously, XBRL U.S. has updated the list of tags to reflect our most recent revisions to mutual fund risk/return disclosure requirements, and has submitted this list for public comment, after which it will be submitted for acknowledgment to XBRL International. This process should be completed by the end of January 2009. Therefore, we believe that the list of tags for risk/return summary information is now sufficiently advanced, to require that mutual funds provide their risk/return summary information in interactive data format. Further, as discussed above, over the last three years the Commission has gained

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203 See letter of ICI, Oppenheimer, T. Rowe Price, and Vanguard.

204 See supra notes 69 and 70 and accompanying text.

205 These amendments were adopted on November 19, 2008. See supra note 69, and Summary Prospectus Adopting Release, supra note 28.

experience with interactive data in the voluntary program covering both mutual fund risk/return and financial statement information.

We do, however, recognize that requiring mutual funds to tag their risk/return summary information at the same time that they are revising their prospectuses for the recent amendments to Form N-1A in the Summary Prospectus Adopting Release could result in an unnecessary burden. For that reason, we are making a modification to the compliance date so that mutual funds have an additional year before they are required to submit tagged risk/return summary information. This period of almost two years should provide funds with sufficient time to prepare the amended disclosures and interactive data submissions based on those disclosures.

While the requirements we recently adopted for interactive submission of financial data include a schedule of tiered implementation, we believe that mutual fund investors have an important interest in having access to interactive risk/return data from all funds concurrently. Therefore, we are adopting, as proposed, a single compliance date for all mutual funds. We expect that most mutual funds that are part of smaller fund families, which generally are disproportionately affected by regulatory costs, will be able to provide their risk/return summary information in interactive data format without undue effort or expense. While interactive data reporting involves changes in reporting procedures mostly in the initial reporting periods, we expect that these changes will provide efficiencies in future periods. As a result, there may be potential future net savings to the mutual fund, particularly if interactive data become integrated into the mutual fund's disclosure process. While we recognize that requiring interactive data risk/return summary information will likely result in start-up expenses for all mutual fund

families, we expect that both software and third-party services will be available to help meet the needs of mutual fund families, including meeting the unique needs of smaller mutual fund families.

We are sensitive to concerns expressed by some commenters that undue expense and burden may accompany the adoption of required interactive data reporting.[206] We believe that the extended compliance date and the proposed 15-business day period for making interactive data submissions seem to alleviate these concerns.[207]

Under the rules we are adopting, the voluntary program is being modified to allow for participation by mutual funds with respect to risk/return summary information up until January 1, 2011, but continue to permit investment companies to participate with respect to financial statement information thereafter. Investment companies may submit their tagged portfolio holdings information, pursuant to the rules we are adopting, at any time after the effective date of these rules, July 15, 2009. This effective date was chosen to coincide with the release of an updated EDGAR Filer Manual which will incorporate the new list of tags for portfolio holdings information.

We intend to monitor implementation and, if necessary, make appropriate adjustments to the adopted amendments.

III. PAPERWORK REDUCTION ACT

A. Reporting and Burden Estimate

Certain provisions of the rule and form amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995

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206 See letters of ICI, Schnase, and Starkman.

207 We discuss more fully supra at Section II.F liability related to required submissions of interactive data.

("PRA").[208] The titles for the collections of information are: (1) "Mutual Fund Interactive Data" (OMB Control No. 3235-0642) and (2) "Voluntary XBRL-Related Documents" (OMB Control No. 3235-0611). We published notice soliciting comments on the collection of information requirements in the release proposing the amendments[209] and submitted the proposed collections of information to the Office of Management and Budget ("OMB") for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.[210] OMB has assigned a control number to the collection of information for mutual fund interactive data. We received four comments on the collection of information requirements[211] and have revised the estimated reporting and cost burdens of the rule and form amendments, as discussed below. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number. Because we have modified our proposals as described above, we are revising the burden estimate for the Mutual Fund Interactive Data collection of information. We have submitted a revised request to OMB.

The title for the new collection of information for submitting risk/return summary information in interactive data format that the amendments establish is "Mutual Fund Interactive Data". This collection of information relates to already existing regulations and forms adopted under the Securities Act, the Exchange Act, and the Investment Company Act that set forth disclosure requirements for mutual funds and other issuers. The amendments require mutual funds to submit their risk/return summary information in

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208 44 U.S.C. 3501 et seq.

209 See Proposing Release, supra note 9, 73 FR at 35459.

210 See Proposing Release, supra note 9, 73 FR at 35457-59.

211 See letters of Confluence, ICI, Schnase, and Starkman.

interactive data format and post it on their Web sites, if any, in interactive data form. The specified risk/return summary information already is and will continue to be required to be submitted to the Commission in traditional format under existing disclosure requirements. Compliance with the amendments is mandatory beginning with initial registration statements and post-effective amendments that are annual updates to effective registration statements that become effective after January 1, 2011.[212]

The title for the collection of information for submitting portfolio holdings in interactive data format is "Voluntary XBRL-Related Documents". The amendments will permit investment companies that are registered under the Investment Company Act, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X to submit exhibits containing a tagged schedule of portfolio holdings without having to submit other financial information in interactive data format. Compliance with these amendments is voluntary.

B. Submission of Risk/Return Summary Information Using Interactive Data

Form N-1A (OMB Control No. 3235-0307) under the Securities Act and the Investment Company Act[213] is used by mutual funds to register under the Investment Company Act and to offer their securities under the Securities Act. The information required by the new collection of information, corresponds to the risk/return summary information now required by Form N-1A and is required to appear in exhibits to Form N-1A, exhibits to prospectuses with risk/return summary information that varies from the

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212 See supra Section II.H.

213 17 CFR 239.15A; 17 CFR 274.11A.

registration statement, and on mutual funds' Web sites.

In the Proposing Release, we estimated that each mutual fund would submit one interactive data document as an exhibit to a registration statement or a post-effective amendment thereto on Form N-1A that includes or amends information provided in response to Items 2 or 3.[214] We estimated in the Proposing Release that interactive data filers would require an average of approximately 13 burden hours to tag risk/return summary information in the first year, and the same task in subsequent years would require an average of approximately 11 hours.[215] Therefore, we estimated the average annual burden over a three-year period to be approximately 12 hours.[216]

In response to commenters' concerns, however, we are modifying our rules to include changes to risk/return summary information that mutual funds are permitted to make pursuant to rule 497 under the Securities Act.[217] Based on a limited, random, non-statistical survey by Commission staff of filings made pursuant to rule 497, we estimate that 5% of mutual funds, or approximately 443 funds,[218] will make changes to risk/return summary information in filings submitted pursuant to rule 497. Based on estimates of 8,856 mutual funds each submitting one interactive data document as an exhibit to a registration statement or post-effective amendment thereto[219] and 443 mutual funds submitting an additional interactive data document as an exhibit to a filing pursuant to

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214 This information is now contained in Items 2, 3, and 4. See supra note 61.

215 The average burden hours for the first and subsequent submissions were calculated using data collected from a voluntary program participant questionnaire. See infra Section IV.

216 (13.33 hours for the first submission + 11.275 hours for the second submission + 11.275 hours for the third submission) ÷ 3 years = approximately 12 hours.

217 See supra notes 90 through 95 and accompanying text.

218 5% x 8,856 mutual funds = approximately 443 mutual funds.

219 This estimate is based on an analysis by the Division of Investment Management staff of publicly available data.

rule 497, each incurring 12 hours per year on average, we estimate that, in the aggregate, interactive data adoption will result in an additional 111,588 burden hours for all mutual funds for each of the first three years.[220] Converted into dollars, this amounts to approximately $23,768,244.[221]

One commenter challenged the estimates provided in the Proposing Release, asserting that the sample of voluntary program participants is too small and consists mostly of large fund complexes.[222] We note that the 22 participants in the voluntary program at that time included both larger and smaller funds, and, therefore, the estimates derived from our experiences with this program reflect burdens incurred by funds of varying sizes.[223] Of these 22 funds, six funds, representing a range of fund complex sizes, provided data in response to the voluntary program questionnaire concerning internal and external costs of preparing and submitting interactive risk/return summary

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220 (8,856 mutual funds + 443 mutual funds) x 12 incremental burden hours per mutual fund = 111,588 burden hours.

221 This cost increase is estimated using an estimated hourly wage rate of $213.00 ((111,588 burden hours) x ($213.00 hourly wage rate) = $23,768,244 total incremental internal cost). The estimated wage figure is based on published rates for compliance attorneys and programmer analysts, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, yielding effective hourly rates of $270 and $194, respectively. See Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2007 (Sept. 2007) ("SIFMA Report"). The estimated wage rate was further based on the estimate that compliance attorneys would account for one quarter of the hours worked and senior system analysts would account for the remaining three quarters, resulting in a weighted wage rate of $213.00 per hour (($270 x .25) + ($194 x .75)).

222 See letter of Schnase.

223 As we noted above in Section I.A., to date 25 funds have participated in the voluntary program. However, at the time of our Proposing Release, only 22 funds had submitted interactive data risk/return summary information.

information.[224]

We further estimate, as we did in the Proposing Release, that mutual funds will require an average of approximately 1 burden hour to post interactive data to their Web sites. Based on estimates of 8,856 mutual funds posting interactive data, each incurring 1 burden hour per year on average, we estimate that, in the aggregate, adoption of Web site posting requirements will result in an additional 8,856 burden hours for all mutual funds.[225] Converted into dollars, this amounts to approximately $2,214,000.[226]

One commenter asserted that the Commission's cost estimates may be vastly understated because they omit the much larger cost of converting fund Web sites to XBRL compatibility.[227] This commenter did not provide any specific cost estimates to support this assertion. Complying with the Web site posting requirement, however, does not require conversion of the fund's Web site infrastructure.

We also estimate, as we did in the Proposing Release, that software and consulting services will be used by mutual funds for an increase of approximately $802 per mutual fund.[228] Based on the estimate of 8,856 mutual funds using software and

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224 The average burden hours for the first and subsequent submissions were calculated using data collected from six responses to a voluntary program participant questionnaire from mutual funds that participated in the voluntary program. See infra Section IV.A.

225 8,856 mutual funds x 1 burden hour per mutual fund = 8,856 burden hours.

226 ($250 x 1 hour x 8,856 mutual funds). This cost estimate is based on informal discussions with a limited number of persons believed to be generally knowledgeable about preparing, submitting, and posting interactive data. See infra Section IV.A.

227 See letter of Starkman.

228 For purposes of this estimate, we assumed that the largest 50 fund complexes will develop software in-house incurring costs of $125,000 in the first year. Assuming that the largest 50 fund complexes will develop software for use in all of their funds, and that their funds encompass 80% of the number of funds (7,085), then the average first year cost for those funds will be ($125,000 x 50)/7,085 = $882. Therefore, for those funds using software developed internally, the average 3 year cost will be approximately $827 ($882 in the first year + $800 in the second year + $800 in the third year) ÷ 3 years =

consulting services at an annual cost of $802 we estimate that, in the aggregate, the total external costs to the industry will be approximately $7,098,970.[229] While one commenter asserted that these estimates do not include professional costs from outside accountants and lawyers,[230] we note that this estimate does reflect the external cost data provided in response to the voluntary program questionnaire. Respondents to the questionnaire universally indicated that they did not use the services of outside accountants in preparing their interactive data submissions. A few of the respondents indicated that they used the services of an outside attorney in preparing their interactive data submissions, however, only one respondent indicated a de minimis expense for such services. A few respondents who did not use the services of an outside attorney for their voluntary filing did indicate they would work with an outside attorney to prepare their interactive data submission upon adoption of our rule amendments. These costs were reflected in our estimates in the Proposing Release.

One commenter also stated that costs for the voluntary program participants were low because many fund groups received tagging software and services at no cost, which the commenter anticipated would not be the case upon the adoption of our rule amendments.[231] We note, however, that our survey data included information from funds that used no-cost software and from one fund that created its own software in-house at

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approximately $827. The average 3 year cost for those funds that use commercial software will be $700 ($500 in the first year + $800 in the second year + $800 in the third year) ÷ 3 years = $700. Assuming 80% of funds incurred costs of $827 and 20% of funds incurred costs of $700, the average software and consulting cost per mutual fund will be approximately $802. These estimates were derived from responses to a voluntary program questionnaire. See infra Section IV.A.

229 8,856 mutual funds x $802 = approximately $7,098,970.

230 See letter of Schnase.

231 See letter of ICI.

great expense.[232] We believe our cost estimates provide an adequate picture of the initial software expenditures for funds to comply with our rule amendments.

One commenter asserted that automated tagging and filing processes would reduce the risk and cost associated with manual processes.[233] We agree that such software tools may help minimize both the burden on respondents and the risk of errors in the collection process. While this commenter noted that additional software tools would need to be introduced in order to allow data to be identified and tagged at its source, thereby automating the processing of the risk/return data, we expect that the development of such tools is likely to be hastened by mutual fund disclosure using interactive data. As noted previously,[234] there is a growing number of software applications available to preparers and consumers that are designed to help make interactive data increasingly useful to both retail and institutional investors.

Regulation C and Regulation S-T

Regulation C (OMB Control No. 3235-0074) describes the procedures to be followed in preparing and filing registration statements with the Commission. Regulation S-T (OMB Control No. 3235-0424) specifies the requirements that govern the electronic submission of documents. The changes to these items that we are adopting will add and revise rules under Regulations C and S-T. As we explained in the Proposing Release, the additional collection of information burden that will result from these changes, however, are included in Form N-1A, and we have reflected the burden for these new requirements in the burden estimate for the new collection of information "Mutual Fund Interactive

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232 See infra note 252.

233 See letter of Confluence.

234 See supra Section II.E.

Data." The rules in Regulations C and S-T do not impose any separate burden.

C. Changes to the Voluntary Program

We are decreasing the burden associated with the existing collection of information for Voluntary XBRL-Related Documents to reflect the amendments. Mutual funds will no longer be able to submit risk/return summary information in interactive data format through the voluntary program after the compliance date for the mandatory rules.

When we adopted the amendments to expand the voluntary program to enable mutual funds voluntarily to submit risk/return summary information in interactive data format, we estimated an increase to the existing collection of information for Voluntary XBRL-Related Documents.[235] We estimated that 10% of the approximately 545 fund complexes that have mutual funds, or 55 fund complexes, would each submit documents containing tagged risk/return summary information for one mutual fund.[236] We further estimated that the initial creation of tagged documents containing risk/return summary information would require, on average, approximately 110 burden hours per mutual fund, and the creation of such tagged documents in subsequent years would require an average 10 burden hours per mutual fund. Because the PRA estimates represent the average burden over a three-year period, we estimated the average hour burden for the submission of tagged documents containing risk/return summary information for one mutual fund to be approximately 43 hours.[237]

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235 See Risk/Return Voluntary Program Adopting Release, supra note 32.

236 In the case of a mutual fund with multiple series, our estimate treated each series as a separate mutual fund.

237 (110 hours in the first year + 10 hours in the second year + 10 hours in the third year) ÷ 3 years = 43 hours.

Based on our previous estimates of 55 participants submitting tagged documents containing risk/return summary information for one mutual fund once per year and incurring 43 hours per submission, we estimated that, in the aggregate, the industry would incur an additional 2,365 burden hours associated with the amendments.[238] We further estimated that 75% of this burden increase, or approximately 1,774 hours, would be borne internally by the mutual fund complexes. We estimated that this internal burden increase converted to dollars would amount to a total annual increase of internal costs of approximately $393,828.[239]

We also estimated that 25% of the burden, or approximately 591 hours, would be outsourced to external professionals and consultants retained by the mutual fund complex at an average cost of $256.00 per hour for a total annual increase of approximately $151,296.[240] In addition, we estimated that the cost of licensing software would be $333 per participant per year, for a total annual increase of $18,315.[241] Altogether, we estimated the total annual increase in external costs related to the amendments would be $169,611.[242]

Given that mutual funds will no longer be able to submit risk/return summary information in interactive data format through the voluntary program some time after adoption of the amendments, we will reduce the internal hour burden associated with the

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238 55 documents per year x 43 hours per submission = 2,365 hours.

239 See note 82 of the Risk/Return Voluntary Program Adopting Release, supra note 32.

240 See note 83 of the Risk/Return Voluntary Program Adopting Release, supra note 32.

241 $333 per participant x 55 participants = $18,315.

242 This annual total consisted of $151,296 in outside professional costs plus $18,315 in software costs.

voluntary program by 1,774 hours and the internal cost burden by $393,828. We will also reduce the external cost burden by $169,611.

The amendments to the voluntary program also enable investment companies that are registered under the Investment Company Act, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X to submit exhibits containing a tagged schedule of portfolio holdings without having to submit other financial information in interactive data format. As with the current voluntary program, volunteers can participate, without pre-approval, merely by submitting Schedule I in interactive data format.

One commenter stated that the cost estimates from the voluntary program did not include many, or any, costs associated with tagging data other than the risk/return summary, such as portfolio holdings information.[243] We note, however, that the hour and cost burdens for voluntary interactive data submissions of portfolio holdings information were discussed separately from the hour and cost burdens for the submission of risk/return summary information in interactive data format in the Proposing Release and also are discussed below.

We estimate that 20 registrants will choose to submit a schedule of portfolio holdings in interactive data format.[244] We believe that investment companies that are registered under the Investment Company Act, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in

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243 See letter of Schnase.

244 This estimate is based on the current level of participation in the voluntary program, in which 25 funds have submitted interactive risk/return summary information.

accordance with Article 6 of Regulation S-X will participate, given the flexibility provided by a new option to submit exhibits containing just portfolio holdings information in interactive data format.

Submission of portfolio holdings information in interactive data format will not affect the burden of preparing the registrants' traditional format filings. In order to provide portfolio holdings information in interactive data format, a participating registrant will have to tag Schedule I and submit the resulting interactive data file as an exhibit to its filing on Form N-CSR or Form N-Q.[245] A list of tags that could be used to tag portfolio holdings is expected to be finalized by the end of January 2009. Based on our experience with mutual funds that have submitted risk/return summary information in the current voluntary program, we estimate that the initial creation of portfolio holdings information in interactive data format will require, on average, approximately 12 burden hours per registrant,[246] and the creation of such information in interactive data format in subsequent years will require an average of 10 burden hours per registrant.[247] Because the PRA estimates represent the average burden over a three-year period, we estimate the

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245 Form N-CSR [17 CFR 249.331; 17 CFR 274.128]; Form N-Q [17 CFR 249.332; 17 CFR 274.130].

246 Mutual funds submitting risk/return summary information in our voluntary program indicated that an initial submission in the voluntary program took approximately 13 hours of labor. Given that the submission of portfolio holdings in interactive data format is less complex than the submission of risk/return summary information in interactive data format but potentially requires the tagging of many more individual items, we estimate that the initial creation of interactive data files containing portfolio holdings information will require, on average, approximately 12 burden hours per volunteer.

247 Mutual funds submitting risk/return summary information in the current voluntary program indicated that each set of submissions, after the initial set, would take approximately 11 burden hours, or 2 hours less than the initial submission. We estimate that the reduction in burden hours for subsequent submissions of portfolio holdings information in interactive data format will be a similar 2 hour reduction, or approximately 10 burden hours per volunteer.

average hour burden for the submission of portfolio holdings information in interactive data format for one registrant to be approximately 11 hours.[248]

Based on the estimate of 20 registrants submitting interactive data files containing portfolio holdings information once each year and incurring 11 hours per submission we estimate that, in the aggregate, the industry will incur an additional 220 burden hours associated with the proposed amendments.[249] We estimate that this internal burden increase converted to dollars will amount to approximately $47,000.[250]

We also estimate that external professionals and consultants will be retained by the registrant for an increase of approximately $600.00.[251] It is our understanding that annual software licensing costs generally would be included in the cost of hiring external professionals and consultants.[252] Based on the estimate of 20 registrants retaining

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248 (12 hours in the first year + 10 hours in the second year + 10 hours in the third year) ÷ 3 years = approximately 11 hours. While the PRA requires an estimate based on a hypothetical three years of participation, a registrant, as noted earlier, could participate in the voluntary program by submitting portfolio holdings information in interactive data format over a shorter period or even just once as the registrant chooses.

249 20 documents per year x 11 hours per submission = 220 hours. We note that mutual funds submit portfolio holdings information to the Commission four times per year. However, for purposes of our analysis, we estimate that mutual funds choosing to participate in the voluntary program will submit portfolio holdings information in interactive data format once each year.

250 This cost increase is estimated by multiplying the increase in annual internal hour burden (220) by the estimated hourly wage rate of $213.00. See supra note 221.

251 ($100.00 in the first year + $800.00 in the second year + $800.00 in the third year) ÷ 3 years = approximately $600.00. Mutual funds participating in our voluntary program for the submission of risk/return summary information in interactive data format indicated an initial external cost of $100.00 for the hiring of external professionals and consultants and projected an annual cost of $800.00 for external service providers going forward. The increase going forward was due to the fact that two of the participants indicated that each of their external service providers had waived its fee for the initial submission.

252 We note that one respondent spent over $100,000 internally to develop software to submit risk/return summary information in interactive data format. We did not include this number in our calculations as this software was developed solely for purposes of submitting risk/return summary information and not for submitting financial information in interactive data format. See infra note 270.

external professionals and consultants at an annual cost of $600.00 we estimate that, in the aggregate, the total external cost to the industry will be $12,000.[253]

As a result of the changes to the voluntary program, we therefore estimate a total decrease in internal burden hours of approximately 1,600[254] and a total decrease in internal costs of approximately $347,000.[255] We further estimate a total decrease in external costs of approximately $158,000.[256]

IV. COST/BENEFIT ANALYSIS

A. Submission of Risk/Return Summary Information Using Interactive Data

The interactive data framework that we are adopting has the potential to remove a barrier in the flow of information between mutual funds and users of information that is conveyed through mutual fund disclosures. This should enable less costly dissemination of information and thereby improve the allocation of capital. The cost of implementation will depend primarily on the costs of transition by mutual funds to the new mode of reporting. The magnitudes of these benefits and costs from any individual mutual fund's adoption of interactive data reporting will depend on the number of other mutual funds

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We also note that one commenter stated that our estimated costs for interactive data software and services were low because many fund groups received tagging software and services at no cost. See supra note 231 and accompanying text.

253 20 registrants submitting interactive data files under the voluntary program x $600.00 = $12,000.

254 (1,774 hours for the removal of risk/return summary information from the voluntary program – 220 hours for the submission of schedule of portfolio holdings in interactive data format = approximately 1,600 hours.)

255 ($393,828 for the removal of risk/return summary information from the voluntary program – $47,000 for the submission of schedule of portfolio holdings in interactive data format = approximately $347,000.)

256 ($169,611 for the removal of risk/return summary information from the voluntary program – $12,000 for the submission of schedule of portfolio holdings in interactive data format = approximately $158,000.)

that also adopt and on the availability of supporting software and other infrastructures that enable analysis of the information. To the extent that submitted information allows investors to make investment decisions based on market-wide comparison and analysis, the value to the investors of the reported information tends to increase with the total number of mutual funds adopting the regime. Likewise, mutual funds' incentives to report their information using interactive data depends on the interest level of the investors in this mode of reporting. By mandating implementation, the rule will expand the network of adopters and thereby create positive network externalities of reported information for the investors.

In the Proposing Release, we requested public comment and empirical data regarding the costs and benefits of the amendments. Three commenters generally expressed concern about the costs of implementing the Commission's proposal and the uncertain nature of any cost efficiencies or cost savings.[257] One commenter stated that investors will not be helped by the additional costs incurred by mutual funds as a result of the proposal and that the required interactive disclosure will be static and quickly outdated.[258] None of these commenters provided any specific quantitative data relating to cost estimates.

1. Benefits of Interactive Data Submissions and Web Site Posting

The rules have the potential to benefit investors both directly and by facilitating the exchange of information between mutual funds and the third party information providers and other intermediaries who receive and process mutual fund disclosures.

Information Access

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257 See letters of Gilmore, ICI, and Schnase.

258 See letter of Federated.

Benefits of the rulemaking accrue from the acceleration of market-wide adoption of interactive data format reporting. The magnitudes of the benefits thus depend on the value to investors of the new reporting regime relative to the old reporting regime and on the extent to which the mandated adoption speeds up the market-wide implementation.

Requiring mutual funds to file their risk/return summary information using the interactive data format enables investors, third-party information providers, and the Commission staff to capture and analyze that information more quickly and at a lower cost than is possible using the same information provided in a static format.[259] Even though the new regime does not require any new information to be disclosed or reported, certain benefits accrue when mutual funds use an interactive data format to report their risk/return summary information. These include the following. Through interactive data, what is currently static, text-based information can be dynamically searched and analyzed, facilitating the comparison of mutual fund cost, performance, and other information across multiple classes of the same fund and across the more than 8,000 funds currently available. Any investor with a computer has the ability to acquire and download data that have generally been available only to intermediaries and third-party analysts. For example, users of risk/return summary information can download it directly into spreadsheets, analyze it using commercial off-the-shelf software, or use it within investment models in other software formats. Also, to the extent investors currently are required to pay for access to mutual fund risk/return summary information that has been extracted and reformatted into an interactive data format by third-party sources, the availability of interactive data in Commission filings will allow investors to avoid

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259 See supra Section II.A.

additional costs associated with third-party sources.

The magnitude of this informational benefit varies, however, with the availability of sophisticated tools that will allow investors to analyze the information. The growing development of software products for users of interactive data is helping to make interactive data increasingly useful to both institutional and retail investors.[260] For example, currently there are many software providers and financial printers that are developing interactive data viewers. We anticipate that these will become widely available and increasingly accessible to investors. We expect that the open standard feature of the interactive data format will facilitate the development of applications, and software, and that some of these applications may be made available to the public for free or at a relatively low cost. The continued improvement in this software will allow increasingly useful ways to view and analyze mutual fund risk/return summary information to help investors make more well-informed investment decisions.

Interactive data also provides a significant opportunity for mutual funds to automate their regulatory filings and business information processing, with the potential to increase the speed, accuracy, and usability of mutual fund disclosure. This reporting regime may in turn reduce filing and processing costs.

By enabling mutual funds to further automate their disclosure processes, interactive data may eventually help funds improve the timeliness of, and speed at which they generate information. For example, with standardized interactive data tags, registration statements may require less time for information gathering and review. One

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260 See SEC's Office of Interactive Disclosure Urges Public Comment as Interactive Data Moves Closer to Reality for Investors, Securities and Exchange Commission Press Release, Dec. 5, 2007, available at: http://www.sec.gov/news/press/2007/2007-253.htm.

commenter expressed some skepticism about the ability of interactive data to create internal efficiencies that may ultimately result in cost savings.[261] We continue to believe, however, that internal efficiencies may be one of several possible benefits of interactive data tagging.

A mutual fund that uses a standardized interactive data format at earlier stages of its reporting cycle may also increase the accuracy of its disclosure by reducing the need for repetitive data entry that could introduce errors and enhancing the ability of a mutual fund's in-house professionals to identify and correct errors in the fund's registration statements filed in traditional electronic format. There has been a growing development in both the number and capabilities of software products and applications to assist mutual funds to tag their risk/return summary information using interactive data helping make interactive data increasingly useful.[262]

Mutual funds that automate their regulatory filings and business information processing in a manner that facilitates their generation and analysis of disclosures should, as a result, realize a reduction in costs.

Market Efficiency

The requirements may benefit investors by making financial markets more efficient in regard to the following:[263]

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261 See letter of ICI.

262 Id.

263 We believe the benefits will stem primarily from the requirement to submit interactive data to the Commission and the Commission's disseminating that data. We also believe, however, that the requirement that mutual funds with Web sites post the interactive data required to be submitted would encourage its widespread dissemination thereby contributing to lower access costs for users and the related benefits described.

- capital formation as a result of mutual funds being in a better position to attract shareholders because of greater (less costly) awareness on the part of investors of mutual fund risk/return summary information; and
- capital allocation as a result of investors' being better able to allocate capital among those mutual funds seeking it because of interactive data reporting's facilitating innovations in efficient communication of mutual fund risk/return summary information.

More Efficient Capital Formation

An increase in the efficiency of capital formation is a benefit that may accrue to the extent that interactive data reduces some of the information barriers that make it costly for mutual funds to find appropriate sources of new investors. In particular, smaller mutual fund complexes are expected to benefit from enhanced exposure to investors. If interactive data risk/return summary reporting increases the availability, or reduces the cost of collecting and analyzing, mutual fund risk/return summary data, as anticipated, then there could be improved coverage of mutual funds in smaller fund complexes by third party information providers and commercial data vendors.

At present, some mutual funds in smaller fund complexes do not provide their data to third party information providers.[264] This may reduce the likelihood that their data is readily available to investors who use commercially available products to assess mutual fund performance. If interactive data reporting increases coverage of mutual funds in smaller fund complexes by third-party information providers, and this increases their exposure to investors, then lower search costs for shareholders could result.

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264 Analysis by Division of Investment Management staff based on publicly available data.

More Efficient Capital Allocation

An increase in the efficiency of capital allocation may accrue to the extent that interactive data increase the quality of information by reducing the cost to access, collect, and analyze mutual fund risk/return summary information or improve the content of mutual fund-reported information.[265] An increase in quality and improvement in content should enable investors to better allocate their capital among mutual funds.

Information quality in mutual fund markets is likely to be higher as a result of interactive data reporting, leading to more efficient capital allocation. As a result of the improved utility of information, investors may be able to evaluate various mutual funds, thereby facilitating capital flow into their favored investment prospects.

We believe that requiring mutual funds to provide interactive data is likely to improve the quality of risk/return summary information available to end users, and helps spur interactive data-related innovation in the supply of mutual fund comparative products, resulting from a potential increased competition among suppliers of such products due to lower entry barriers as a result of lower data collection costs.

However, we have considered competing views of the informational consequences of interactive data. For example, a requirement to submit interactive data information could decrease the marginal benefit of collecting information and thus reduce the information quality to the extent it reduces third-party incentives to facilitate access to, collect, or analyze information. Assuming that markets efficiently price the value of information, the amount of information accessed, collected (or enhanced), and analyzed

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265 In the context of the discussion below, quality refers to the ease with which end-users of risk/return summary information can access, collect, and analyze the data. This issue is separate from the content of mutual fund-reported information.

will be determined by the marginal benefit of doing so.[266] Lowering information collection costs (through a requirement to submit interactive data information) should increase this benefit. If this is so, then there should be no degradation in the level of information quality as a result of changes in third-party provider behavior under an interactive data reporting regime. However, if one competitor in the industry can subsidize its operations through an alternative revenue stream, both quality and competition may suffer.[267]

Another potential information consequence of the requirements is how the precision and comparability of the information disseminated by data service providers may change because the interactive data requirements will shift the source of data formatting that allows aggregation and facilitates comparison and analysis from end-users to mutual funds submitting interactive data. At present, data service providers manually key risk/return summary information into a format that allows aggregation. As a result, the data service provider makes interpretive decisions on how to aggregate reported items so that they can be compared across all mutual funds. Consequently, when a subscriber of the commercial product offered by a data service provider uses this aggregated data, it

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266 Also, we expect that because the rules require the use of the XBRL interactive data standard, the open standard nature of XBRL will facilitate the development of related software, some of which may, as a result, be made available to the public for free or at a relatively low cost and provide the public alternative ways to view and analyze interactive data information.

267 For illustration purposes only, assume that an Internet service company develops an interactive data-based tool that easily provides mutual fund risk/return summary information for free to all subscribers, and it uses this product as a loss leader to increase viewership and advertising revenue. If the data provided is of the same quality as data provided through subscription to other available commercial products, then there should be no informational efficiency loss. However, if a data aggregator's providing information that improves investor interpretation and goes beyond risk/return summary information is possible, but no longer profitable to produce for competitors without the subsidy, then valuable information production may be lost.

can expect consistent interpretation of the reported items. In contrast, the requirement for mutual funds to submit interactive data information will require mutual funds to independently decide within the confines of applicable requirements which "tag" best describes each item within the risk/return summary – lessening the amount of interpretation required by data service providers or end-users of the data. Once a standard tag is chosen, comparison to other funds is straightforward. However, because mutual funds have some discretion in how to select tags, and can extend the taxonomy (create new tags) when an appropriate tag does not exist, unique interpretations by each fund could result in reporting differences from what current data service providers and other end-users would have chosen. This view suggests that the fund-submitted information disseminated by data service providers may be, on the one hand, less comparable because they have not normalized it across mutual funds but, on the other hand, more accurate because the risk of human error in the manual keying and interpretation of filed information will be eliminated and more precise because it will reflect decisions by the mutual funds themselves. Replicating prior methods still will be possible, however, because mutual funds continue to be required to file risk/return summary information in traditional format. As a result, nothing prohibits data service providers from continuing to provide data in the same manner that they did before. Nonetheless, interactive data benefits could diminish if other reporting formats are required for clarification in data aggregation.

The content of mutual fund-reported information may improve because, as previously discussed, a mutual fund that uses a standardized interactive data format at earlier stages of its disclosure cycle may increase the accuracy of its disclosure. In

contrast, the content of mutual fund-reported information may improve or decline to the extent that the interactive data process influences what mutual funds disclose. While the requirements to submit and post interactive data information are designed to be disclosure neutral, it is possible they may affect what is disclosed.

2. Costs of Interactive Data Submissions and Web Site Posting

The primary cost of the rule amendments is the cost of mutual funds' implementation of the rule, which includes the costs of submitting and posting interactive data. We discuss this cost element extensively below. In addition, because the rules allow an increase in the flow of risk/return summary information being reported directly to third party information providers and investors, there will be a cost of learning on the part of the investors in using and analyzing risk/return summary information at the interactive data level.

As for the cost of implementation of the rule, based on currently available data, we estimate the average direct costs of submitting and posting interactive data-formatted risk/return summary information for all mutual funds under the proposed rules will, based on certain assumptions, be as follows:

Table. Estimated direct costs to individual funds of submitting interactive data-formatted risk/return summary information

	First submission	Subsequent submissions
Preparation[268]	$2,600	$2,300
Software and consulting services[269]	$20,600 [270]	$800
Web site posting[271]	$250	$250
Total cost	$23,450	$3,350

268 Estimates based on risk/return summary voluntary program questionnaire responses. The voluntary program questionnaire responses indicated that different filers use different personnel to prepare interactive data submissions. We calculated costs for each participant based upon the personnel each individual respondent to the voluntary program questionnaire indicated it used and the length of time it indicated the personnel spent on the preparation. The numbers in the table represent the average of all of these calculations. The following wage rates were assumed for preparation cost estimates: operations specialist -- $129; paralegal -- $168; senior compliance examiner -- $180; intermediate business analyst -- $183; senior accountant -- $185; programmer analyst -- $194; financial reporting manager -- $268; and attorney -- $295. These estimated wage figures are based on published rates for the personnel above, modified to account for bonuses, firm size, employee benefits, and overhead, yielding the effectively hourly rates above. See SIFMA Report, supra note 221.

269 Software licensing and the use of a consultant can be substitutionary – mutual funds can choose to do one or the other, or do both – and are thus aggregated.

270 We note that one volunteer expended over $100,000 in information technology to develop internal software that applies interactive data tags to risk/return summary information. This one expenditure by one fund resulted in a higher average software and consulting services cost per fund of $20,600 for the first submission. Excluding this data, the average software and consulting services costs per fund would have been approximately $500.

While our averages imply that the costs of internally developing software is allocated to one fund in the sample, in reality the complex that developed the software will likely use that software for all of its funds. Thus the development cost could be allocated across all funds within that complex rather than to one fund.

271 Voluntary program participants were not required to post on their Web sites, if any, the interactive data information they submitted. Consequently, the costs of the requirement to post interactive data information are not derived from the voluntary program participant questionnaire responses or discussed in our analysis of those responses. Those costs are, instead, derived from informal discussions with a limited number of persons believed to be generally knowledgeable about preparing, submitting, and posting interactive data.

The above estimates are generated from a limited number of voluntary program participant questionnaire responses. In particular, these responses provided detail on the actual and projected costs of preparing risk/return summary information in interactive data format and for purchasing software or related filing agent services. A detailed analysis of the costs associated with voluntary program participation suggests that the estimated direct cost of submitting risk/return summary information in interactive data format falls within the range of $735.50 to $127,500 per fund for the first submission.[272] This cost reflects expenditures on interactive data-related software, consulting or filing agent services used, and the market rate for all internal labor hours spent (including training) to prepare, review, and submit the first interactive data format risk/return summary information. The future experiences of individual mutual funds regarding risk/return summary information filed in an interactive data format still may vary according to the mutual funds' size, complexity, and other factors not apparent from the voluntary program participant responses and commenters' responses. The discussion below summarizes the direct cost estimates of compliance regarding risk/return summary submissions based on voluntary program participant questionnaire responses and the specified assumptions.[273]

- Average cost of first submission, excluding the costs of Web site posting, from voluntary program questionnaire data is $23,200.

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272 See supra note 270 with respect to the high end of the range.

273 The details of this analysis regarding risk/return summary information, including the underlying assumptions and other considerations related to both the costs and benefits of requiring submission of interactive data, are provided following the summary.

- Projected average cost of subsequent submissions, excluding the costs of Web site posting, from voluntary program questionnaire data is $3,100.

This analysis attempts to quantify some of the direct costs that mutual funds will incur to submit and post interactive data. Whether mutual funds choose to purchase and learn how to use software packages designed for interactive data submissions or outsource this task to a third party, internal (labor) resources will be required to complete the task. The cost estimates provided here using voluntary program participant questionnaire responses shed light on the potential dollar magnitude of the costs of requiring interactive data submissions.

At the time the Commission proposed these amendments, 22 mutual funds had participated in the voluntary program for interactive risk/return summaries. Of these, nine were provided questionnaires on the details of their cost experience, and six responses were collected representing the cost data for ten funds.[274] The table below summarizes the aggregate costs per mutual fund, including software and filing agent service costs and an estimated cost for the internal labor hours required to prepare and submit the interactive data format information. The low and high estimates of the cost for internal labor hours were calculated using a variety of billing rates corresponding to the job descriptions of internal personnel involved in preparing the tagged risk/return summaries.[275] The reported costs are calculated using responses from the 6 voluntary program participants that provided responses. Those six respondents represent mutual

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274 The questionnaires requested data for one fund; however, several questionnaire respondents voluntarily submitted cost information for more than one fund.

275 See supra note 221. These estimates are from the 2007 SIFMA Report, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. Questionnaire respondents apportioned time spent tagging risk/return summaries among various job types.

fund complexes whose assets comprise a range of approximately .01% to 12.00% of all the assets of the mutual funds that will be required to submit interactive data.[276]

Table. Summary of illustrative survey data on the direct cost estimates for voluntary program participants

	All voluntary program participants respondents	
	Low	High
First submission		
Estimated costs	$735.50	$127,500[277]
Subsequent submissions		
Estimated costs	$555.00	$5,640
Average reduction in cost		
from first to second submission	24.54%	95.58%[278]

Scalability of Interactive Data-Related Support Services and Technology

The final cost consideration in this section is the scalability of interactive data-related support services and technology. In particular, it is unclear how the market for interactive data support services and technology will change in light of the adoption of the rule amendments.

The roles of each potential kind of service provider within the interactive data market are likely to develop further and are not yet clear, and there are many potential participants to consider, including the software vendors, print/filing agents, and consultants, as well as the Commission.[279] Until the market of mutual funds that submit

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276 Based on total mutual fund assets of $10.6 trillion. Lipper-Directors' Analytical Data, Reuters Sept. 2008.

277 We note that these costs are higher due to one questionnaire respondent who spent significantly more than all other respondents to create its own interactive data software in-house. See supra note 270.

278 Id.

279 In addition, mutual fund complexes with a large number of funds may consider developing software in-house since that cost could be allocated across all of their funds.

interactive data information grows substantially larger, it is difficult to predict how standard solutions will evolve. For example, we do not know whether mutual funds will adopt solutions that create interactive data submissions using third party software, a so-called "bolt-on" approach, or will seek integrated solutions that enable funds to prepare interactive data submissions from their existing software. Moreover, filing agents may maintain their role as an intermediary by offering interactive data technology or other service providers may cause that role to change. Others with technical expertise may participate in the technology with unpredictable results.

Combining the uncertainty over the source of future interactive data services with increased demand for these services could result in a new equilibrium market price that is different from what is currently reported by voluntary program participants. This price will be higher if the demand for interactive data services increases (from 15 mutual fund complexes currently participating in the voluntary program to approximately 683 mutual fund complexes[280] participating) at a faster rate than the supply for these same services. More broadly, if the interactive data requirement results in clients subscribing for interactive data services faster than the rate at which these services can be supplied, then a price increase is the natural discriminator in how to allocate limited resources.

The submission costs discussed in this section suggest that if interactive data is implemented too quickly it could result in higher than necessary submission costs if the supply of interactive data-related resources is constrained, but the effect will likely diminish as a market place for interactive data services develops. Hence, this concern is mitigated by delaying the requirement that mutual funds submit interactive data until

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280 See ICI 2008 Investment Company Fact Book, supra note 63, at 14 (683 fund sponsors).

January 1, 2011. This delay is designed to allow interactive data service suppliers to keep pace with demand.

B. Changes to Voluntary Program

In order to facilitate further evaluation of data tagging, the rule amendments will enable investment companies that are registered under the Investment Company Act, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X to submit exhibits containing a tagged schedule of portfolio holdings without having to submit other financial information in interactive data format.

1. Benefits

We believe that portfolio holdings information in interactive data format will allow more efficient and effective retrieval, research, and analysis of registrants' portfolio holdings through automated means. The proposed amendments to the voluntary program will assist us in assessing whether using interactive data tags enhances users' ability to analyze and compare portfolio holdings information included in filings with the Commission.

Currently, a number of companies use computers and data entry staff to mine portfolio holdings information provided by mutual funds and others in order to populate databases that are used to package information for sale to analysts, funds, investors, and others. Permitting funds and other entities to tag portfolio holdings information in Commission filings will aid this data-mining process in that it will identify points of data at the source, which will reduce the cost to populate databases and improve the accuracy of that data. Additionally, the changes to the voluntary program will benefit funds and

the public by permitting experimentation with data tagging using the new portfolio holdings list of tags when it is created.

In the future, the availability of potentially more accurate information about mutual funds and other entities will also reduce the cost of research and analysis and create new opportunities for companies that compile, provide, and analyze data to produce more value added services. Enhanced access to information submitted in interactive data format also will allow retail investors (or financial advisers assisting such investors) to perform more personalized and sophisticated analyses and comparisons of mutual funds and other investment options, which will result in investors making better informed investment decisions, and therefore in a more efficient distribution of assets by investors among different funds. This may, in turn, also contribute to increased competition among mutual funds and other entities and result in a more efficient allocation of resources among competing investment products. Although it is not possible to quantify precisely the beneficial effects of more efficient allocation of investors' assets and increased competition, they may be significant, given the size of the mutual fund industry.

Other benefits resulting from the inclusion of portfolio holdings information as a stand-alone item in the voluntary program will include an increase in the accuracy of information and the potential for increased timeliness of data that investors use to make informed investment decisions. Another benefit is that portfolio holdings information submitted in interactive data format will allow automated, instantaneous extraction of every investment disclosed in the schedule of portfolio holdings. Finally, the investment analysis process may become more efficient and effective through the increased use of

automation and reduced human intervention that should result from the use of interactive data.

2. Costs

The amendments to the voluntary program will lead to some costs for filers choosing to submit portfolio holdings information in interactive data format. For purposes of the PRA, we estimated that the increase in annual internal burden hours to the industry will be approximately 220 hours, which will amount to an increase in costs of approximately $47,000 and that the increase in annual external costs per filer will amount to approximately $600 per year for a total estimated increase to the industry of approximately $12,000 on an annual basis.[281]

We based these cost estimates upon, among other things, experience with mutual funds who have submitted risk/return summary information in interactive data format in the current voluntary program.[282] Due to the fact that no mutual fund has submitted portfolio holdings information through the voluntary program, however, we have limited data to quantify the cost of implementing the use of interactive data tags applied to portfolio holdings information. In the future, there may be additional costs to current users of EDGAR data. For example, companies that currently provide tagging and dissemination of EDGAR data may experience decreased demand for their services. These entities have developed certain products and services based on data in EDGAR; many entities disseminate, repackage, analyze, and sell the information. Allowing filers to submit tagged portfolio holdings information, even voluntarily, may have an impact on entities providing EDGAR-based services and products. Because the Commission does

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281 See infra Section III.A.2.

282 See supra note 268.

not regulate all these entities, it is currently not feasible to accurately estimate the number or size of these potentially affected entities. The limited, voluntary nature of the program will help the Commission assess the effect, if any, on these entities. Additionally, the availability of interactive data on EDGAR may provide these companies with alternative business opportunities.

Combined with the removal of risk/return summary information from the voluntary program, we estimated for PRA purposes that there will be a total decrease of 1,600 burden hours which will amount to approximately $347,000, and a total decrease in external costs of approximately $158,000. Therefore, the total cost decrease to the industry for purposes of the PRA for the rule amendments related to the voluntary program is $505,000.[283]

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

Section 23(a)(2) of the Exchange Act[284] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, Section 2(b)[285] of the Securities Act, Section 3(f)[286] of the Exchange Act, and Section 2(c)[287] of the Investment Company Act require the

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283 This estimate was derived from previously reported costs estimates from the voluntary program.

284 15 U.S.C. 78w(a)(2).

285 15 U.S.C. 77b(b).

286 15 U.S.C. 78c(f).

287 15 U.S.C. 80a-2(c).

Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

A. Submission of Risk/Return Summary Information Using Interactive Data

The rule amendments to require mutual funds to submit interactive data to the Commission and post it on their Web sites are intended to make risk/return summary information easier for investors to analyze while assisting in automating regulatory filings and business information processing. As discussed previously,[288] we believe that these amendments are likely to benefit investors by making financial markets more efficient in regard to capital formation by reducing some of the information barriers that make it costly for mutual funds to find appropriate sources of new investors. Similarly, these requirements may enable investors to better allocate their capital among mutual funds by reducing the cost to access, collect, and analyze mutual fund risk/return summary information and by improving the content of fund-reported information available to investors. Since lower data collection costs would lower entry barriers for suppliers of interactive-data-related fund comparative products, these requirements also may result in increased competition among these suppliers, which, in turn, would help spur innovation with respect to such products.

We requested comment on whether the proposed amendments would promote efficiency, competition, and capital formation. One commenter asserted that requiring funds to utilize the current list of tags when revisions are likely in the near term would be

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288 See supra Section IV.A.1.

inefficient and costly.[289] As noted above, however, revisions to the list of tags for risk/return summary information have been issued for public comment and are expected to be finalized by the end of January 2009. Again, this will provide mutual funds with substantial time to prepare to tag their risk/return summary information. This commenter also stated that its members were skeptical that using XBRL for risk/return summary information will create internal efficiencies that would ultimately result in cost savings.[290] While the internal efficiencies of interactive data for mutual funds are currently unquantified, we continue to believe that they may be available to mutual funds. Further, as discussed in detail above, we anticipate that the rules may lead to more efficient capital formation and allocation.[291]

We understand that private sector businesses such as those that access mutual fund information and aggregate, analyze, compare, or convert it into interactive format have business models and, as a result, competitive strategies that the adopted interactive data requirements might affect. Since interactive data technology is designed to remove an informational barrier, business models within the mutual fund services industry that are currently adapted to traditional format document reporting may change, with possible consequences for the revenue stream of current product offerings due to the competitive effects of such a change. The competitive effects may relate to changes in the accessibility of risk/return summary information to investors, the nature of the information that investors receive, and the potential from new entry or innovation in the markets through which mutual fund disclosures are transmitted from mutual funds to

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289 See letter of ICI.

290 Id.

291 See supra Section IV.A.1.

investors. For example, lower entry barriers that result from lower data collection costs may increase competition among third party information providers and help spur interactive data-related innovation. It is also possible, however, that increased competition from new market entrants could reduce industry profit margins, and, as a result, the quality of services may suffer. For example, and illustration purposes only, assume that an Internet service company develops and interactive data-based tool that easily provides risk/return summary information for free to all subscribers, and it uses this product as a loss leader to increase viewership and advertising revenue. If the data provided is of the same quality as data provided through subscription to other available commercial products, then there should be no informational efficiency loss and the quality of services should not be impaired. However, if the incumbent service providers provide a higher quality of information that improves investor interpretation beyond risk/return summary information, but they find that it is no longer profitable to produce this information as a result of subsidized products from inferior providers, then valuable information production may be lost.

For the reasons described more fully above, we believe the liability protections for interactive data are necessary or appropriate in the public interest and consistent with the protection of investors. Moreover, the protections are also consistent with the purposes fairly intended by the policy and provisions of the Investment Company Act.

B. Changes to the Voluntary Program

The amendments no longer allow mutual funds to submit risk/return summary information in interactive data format through the voluntary program after the compliance date for the mandatory rules and enable investment companies that are

registered under the Investment Company Act, business development companies, and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X to submit exhibits containing a tagged schedule of portfolio holdings without having to submit other financial information in interactive data format. The changes to the voluntary program are intended to help further evaluate the usefulness to investors, third-party information providers, investment companies, the Commission, and the marketplace of interactive data and, in particular, of submitting portfolio holdings information in interactive data format. Because compliance with the amendments is voluntary, the Commission estimates that the impact of the amendments will be limited. However, because the submission of portfolio holdings information in interactive data format has the potential to facilitate analysis of that information, we believe that the amendments could promote efficiency by allowing us and others to gain experience with portfolio holdings information in interactive data format.

Further, submitting portfolio holdings information in interactive data format has the potential to help streamline the delivery of portfolio holdings information, and provide investors and others with improved tools to compare funds and other entities. As with the filing of risk/return summary information in interactive data format, we believe that the potential to streamline the delivery of portfolio holdings information and to provide investors and others with improved comparison tools could promote efficiency and competition through more efficient allocation of investments by investors and more efficient allocation of assets among competing funds and other investment products.

In the future, companies that currently provide tagging and dissemination of EDGAR data may experience decreased demand for their services. The availability of interactive data on the Commission's electronic filing system however, may provide these companies with alternative business opportunities. We do not anticipate that the amendments will have a significant impact on capital formation. Finally, because the amendments are designed to permit mutual funds and other entities to provide information in a format that we believe will be more useful to investors, we believe that the amendments are appropriate in the public interest and for the protection of investors.

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

This Final Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[292] It relates to the amendments we are adopting that will require mutual funds to provide risk/return summary information to the Commission and on their Web sites in interactive data format and enable investment companies and other entities to submit exhibits through the voluntary program containing a tagged schedule of portfolio holdings without having to submit other financial information in interactive data format.

A. Need for the Rule

1. Submission of Risk/Return Summary Information Using Interactive Data

The main purpose of the amendments is to make risk/return summary information easier for investors to analyze while assisting in automating regulatory filings and business information processing. Currently, mutual funds are required to file their registration statements in a traditional format that provides static text-based information.

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292 5 U.S.C. 604.

We believe that providing the risk/return summary information these filings contain in interactive data format will:

- enable investors and others to search and analyze the information dynamically;
- facilitate comparison of mutual fund performance; and
- provide an opportunity to automate regulatory filings and business information processing with the potential to increase the speed, accuracy, and usability of risk/return summary disclosure.

2. Changes to the Voluntary Program

The main purpose of the amendments to the voluntary program is to help us evaluate the usefulness to investors, third party information providers, funds, the Commission, and the marketplace of interactive data and, in particular, of submitting portfolio holdings information in interactive data format. We believe the changes to the voluntary program will enable us to further study the extent to which interactive data enhance the comparability of portfolio holdings information, the usefulness of interactive data for dissemination, and our staff's ability to review and assess the accuracy and adequacy of that data. The changes to the voluntary program also will help us assess the effect of interactive data on the quality and transparency of portfolio holdings information, as well as the compatibility of interactive data with the Commission's disclosure requirements.

More specifically, we believe that the changes to the voluntary program will better enable us to study the extent to which interactive data will:

- enable investors and others to search and analyze the information dynamically;
- facilitate comparison of portfolio holdings among funds and other entities; and
- possibly provide a significant opportunity to reduce the resources needed for data analysis.

In addition, we believe the changes to the voluntary program will enhance our ability to evaluate the:

- impact on the staff's ability to review filings on a more timely and efficient basis;
- use of interactive data for risk assessment and surveillance procedures; and
- compatibility of interactive data with reporting quality, transparency, and other Commission reporting requirements.

B. Significant Issues Raised by Public Comment

In the Proposing Release, we requested comment on the number of small entity issuers that may be affected, the existence or nature of the potential impact and how to quantify the impact of the amendments. Commenters generally supported both the use of technology to better inform mutual fund investors and the Commission's goal of providing risk/return summary information in an interactive data format, but most commenters stated that requiring mutual funds to provide tagged risk/return summary information at this time is premature.[293] Two commenters suggested that funds should be phased into the mandatory interactive data program based on fund size.[294] As discussed

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293 See supra notes 55 and 56 and accompanying text.

294 See letters of Data Communiqué and Schnase.

more extensively below, however, we do not believe a phase-in or alternate procedures for small entities are warranted as such a phase-in would detract from the completeness and uniformity of tagged risk/return summary information. We continue to believe that the potential of interactive data for enhancing investors' access to mutual fund information justifies implementation of this initiative at this time.

C. Small Entities Subject to the Rules

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[295] Approximately 127 mutual funds registered on Form N-1A meet this definition.[296] All of these mutual funds will become subject to the rules to require submission of risk/return summary information using interactive data. A smaller subset of these mutual funds may voluntarily submit tagged portfolio holdings information, but, because submitting portfolio holdings information will be voluntary, we anticipate that only mutual fund complexes with sufficient resources would elect to participate. To date, no small entity mutual funds have elected to participate in the current voluntary program.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

1. Submission of Risk/Return Summary Information Using Interactive Data

All mutual funds subject to the amendments are required to submit risk/return summary information to the Commission in interactive data format and, if they have a

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295 17 CFR 270.0-10.

296 This estimate is based on analysis by the Division of Investment Management staff of publicly available data as of December 2007.

Web site, post the interactive data on their Web site. We believe that, in order to submit risk/return summary information in interactive data format, mutual funds in general and small entities in particular likely will need to prepare and then submit the interactive data by expending internal labor hours in connection with either or both of:

- purchasing, learning, and using software packages designed to prepare risk/return summary information in interactive format; and
- hiring and working with a consultant or filing agent.

We believe that mutual funds will incur relatively little cost in connection with the requirement to post the interactive data on their Web site because the requirement applies only to mutual funds that already have a Web site.[297]

2. Changes to the Voluntary Program

The voluntary program is designed to assist us in assessing the feasibility of using interactive data on a broader basis. Experience with the current voluntary program indicates that the cost of submitting portfolio holdings information in interactive data format, the associated burden on the Commission's electronic filing system, and the possible effect of the proposed changes to the voluntary program on those entities that use the data from the Commission's electronic filing system will be minimal.

No registrant will be required to submit documents in interactive data format under the changes we are adopting to the voluntary program. The submission of portfolio holdings information in interactive data format will require a participant to tag the portfolio holdings information already provided in required disclosures and to submit

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297 The internal labor and external costs required to comply with the rules we are adopting are discussed more fully in Sections III and IV above.

exhibits to its filing. Volunteers may also need to purchase software or retain a consultant to assist in creating interactive data exhibits.[298]

E. Agency Action to Minimize the Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the amendments, the Commission considered the following alternatives: (1) the establishment of different compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the amendments for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the amendments, or any part thereof, for small entities.

1. Submission of Risk/Return Summary Information Using Interactive Data

We believe that, as to small entities, differing compliance, reporting or timetable requirements, a partial or complete exemption from the requirements, or the use of performance rather than design standards would be inappropriate because these approaches would detract from the long-term completeness and uniformity of the interactive data format risk/return summary information database. Less long-term completeness and uniformity would reduce the extent to which the amendments will enable investors and others to search and analyze the information dynamically; facilitate comparison of mutual fund information; and, possibly, provide an opportunity to automate regulatory filings and business information processing with the potential to

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298 Id.

increase the speed, accuracy, and usability of risk/return summary information disclosure. We note that all mutual funds, including small entities, are not required to comply with the new requirements until after January 1, 2011.[299]

2. Changes to the Voluntary Program

The purpose of the amendments is to help us evaluate the usefulness to investors, third-party information providers, mutual funds and other entities, the Commission, and the marketplace of interactive data and, in particular, of submitting portfolio holdings information in interactive data format. Submitting documents containing portfolio holdings information in interactive data format is entirely voluntary.

We have considered different or simpler procedures for small entities, but for interactive data to provide benefits such as ready comparability there cannot be alternative procedures in place for different entities. Similarly, in order to achieve the benefits of interactive data, use of a single technology is necessary. If we determine to require the filing of portfolio holdings information in interactive data format in the future, we will look to the results of the voluntary program to find alternatives to minimize any burden on small entities.

VII. STATUTORY AUTHORITY

The Commission is adopting the amendments outlined above under Sections 5, 6, 7, 10, 19(a), and 28 of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, 77s(a), and 77z-3]; Sections 3, 12, 13, 14, 15(d), 23(a), 35A, and 36 of the Exchange Act [15 U.S.C. 78c, 78l, 78m, 78n, 78o(d), 78w(a), 78ll, and 78mm]; Sections 314 and 319 of the Trust

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[299] In this regard, in Section II.H. of this release we note that the additional time is intended to permit mutual funds to plan for and implement the interactive data reporting process after having the opportunity to experiment with the voluntary program.

Indenture Act [15 U.S.C. 77nnn and 77sss]; and Sections 6(c), 8, 24, 30, and 38 of the Investment Company Act [15 U.S.C. 80a-6(c), 80a-8, 80a-24, 80a-29, and 80a-37].

List of Subjects

17 CFR Parts 232 and 239

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 230 and 274

Investment Companies, Reporting and recordkeeping requirements, Securities.

TEXT OF RULE AND FORM AMENDMENTS

For the reasons set forth above, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 230 – GENERAL RULES AND REGULATIONS, SECURITES ACT OF 1933

1. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78l , 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. Amend § 230.485 by adding paragraph (c)(3) to read as follows:

§ 230.485 Effective date of post-effective amendments filed by certain registered investment companies.

* * * * *

(c) * * *

(3) A registrant's ability to file a post-effective amendment, other than an amendment filed solely for purposes of submitting an Interactive Data File, under

paragraph (b) of this section is automatically suspended if a registrant fails to submit and post on its Web site any Interactive Data File exhibit as required by General Instruction C.3.(g) of Form N-1A (§§239.15A and 274.11A of this chapter). A suspension under this paragraph (c)(3) shall become effective at such time as the registrant fails to submit or post an Interactive Data File as required by General Instruction C.3.(g) of Form N-1A. Any such suspension, so long as it is in effect, shall apply to any post-effective amendment that is filed after the suspension becomes effective, but shall not apply to any post-effective amendment that was filed before the suspension became effective. Any suspension shall apply only to the ability to file a post-effective amendment pursuant to paragraph (b) of this section and shall not otherwise affect any post-effective amendment. Any suspension under this paragraph (c)(3) shall terminate as soon as a registrant has submitted and posted to its Web site the Interactive Data File as required by General Instruction C.3.(g) of Form N-1A.

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3. Amend § 230.497 by adding a sentence at the end of paragraphs (c) and (e) to read as follows:

§ 230.497 Filing of investment company prospectuses – number of copies.

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(c) * * * Investment companies filing on Form N-1A must, if applicable pursuant to General Instruction C.3.(g) of Form N-1A, include an Interactive Data File (§ 232.11 of this chapter).

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(e) * * * Investment companies filing on Form N-1A must, if applicable pursuant to General Instruction C.3.(g) of Form N-1A, include an Interactive Data File (§ 232.11 of this chapter).

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

4. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

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5. Further amend § 232.11 as published at 74 FR 6813, February 10, 2009, by revising the definition of "Related Official Filing" to read as follows:

§ 232.11 Definition of terms used in part 232.

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Related Official Filing. The term Related Official Filing means the ASCII or HTML format part of the official filing with which an Interactive Data File appears as an exhibit or, in the case of a filing on Form N-1A, the ASCII or HTML format part of an official filing that contains the information to which an Interactive Data File corresponds.

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6. Further amend § 232.202 as published beginning at 74 FR 6813, February 10, 2009, by revising Note 4 to § 232.202 to read as follows:

§ 232.202 Continuing hardship exemption.

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Note 4 to § 232.202: Failure to submit or post, as applicable, the Interactive Data File as required by Rule 405 by the end of the continuing hardship exemption if granted for a limited period of time, will result in ineligibility to use Forms S-3, S-8, and F-3 (§§ 239.13, 239.16b and 239.33 of this chapter), constitute a failure to have filed all required reports for purposes of the current public information requirements of Rule 144(c)(1) (§ 230.144(c)(1) of this chapter), and, pursuant to Rule 485(c)(3), suspend the ability to file post-effective amendments under Rule 485(b) (§ 230.485 of this chapter).

7. Further amend § 232.401 as published at 74 FR 6814, February 10, 2009, by revising paragraph (a) to read as follows:

§ 232.401 XBRL-Related Document submissions.

(a) Only an electronic filer that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), a "business development company" as defined in section 2(a)(48) of that Act, or an entity that reports under the Exchange Act and prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et seq.) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program. An electronic filer that participates in the voluntary XBRL program may submit XBRL-Related Documents (§232.11) in electronic format as an exhibit to: the filing (other than a Form N-1A (§239.15A and §274.11A of this chapter) to which the XBRL-Related Documents relate; an amendment to such filing, but, in the case of a Form N-1A filing, an amendment made only after the effective date of the Form N-1A filing to which the XBRL-Related Documents relate; or, if the electronic filer is eligible to file a Form 8-K (§249.308 of this chapter) or a Form 6-K (§249.306 of this chapter), a Form 8-K or a Form 6-K, as

applicable, that references the filing to which the XBRL-Related Documents relate if such Form 8-K or Form 6-K is submitted no earlier than the date of that filing. The XBRL-Related Documents must comply with the content and format requirements of this section, be submitted as an exhibit to a form that contains the disclosure required by this section and be submitted in accordance with the EDGAR Filer Manual and, as applicable, one of Item 601(b)(100) of Regulation S-K (§229.601(b)(100) of this chapter), Item 601(b)(100) of Regulation S-B (§228.601(b)(100) of this chapter), Form 20-F (§249.220f of this chapter), Form 6-K or §270.8b-33 of this chapter.

* * * * *

8. Amend § 232.401 by:

a. Removing "or" at the end of paragraph (b)(1)(iii);

b. Revising paragraph (b)(1)(iv);

c. Adding paragraph (b)(1)(v); and

d. Revising paragraph (d)(2), introductory text.

The addition and revisions read as follows:

§ 232.401 XBRL-Related Document submissions.

* * * * *

(b) * * *

(1) * * *

(iv) The risk/return summary information set forth in Items 2, 3, and 4 of Form N-1A provided that the filing is submitted prior to January 1, 2011, and, in the case of a Form N-1A filing that includes more than one series (as that term is used in rule 18f-2(a) under the Investment Company Act (§270.18f-2(a) of this chapter), a filer may include in

mandatory content complete risk/return summary information for any one or more of those series; or

(v) If the electronic filer is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), a "business development company" as defined in section 2(a)(48) of that Act, or an entity that reports under the Exchange Act and prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et seq.), Schedule I – Investments in Securities of Unaffiliated Issuers (§ 210.12-12 of this chapter).

* * * * *

(d) * * *

(2) The disclosures required by paragraph (d)(1) of this section must appear within the XBRL-Related Documents as a tagged data element and, as applicable, in:

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9. Further amend § 232.405 as published beginning at 74 FR 6814, February 10, 2009, by:

a. Revising Preliminary Note 1;

b. Revising paragraphs (a), (b) and (g); and

c. Adding a sentence at the end of the Note to § 232.405.

The revisions and addition read as follows:

§ 232.405 Interactive Data File submissions and postings.

Preliminary Note 1. Sections 405 and 406T of Regulation S-T (§§232.405 and 232.406T) apply to electronic filers that submit or post Interactive Data Files. Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter), paragraph 101 of the

Information Not Required to be Delivered to Offerees or Purchasers of both Form F-9 (§239.39 of this chapter) and Form F-10 (§239.40 of this chapter), Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter), paragraph B.7 of the General Instructions to Form 40-F (§249.240f of this chapter), paragraph C.6 of the General Instructions to Form 6-K (§249.306 of this chapter), and General Instruction C.3.(g) of Form N-1A (§§ 239.15A and 274.11A of this chapter) specify when electronic filers are required or permitted to submit or post an Interactive Data File (§232.11), as further described in the Note to § 232.405.

* * * * *

(a) Content, format, submission and posting requirements – General. An Interactive Data File must:

(1) Comply with the content, format, submission and Web site posting requirements of this section;

(2) Be submitted only by an electronic filer either required or permitted to submit an Interactive Data File as specified by Item 601(b)(101) of Regulation S-K, paragraph 101 of the Information Not Required to be Delivered to Offerees or Purchasers of either Form F-9 or Form F-10, Item 101 of the Instructions as to Exhibits of Form 20-F, paragraph B.7 of the General Instructions to Form 40-F, paragraph C.6 of the General Instructions to Form 6-K, or General Instruction C.3.(g) of Form N-1A, as applicable, as an exhibit to:

(i) A form that contains the disclosure required by this section; or

(ii) If the electronic filer is not an open-end management investment company registered under the Investment Company Act, an amendment to a form that contains the

disclosure required by this section if the amendment is filed no more than 30 days after the earlier of the due date or filing date of the form and the Interactive Data File is the first Interactive Data File the electronic filer submits or the first Interactive Data File the electronic filer submits that complies or is required to comply, whichever occurs first, with paragraphs (d)(1) through (d)(4), (e)(1), and (e)(2) of this section;

(3) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, Item 601(b)(101) of Regulation S-K, paragraph 101 of the Information Not Required to be Delivered to Offerees or Purchasers of either Form F-9 or Form F-10, Item 101 of the Instructions as to Exhibits of Form 20-F, paragraph B.7 of the General Instructions to Form 40-F, paragraph C.6 of the General Instructions to Form 6-K, or General Instruction C.3.(g) of Form N-1A; and

(4) Be posted on the electronic filer's corporate Web site, if any, in accordance with, as applicable, Item 601(b)(101) of Regulation S-K, paragraph 101 of the Information Not Required to be Delivered to Offerees or Purchasers of either Form F-9 or Form F-10, Item 101 of the Instructions as to Exhibits of Form 20-F, paragraph B.7 of the General Instructions to Form 40-F, paragraph C.6 of the General Instructions to Form 6-K, or General Instruction C.3.(g) of Form N-1A.

(b)(1) Content - categories of information presented. If the electronic filer is not an open-end management investment company registered under the Investment Company Act of 1940, an Interactive Data File must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Filing, no more and no less, from all of the following categories:

(i) The complete set of the electronic filer's financial statements (which

includes the face of the financial statements and all footnotes); and

(ii) All schedules set forth in Article 12 of Regulation S-X (§§ 210.12-01 – 210.12-29) related to the electronic filer's financial statements.

Note to paragraph (b)(1): It is not permissible for the Interactive Data File to present only partial face financial statements, such as by excluding comparative financial information for prior periods.

(2) If the electronic filer is an open-end management investment company registered under the Investment Company Act of 1940, an Interactive Data File must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Filing, no more and no less, from the risk/return summary information set forth in Items 2, 3, and 4 of Form N-1A.

* * * * *

(g) Posting. Any electronic filer that maintains a corporate Web site and is required to submit an Interactive Data File must post that Interactive Data File on that Web site by the end of the calendar day on the earlier of the date the Interactive Data File is submitted or is required to be submitted, and, if the electronic filer is not an open-end management company registered under the Investment Company Act of 1940, the Interactive Data File must remain accessible on that Web site for at least a 12-month period. For an electronic filer that is an open-end management investment company registered under the Investment Company Act of 1940, General Instruction C.3.(g) of Form N-1A specifies the period of time for which an Interactive Data File must remain accessible on a company's Web site.

Note to §232.405: * * * For an issuer that is an open-end

management investment company registered under the Investment Company Act of 1940, General Instruction C.3.(g) of Form N-1A specifies the circumstances under which an Interactive Data File must be submitted as an exhibit and be posted to the company's Web site, if any.

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

10. The authority citation for Part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

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PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

11. The authority citation for Part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

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12. Amend Form N-1A (referenced in §§ 239.15A and 274.11A) by adding a paragraph (g) to General Instruction C.3. to read as follows:

Note: The text of Form N-1A does not, and these amendments will not, appear in the Code of Federal Regulations.

FORM N-1A

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GENERAL INSTRUCTIONS

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C.

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3.

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(g) Interactive Data File.

(i) An Interactive Data File (§ 232.11 of this chapter) is required to be submitted to the Commission and posted on the Fund's Web site, if any, in the manner provided by Rule 405 of Regulation S-T (§ 232.405 of this chapter) for any registration statement or post-effective amendment thereto on Form N-1A that includes or amends information provided in response to Items 2, 3, or 4. The Interactive Data File must be submitted as an amendment to the registration statement to which the Interactive Data File relates. The amendment must be submitted after the registration statement or post-effective amendment that contains the related information becomes effective but not later than 15 business days after the effective date of that registration statement or post-effective amendment.

(ii) An Interactive Data File is required to be submitted to the Commission and posted on the Fund's Web site, if any, in the manner provided by Rule 405 of Regulation S-T for any form of prospectus filed pursuant to rule 497(c) or (e) under the Securities Act [17 CFR 230.497(c) or (e)] that includes information provided in response to Items 2, 3, or 4 that varies from the registration statement. The Interactive Data File may be submitted with or up to 15 business days subsequent to the filing made pursuant to rule 497.

(iii) An Interactive Data File is required to be posted on the Fund's Web site for as long as the registration statement or post-effective amendment to which the Interactive Data File relates remains current.

(iv) An Interactive Data File must be submitted as an exhibit to Form N-1A, under paragraph (i) of this Instruction, or as an exhibit to the filing made pursuant to rule 497, under paragraph (ii) of this Instruction. The Interactive Data File must be submitted in such a manner that will permit the information for each series and, for any information that does not relate to all of the classes in a filing, each class of the Fund to be separately identified.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

February 11, 2009

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59401 / February 13, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13372

In the Matter of **SG Americas Securities, LLC and Francois O. Barthelemy,** **Respondents.**	**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 SG Americas Securities, LLC ("SGAS") and Francois O. Barthelemy ("Barthelemy") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative 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 the Offers submitted by the Respondents, the Commission finds[1] that:

a. SUMMARY

1. This matter involves the failure by SGAS (by and through the transactions described in paragraph 5. below) and Barthelemy to reasonably supervise Guillaume Pollet ("Pollet"), a former managing director at SG Cowen Securities Corporation ("SG Cowen"). Pollet was the head of SG Cowen's two-person Reg. D/Private Placement desk ("Reg. D Desk"), in charge of investing the capital of SG Cowen's parent, Société Générale ("SG"), in private issuances of public equities, popularly known as "PIPE" transactions. During 2001, Pollet violated the antifraud provisions of the federal securities laws by selling short the publicly traded securities of PIPE issuers prior to the close of the PIPE transaction in which he was investing or contemplating investing. In certain instances, Pollet's short-selling was contrary to specific representations in Securities Purchase Agreements ("SPAs"), including representations that no short selling or trading in the issuer's securities had taken place. With respect to ten PIPE transactions, Pollet's pre-close short selling also constituted unlawful insider trading. All of the trading took place in an SG proprietary account, which made at least $5.75 million in profits from Pollet's unlawful conduct.

2. In 2005, the Commission filed an enforcement action against Pollet based on this conduct, *SEC v. Guillaume Pollet* (05 Civ. 1937 (SLT). The United States Attorney's Office for the Eastern District of New York ("EDNY") also filed criminal charges against Pollet. *See U.S. v. Guillaume Pollet,* 05 Cr. 287 (SLT). A final settlement has been entered by the Court in the Commission's action, pursuant to which Pollet was permanently enjoined from violating Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and ordered to pay a civil penalty in the amount of $150,000. In addition, the Commission instituted and simultaneously settled administrative proceedings against Pollet barring Pollet from association with any broker or dealer pursuant to Section 15(b)(6) of the Exchange Act. Pollet pled guilty to one count of securities fraud in the criminal case, relating to his trading in one of the PIPE transactions at issue in the Commission's complaint. In December 2005, Pollet was sentenced to two months imprisonment, three months of home confinement, and three years of supervised release.

3. SG Cowen failed to have a reasonable system to implement its compliance and supervisory policies to prevent and detect Pollet's unlawful trading. SG Cowen investment bankers failed to notify SG Cowen's Control Room staff that they had contacted Pollet about investing in PIPE transactions where SG Cowen served as placement agent, in violation of SG Cowen's Chinese Wall procedures. Nevertheless, Pollet's proprietary trading in such transactions

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[1] The findings herein are made pursuant to Respondents' Offers and are not binding on any other person or entity in this or any other proceeding.

appeared on SG Cowen's Watch List. SG Cowen's Control Room staff failed to adequately investigate Pollet's trading, even though they realized it was suspicious, and in violation of SG Cowen's internal policies and procedures: a Control Room staff member contacted Pollet but accepted Pollet's concocted explanation for the trading, even though the staff member later admitted that he did not understand Pollet's explanation. Further, prior to Pollet's suspension, SG Cowen did not have a reasonable system to implement its policies or procedures concerning the proper retention of outside counsel, or the vetting of legal advice received from outside counsel. As a result of SG Cowen's failure to have a reasonable system to implement its policies and procedures for supervisory oversight of legal advice given to Pollet and follow up with Pollet regarding his trading in light of the legal advice, Pollet was able to engage in opinion shopping, and to attach his own self-serving interpretation to legal advice he received.

4. At all times relevant to this proceeding, Barthelemy was Pollet's direct supervisor. Barthelemy failed reasonably to supervise Pollet because he failed to follow up on the "red flags" indicating that Pollet's trading was questionable. For example, Barthelemy was copied on an e-mail stating that a senior SG official in Paris was "astonished" that Pollet had borrowed and sold shares of a potential PIPE issuer during a period of time when Pollet was "closely in touch" with the company's management. Barthelemy took no action to follow up on the e-mail. Barthelemy was also aware that Pollet's post-close trading could present legal and regulatory concerns, and while Barthelemy directed Pollet to obtain legal advice from counsel concerning post-close trading, Barthelemy did not take steps to find out what the advice was or whether it was being appropriately followed. Instead, Barthelemy erroneously assumed that Pollet's trading was in accordance with legal guidance Pollet had received. For example, in August 2001, Pollet gave Barthelemy a legal memorandum that Pollet represented to Barthelemy sanctioned pre-close short selling. Barthelemy did not read or review this memorandum – which was limited in important ways – until October 2001 when an SG Cowen client raised questions about Pollet's trading, and SG Cowen commenced an internal investigation of the trading at issue here. In addition, while Pollet was on vacation, Barthelemy signed two SPAs that contained false representations and failed to follow up with Pollet regarding the accuracy of those representations.

b. RESPONDENTS

5. **SGAS,** a Delaware limited liability company, is a broker-dealer registered with the Commission. SGAS is an indirect wholly-owned U.S. subsidiary of SG, an international bank headquartered in Paris, France. SGAS, which was formed in August 2003, did not commence operations until April 2004. At the time of the conduct at issue, SG Cowen was a wholly-owned indirect subsidiary of SG. SG Cowen's equity derivatives business had, until late 2001, included the Reg. D Desk which was supervised by Barthelemy. Effective April 23, 2004, SG Cowen merged into another entity indirectly wholly owned by SG. Through a series of transactions in April 2004, SGAS acquired that other entity's U.S. Equity Derivatives Group ("EDG") and certain

other businesses.[2] As a result of the April 2004 merger, SG Cowen ceased to exist. At all times relevant hereto, SG Cowen's EDG reported into SG's global EDG, based in Paris, France.

6. **Barthelemy,** age 40, is a resident of Rye, New York. He is head of equity derivatives and a managing director at SGAS. In 2001, Barthelemy was an SG Cowen managing director and the head of EDG. As the head of EDG, Barthelemy supervised the EDG's eleven sales and trading desks, including the Reg. D Desk, which was managed by Pollet. In 2001, Barthelemy held Series 7, 24, 55, and 63 licenses. Barthelemy subsequently obtained Series 9 and 10 licenses. At all times relevant hereto, Barthelemy reported to the two co-heads of SG's global EDG in Paris. Following its internal investigation in this matter, SG Cowen suspended Barthelemy for 30 days and fined him $25,000.

c. OTHER RELEVANT INDIVIDUAL AND ENTITIES

7. **Pollet,** age 43, is a resident of Switzerland. He was a managing director at SG Cowen in charge of the Reg. D Desk from 1999 until his termination in December 2001 as a result of the unlawful trading discussed herein. The two members of the Reg. D Desk were Pollet and an analyst who reported to Pollet (the "Analyst"). SG had a proprietary account with SG Cowen, and Pollet invested SG's capital in PIPE transactions, and traded in the underlying stock of the PIPE issuers. Pollet reported directly to Barthelemy. During the period at issue, Pollet held Series 7, 8, and 55 licenses.

8. **The PIPE Issuers:** Pollet's unlawful trading involved eleven companies that issued, or contemplated issuing, PIPEs: The viaLink Company ("viaLink"), Computer Motion Inc. ("Computer Motion"), Daleen Technologies, Inc. ("Daleen"), Hollywood Media Corp. ("Hollywood Media"), SangStat Medical Corporation ("SangStat"), EntreMed, Inc. ("EntreMed"), DMC Stratex Networks, Inc. ("DMC Stratex"), Sorrento Networks, Inc. ("Sorrento"), Aradigm Corporation ("Aradigm"), HealthExtras, Inc. ("HealthExtras"), and Proxim, Inc. ("Proxim") (collectively, the "Issuers"). In 2001, the common stock of each of the Issuers was registered with the Commission pursuant to Section 12(g) of the Exchange Act, and traded on the Nasdaq National Market, with the exception of viaLink's common stock, which traded on the Nasdaq Small Cap Market.

d. BACKGROUND

Overview of PIPE Transactions

9. PIPEs are private investments in public equities. Companies typically utilize the PIPE market when more traditional means of financings, such as registered follow-on offerings are impracticable. PIPE securities are generally issued pursuant to Section 4(2) of the Securities Act, which provides an exemption from registration for a non-public offering by an issuer. At the

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[2] In 1998, SG purchased the retail brokerage business asset of Cowen and Co., and combined them with SG's U.S. broker dealer subsidiary, SG Securities Corporation, to form SG Cowen Securities Corporation.

closing of a PIPE transaction, PIPE investors receive restricted securities. The stock purchase agreements generally require the issuer to file a registration statement to register the securities issued in the PIPE transaction (or in the case of convertible securities, the underlying securities) within a specified period, usually 30 or 60 days, and to take reasonable steps to have it declared effective by the Commission, typically within 60 to 120 days after the close. In other words, PIPE investors are required to wait a certain period of time before they can freely trade the securities received in the PIPE transaction. PIPE transactions often contain price discounts or other concessions, such as warrants, to compensate for the temporary illiquidity of the investment.

10. PIPE financings are generally not announced publicly until the transaction closes. Each of the Issuers considered their PIPE transaction to be a significant event for the company, and expressed varying degrees of concern about keeping confidential the fact that they were contemplating such a financing, lest potential investors sell short the Issuer's stock ahead of the close of the transaction. The marketing materials for PIPEs typically are marked "confidential" and some PIPE issuers require potential PIPE investors to enter into confidentiality agreements. A PIPE financing generally tends to have a dilutive effect on the issuer's stock price as more shares of its stock become available in the marketplace. As a result, when a PIPE is publicly announced, the stock price of the issuer often declines. Also, because the number of shares issued in a PIPE transaction is typically calculated based on the average share price of the issuer's stock in the days leading up to the close of the transaction, PIPE investors may be motivated to engage in manipulative short selling prior to the close in an effort to lower the stock price, and thus increase the number of shares received by the PIPE investor.

11. In order to invest SG's capital in PIPEs, Pollet needed approval from Barthelemy and from one of the co-heads of the global EDG in Paris. Besides making PIPE investments and trading in the securities of companies which had participated in, or which were contemplating, PIPEs and other private offerings, the Reg. D Desk engaged in no other type of trading.

12. SG Cowen's Private Equity Group ("PEG"), which was not among the assets acquired by SGAS, was headed by a managing director ("PEG Director"), and provided investment banking services to PIPE issuers and other public and non-public companies. Pollet invested in four PIPE transactions in which SG Cowen investment bankers served as the placement agent for the PIPE.

e. POLLET'S FRAUDULENT CONDUCT RELATING TO PIPE TRANSACTIONS

Pollet Sold Short PIPE Issuers' Securities Prior to the Close, as Well as After the Close But Prior to the Registration of the PIPE Shares

13. In 2001, Pollet's trading practice relating to PIPEs fell into a general pattern: Pollet would start to sell short an issuer's common stock in varying quantities when Pollet first learned that the issuer was contemplating a PIPE financing in which Pollet might invest SG's capital. The short sales were made in an SG proprietary account. Such short-selling would begin prior to the close of the PIPE transaction and, in all but one case, before the transaction had been made public.

Pollet would continue to sell short the stock of the issuer after the close, but prior to the registration of the securities issued in the PIPE transaction. Pollet used the securities that he acquired for SG in the PIPE transaction to cover the short position he had built in the stock of the issuer of those securities. If the PIPE transaction did not close, or Pollet did not cause SG to invest in it, Pollet typically covered his short position with securities acquired on the open market.

14. With respect to the PIPE transactions at issue here, Pollet invested a fixed amount of SG's capital and SG received in exchange an amount of securities that was determined based on the average share price of the Issuer's stock over a certain number of days – ranging from five days to twenty days – leading up to the close of the transaction ("Average Price"). The PIPE shares were priced at a percentage of the Average Price, ranging from 85 percent to 115 percent. In most PIPE transactions, SG also received warrants to purchase additional stock, and in the convertible transactions, SG received dividend or interest payments. In the transactions where SG received PIPE shares at a discount to the Average Price, Pollet's pre-close short selling allowed SG to lock in the spread between the price at which Pollet sold short the stock of the Issuer and the discounted PIPE share price. In the PIPE transactions structured as convertibles and priced at a premium to the Average Price, Pollet's pre-close short selling allowed him to eliminate any risk relating to the underlying convertible security Pollet purchased in the transaction, without any adverse effect on Pollet's ability to trade the warrants included in those transactions, and for SG to collect the periodic interest and dividend payments. As a result of Pollet's unlawful trading, SG locked in gains in PIPE transactions in which Pollet invested on SG's behalf, and it earned trading profits in PIPE transactions in which SG did not invest. In total, SG made $5,756,086.03 in profits from Pollet's unlawful trading.

Pollet's Trading Violated Representations Made to Issuers

15. In certain instances, Pollet's trading violated specific representations in SPAs. For example, in two PIPE transactions – involving Computer Motion and Hollywood Media – SG represented that SG had not sold short the Issuer's stock prior to the close of the PIPE transaction. In two other PIPE transactions – involving viaLink and Sorrento – SG represented that SG had not traded in the Issuer's securities prior to the close of the PIPE transaction. Pollet negotiated the provisions in all four SPAs and signed three of them, while the Hollywood Media SPA was signed by Barthelemy because Pollet was on vacation when that SPA was executed. The representations in these SPAs were false because Pollet had, in fact, accumulated for SG a significant short position in the stock of each such Issuer prior to the close of the transactions, and Pollet knew the representations were false because he placed the trades.

Pollet's Insider Trading Violated a Duty Owed to the PIPE Issuer

16. Pollet's pre-close short-selling constituted insider trading in ten PIPE transactions. In each of those transactions, Pollet violated a duty of trust or confidence that SG Cowen owed the Issuer. In four PIPE transactions – involving Sorrento, Aradigm, HealthExtras, and Proxim – SG Cowen owed a fiduciary duty to the Issuer because the PEG was acting as the Issuer's investment banker, and Pollet breached such duty by selling short the Issuer's publicly-traded common stock. Moreover, in at least two of those four transactions, SG Cowen expressly agreed to keep the fact of

the PIPE transaction confidential as well. In six other PIPE transactions – involving SangStat, Hollywood Media, Computer Motion, Daleen, EntreMed, and DMC Stratex – SG Cowen entered into confidentiality agreements with the Issuer that gave rise to a duty of confidentiality, which Pollet then breached by selling short such Issuer's publicly traded common stock.

f. THE ENTITY'S FAILURE TO SUPERVISE

17. During 2001, while Pollet was engaging in the unlawful trading activity described above, SG Cowen failed to have a system to implement its compliance, control, and supervisory policies to prevent and detect Pollet's unlawful trading. Specifically, the Control Room failed to detect Pollet's trading in PIPE Issuers' securities even though Pollet's trades appeared on the Control Room's Watch List Exception Reports. The SG Cowen investment bankers failed to notify the Control Room that they had solicited Pollet about investing in PIPE transactions in which SG Cowen acted as the PIPE placement agent. If SGAS (by and through the transactions described in paragraph 5. above) had a system in place to implement its policies and procedures with respect to communications between the investment banking group and traders and subsequent monitoring of related trades, Pollet's illegal trading activity could have been prevented and detected.

18. SG Cowen Failed to Implement Controls to Bring Pollet Over the Chinese Wall.

a. In 2001, SG Cowen's compliance manual set forth firm-wide Chinese Wall procedures, which prohibited members of the banking group from sharing information with SG Cowen sales, trading or research personnel, absent pre-clearance. Specifically, the policy provided that "members of our corporate and investment banking groups are not permitted to 'Cross the Wall', i.e., share inside information with sales, trading or research personnel unless the proposed disclosure has been pre-cleared with the Legal and Compliance Department" (emphasis in original).

b. Furthermore, SG Cowen's manual stated that where a trader, salesperson or research analyst is brought "Over the Wall," the recipient of the information becomes an "insider" and is subject to the same restrictions and confidentiality obligations as corporate and investment banking personnel. The PEG Director, who headed SG Cowen's PEG, solicited Pollet to invest in PIPE transactions without first notifying the Control Room. If SG Cowen had had a reasonable system to implement its policies and procedures regarding bringing a trader "Over the Wall," controls would have been put in place to determine the appropriateness of sharing inside information with Pollet and to subject Pollet's trading activity to greater scrutiny.

19. SG Cowen's Control Room Failed to Detect Pollet's Unlawful Trading.

a. The SG Cowen PEG instructed the Control Room to place the names of the PIPE Issuers it represented on its Watch List. This is a list of companies on which SG Cowen has inside information, and it is monitored daily by the Control Room staff for potential improper trading. At the time of the trading at issue, the Control Room had three employees who, in addition to maintaining the Watch List, also monitored proprietary trading. Every morning, the

Control Room generated a report of the prior day's trading in the stocks of companies listed on the Watch List (the "Watch List Exception Report"). The Watch List Exception Report was reviewed daily by Control Room staff. Most of the Watch List Exception Reports that listed Pollet's trades in the securities of the PIPE Issuers represented by the SG Cowen PEG were reviewed by a PEG staff member ("Staff Member A"). SG Cowen's Control Room manual stated that, "[w]hen circumstances indicate that the Chinese Wall may have been compromised, the Control Room will conduct a further analysis of the securities positions taken and inquire into the reasons the positions were taken and information known to the person making the investment decision in question."

b. Virtually all of Pollet's trades in the Issuers which had retained the SG Cowen PEG as placement agent appeared on the daily Watch List Exception Reports, and were clearly identifiable as proprietary SG trades. However, prior to August 2001, Pollet's trades were not questioned by the Control Room staff or any supervisor. Instead, they were either checked off or marked "ok."

c. On August 14, 2001, Staff Member A e-mailed Barthelemy asking him to clarify the trading strategy being used by Pollet for SG's proprietary account. Barthelemy responded via e-mail that the strategy was "Reg. D and private placements."

d. On August 28, 2001, when Pollet's trades in one of the PIPE Issuer's stock appeared on the Watch List Exception Report, Staff Member A e-mailed Pollet asking, "As is (sic) understand [your] account's strategy is Reg D and Private Placements. I see that you are buying and selling...a registered security. Can you please tell me the strategy in buying and selling this stock?" Pollet responded, "It is an equity swap arbitrage." Staff Member A accepted Pollet's explanation and performed no further inquiries, even though Staff Member A did not know what the term "equity swap arbitrage" meant. In fact, "equity swap arbitrage" is a meaningless term which Pollet used to confuse the Control Room and evade further investigation. Going forward, Staff Member A wrote "equity swap arbitrage" next to all trades in that stock that Pollet made in SG's account that appeared on the Exception Reports. Staff Member A failed to inquire further into Pollet's trading even though one of the things Staff Member A was supposed to look for when reviewing the Watch List Exception Report was "position building" *i.e.*, someone building a position, long or short, over time, which is precisely what Pollet was doing with each Issuer. Nor did Staff Member A bring Pollet's trading or explanation to the attention of Staff Member A's superiors.

20. SG Cowen Failed to Have a Reasonable System to Address Whether Supervisors Followed Up on Questionable Trading in the Firm's Proprietary Account.

a. The PIPE investment process required Pollet to submit a credit analysis report on the issuer – called an Issuer Line Application ("ILA") – to Barthelemy and senior SG officials in Paris seeking authorization for the PIPE investment. One of the senior officials ("Senior Official") who received the ILAs was a co-head of global EDG and one of Barthelemy's supervisors in Paris. The ILAs discussed the extent to which a PIPE investment would be hedged in the future, and the stock borrowing capacity available at SG and elsewhere. Initially, Pollet disclosed in the ILAs the amount of an Issuer's stock that he had already sold short (that is, sold

prior to the close of the PIPE transaction he was seeking authorization to invest in). However, in February 2001, Pollet's ILA on viaLink, which disclosed his pre-close short selling activity in connection with the viaLink PIPE, elicited an e-mail, dated February 6, 2001 ("February 6th e-mail"), from an SG private placement analyst in Paris to Pollet (with a "cc" to Barthelemy) that said, in part, "[The Senior Official] was very astonished that you [*i.e.* Pollet] already borrowed and sold shared (sic) on [viaLink] before getting the final agreement from management and also during a period of time you were closely in touch with [viaLink's] management." Because there was no system to address whether supervisors followed up on questionable trading in the firm's proprietary account, neither SG's senior management in Paris nor Barthelemy, nor anyone else at SG Cowen alerted the Legal and Compliance Departments or took other action after this e-mail.

b. The Legal and Compliance Departments failed to take meaningful action to ensure that Pollet's post-close trading of an issuer's stock was in compliance with SG Cowen's internal guidelines. Throughout the relevant period, SG Cowen had an unwritten internal guideline prohibiting short sales of an issuer's stock within 30 days after the PIPE transaction had closed (the "30-day Guideline"). SG Cowen failed to reasonably implement this guideline.

c. The purpose of the 30-day Guideline was to ensure that transactions designed to hedge positions in restricted PIPE securities would not be deemed sales of restricted securities. In November 2000, Pollet sought to have the 30-day Guideline modified so he could trade in the issuers' stock within 30 days after the close of the PIPE deal. Pollet went to SG's then-Chief U.S. Compliance Officer ("Chief Compliance Officer") who told Pollet to consult with an in-house lawyer ("In-house Counsel 1"). In-house Counsel 1 never reached a final decision on this matter; rather, In-house Counsel 1 advised Pollet to consult with outside counsel as to industry practice, which resulted in Pollet seeking advice from a securities lawyer at a law firm ("Counsel A"), who advised Pollet that while industry practice varied widely, most firms imposed a restriction of some length in order to establish investment intent.

d. In February 2001, Pollet received a memorandum from a securities lawyer at a law firm who regularly provided legal guidance to SG Cowen ("Counsel B") regarding a possible change to the 30-day Guideline. Counsel B's advice – which was never adopted by SG Cowen – was that the 30-day Guideline should only be deviated from in situations where the price of the common stock of the PIPE issuer fell significantly during the 30-day period, such that, by entering into a hedge during this period, SG Cowen would lock in a significant economic loss.

e. In March 2001, Pollet and the Chief Compliance Officer engaged in an e-mail exchange that concluded with the Chief Compliance Officer advising Pollet to consult with another in-house counsel ("In-house Counsel 2") on the issue of whether Pollet could modify the 30-day Guideline under certain circumstances. The Chief Compliance Officer undertook no follow-up to determine if Pollet had consulted with In-house Counsel 2 on this topic. Pollet ultimately abandoned his effort to modify the 30-day Guideline, which remained in effect until SG Cowen shut down the Reg. D Desk.

f. In addition to failing to ensure that Pollet was trading in compliance with SG Cowen's internal guidelines, the Legal and Compliance Departments failed to determine

whether Pollet was trading in compliance with the legal advice Pollet received from Counsel B. Finally, after April 2001, and until SG Cowen closed down the Reg. D Desk in late 2001, there was no in-house lawyer at SG Cowen who was specifically designated to handle legal inquiries concerning the Reg. D Desk. SG Cowen's lack of oversight enabled Pollet to engage in opinion shopping when he received unfavorable advice.

g. BARTHELEMY'S FAILURE TO SUPERVISE

21. Barthelemy was the head of SG Cowen's EDG in the U.S., which included the Reg. D Desk. Barthelemy was Pollet's direct supervisor. Barthelemy knew about Pollet's general trading strategy with respect to PIPE transactions, he reviewed the Reg. D Desk's profit and loss statements ("P&Ls") on a daily basis, and he reviewed the Reg. D Desk's trading positions at least weekly. Barthelemy also discussed the P&Ls with Pollet and the Analyst several times a week. Barthelemy failed reasonably to supervise Pollet with a view to preventing and detecting Pollet's violations of the federal securities laws by failing to respond to various "red flags" relating to Pollet's trading activity.

22. Red Flags.

a. Barthelemy failed to follow up on several "red flags" that Pollet's trading was questionable. Barthelemy was copied on the February 6th e-mail, which stated that a senior SG official had expressed astonishment that Pollet had borrowed and sold shares of viaLink stock before getting a final approval to invest in viaLink's PIPE from SG management, and while Pollet was in close contact with viaLink's management. Barthelemy took no action to follow up on the February 6th e-mail, even though it reflected concerns by one of SG's top officers about Pollet's trading.

b. Following Pollet's receipt of the February 6th e-mail, Pollet instructed the Analyst to omit pre-close short positions Pollet had entered into from future ILAs, which the Analyst did. Going forward, Pollet and the Analyst also concealed short positions Pollet had entered into during conference calls with SG officials in Paris, limiting their discussions only to post-close hedging of an Issuer's stock and the borrowing capacity available in the marketplace for such stock. Barthelemy reviewed each of these later ILAs, and although he was aware at least on a weekly basis of the positions Pollet had already taken on behalf of SG in the Issuers' stock, Barthelemy took no corrective action or follow-up with respect to these omissions. For example, on April 17, 2001, Barthelemy received the Hollywood Media ILA which discussed Pollet's "plan" to build a short position in Hollywood Media's stock on behalf of SG, even though Pollet had started to short such stock nearly a month earlier, in mid-March. Barthelemy took no action to follow up on this red flag as to why Pollet was concealing his short selling activity. Further, a subsequent ILA sent to SG's officers in Paris and to Barthelemy on April 23, 2001, did not disclose that Pollet had already taken a short position in VaxGen Inc.'s ("VaxGen") stock, also beginning in mid-March. However, two days later, on April 25, 2001, the Analyst e-mailed Barthelemy, "[t]hus far, we have a hedge of 48,000 shares or $900,000." Barthelemy failed to take any action in response to this e-mail.

c. Another "red flag" was raised on August 14, 2001, when Barthelemy received an e-mail from SG Cowen's Control Room asking to clarify Pollet's trading strategy. Barthelemy replied that the strategy was "Reg. D and private placements," but took no further steps to inquire why the Control Room was seeking to clarify the trading strategy of a desk that he supervised.

23. Red Flags Related to Legal Advice Concerning Pollet's Trading and Investments.

Pre-Close Short Selling.

a. In early 2001, Counsel B advised Pollet that Pollet should not sell short a PIPE Issuer's stock prior to the close of a PIPE transaction in which Pollet was contemplating investing. Counsel B warned Pollet not to engage in such pre-close short selling activity for three reasons: (i) it quite likely was insider-trading; (ii) it likely violated the Securities Act's registration requirements; and (iii) it could violate the "investment intent" representations routinely made in SPAs. Pollet did not ask Counsel B to put his advice in writing, and Pollet did not share Counsel B's legal advice with Barthelemy or SG Cowen's Legal and Compliance Departments. In direct contravention of Counsel B's legal advice, Pollet engaged in pre-close short selling in eight PIPE transactions prior to July 12, 2001, at which point Pollet sought other legal advice concerning pre-close short selling. Prior to Pollet's suspension, Barthelemy did not discuss with anyone at SG Cowen, including Pollet, whether it was proper for SG Cowen to engage in pre-close short selling.

b. On July 12, 2001, Pollet asked another lawyer ("Counsel C") who was representing SG Cowen in a PIPE transaction, about the propriety of pre-close short selling. When Counsel C indicated that, in certain situations, pre-close short selling might be permitted, Pollet requested a written memorandum on the issue. On August 13, 2001, Counsel C provided Pollet with a legal memorandum which stated that pre-close short selling could be permissible provided that Pollet ceased all such activity once he concluded that a PIPE transaction was reasonably likely to occur. Counsel C also cautioned Pollet to consider the terms of any confidentiality agreement to which SG Cowen might be a party. Pollet gave Barthelemy Counsel C's memorandum on or around August 15, 2001, but Barthelemy failed to review it at the time, and only looked at it after SG Cowen had launched its internal investigation into Pollet's trading in October 2001. Because Barthelemy failed to read Counsel C's memorandum, Barthelemy did not know that Pollet had ignored Counsel C's advice and repeatedly sold short in advance of four PIPE transactions even after it was reasonably likely that the PIPE transactions would close. For example, in the HealthExtras PIPE, Pollet sold short the Issuer's stock on the very day he sent an e-mail stating that the closing had been set for the next day. Moreover, the PEG acted as the investment banker in each of the four remaining PIPEs, and therefore had a duty of confidentiality with respect to the Issuers.

Post-Close Short Selling.

c. In February 2001, Pollet received a memorandum from Counsel B regarding a possible change to the 30-day Guideline. Counsel B's advice – which was never

adopted by SG Cowen – was that the 30-day Guideline should only be deviated from in situations where the price of the common stock of the PIPE issuer fell significantly during the 30-day period, such that, by entering into a hedge during this period, SG Cowen would lock in a significant economic loss. While Barthelemy received a copy of Counsel B's memorandum at the time, he did not read it or discuss it with Pollet, and took no steps to determine whether Pollet's trading complied with the legal advice in Counsel B's memorandum.

d. In March 2001, Barthelemy was copied on the e-mail exchange between Pollet and the Chief Compliance Officer that clearly showed that the issue of post-close short selling within the 30-day period was still unresolved. At that point, Barthelemy directed Pollet to seek guidance from a senior lawyer in the Legal Department. However, Pollet failed to do so, and Barthelemy never followed up with Pollet to see if Pollet had complied with Barthelemy's instructions. The 30-day Guideline was, in fact, never modified, and both Pollet and Barthelemy knew that it remained in effect. Nevertheless, in direct contravention of the 30-day Guideline, Pollet repeatedly sold short the stock of Issuers immediately after the close of the PIPE, and Barthelemy was aware of Pollet's trading on at least a weekly basis. Barthelemy knew that Pollet's trading in this regard was more aggressive than the 30-day Guideline.

SG Cowen's Participation on Both Sides of PIPEs.

e. Barthelemy did not adequately inquire about the propriety of SG Cowen being on both sides of a PIPE transaction – that is, acting as the issuer's investment banker, as well as being an investor in the transaction. When Barthelemy first learned that Pollet was contemplating an investment in Sorrento, a transaction for which SG Cowen was acting as the investment banker, Barthelemy asked Pollet to get legal advice on this issue and was satisfied when Pollet told him that he had consulted with a lawyer who had opined that SG Cowen's dual role was not problematic. Pollet showed Barthelemy a legal memorandum from Counsel C at the time, but Barthelemy did not read the memorandum or ask about the substance of the advice it contained. As it turns out, the memorandum had no bearing whatsoever on the issue of whether it was okay for SG Cowen to participate on both sides of a PIPE deal. Instead, as Barthelemy discovered much later, Counsel C's memorandum addressed only pre-close short selling.

24. Other Supervisory Failures.

a. Pollet sought legal advice on the issue of hedging PIPE securities from three different outside lawyers. Barthelemy knew that Counsel B was the lawyer regularly used by Pollet's group. He also knew that Pollet sought advice from Counsels A and C. In fact, Barthelemy asked Pollet why he was seeking advice from Counsel C, but failed to pursue the matter any further. Pollet's use of different lawyers was a "red flag" that Barthelemy should have followed up on.

b. In Pollet's absence, Barthelemy signed two SPAs negotiated by Pollet containing misrepresentations without following up with Pollet or reviewing the trading records to confirm the accuracy of those representations. Barthelemy signed the Hollywood Media SPA, which contained a false representation that SG had not sold short Hollywood Media's common

stock prior to the closing date, when in fact Pollet had accumulated a significant short position in Hollywood Media shares at the time the SPA was executed. Barthelemy also signed the VaxGen SPA. Barthelemy testified that he did not read either the Hollywood Media SPA or the VaxGen SPA prior to signing the documents, but that his general practice was to verify that a document he was signing had been reviewed by counsel. There is no evidence that Barthelemy followed such a practice in these two instances. In any event, the false representations at issue concerned factual and business matters, not legal questions. Barthelemy's failure to confirm the accuracy of the representations in the Hollywood Media and VaxGen SPAs prior to signing the documents meant that he missed red flags, which could have led to the prevention and detection of Pollet's unlawful trading.

c. Finally, Barthelemy did not implement SG Cowen's Chinese Wall procedures. SG Cowen's Equity Division Compliance Manual requires that all supervisors, among other practices, must "[p]romote respect for and full adherence to [the firm's] Chinese Wall policies by emphasizing the severe consequences, including fines and imprisonment, for breaches." Barthelemy was not familiar with SG Cowen's Chinese Wall procedures while supervising Pollet and therefore failed to implement these procedures. If Barthelemy had implemented these procedures, he could have prevented Pollet's wrongful conduct.

h. APPLICABLE LAW

Sections 15(b)(4)(E) and 15(b)(6)(A) of the Exchange Act

25. Section 15(b)(4)(E) of the Exchange Act authorizes the Commission to sanction a broker or dealer if that broker or dealer has "fail[ed] reasonably to supervise, with a view toward preventing securities law violations, a person subject to its supervision who commits [a violation of, among other statutes, any provision of the Exchange Act]." In the Matter of Dean Witter Reynolds Inc., et al., Admin. Proc. File No. 3-9686, 2001 SEC Lexis 99 (Jan. 22, 2001) (citing In the Matter of James Harvey Thornton, Exch. Act Rel. No. 41007, 69 SEC Docket 49, 53 (Feb. 1, 1999)). Section 15(b)(6)(A) of the Exchange Act incorporates Section 15(b)(4)(E) by reference and authorizes the Commission to impose sanctions for deficient supervision on individuals associated with broker-dealers. Under Section 15(b)(4)(E), such sanction must be in the public interest. In order to prove a failure to supervise claim, the Commission must establish: (i) an underlying securities law violation; (ii) association of the registered representative or person who committed the violation; (iii) supervisory jurisdiction over that person; and (iv) failure reasonably to supervise the person committing the violation. See In re Philadelphia Investors, Ltd. and Clarence Z. Wurts, SEC Admin. Proc. File No. 3-9114, 1998 WL 122180 (March 20, 1998).

26. During 2001, Pollet sold short the publicly traded securities of the PIPE Issuers prior to the close of PIPE transactions in which Pollet was investing or contemplating investing on behalf of SG. In several instances, Pollet's short-selling was contrary to specific representations made to the Issuers in the SPAs. Pollet's conduct violated Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5].

27. At the time Pollet committed the violations of the antifraud provisions described above, Pollet was associated with SG Cowen, and Barthelemy was Pollet's direct supervisor. Both SG Cowen and Barthelemy had supervisory jurisdiction over Pollet during this time.

28. In large organizations it is especially imperative that those in authority exercise particular vigilance when indications of irregularity reach their attention. See Wedbush Securities, Inc., 48 S.E.C. 963, 967 (1988) (citations omitted). "The supervisory obligations imposed by the federal securities laws require a vigorous response even to indications of wrongdoing." In the Matter of John H. Gutfreund, 51 S.E.C. 93, 108, Exch. Act Release No. 34-31554 (Dec. 3, 1992). Supervisors who learn of red flags or suggestions of irregularity in the conduct of their employees may not discharge their supervisory obligations simply by relying on the unverified representations of such employees. In the Matter of Dean Witter Reynolds Inc., et al., 69 S.E.C. Docket 725, Exch. Act Release No. 41145 (March 8, 1999) (citations omitted). Instead, "[r]ed flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review. When indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of the federal securities laws." In the Matter of Edwin Kantor, 51 S.E.C. 440, 447, Exch. Act Release No. 32341 (May 20, 1993).

29. Moreover, the Commission has long emphasized that the responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the regulatory scheme to protect investors. Lehman Brothers, Inc., Exch. Act Rel. No. 37673, 1996 SEC Lexis 2453, at *21 (September 12, 1996) (citing Smith Barney, Harris Upham & Co., Exch. Act Rel. No. 21813, 1985 SEC Lexis 2051 (March 5, 1985)). However, the establishment of policies and procedures alone is not sufficient to discharge supervisory responsibilities; on-going monitoring and review is necessary to ensure that the established procedures which make up the supervisory program are effective in preventing and detecting violations. Consolidated Investment Services, Inc., Exch. Act Rel. No. 36687, 1996 WL 20829 (January 5, 1996).

30. As a result of the conduct described above in Sections III.f. and III.g., SGAS and Barthelemy, respectively, failed reasonably to supervise Pollet with a view to preventing and detecting Pollet's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

i. RESPONDENTS' REMEDIAL EFFORTS

31. In determining to accept the Offer, the Commission considered remedial acts taken by SG Cowen, and the cooperation SG Cowen afforded the Commission staff during its investigation.

j. UNDERTAKING

32. Barthelemy shall provide to the Commission, within ten (10) days after the end of the three-month suspension period described below in Section IV, an affidavit that he has complied fully with this sanction. Such affidavit shall be submitted under cover letter that identifies

Barthelemy as a Respondent and the file number of these proceedings, and hand-delivered or mailed to David Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Room 4300, New York, New York 10281-1022.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 15(b)(4)(E) of the Exchange Act, SGAS is hereby censured.

B. SGAS shall, within ten (10) days of the entry of this Order, pay disgorgement of $5,756,086.03 and prejudgment interest of $2,628,846.40 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies SGAS as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Room 4300, New York, New York 10281-1022.

C. Barthelemy be, and hereby is, suspended from acting in a supervisory capacity for any broker or dealer for a period of three (3) months, effective beginning the second Monday following the issuance of this Order.

D. Barthelemy shall comply with his undertaking enumerated in Section III.j. above.

E. Barthelemy shall, within ten (10) days of the entry of the Order, pay a civil money penalty in the amount of $50,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies Barthelemy as a Respondent in these proceedings, the file number of these proceedings, a

copy of which cover letter and money order or check shall be sent to David Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Room 4300, New York, New York 10281-1022.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59423 / February 19, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2939 / February 19, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13374

In the Matter of **DAVID J. LUBBEN,** **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 David J. Lubben ("Respondent" or "Lubben") 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 attorney . . . who has been by name: (A) permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III. 3. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Lubben, age fifty-six (56), is and has been an attorney licensed to practice in the State of Minnesota. From 1996 until late 2006, he served as General Counsel to UnitedHealth Group Inc. ("UnitedHealth").

2. UnitedHealth is and was, at all relevant times, a Minnesota corporation with its principal place of business in Minnetonka, Minnesota. UnitedHealth is a diversified health and well-being company offering a variety of insurance and other products and services to approximately 70 million individuals through six operating businesses. UnitedHealth's securities are registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and are listed on the New York Stock Exchange.

3. On January 23, 2009, a final judgment was entered against Respondent in the civil action entitled Securities and Exchange Commission v. David J. Lubben, 08-cv-6454, in the United States District Court for the District of Minnesota. The final judgment permanently enjoined Lubben from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Sections 10(b), 13(b)(5), 14(a) and 16(a) of the Exchange Act and Rules 10b-5, 13b2-1, 14a-9 and 16a-3 thereunder, and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) and 16(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, 13a-13 and 16a-3 thereunder. The final judgment also ordered that Lubben is liable for $1,403,310 in disgorgement, plus $347,211 in prejudgment interest, and a $575,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that Lubben participated in a stock options backdating scheme at UnitedHealth, in which hindsight was used to pick advantageous grant dates for the Company's nonqualified stock options, which dates corresponded to dates of historically low annual or quarterly closing prices for UnitedHealth's common stock. The complaint further alleged that various individuals, including Lubben or others acting at his direction, created false or misleading Company records indicating that the grants had occurred on the earlier dates when the Company's stock price had been at a low. According to the complaint, because of the undisclosed backdating, for fiscal years 1996 through

2005, UnitedHealth filed with the Commission and disseminated to investors quarterly and annual reports, proxy statements and registration statements that Lubben knew, or was reckless in not knowing, contained or incorporated by reference materially false and misleading statements pertaining to the true grant dates of UnitedHealth options and materially false and misleading financial statements, which underreported compensation expenses. In addition, the complaint alleged that Lubben received and exercised backdated options on shares of UnitedHealth stock, and thus personally benefited from the backdating.

IV.

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

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

Lubben is suspended from appearing or practicing before the Commission as an attorney for three (3) years. Furthermore, before appearing and resuming practice before the Commission, Lubben must submit an affidavit to the Commission's Office of General Counsel truthfully stating, under penalty of perjury, that he has complied with the Order; that he is not the subject of any suspension or disbarment as an attorney by a court of the United States or of any state, territory, district, commonwealth, or possession; and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **February 2009**, 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:

KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, ACTING CHAIRMAN

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

2 Documents

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 3, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13361

In the Matter of	
L Rex International, Inc., **Lakshmi Enterprises, Inc.,** **Lamaur Corp.,** **Laminco Resources, Inc.** **(n/k/a Zaruma Resources, Inc.,),** **Landis & Partners, Inc.,** **Las Americas Broadband, Inc., and** **Laser Precision Corp.** **(n/k/a NetTest, 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 L Rex International, Inc., Lakshmi Enterprises, Inc., Lamaur Corp., Laminco Resources, Inc. (n/k/a Zaruma Resources, Inc.), Landis & Partners, Inc., Las Americas Broadband, Inc. and Laser Precision Corp. (n/k/a NetTest, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. L Rex International, Inc. (CIK No. 824498) is a British Virgin Islands corporation located in Wanchai, Hong Kong, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). L Rex International 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, 1994.

2. Lakshmi Enterprises, Inc. (CIK No. 1097364) is a void Delaware corporation located in Pacific Palisades, California with a class of securities registered with the

Commission pursuant to Exchange Act Section 12(g). Lakshmi 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 $73,670 since inception on May 9, 1997.

3. Lamaur Corp. (CIK No. 1011154) is a void Delaware corporation located in Fridley, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lamaur 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 $2,131,000 for the prior nine months.

4. Laminco Resources, Inc. (n/k/a Zaruma Resources, Inc.) (CIK No. 1011352) 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). Laminco Resources 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, 1999, which reported a net loss of $331,400 (Canadian) for the prior year.

5. Landis & Partners, Inc. (CIK No. 1108702) is a permanently revoked Nevada corporation located in Fountain Hills, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Landis & Partners is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001.

6. Las Americas Broadband, Inc. (CIK No. 760497) is a delinquent Colorado corporation located in Tehachapi, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Las Americas Broadband is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2003, which reported a net loss of $4,222,512 for the prior year.

7. Laser Precision Corp. (n/k/a NetTest, Inc.) (CIK No. 312242) is an inactive New York corporation located in San Juan Capistrano, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Laser Precision 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, 1994.

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 certain foreign private issuers to furnish quarterly and other material reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

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.

Elizabeth M. Murphy
Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings
In the Matter of L Rex International, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
L Rex International, Inc.					
	20-F	12/31/95	06/28/96	Not filed	151
	20-F	12/31/96	06/30/97	Not filed	139
	20-F	12/31/97	06/29/98	Not filed	127
	20-F	12/31/98	06/29/99	Not filed	115
	20-F	12/31/99	06/28/00	Not filed	103
	20-F	12/31/00	06/29/01	Not filed	91
	20-F	12/31/01	07/01/02	Not filed	78
	20-F	12/31/02	06/30/03	Not filed	67
	20-F	12/31/03	06/28/04	Not filed	55
	20-F	12/31/04	06/29/05	Not filed	43
	20-F	12/31/05	06/29/06	Not filed	31
	20-F	12/31/06	06/29/07	Not filed	19
	20-F	12/31/07	06/30/08	Not filed	7
Total Filings Delinquent	13				
Lakshmi Enterprises, Inc.					
	10-QSB	06/30/01	08/14/01	Not filed	89
	10-QSB	09/30/01	11/14/01	Not filed	86
	10-KSB	12/31/01	04/01/02	Not filed	81
	10-QSB	03/31/02	05/15/02	Not filed	80
	10-QSB	06/30/02	08/14/02	Not filed	77
	10-QSB	09/30/02	11/14/02	Not filed	74
	10-KSB	12/31/02	03/31/03	Not filed	70
	10-QSB	03/31/03	05/15/03	Not filed	68
	10-QSB	06/30/03	08/14/03	Not filed	65
	10-QSB	09/30/03	11/14/03	Not filed	62
	10-KSB	12/31/03	03/30/04	Not filed	58
	10-QSB	03/31/04	05/17/04	Not filed	56
	10-QSB	06/30/04	08/16/04	Not filed	53
	10-QSB	09/30/04	11/15/04	Not filed	50
	10-KSB	12/31/04	03/31/05	Not filed	46
	10-QSB	03/31/05	05/16/05	Not filed	44

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Lakshmi Enterprises, Inc.					
	10-QSB	06/30/05	08/15/05	Not filed	41
	10-QSB	09/30/05	11/14/05	Not filed	38
	10-KSB	12/31/05	03/31/06	Not filed	34
	10-QSB	03/31/06	05/15/06	Not filed	32
	10-QSB	06/30/06	08/14/06	Not filed	29
	10-QSB	09/30/06	11/14/06	Not filed	26
	10-KSB	12/31/06	04/02/07	Not filed	21
	10-QSB	03/31/07	05/15/07	Not filed	20
	10-QSB	06/30/07	08/14/07	Not filed	17
	10-QSB	09/30/07	11/14/07	Not filed	14
	10-KSB	12/31/07	03/31/08	Not filed	10
	10-Q[1]	03/31/08	05/15/08	Not filed	8
	10-Q[1]	06/30/08	08/14/08	Not filed	3
	10-Q[1]	09/30/08	11/14/08	Not filed	2
Total Filings Delinquent	**30**				
Lamaur Corp.					
	10-K	12/31/01	04/01/02	Not filed	81
	10-Q	03/31/02	05/15/02	Not filed	80
	10-Q	06/30/02	08/14/02	Not filed	77
	10-Q	09/30/02	11/14/02	Not filed	74
	10-K	12/31/02	03/31/03	Not filed	70
	10-Q	03/31/03	05/15/03	Not filed	68
	10-Q	06/30/03	08/14/03	Not filed	65
	10-Q	09/30/03	11/14/03	Not filed	62
	10-K	12/31/03	03/30/04	Not filed	58
	10-Q	03/31/04	05/17/04	Not filed	56
	10-Q	06/30/04	08/16/04	Not filed	53
	10-Q	09/30/04	11/15/04	Not filed	50

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

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Lamaur Corp. (continued)	*10-K*	12/31/04	03/31/05	Not filed	46
	10-Q	03/31/05	05/16/05	Not filed	44
	10-Q	06/30/05	08/15/05	Not filed	41
	10-Q	09/30/05	11/14/05	Not filed	38
	10-K	12/31/05	03/31/06	Not filed	34
	10-Q	03/31/06	05/15/06	Not filed	32
	10-Q	06/30/06	08/14/06	Not filed	29
	10-Q	09/30/06	11/14/06	Not filed	26
	10-K	12/31/06	04/02/07	Not filed	21
	10-Q	03/31/07	05/15/07	Not filed	20
	10-Q	06/30/07	08/14/07	Not filed	17
	10-Q	09/30/07	11/14/07	Not filed	14
	10-K	12/31/07	03/31/08	Not filed	10
	10-Q	03/31/08	05/15/08	Not filed	8
	10-Q	06/30/08	08/14/08	Not filed	5
	10-Q	09/30/08	11/14/08	Not filed	2
Total Filings Delinquent	**28**				
Laminco Resources, Inc. (n/k/a Zaruma Resources, Inc.)	*20-F*	12/31/00	06/29/01	Not filed	91
	20-F	12/31/01	07/01/02	Not filed	78
	20-F	12/31/02	06/30/03	Not filed	67
	20-F	12/31/03	06/28/04	Not filed	55
	20-F	12/31/04	06/29/05	Not filed	43
	20-F	12/31/05	06/29/06	Not filed	31
	20-F	12/31/06	06/29/07	Not filed	19
	20-F	12/31/07	06/30/08	Not filed	7
Total Filings Delinquent	**8**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Landis & Partners, Inc.					
	10-KSB	12/31/01	04/01/02	Not filed	81
	10-QSB	03/31/02	05/15/02	Not filed	80
	10-QSB	06/30/02	08/14/02	Not filed	77
	10-QSB	09/30/02	11/14/02	Not filed	74
	10-KSB	12/31/02	03/31/03	Not filed	70
	10-QSB	03/31/03	05/15/03	Not filed	68
	10-QSB	06/30/03	08/14/03	Not filed	65
	10-QSB	09/30/03	11/14/03	Not filed	62
	10-KSB	12/31/03	03/30/04	Not filed	58
	10-QSB	03/31/04	05/17/04	Not filed	56
	10-QSB	06/30/04	08/16/04	Not filed	53
	10-QSB	09/30/04	11/15/04	Not filed	50
	10-KSB	12/31/04	03/31/05	Not filed	46
	10-QSB	03/31/05	05/16/05	Not filed	44
	10-QSB	06/30/05	08/15/05	Not filed	41
	10-QSB	09/30/05	11/14/05	Not filed	38
	10-KSB	12/31/05	03/31/06	Not filed	34
	10-QSB	03/31/06	05/15/06	Not filed	32
	10-QSB	06/30/06	08/14/06	Not filed	29
	10-QSB	09/30/06	11/14/06	Not filed	26
	10-KSB	12/31/06	04/02/07	Not filed	21
	10-QSB	03/31/07	05/15/07	Not filed	20
	10-QSB	06/30/07	08/14/07	Not filed	17
	10-QSB	09/30/07	11/14/07	Not filed	14
	10-KSB	12/31/07	03/31/08	Not filed	10
	10-Q [1]	03/31/08	05/15/08	Not filed	8
	10-Q [1]	06/30/08	08/14/08	Not filed	5
	10-Q [1]	09/30/08	11/14/08	Not filed	2
Total Filings Delinquent	**28**				
Las Americas Broadband, Inc.					
	10-QSB	03/31/04	05/17/04	Not filed	56
	10-QSB	06/30/04	08/16/04	Not filed	53
	10-QSB	09/30/04	11/15/04	Not filed	50
	10-KSB	12/31/04	03/31/05	Not filed	46

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Las Americas Broadband, Inc. (continued)	*10-QSB*	03/31/05	05/16/05	Not filed	44
	10-QSB	06/30/05	08/15/05	Not filed	41
	10-QSB	09/30/05	11/14/05	Not filed	38
	10-KSB	12/31/05	03/31/06	Not filed	34
	10-QSB	03/31/06	05/15/06	Not filed	32
	10-QSB	06/30/06	08/14/06	Not filed	29
	10-QSB	09/30/06	11/14/06	Not filed	26
	10-KSB	12/31/06	04/02/07	Not filed	21
	10-QSB	03/31/07	05/15/07	Not filed	20
	10-QSB	06/30/07	08/14/07	Not filed	17
	10-QSB	09/30/07	11/14/07	Not filed	14
	10-KSB	12/31/07	03/31/08	Not filed	10
	10-Q'	03/31/08	05/15/08	Not filed	8
	10-Q'	06/30/08	08/14/08	Not filed	5
	10-Q'	09/30/08	11/14/08	Not filed	2
Total Filings Delinquent	**19**				
Laser Precision Corp. (n/k/a NetTest, Inc.)	*10-K*	12/31/94	03/31/95	Not filed	166
	10-Q	03/31/95	05/15/95	Not filed	164
	10-Q	06/30/95	08/14/95	Not filed	161
	10-Q	09/30/95	11/14/95	Not filed	158
	10-K	12/31/95	04/01/96	Not filed	153
	10-Q	03/31/96	05/15/96	Not filed	152
	10-Q	06/30/96	08/14/96	Not filed	149
	10-Q	09/30/96	11/14/96	Not filed	146
	10-K	12/31/96	03/31/97	Not filed	142
	10-Q	03/31/97	05/15/97	Not filed	140
	10-Q	06/30/97	08/14/97	Not filed	137
	10-Q	09/30/97	11/14/97	Not filed	134
	10-K	12/31/97	03/31/98	Not filed	130
	10-Q	03/31/98	05/15/98	Not filed	128
	10-Q	06/30/98	08/14/98	Not filed	125
	10-Q	09/30/98	11/16/98	Not filed	122

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Laser Precision Corp. (n/k/a NetTest, Inc.) (continued)	*10-K*	12/31/98	03/31/99	Not filed	118
	10-Q	03/31/99	05/17/99	Not filed	116
	10-Q	06/30/99	08/16/99	Not filed	113
	10-Q	09/30/99	11/15/99	Not filed	110
	10-K	12/31/99	03/30/00	Not filed	106
	10-Q	03/31/00	05/15/00	Not filed	104
	10-Q	06/30/00	08/14/00	Not filed	101
	10-Q	09/30/00	11/14/00	Not filed	98
	10-K	12/31/00	04/02/01	Not filed	93
	10-Q	03/31/01	05/15/01	Not filed	92
	10-Q	06/30/01	08/14/01	Not filed	89
	10-Q	09/30/01	11/14/01	Not filed	86
	10-K	12/31/01	04/01/02	Not filed	81
	10-Q	03/31/02	05/15/02	Not filed	80
	10-Q	06/30/02	08/14/02	Not filed	77
	10-Q	09/30/02	11/14/02	Not filed	74
	10-K	12/31/02	03/31/03	Not filed	70
	10-Q	03/31/03	05/15/03	Not filed	68
	10-Q	06/30/03	08/14/03	Not filed	65
	10-Q	09/30/03	11/14/03	Not filed	62
	10-K	12/31/03	03/30/04	Not filed	58
	10-Q	03/31/04	05/17/04	Not filed	56
	10-Q	06/30/04	08/16/04	Not filed	53
	10-Q	09/30/04	11/15/04	Not filed	50
	10-K	12/31/04	03/31/05	Not filed	46
	10-Q	03/31/05	05/16/05	Not filed	44
	10-Q	06/30/05	08/15/05	Not filed	41
	10-Q	09/30/05	11/14/05	Not filed	38
	10-K	12/31/05	03/31/06	Not filed	34
	10-Q	03/31/06	05/15/06	Not filed	32
	10-Q	06/30/06	08/14/06	Not filed	29
	10-Q	09/30/06	11/14/06	Not filed	26
	10-K	12/31/06	04/02/07	Not filed	21
	10-Q	03/31/07	05/15/07	Not filed	20

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Laser Precision Corp. (n/k/a NetTest, Inc.) (continued)					
	10-Q	06/30/07	08/14/07	Not filed	17
	10-Q	09/30/07	11/14/07	Not filed	14
	10-K	12/31/07	03/31/08	Not filed	10
	10-Q	03/31/08	05/15/08	Not filed	8
	10-Q	06/30/08	08/14/08	Not filed	5
	10-Q	09/30/08	11/14/08	Not filed	2
Total Filings Delinquent	**56**				

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 3, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13360

In the Matter of	
Lambert Communications, Inc., Laniprin Life Sciences, Inc., Last American Exit, Inc., Lawrence Insurance Group, Inc., Le Print Express International, Inc., Leak-X Environmental Corp., and Leisure Shoppers, Inc.,	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**
Respondents.	

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Lambert Communications, Inc., Laniprin Life Sciences, Inc., Last American Exit, Inc., Lawrence Insurance Group, Inc., Le Print Express International, Inc., Leak-X Environmental Corp., and Leisure Shoppers, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Lambert Communications, Inc. (CIK No. 913755) is a void Delaware corporation located in Brookfield, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lambert Communications 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, 1994, which reported a net loss of $7,525,911 for the prior nine months.

2. Laniprin Life Sciences, Inc. (CIK No. 1103717) is a delinquent Colorado corporation located in Pompano Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Laniprin Life Sciences 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 October 31, 2001, which reported a net loss of $3,349 for the prior six months.

3. Last American Exit, Inc. (CIK No. 1122205) is an inactive New York corporation located in Huntington, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Last American Exit is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB on November 13, 2000, which reported a net loss of $2,000 since inception on August 14, 2000.

4. Lawrence Insurance Group, Inc. (CIK No. 805266) is a void Delaware corporation located in Schenectady, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lawrence Insurance 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, 1997, which reported a net loss of $921,000 for the prior nine months.

5. Le Print Express International, Inc. (CIK No. 1011667) is an Ontario corporation located in Scarborough, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Le Print Express International 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 June 30, 1999.

6. Leak-X Environmental Corp. (CIK No. 842697) is a void Delaware corporation located in West Chester, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Leak-X Environmental 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, 2000, which reported a net loss of $102,476 for the prior three months.

7. Leisure Shoppers, Inc. (CIK No. 1068267) is a Louisiana corporation located in Pineville, Louisiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Leisure Shoppers 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 April 5, 2002.

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 certain foreign private issuers to furnish quarterly and other material reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

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.

Elizabeth M. Murphy
Secretary

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

Attachment

Appendix 1

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

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Lambert Communications, Inc.					
	10-K	12/31/94	03/31/95	Not filed	167
	10-Q	03/31/95	05/15/95	Not filed	165
	10-Q	06/30/95	08/14/95	Not filed	162
	10-Q	09/30/95	11/14/95	Not filed	159
	10-K	12/31/95	04/01/96	Not filed	154
	10-Q	03/31/96	05/15/96	Not filed	153
	10-Q	06/30/96	08/14/96	Not filed	150
	10-Q	09/30/96	11/14/96	Not filed	147
	10-K	12/31/96	03/31/97	Not filed	143
	10-Q	03/31/97	05/15/97	Not filed	141
	10-Q	06/30/97	08/14/97	Not filed	138
	10-Q	09/30/97	11/14/97	Not filed	135
	10-K	12/31/97	03/31/98	Not filed	131
	10-Q	03/31/98	05/15/98	Not filed	129
	10-Q	06/30/98	08/14/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Lambert Communications, Inc. (continued)	*10-Q*	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	**56**				
Laniprin Life Sciences, Inc.	*10-QSB*	01/31/02	03/18/02	Not filed	83
	10-KSB	04/30/02	07/29/02	Not filed	79
	10-QSB	07/31/02	09/16/02	Not filed	77
	10-QSB	10/31/02	12/16/02	Not filed	74
	10-QSB	01/31/03	03/17/03	Not filed	71
	10-KSB	04/30/03	07/29/03	Not filed	67
	10-QSB	07/31/03	09/15/03	Not filed	65

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Laniprin Life Sciences, Inc. (continued)					
	10-QSB	10/31/03	12/15/03	Not filed	62
	10-QSB	01/31/04	03/16/04	Not filed	59
	10-KSB	04/30/04	07/29/04	Not filed	55
	10-QSB	07/31/04	09/14/04	Not filed	53
	10-QSB	10/31/04	12/15/04	Not filed	50
	10-QSB	01/31/05	03/17/05	Not filed	47
	10-KSB	04/30/05	07/29/05	Not filed	43
	10-QSB	07/31/05	09/14/05	Not filed	41
	10-QSB	10/31/05	12/15/05	Not filed	38
	10-QSB	01/31/06	03/17/06	Not filed	35
	10-KSB	04/30/06	07/31/06	Not filed	31
	10-QSB	07/31/06	09/14/06	Not filed	29
	10-QSB	10/31/06	12/15/06	Not filed	26
	10-QSB	01/31/07	03/19/07	Not filed	23
	10-KSB	04/30/07	07/30/07	Not filed	19
	10-QSB	07/31/07	09/14/07	Not filed	17
	10-QSB	10/31/07	12/17/07	Not filed	14
	10-QSB	01/31/08	03/17/08	Not filed	11
	10-KSB	04/30/08	07/30/08	Not filed	7
	10-Q [1]	07/31/08	09/15/08	Not filed	5
	10-Q [1]	10/31/08	12/15/08	Not filed	2
Total Filings Delinquent	**27**				
Last American Exit, Inc.					
	10-KSB	12/31/00	04/02/01	Not filed	94
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Last American Exit, Inc. (continued)					
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-KSB	12/31/07	03/31/08	Not filed	11
	10-Q[1]	03/31/08	05/15/08	Not filed	9
	10-Q[1]	06/30/08	08/14/08	Not filed	6
	10-Q[1]	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	**32**				
Lawrence Insurance Group, Inc.					
	10-K	12/31/97	03/31/98	Not filed	131
	10-Q	03/31/98	05/15/98	Not filed	129
	10-Q	06/30/98	08/14/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Lawrence Insurance Group, Inc. (continued)					
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3

Total Filings Delinquent **44**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Le Print Express International, Inc.					
	20-F	06/30/00	01/02/01	Not filed	97
	20-F	06/30/01	12/31/01	Not filed	86
	20-F	06/30/02	12/30/02	Not filed	74
	20-F	06/30/03	12/30/03	Not filed	62
	20-F	06/30/04	12/30/04	Not filed	50
	20-F	06/30/05	12/30/05	Not filed	38
	20-F	06/30/06	01/02/07	Not filed	25
	20-F	06/30/07	12/31/07	Not filed	14
	20-F	06/30/08	12/31/08	Not filed	2
Total Filings Delinquent	**8**				
Leak-X Environmental Corp.					
	10-KSB	12/31/00	04/02/01	Not filed	94
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Leak-X Environmental Corp. (continued)					
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-KSB	12/31/07	03/31/08	Not filed	11
	10-Q[1]	03/31/08	05/15/08	Not filed	9
	10-Q[1]	06/30/08	08/14/08	Not filed	6
	10-Q[1]	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	**32**				
Leisure Shoppers, Inc.					
	10-QSB	03/31/02	07/19/02	Not filed	79
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Leisure Shoppers, Inc. (continued)	*10-KSB*	12/31/07	03/31/08	Not filed	11
	10-Q[1]	03/31/08	05/15/08	Not filed	9
	10-Q[1]	06/30/08	08/14/08	Not filed	6
	10-Q[1]	09/30/08	11/14/08	Not filed	3

Total Filings Delinquent **27**

[1]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

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **February 2009**, 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.
Mary L. Schapiro was sworn in as SEC Chairman on January 27, 2009.

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

MARY L. SCHAPIRO, CHAIRMAN

KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

32 Documents

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, 230, 240, 244 and 249

[RELEASE NOS. 33-9005; 34-59350; 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; Extension of comment period.

SUMMARY: The Securities and Exchange Commission ("Commission") is extending the comment period for a release 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 and amendments to various regulations, rules and forms that would permit early use of IFRS by a limited number of U.S. issuers [Release No. 33-8982; 73 FR 70816 (Nov. 21, 2008)]. The original comment period for Release No. 33-8982 is scheduled to end on February 19, 2009. The Commission is extending the time period in which to provide the Commission with comments on that release for 60 days until Monday, April 20, 2009. This action will allow interested persons additional time to analyze the issues and prepare their comments.

DATES: Comments should be received on or before April 20, 2009.

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

Electronic Comments:

- Use the Commission's Internet comment form

(http://www.sec.gov/rules/proposed.shtml); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-27-08 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 Elizabeth M. Murphy, 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 has requested comment on a release proposing a Roadmap and amendments relating to the use of IFRS by U.S. issuers. The proposed Roadmap sets forth milestones that, if achieved, could lead to the required use of IFRS by U.S. issuers by 2014 if the Commission believes it to be in the public interest and for the protection of investors. The proposed amendments to various regulations, rules and forms 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. This release was published in the Federal Register on November 21, 2008.

The Commission originally requested that comments on the release be received by February 19, 2009. The Commission has received requests for an extension of time for public comment on the proposed Roadmap and amendments to, among other things, improve the potential response rate and quality of responses,[1] and believes that it would be appropriate to do so in order to give the public additional time to consider thoroughly the matters addressed by the release. Therefore, the Commission is extending

[1] See e.g., Northrop Grumman Corporation (Jan. 9, 2009), Raytheon Company (Jan. 12, 2009), Honeywell (Jan. 12, 2009), Aerospace Industries Association (Jan. 13, 2009), United Technologies Corporation (Jan. 19, 2009), and Financial Executives International (Jan. 23, 2009). Comments are available on the Commission's Internet Web site at http://www.sec.gov/comments/s7-27-08/s72708.shtml.

the comment period for Release No. 33-8982 "Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers" for sixty days, to Monday, April 20, 2009.

By the Commission,

Elizabeth M. Murphy
Secretary

Dated: February 3, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59363 / February 5, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2931 / February 5, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-10354

In the Matter of Jeffrey M. Yonkers, CPA	ORDER GRANTING APPLICATION FOR REINSTATEMENT TO APPEAR AND PRACTICE BEFORE THE COMMISSION AS AN INDEPENDENT ACCOUNTANT

On July 27, 2001, Jeffrey M. Yonkers, CPA ("Yonkers") was denied the privilege of appearing or practicing as an accountant before the Commission as a result of settled public administrative proceedings instituted by the Commission against him pursuant to Rule 102(e) of the Commission's Rules of Practice.[1] On February 15, 2008, Yonkers was reinstated to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.[2] This order is issued in response to Yonkers' application for reinstatement to appear and practice before the Commission as an independent accountant.

The Commission alleged that the financial statements of Detour Magazine, Inc. ("Detour") contained in their filings with the Commission during 1997 and 1998, as audited by Yonkers and others, materially misrepresented the company's financial condition and results of operation. Based upon his conduct during the audits of Detour's financial statements, the Commission determined that Yonkers had willfully violated Section 10A of the Securities Exchange Act of 1934 ("Exchange Act") and willfully aided and abetted Detour's violations of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder. The Commission also determined that Yonkers engaged in improper professional conduct under Rule 102(e) of the Commission's Rules of Practice.

[1] *See* Accounting and Auditing Enforcement Release No. 1428 dated July 27, 2001. Yonkers was permitted, pursuant to the order, to apply for reinstatement after one year upon making certain showings.

[2] *See* Accounting and Auditing Enforcement Release No. 2787 dated February 15, 2008.

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

Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."[3] This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Yonkers, it appears that he has complied with the terms of the July 27, 2001 order suspending him from appearing or practicing before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Yonkers, by undertaking to comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to all requirements relating to registration, inspections, concurring partner reviews and quality control standards in his practice before the Commission as an independent accountant, has shown good cause for reinstatement. Therefore, it is accordingly,

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Jeffrey M. Yonkers, CPA is hereby reinstated to appear and practice before the Commission as an independent accountant.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

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

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 6, 2009

IN THE MATTER OF

BIH CORPORATION

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 BIH Corporation ("BIH") because of questions regarding the accuracy of assertions by BIH in its website and in press releases to investors concerning, among other things: (1) the identity of the person or persons in control of the operation and management of the company, and (2) contracts entered into by one of BIH's subsidiaries.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. EST on February 6, 2009, through 11:59 p.m. EST, on February 20, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59375A / February 10, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2842A / February 10, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13367

In the Matter of

PATRICK J. VAUGHAN

Respondent.

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

I.

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) the Exchange Act and Section 203(f) of the Advisers Act, 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[1] that:

Respondent

1. Vaughan, age 54, resides in Cockeysville, Maryland. He was a registered representative associated with various broker-dealers from 1983 through the present. During the period January 2003 through November 2005, Vaughan was associated with Ferris Baker Watts, Inc. ("Ferris") as the firm's Director of Retail Sales.

Other Relevant Individuals and Entities

2. Ferris is a Delaware corporation headquartered in Washington, D.C. Ferris is both a registered broker-dealer and a registered investment adviser. Ferris has over 600 employees, including over 250 registered representatives working in over forty branch offices in eight states and the District of Columbia.

3. Stephen Glantz ("Glantz"), age 55, was formerly a resident of Chagrin Falls, Ohio. He was a registered representative associated with various broker-dealers from 1997 through 2005. During the period January 2003 through November 2005, Glantz was associated with Ferris. On September 4, 2007, Glantz pled guilty to one count of securities fraud and one count of making false statements to law enforcement officials. On December 14, 2007, Glantz was sentenced to 33 months in prison and ordered to pay $110,000 in restitution.

4. IPOF Fund ("IPOF") is an Ohio limited partnership, not registered with the Commission in any capacity. IPOF was formed by David A. Dadante ("Dadante") in 1999. Dadante operated IPOF as an investment company and solicited funds from investors purportedly to purchase stock in initial public offerings. Dadante caused IPOF to raise $50 million from at least 100 investors in unregistered securities offerings and used some of the proceeds to fund his lavish lifestyle and to make Ponzi scheme-type payments. Dadante deposited the remaining investor funds into brokerage accounts that he controlled in the names of IPOF and other entities at several broker-dealers, including Ferris. Glantz served as the registered representative for the Ferris accounts controlled by Dadante. On April 20, 2007 IPOF was permanently enjoined from violating Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 7(a) of the Investment Company Act of 1940 in SEC v. David A. Dadante et. al., Case No. 1:06-cv-0938 (N.D. Ohio).

5. Dadante, age 54, was formerly a resident of Gates Mills, Ohio. Dadante was the founder and general partner of IPOF. He was not registered with the Commission in any capacity. On August 6, 2007, Dadante pled guilty to two counts of securities fraud. On November 1, 2007, Dadante was permanently enjoined from violating Sections 5(a), 5(c), and 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2)

[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.

of the Advisers Act in SEC v. David A. Dadante et. al., Case No. 1:06-cv-0938 (N.D. Ohio). On November 29, 2007, the Commission barred Dadante from association with any investment adviser. On December 14, 2007, Dadante was sentenced to 156 months in prison and ordered to pay over $28 million in restitution.

6. Innotrac Corp. ("Innotrac") is a Georgia corporation with its principal place of business in Duluth, Georgia. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is traded under the symbol "INOC" on NASDAQ. Innotrac provides order processing, order fulfillment, and call center services to large corporations that outsource these functions.

Background

7. From at least August 2002 through November 2005, Glantz, Dadante, and a registered representative at another brokerage firm, all participated in a scheme to manipulate the market for the stock of Innotrac. All three pled guilty to violations of Section 10(b) of the Exchange Act and in their plea agreements, they all admitted that they artificially inflated and maintained the price for Innotrac stock. Glantz also admitted in his plea agreement that he engaged in unauthorized and unsuitable trading in his customers' accounts. During the period from August 2002 through November 2005, Dadante used IPOF to acquire more than 30% of the outstanding common stock of Innotrac, and through IPOF and other accounts controlled by him, controlled on average approximately 35% of the public float for Innotrac and typically accounted for between 35% and 50% of the approximate 11,000 share average daily trading volume in Innotrac. Dadante acquired a substantial portion of his Innotrac holdings during the period January 2003 through February 2004 in the IPOF account at Ferris for which Glantz was the registered representative. During the scheme, Glantz purchased Innotrac stock for certain of his other customers at Ferris, and, through their accounts, controlled approximately an additional 25% of Innotrac's public float. Acting in concert, Glantz, Dadante, and the other registered representative employed a variety of manipulative trading practices, including marking the closing price for Innotrac stock, engaging in matched and wash trades, and attempting to artificially create downbids to suppress short selling of Innotrac. To perpetrate the manipulative scheme, and to generate income for himself, Glantz also engaged in unauthorized and unsuitable trading in Innotrac and certain other securities in the accounts of customers other than IPOF.

Vaughan's Failure to Supervise

8. Vaughan failed reasonably to supervise Glantz with a view toward preventing and detecting his violations of the federal securities laws by failing to respond reasonably to red flags regarding Glantz's misconduct and lack of supervision, as discussed below.

9. During Glantz's tenure at Ferris, Vaughan was the firm's Director of Retail Sales and reported to Ferris Senior Executive B. Vaughan was one of the highest level supervisors for Ferris' retail brokers. Vaughan and Senior Executive B recruited and hired Glantz. They both had the requisite degree of responsibility, ability or authority at Ferris to affect the conduct of Glantz.

10. When Glantz was hired, Vaughan and Senior Executives A and B all knew that Glantz had ten customer complaints on his Form U-4. Several employees of the firm's Beachwood, Ohio office had also warned them that Glantz had a questionable reputation in the industry.

11. Despite Glantz's history, Vaughan and Senior Executives A and B permitted Glantz to work under a special arrangement which allowed him greater freedom of action than other registered representatives at Ferris. Glantz, a retail broker, was permitted to manage both retail and institutional accounts. Vaughan and Senior Executive B also permitted Glantz, a retail broker assigned to Ferris' Beachwood, Ohio branch office, to work at Ferris' Institutional Trading Desk in Baltimore several days a week. The special arrangement under which Glantz was permitted to work was extremely unusual at Ferris. Glantz took advantage of that special arrangement to evade Ferris' supervisory procedures.

12. Glantz began working for Ferris on January 2, 2003, and problems with his conduct arose very shortly after he started. On May 23, 2003, Vaughan received by email a copy of a compliance department memorandum addressed to members of the firm's Credit Committee (the "May 23 Memo") which warned that there might be manipulative and unsuitable trading in Innotrac and that Glantz was not being properly supervised. The May 23 Memo reported, among other things, that a number of Glantz customer accounts held large positions in Innotrac, that Ferris customers owned approximately 40% of the total float and 19% of the outstanding shares of Innotrac, and that IPOF owned approximately 31% of the total float and 15% of the outstanding shares. This memorandum stated that "[w]hile the price of [Innotrac] has been in an up-trend, I believe this is largely due to the IPOF's accumulation of the shares in small lots on almost a daily basis driving the price higher." The May 23 Memo also noted that Glantz was accumulating Innotrac shares in a similar manner in some of his other customer accounts, that IPOF was a "control person" of Innotrac but had not made the necessary filings with the Commission, and that the IPOF account had a margin debit of $9.381 million. The memorandum further reported that the trading in the IPOF account was not consistent with its investment objective of "growth and income." The May 23 Memo also contained a chart showing a high concentration of Innotrac stock and significant margin debts in other Glantz customer accounts, the majority of which were individual accounts or profit sharing plans whose investment objectives were reported as "growth and income." The May 23 Memo further stated that "without question, there is and has been a breakdown of supervisory responsibilities and who shares or owns supervisory responsibilities over the activity in the account and Mr. Glantz."

13. Ferris' Credit Committee responded to the size of IPOF's margin debt by raising the margin requirements for the account. A few weeks later, the author of the May 23 Memo, Ferris' Compliance Director, and Senior Executive A had a conference call with Vaughan and Senior Executive B to discuss the May 23 Memo. Neither Vaughan nor Senior Executive B reasonably responded to the red flags raised in the May 23 Memo as a result of this call.

14. In late July and August 2003, the compliance department informed Senior Executive A that: (1) the Beachwood branch manager was continuing to have problems supervising Glantz because he was working out of Ferris' Baltimore office; (2) the IPOF account was continuing to acquire a significant number of Innotrac shares; (3) Dadante was manipulating

the bid for Innotrac; and (4) Dadante had opened another account and engaged in free-riding, as a result of which the compliance department had restricted the account.

15. On September 4, 2003, Vaughan, Senior Executive B, and Glantz met with Senior Executive A to discuss IPOF and the significant and unusual accumulation of Innotrac shares in IPOF and another Glantz customer account. Vaughan and Senior Executives A and B failed to reasonably responded to the red flags discussed at this meeting.

16. By February 4, 2004, the margin balance in the IPOF account had grown to $18.1 million and the account posed a significant credit risk for Ferris. That same day, Senior Executive A wrote a memo to the Credit Committee, which he emailed to Vaughan, admitting that there continued to be "a lack of clear definition as to who has day to day supervisory responsibilities for Steve Glantz." The Credit Committee restricted the IPOF account by prohibiting the use of margin for any future purchases of Innotrac. However, Vaughan and Senior Executives A and B all failed to reasonably respond to the red flags discussed in this memorandum regarding Glantz's conduct and lack of supervision at that time.

17. After February 4, 2004, neither Dadante nor IPOF purchased any more Innotrac stock through Ferris. Glantz, however, continued to engage in manipulative, unsuitable and unauthorized trading in other customer accounts. Among other things, Glantz utilized excessive margin to make unauthorized purchases of speculative stocks for customer accounts. Glantz's use of margin and the nature and concentration of the stocks he purchased were unsuitable for his customers. Glantz did not disclose these facts, or the risks involved, to his customers. Glantz effected such trades deliberately for the purpose of increasing his own income.

18. In March 2004, many months after Glantz began splitting his time between Ferris' Baltimore office and the Beachwood office, Vaughan and Senior Executive B officially transferred Glantz to Ferris' Baltimore branch office. Neither of them informed the Baltimore branch manager of any issues involving Glantz or his handling of his customers' accounts.

19. In September 2004, two new Ferris compliance officers conducted the annual compliance audit for the Baltimore branch. When they reviewed Glantz's accounts, they became concerned that Glantz was engaging in unsuitable trading and was orchestrating transactions in his customers' accounts that were designed to artificially support the price of Innotrac. During the audit, the Baltimore branch manager told the compliance officers, among other things, that he was unable to supervise Glantz and that Glantz needed to be terminated. The compliance officers subsequently wrote a memorandum to Senior Executive A detailing their findings regarding Glantz. The memorandum, which was not provided to Vaughan, discussed several Glantz accounts other than IPOF, the majority of which had been previously discussed in the May 23 Memo. The memorandum reported that all of these accounts had stated investment objectives of "growth and income" and had appeared on Ferris' "active account" report for the month of September 2004, and that most of the accounts had engaged in frequent, short-term trading during this period. The memorandum further stated that these accounts had a "preponderance for large share quantity, low-priced, speculative investments." The memorandum also reported that on September 30, 2004, Glantz cross traded 50,000 shares of Innotrac worth over $400,000 by selling

these shares from one of his customer's accounts to four other customers' accounts, and that these trades were a "cause for concern." This memorandum concluded that "the appropriate supervisory oversight is currently not in place for Mr. Glantz."

20. On December 8, 2004, one of the compliance officers who participated in the compliance audit for the Baltimore branch discovered that Glantz had purchased 105,700 additional Innotrac shares worth approximately $927,000 for certain of his customers in December and told Senior Executive A about these trades. This compliance officer called three of the customers whose accounts were involved in the trades.

21. On December 15, 2004, Senior Executive A wrote a memorandum to Vaughan and Senior Executive B recommending that Glantz be terminated (the "Termination Memo"). He emailed the Termination Memo to Vaughan and Senior Executive B in the early morning hours of December 16, 2004. In the Termination Memo, Senior Executive A stated, among other things, that Glantz's investments and use of margin for the accounts of one of his individual customers was "clearly unsuitable" and that the trading in these accounts exposed Glantz and Ferris to "claims of churning." The Termination Memo also reported that compliance had contacted the customers for whose accounts Innotrac had been purchased in December 2004, that none of the customers had initiated the trades, that they did not know that the purchases had been made, and that there was no written discretionary authority for these accounts. The Termination Memo also stated that Glantz had structured the December trades to avoid disrupting the market for Innotrac. The Termination Memo further stated that Glantz had been "essentially unsupervised" during his tenure at Ferris and concluded by recommending that Glantz be terminated.

22. Senior Executive A and Ferris' Compliance Director at that time met with Vaughan and Senior Executive B to discuss the issues raised in the Termination Memo. Senior Executive B challenged the recommendation that Glantz be terminated and suggested that Glantz instead be placed on special supervision. At the end of the meeting, Senior Executive A retracted his recommendation that Glantz be fired and agreed with Senior Executive B to allow Glantz to be placed on special supervision. Vaughan acquiesced in that decision.

23. In January 2005, in accordance with the special supervision memorandum, Senior Executive B became Glantz's supervisor. Glantz continued to engage in fraudulent trading practices during the period of his special supervision. During this period, Senior Executives A and B continued to receive red flags regarding Glantz's violative conduct but failed to respond reasonably to those warnings. Glantz remained an employee of Ferris until November 2005, at which time several IPOF investors filed a lawsuit and named Ferris as a defendant.

Violations

24. As a result of the conduct described above, Vaughan failed reasonably to supervise Glantz with a view to detecting and preventing Glantz's violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

IV.

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

Accordingly, pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Respondent be, and hereby is, suspended from association in a supervisory capacity with any broker, dealer, or investment adviser for a period of six (6) months, effective immediately upon the entry of this Order.

B. IT IS FURTHER ORDERED that Respondent shall, within 30 days of the entry of this Order, pay disgorgement of $12,721 and prejudgment interest of $3,906, for a total of $16,627, to the United States Treasury. It is further ordered that Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $50,000 to the United States Treasury. If timely payments are not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Patrick J. Vaughan as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Timothy L. Warren, Division of Enforcement, Securities and Exchange Commission, 175 W. Jackson Blvd., Chicago, IL 60604.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59372 / February 10, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2837 / February 10, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13364

In the Matter of **FERRIS, BAKER WATTS, INC.** **Respondent.**	**CORRECTED ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(e) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Ferris, Baker Watts, Inc. ("Respondent" or "Ferris").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities and Exchange Act of 1934 and Section 203(e) of the Investment Advisers Act of 1940,

Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

1. These proceedings arise from supervisory failures at Ferris. Specifically, a registered representative associated with Ferris named Stephen Glantz ("Glantz"), one of Glantz's customers, and a registered representative at another brokerage firm, all participated in a scheme to manipulate the market for the stock of Innotrac Corporation ("Innotrac"), a thinly traded NASDAQ National Market security in which Ferris made a market. Glantz also engaged in a pattern of unauthorized and unsuitable trading in the accounts of several of his customers. Glantz's fraud began as early as August 2002 and continued throughout the period from January 2003 through November 2005, when Glantz was employed as a registered representative of Ferris. Ferris failed to design reasonable systems to implement its written supervisory policies and procedures. Ferris' supervisory failures were in addition to supervisory failures of certain members of the firm's senior management.

Respondent

2. Ferris is a Delaware corporation headquartered in Washington, D.C. Ferris is both a registered broker-dealer and a registered investment adviser. Ferris has over 600 employees, including over 250 registered representatives working in over forty branch offices in eight states and the District of Columbia.

Other Relevant Entities

3. Glantz, age 55, was formerly a resident of Chagrin Falls, Ohio. He was a registered representative associated with various broker-dealers from 1997 through 2005. During the period January 2003 through November 2005, Glantz was associated with Ferris. On September 4, 2007, Glantz pled guilty to one count of securities fraud and one count of making false statements to law enforcement officials. On December 14, 2007, Glantz was sentenced to 33 months in prison and ordered to pay $110,000 in restitution.

4. IPOF Fund ("IPOF") is an Ohio limited partnership, not registered with the Commission in any capacity. IPOF was formed by David A. Dadante ("Dadante") in 1999. Dadante operated IPOF as an investment company and solicited funds from investors purportedly to purchase stock in initial public offerings. Dadante caused IPOF to raise $50 million from at least 100 investors in unregistered securities offerings and used some of the proceeds to fund his

[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.

lavish lifestyle and to make Ponzi scheme-type payments. Dadante deposited the remaining investor funds into brokerage accounts that he controlled in the names of IPOF and other entities at several broker-dealers, including Ferris. Glantz served as the registered representative for the Ferris accounts controlled by Dadante. On April 20, 2007 IPOF was permanently enjoined from violating Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 7(a) of the Investment Company Act of 1940 in SEC v. David A. Dadante et. al., Case No. 1:06-cv-0938 (N.D. Ohio).

5. Dadante, age 54, was formerly a resident of Gates Mills, Ohio. Dadante was the founder and general partner of IPOF. He was not registered with the Commission in any capacity. On August 6, 2007, Dadante pled guilty to two counts of securities fraud. On November 1, 2007, Dadante was permanently enjoined from violating Sections 5(a), 5(c), and 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act in SEC v. David A. Dadante et. al., Case No. 1:06-cv-0938 (N.D. Ohio). On November 29, 2007, the Commission barred Dadante from association with any investment adviser. On December 14, 2007, Dadante was sentenced to 156 months in prison and ordered to pay over $28 million in restitution.

6. Innotrac is a Georgia corporation with its principal place of business in Duluth, Georgia. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is traded under the symbol "INOC" on NASDAQ. Innotrac provides order processing, order fulfillment, and call center services to large corporations that outsource these functions.

Background

7. From at least August 2002 through November 2005, Glantz, Dadante, and a registered representative at another brokerage firm, all participated in a scheme to manipulate the market for the stock of Innotrac. All three pled guilty to violations of Section 10(b) of the Exchange Act and in their plea agreements, they all admitted that they artificially inflated and maintained the price for Innotrac stock. Glantz also admitted in his plea agreement that he engaged in unauthorized and unsuitable trading in his customers' accounts. During the period from August 2002 through November 2005, Dadante used IPOF to acquire more than 30% of the outstanding common stock of Innotrac, and through IPOF and other accounts controlled by him, controlled on average approximately 35% of the public float for Innotrac and typically accounted for between 35% and 50% of the approximate 11,000 share average daily trading volume in Innotrac. Dadante acquired a substantial portion of his Innotrac holdings during the period January 2003 through February 2004 in the IPOF account at Ferris for which Glantz was the registered representative. During the scheme, Glantz purchased Innotrac stock for certain of his other customers at Ferris, and, through their accounts, controlled approximately an additional 25% of Innotrac's public float. Acting in concert, Glantz, Dadante, and the other registered representative employed a variety of manipulative trading practices, including marking the closing price for Innotrac stock, engaging in matched and wash trades, and attempting to artificially create downbids to suppress short selling of Innotrac. To perpetrate the manipulative scheme, and to generate income for himself, Glantz also engaged in unauthorized and unsuitable trading in Innotrac and certain other securities in the accounts of customers other than IPOF.

Ferris' Failure Reasonably to Supervise Glantz

8. Ferris Senior Executives B and C recruited and hired Glantz, and Ferris Senior Executive A approved his hire. These Senior Executives all had the requisite degree of responsibility, ability or authority at Ferris to affect the conduct of Glantz.

9. When Glantz was hired, Senior Executives A, B, and C knew that Glantz had ten customer complaints on his Form U-4. Several employees of the firm's Beachwood office had also warned them that Glantz had a questionable reputation in the industry.

10. Despite Glantz's history, Senior Executives A, B, and C permitted Glantz to work under a special arrangement which allowed him greater freedom of action than other registered representatives at Ferris. Glantz, a retail broker, was permitted to manage both retail and institutional accounts. Senior Executives B and C permitted Glantz, a retail broker assigned to Ferris' Beachwood, Ohio branch office, to work at Ferris' Institutional Trading Desk in Baltimore several days a week. The special arrangement under which Glantz was permitted to work was extremely unusual at Ferris. Glantz took advantage of that special arrangement to evade Ferris' supervisory procedures.

11. Glantz began working for Ferris on January 2, 2003, and problems with his conduct arose very shortly after he started.

12. In or about April 2003, a Ferris compliance officer initiated a review of the trading in the accounts for which Glantz was the registered representative and discovered that IPOF was accumulating a large position in Innotrac by making purchases in small lots at incrementally higher prices throughout the trading day. In April 2003, this compliance officer discussed her concerns with Ferris' Compliance Director. The Compliance Director, in turn, told Senior Executive A that she and the compliance officer believed Dadante was manipulating the price of Innotrac. In April and May 2003, this compliance officer also discovered that several other Glantz customer accounts were accumulating large positions in Innotrac. She could not think of any legitimate reason why so many of Glantz's accounts had similar trading patterns, especially because Glantz had marked the majority of the trades as unsolicited. This compliance officer then raised these concerns with the Senior Executive A.

13. On May 23, 2003, this same compliance officer sent a memorandum (the "May 23 Memo") to certain Senior Executives, including Senior Executives A and C. The May 23 Memo reported, among other things, that a number of Glantz customer accounts held large positions in Innotrac, that Ferris customers owned approximately 40% of the total float and 19% of the outstanding shares of Innotrac, and that IPOF owned approximately 31% of the total float and 15% of the outstanding shares. This memorandum warned that there might be manipulative and unsuitable trading in Innotrac and that Glantz was not being properly supervised. This memorandum stated that "[w]hile the price of [Innotrac] has been in an up-trend, I believe this is largely due to the IPOF's accumulation of the shares in small lots on almost a daily basis driving the price higher." The May 23 Memo also noted that Glantz was accumulating Innotrac shares in a similar manner in some of his other customer accounts, that IPOF was a "control person" of

Innotrac but had not made the necessary filings with the Commission, and that the IPOF account had a margin debit of $9.381 million. The memorandum further reported that the trading in the IPOF account was not consistent with its investment objective of "growth and income." The May 23 Memo also contained a chart showing a high concentration of Innotrac stock and significant margin debts in other Glantz accounts, the majority of which were individual accounts or profit sharing plans whose investment objectives were reported as "growth and income." The May 23 Memo further stated that "without question, there is and has been a breakdown of supervisory responsibilities and who shares or owns supervisory responsibilities over the activity in the account and Mr. Glantz."

14. Ferris' Credit Committee responded to the size of IPOF's margin debt by raising the margin requirements for the account. Within approximately a week or two, Ferris' Compliance Director, the author of the May 23 Memo, and Senior Executive A had a conference call with Senior Executives B and C to discuss the May 23 Memo. Senior Executives B and C failed to take any action to address the issues raised in the May 23 Memo as a result of the conversation. Senior Executive A did not follow-up with Senior Executive B or C to determine whether they were taking steps to address Glantz's conduct.

15. In late May 2003, the Compliance Director informed Senior Executive A that Ferris' senior institutional trader believed that Dadante and IPOF were manipulating the market for Innotrac by buying in small lots in order to simulate the appearance of demand for the stock and drive up the price. A few days later Senior Executive A met with the senior institutional trader, and the senior institutional trader told Senior Executive A that he believed that Dadante and IPOF were manipulating the market for Innotrac's stock. On June 5, 2003, the compliance officer who authored the May 23 Memo sent Senior Executive A another memorandum reiterating her concerns about Glantz's supervision and concluded this memorandum by stating that "I strongly ask that you consider placing Mr. Glantz under special supervision." Senior Executive A disregarded this recommendation, notwithstanding that Ferris' written supervisory procedures called for a registered representative to be placed under special supervision when conduct by that registered representative raised concerns about his or her business practices or adherence to rules.

16. On June 9, 2003, Senior Executive A met with Glantz in Beachwood and told Glantz that IPOF would be restricted from buying Innotrac until it complied with the filing requirements of Section 13(d) of the Exchange Act. He, however, failed reasonably to address Glantz's lack of supervision or the other issues regarding Glantz's handling of the trading activity in his customers' accounts. Senior Executive A did restrict IPOF from purchasing Innotrac until IPOF made its Schedule 13D filing on June 25, 2003, after which the restriction was lifted. Dadante and Glantz then continued and escalated their market manipulation scheme.

17. In July and August 2003, Glantz and Dadante implemented a strategy to preclude short selling in Innotrac. At that time, the NASD's (n/k/a FINRA) bid test imposed restrictions on short selling on a downbid. Dadante acted to take advantage of this prohibition by placing two limit orders to buy Innotrac shares, one at a price incrementally higher than the other, without any intention to honor the higher bid. He would then promptly cancel the higher bid, in an attempt to create a downbid and thereby prevent short selling.

18. On July 29, 2003, Ferris' Head NASDAQ Trader contacted the compliance department after discovering what Dadante was doing. A Ferris compliance officer informed Dadante that the practice of playing with the bid was manipulative and violated both Ferris' policies as well as securities rules and regulations. The Head NASDAQ Trader then told the traders he supervised to refrain from honoring any customer requests to upbid and then immediately downbid Innotrac. This compliance officer alerted the Senior Executive A that the IPOF account was manipulating the bid for Innotrac stock. Senior Executive A, however, took no reasonable action in response to these red flags.

19. On August 4, 2003, the Compliance Director met with the author of the May 23 Memo and Senior Executive A, in part, to discuss a plan of action to deal with the IPOF account and Glantz's lack of supervision. During the meeting, they also discussed several other Glantz accounts mentioned in the May 23 Memo, including one that held an abnormally large concentration of Innotrac stock. Senior Executive A failed to reasonably address these red flags.

20. At around the same time as the August 4, 2003 meeting, Dadante's accumulation of Innotrac had caused him to trigger Innotrac's poison pill provision. To circumvent the poison pill and avoid the margin restrictions that had been placed on the IPOF account, Dadante and Glantz opened a new account at Ferris, with Glantz as the registered representative, using the name of a fictitious partnership, GSGI, so that Dadante could continue to manipulate the price of Innotrac. Dadante and Glantz then placed wash trades between the GSGI and IPOF accounts. On August 25, 2003, a margin clerk at Ferris noticed that the GSGI account appeared on a free riding report for a 43,700-share trade in Innotrac on August 21. The clerk reported it to his supervisor, who in turn, notified the author of the May 23 Memo. On August 25, 2003, she emailed the Compliance Director and Senior Executive A that Dadante had opened another account at Ferris and had started buying Innotrac in this new account. Three days later, the Operations Director emailed Senior Executive A that the GSGI account belonged to Dadante and had started purchasing Innotrac shares. She also noted that Glantz's customers now owned over 25% of Innotrac and that another account referenced in the May 23 Memo was 92% concentrated in Innotrac. Senior Executive A failed to reasonably address these red flags.

21. In late August 2003, Senior Executive A had a conversation with Senior Executive B, in which they discussed the compliance department's continued concerns regarding Glantz's supervision. Senior Executive B said that he was going to officially transfer Glantz from the Beachwood office to the Baltimore branch office.

22. On September 4, 2003, Senior Executive A met with Glantz and Senior Executives B and C, and they all discussed IPOF and the significant and unusual accumulation of Innotrac shares in IPOF and another Glantz customer account. However, none of these Senior Executives took any action to reasonably respond to the red flags discussed at this meeting.

23. On January 29, 2004, a compliance officer emailed Senior Executive A that the margin debit in the IPOF account had grown to $16.1 million and that the non-Innotrac securities in the account were valued at only $13.2 million. This compliance officer further noted that

several of the non-Innotrac securities held in the IPOF account were illiquid and highly concentrated and that Ferris could not sell them at their current market value. Thereafter, Senior Executive A unilaterally restricted Glantz from accepting or placing any customer orders for Innotrac and he personally conveyed this restriction to Glantz. By February 4, 2004, the margin balance in the IPOF account had grown to $18.1 million and the account posed a significant credit risk for Ferris. That same day, Senior Executive A wrote a memorandum to the Credit Committee, which he sent to certain other senior executives, including Senior Executive C, stating, among other things, that there continued to be "a lack of clear definition as to who has day to day supervisory responsibilities for Steve Glantz." Ferris' Credit Committee subsequently restricted the IPOF account by prohibiting the use of margin for any future purchases of Innotrac. However, again, Senior Executives A, B, and C failed to reasonably respond to the red flags discussed in this memorandum regarding Glantz's conduct and lack of supervision at that time.

24. On February 5, 2004, a compliance officer sent Senior Executive A an email stating that Ferris' Innotrac market maker had received an order from another brokerage firm to buy 10,000 shares of Innotrac and they were "99% certain" that the order was related to IPOF. That same day, Glantz sent an email to Senior Executives B and C that he did not want to worry about "taking the fall for a situation that is absolutely not my fault," and that he did not want to leave Ferris. On February 9, 2004, Senior Executive B met with Glantz, Dadante, and an attorney who represented both of them, to discuss the new restrictions being placed on the IPOF account. Senior Executives A, B, and C, however, all failed reasonably to respond to Glantz's lack of supervision and the other problems that had previously been brought to their attention with regard to Glantz's handling of his customer accounts.

25. Following the February 9, 2004 meeting, neither Dadante nor IPOF purchased any more Innotrac stock through Ferris. Glantz, however, continued to engage in manipulative, unsuitable and unauthorized trading in other customer accounts. Among other things, Glantz utilized excessive margin to make unauthorized purchases of speculative stocks for customer accounts. Glantz's use of margin and the nature and concentration of the stocks he purchased were unsuitable for his customers. Glantz did not disclose these facts, or the risks involved, to his customers. Glantz effected such trades deliberately for the purpose of increasing his own income.

26. In March 2004, many months after Glantz began splitting his time between Ferris' Baltimore office and the Beachwood office and eight months after Senior Executives A and B discussed transferring Glantz from the Beachwood office to the Baltimore branch office, he was officially transferred to Ferris' Baltimore branch office. No one informed the Baltimore branch manager ("Baltimore manager") of any issues involving Glantz or his handling of his customers' accounts.

27. In the spring and summer of 2004, Ferris had a great deal of turnover in its Compliance Department, including the departures of the Compliance Director and the author of the May 23 Memo. Senior Executive A hired a new Compliance Director ("Compliance Director No. 2") and several other compliance officers. Senior Executive A, however, never briefed any of these new compliance employees regarding Glantz, Dadante, or IPOF.

28. In September 2004, two of the new Ferris compliance officers conducted the annual compliance audit for the Baltimore branch. When they reviewed Glantz's customer accounts, they became concerned that Glantz was engaging in unsuitable trading and was orchestrating transactions in his customers' accounts that were designed to artificially support the price of Innotrac. During the audit, the Baltimore manager told the compliance officers, among other things, that he was unable to supervise Glantz and that Glantz needed to be terminated. The compliance officers subsequently wrote a memorandum to Senior Executive A detailing their findings regarding Glantz. The memorandum discussed several Glantz customer accounts other than IPOF, the majority of which had been previously discussed in the May 23 Memo. This memorandum reported that all of these accounts had stated investment objectives of "growth and income" and had appeared on Ferris' "active account" report for the month of September 2004, and that most of the accounts had engaged in frequent, short-term trading during this period. The memorandum further stated that these accounts had a "preponderance for large share quantity, low-priced, speculative investments." The memorandum also reported that on September 30, 2004, Glantz cross traded 50,000 shares of Innotrac worth over $400,000 by selling these shares from one of his customer's accounts to four other customers' accounts, and that these trades were a "cause for concern." This memorandum concluded that "the appropriate supervisory oversight is currently not in place for Mr. Glantz." Senior Executive A failed reasonably to respond to the red flags discussed in this memorandum at that time.

29. On December 1, 2004, Dadante received a margin call in one of his accounts at another brokerage firm. Glantz agreed to help Dadante by purchasing Innotrac shares from Dadante's non-Ferris account for the accounts of Glantz's other customers at Ferris. In accordance with their scheme, by December 7, 2004, Glantz had bought 105,700 additional Innotrac shares worth approximately $927,000 from Dadante for certain of Glantz's other customers at Ferris.

30. On December 8, 2004, a Ferris compliance officer discovered these trades and told Senior Executive A about them. At Senior Executive A's direction, the compliance officer called three of the customers whose accounts were involved in the trades. He learned from the customers that they had no knowledge of the trades. He also learned that two of the three customers did not even know their accounts were utilizing margin, even though they both had significant margin debits. Around this same time, Compliance Director No. 2 told Senior Executive A that he believed that Glantz was manipulating the price of Innotrac stock and recommended that Glantz be fired immediately.

31. On December 15, 2004, Senior Executive A wrote a memorandum to Senior Executives B and C detailing his concerns about Glantz and recommending that Glantz be terminated (the "Termination Memo"). He emailed the Termination Memo to Senior Executives B and C in the early morning hours of December 16, 2004.

32. In the Termination Memo, Senior Executive A stated, among other things, that Glantz's investments and use of margin for the accounts of one of his individual customers was "clearly unsuitable" and that the trading in these accounts exposed Glantz and Ferris to "claims of churning." The Termination Memo also reported that the compliance department had contacted

the customers for whose accounts Innotrac had been purchased in December 2004, that none of the customers had initiated the trades, that they did not know that the purchases had been made, and that there was no written discretionary authority for these accounts. The Termination Memo also stated that Glantz had structured the December trades to avoid disrupting the market for Innotrac. The Termination Memo further stated that Glantz had been "essentially unsupervised" during his tenure at Ferris and concluded by recommending that Glantz be terminated.

33. Senior Executive A and Compliance Director No. 2 met with Senior Executives B and C to discuss the issues raised in the Termination Memo. Senior Executive B challenged the recommendation that Glantz be terminated and suggested that Glantz instead be placed on special supervision. At the end of the meeting, Senior Executive A retracted his recommendation that Glantz be fired and agreed with Senior Executive B to allow Glantz to be placed on special supervision. Senior Executive C acquiesced in that decision.

34. Senior Executive A caused Ferris to file a Form RE-3 with the NYSE. However, he only included on the Form RE-3 information about Glantz's trading without written authorization. He did not disclose in the Form RE-3 filing any of the other concerns that he included in the Termination Memo.

35. Pursuant to the memorandum outlining the details of Glantz's special supervision, Senior Executive B became Glantz' supervisor. After being placed on special supervision, Glantz was assigned to work out of Ferris' Hunt Valley, Maryland branch. Senior Executive B, however, was Glantz's supervisor, not the Hunt Valley branch manager. Thus, Senior Executive B was responsible for supervising Glantz in accordance with the special supervision memorandum and Ferris' routine supervisory procedures. While under Senior Executive B's supervision, Glantz continued to engage in unauthorized, unsuitable and manipulative trading in his customers' accounts. Senior Executive B did not discover Glantz's continuing fraud, because he was not reasonably performing his duties as Glantz's supervisor. If Senior Executive B had followed Ferris' routine supervisory procedures and the special supervisory procedures in the special supervision memorandum, he would have been able to detect and prevent Glantz's unsuitable, unauthorized, and manipulative trading. Moreover, Senior Executive A did not monitor whether Glantz was being reasonably supervised by Senior Executive B.

36. Soon after being placed on special supervision, Glantz received a stock tip from an individual in Canada that positive news would soon be released about a company called ATC Healthcare, Inc. ("ATC Healthcare"). Based on this tip, on Friday, February 4, 2005, Glantz bought a total of 500,000 shares of ATC Healthcare for himself and for certain customers' accounts without their authorization. Glantz, however, did not allocate these shares at the time of the purchases. At the end of the day, Glantz allocated 480,000 shares among six customer accounts, and allocated 20,000 to his personal account. The next Monday and Tuesday, Glantz purchased an additional 480,000 shares of ATC Healthcare for his customers' accounts. Although no positive news was released about ATC Healthcare during this period, Glantz's purchases caused the stock price to increase from $0.30 to $0.46 a share in just a few days time. Glantz subsequently sold his 20,000 shares at a profit, but did not sell the remaining 960,000 shares that he purchased without authorization for his customers' accounts. Senior Executive B did not discover these and

other manipulative and unauthorized transactions, because he was not reasonably performing his duties as Glantz's supervisor.

37. Ferris' Anti-money Laundering Officer ("AML Officer") discovered these ATC Healthcare trades and emailed Senior Executive A on February 23, 2005, because he was concerned that the trades "could create the appearance of manipulative market practices." In the email, he asked Senior Executive A to request that retail sales management provide an explanation for the trades. Senior Executive A never responded to this email, and never asked retail sales management for an explanation. On April 5, 2005, the AML Officer sent Senior Executive A a follow-up email, with the original email attached. In this second email, he asked if the trades discussed in his original email were suspicious because, if so, he was obligated to file a Suspicious Activity Report ("SAR"). Senior Executive A again failed to respond. On May 13, 2005, Compliance Director No. 2 sent an email, with the AML Officer's two emails attached, telling Senior Executive A that they needed to get an explanation for the ATC Healthcare trades. Again, Senior Executive A failed to respond. The AML Officer then followed-up in person with Senior Executive A several times to attempt to discuss the trades and the possible need to file a SAR. Finally, in June 2005, the AML Officer stood in Senior Executive A's office doorway and refused to leave until he received an answer. Senior Executive A finally told the AML Officer that Ferris would not be filing a SAR for these ATC Healthcare trades.

38. On April 4, 2005, a compliance officer emailed Senior Executive A that through his review of certain Innotrac Form 4 filings, he had discovered that IPOF was on the other side of the December 2004 trades that had triggered the Termination Memo. Senior Executive A responded that "I find it highly unlikely that Glantz did not know who . . . was selling when he placed those shares in his customers' account." He concluded his email by stating that they needed to have another talk with Glantz. However, Senior Executive A did not speak with Glantz or reasonably respond to these red flags.

39. In June 2005, the Compliance Department's audit report for the Hunt Valley branch identified 18 Glantz customer accounts as requiring monitoring of their trading activity and suitability, stating that Ferris should monitor and review those 18 accounts "in regard to their investment objective(s), client profile, portfolio holdings, margin debit, gain/loss analysis...and commissions generated." Senior Executives A and B received this audit report but again failed reasonably to respond to these red flags.

40. On June 29, 2005, Dadante called the Ferris trading desk and told one of the traders that he was going to place a large order to buy Innotrac through his accounts at another brokerage firm. Dadante told the trader that he did not want to buy any shares from any of Glantz's customers. Despite this instruction, the trader matched Dadante's buy order with certain Glantz customers who had placed sell orders, as was appropriate under the circumstances. The trader relayed all of this information to the Head NASDAQ Trader, who that same day sent Senior Executive A and a compliance officer an email summarizing what had transpired and concluding the email by stating that the "approach to this order raises warning flags that could point to attempted price manipulation." Only a few minutes later, this compliance officer emailed Senior Executive A that the transaction entails "more manipulation concerns." Senior

Executive A responded an hour later that he "agreed" and that he would provide directions to the trading desk. However, once again, Senior Executive A failed to reasonably respond to these red flags. Senior Executive B did not discover any of these transactions, because he was not performing his duties as Glantz's supervisor.

41. During the period of Glantz's misconduct at Ferris, the firm failed to design reasonable systems to implement its written supervisory policies and procedures with respect to the special work arrangement under which Glantz was permitted to work. If Ferris had established these systems, it is likely that Glantz's fraudulent conduct could have been prevented and detected.

42. Glantz remained an employee of Ferris until November 2005, at which time several IPOF investors filed a lawsuit and named Ferris as one of the defendants.

Failures to File Suspicious Activity Reports

43. The Bank Secrecy Act ("BSA"),[2] as amended by the USA PATRIOT Act[3] and implemented under rules promulgated by the U.S. Department of Treasury's Financial Crimes Enforcement Network ("FinCEN"), requires that broker-dealers file SARs with FinCEN to report a transaction (or a pattern of transactions of which the transaction is a part of) involving or aggregating to at least $5,000 that the broker-dealer knows, suspects or has reason to suspect: (1) involves funds derived from illegal activity or were conducted to disguise funds derived from illegal activities; (2) were designed to evade any requirements of the BSA; (3) had no business or apparent lawful purpose; or (4) involved use of the broker-dealer to facilitate criminal activity. 31 C.F.R. § 103.19(a)(2).

44. The failure to file a SAR as required by 31 C.F.R. § 103.19 is a violation of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder.

45. From August 2002 through November 2005, Glantz, one of his customers, and a registered representative at another brokerage firm, participated in a scheme to manipulate the market for Innotrac stock in transactions that totaled at least $5,000. In addition, Ferris's AML Officer noted that the ATC Healthcare trades "could create the appearance of manipulative market practices."

46. The information available to Ferris regarding the manipulative practices involving the trading in Innotrac stock, in particular the red flags discussed above, as well as the AML Officer's observations regarding the ATC Healthcare trades, should have suggested to Ferris that it was required to generate and file SARs. However, Ferris failed to file SARs related to the manipulative practices in Innotrac stock and the suspicious trades in ATC Healthcare.

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[2] Currency and Financial Transactions Reporting Act of 1970 (commonly referred to as the BSA), 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-1959, and 31 U.S.C. §§ 5311-5330.

[3] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 296 (2001).

Violations

47. As a result of the conduct described above, Ferris failed reasonably to supervise Glantz with a view to detecting and preventing Glantz's violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and willfully violated Section 17(a) of the Exchange Act and Rule 17a-8 thereunder by failing to file SARs.

IV.

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

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Ferris cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-8 promulgated thereunder;

B. Respondent Ferris is censured.

C. Respondent Ferris shall, within 30 days of the entry of this Order, pay disgorgement of $222,183 and prejudgment interest of $78,473, for a total of $300,656, to the United States Treasury. It is further ordered that Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $500,000 to the United States Treasury. If timely payments are not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Ferris as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Timothy L. Warren, Division of Enforcement, Securities and Exchange Commission, 175 W. Jackson Blvd., Chicago, IL 60604.

By the Commission.

Elizabeth M. Murphy
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59373 / February 10, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2838 / February 10, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13365

In the Matter of

STEPHEN J. GLANTZ,

Respondent.

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

I.

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

II.

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

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

III.

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

1. Glantz is 55 years old, is presently incarcerated, and was formerly a resident of Chagrin Falls, Ohio. From January 2003 through November 2005, Glantz was a registered representative associated with Ferris, Baker, Watts, Inc., a broker-dealer and investment adviser registered with the Commission which maintained offices in various states, including Ohio and Maryland.

2. On September 26, 2007, Glantz pled guilty to one count of securities fraud in violation of Title 15 United States Code, Sections 78j(b) and 78ff, and one count of making false statements, Title 18 United States Code, Section 1001, before the United States District Court for the Northern District of Ohio, in United States v. Stephen J. Glantz, Case No. 1:07-CR-464. On December 21, 2007, a judgment in the criminal case was entered against Glantz. He was sentenced to a prison term of 33 months followed by three years of supervised release and ordered to make restitution in the amount of $110,336.31.

3. The counts of the criminal information to which Glantz pled guilty alleged, inter alia, that Glantz defrauded investors and obtained money and property by engaging in manipulative and deceptive trading activity, and that in connection with that trading activity made use of a national securities exchange, and that Glantz made false statements to federal government agents.

IV.

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

Accordingly, it is hereby ORDERED:

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

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

customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Florence E Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59374 / February 10, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2839 / February 10, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13366

In the Matter of

WILLIAM H. SALEM,

Respondent.

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

I.

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

II.

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

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

III.

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

1. Salem is 49 years old and is a resident of Willoughby Hills, Ohio. From at least January 2003 through November 2005, Salem was a registered representative associated with Advest, Inc., a broker-dealer and investment adviser registered with the Commission which maintained offices in various states, including Ohio.

2. On January 11, 2008, Salem pled guilty to one count of securities fraud in violation of Title 15 United States Code, Sections 78j(b) and 78ff, for manipulating the market for the stock of Innotrac Corp. and one count of making false statements, Title 18 United States Code, Section 1001, before the United States District Court for the Northern District of Ohio, in United States v. William H. Salem, Case No. 1:07-CR-627. On April 3, 2008, a judgment in the criminal case was entered against Salem. He was sentenced to a prison term of one month followed by two years of supervised release and ordered to make restitution in the amount of $5,000.00

3. The counts of the criminal information to which Salem pled guilty alleged, inter alia, that Salem defrauded investors and obtained money and property by engaging in manipulative and deceptive trading activity in the stock of Innotrac Corp., and that in connection with that trading activity made use of a national securities exchange, and that Salem made false statements to federal government agents.

IV.

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

Accordingly, it is hereby ORDERED:

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 11, 2009

IN THE MATTER OF **The Jockey Club, Inc.,** **Juina Mining Corp., Inc.** **(n/k/a AC Energy, Inc.),** **Jumbosports, Inc.,** **Just Like Home, Inc., and** **Just Toys, Inc. (n/k/a Pachinko, Inc.)** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of The Jockey Club, Inc. because it has not filed any periodic reports since the period ended July 31, 1995.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Juina Mining Corp., Inc. (n/k/a AC Energy, Inc.) because it has not filed any periodic reports since October 1, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Jumbosports, Inc. because it has not filed any periodic reports since the period ended July 30, 1999.

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

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

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 11, 2009, through 11:59 p.m. EST on February 25, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 12, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13370

In the Matter of **Minex Resources, Inc.,** **Powerhouse Resources, Inc.,** **SA Telecommunications, Inc.,** **Thorn Apple Valley, Inc., and** **Universal Seismic Associates, Inc.** **(n/k/a Seismic Universal Associates, 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 Minex Resources, Inc., Powerhouse Resources, Inc., SA Telecommunications, Inc., Thorn Apple Valley, Inc., and Universal Seismic Associates, Inc. (n/k/a Seismic Universal Associates, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Minex Resources, Inc. ("MINX [1]") (CIK No. 350389) is a Wyoming corporation located in Riverton, Wyoming with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MINX 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 November 30, 1999, which reported a net loss of $13,992 profit for the prior year. The financial statements filed with MINX's Forms 10-KSB for the periods ended November 30, 1993, 1994, 1996, 1998 and 1999 were unaudited and therefore failed to comply with Commission rules. MINX also failed to file Forms 10-K or 10-KSB for the periods ended November 30, 1995 and November 30, 1997, or any

[1]Where applicable, the short form of each issuer's name is also its stock symbol.

Forms 10-Q or 10-QSB since it filed a Form 10-Q for the period ended August 31, 1993, except for a Form 10-QSB filed for the period ended February 28, 1999, which was not reviewed by an auditor, and therefore failed to comply with Commission rules. As of February 9, 2009, the common stock of MINX 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). The common stock of MINX had an average daily trading volume of 1,722 shares for the six months ended January 9, 2009.

2. Powerhouse Resources, Inc. ("PHKW") (CIK No. 732700) is a delinquent Colorado corporation located in Denver, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PHKW 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, which reported a net loss of $1,084,208 for the prior nine months. On December 9, 1999, PHKW filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Colorado which was terminated on May 11, 2005. As of February 9, 2009, the common stock of PHKW was quoted on the Pink Sheets, had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of PHKW had an average daily trading volume of 11,071 shares for the six months ended January 9, 2009.

3. SA Telecommunications, Inc. ("STCNQ") (CIK No. 845414) is a void Delaware corporation located in Richardson, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). STCNQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 1997, which reported a net loss of $7,474,338 for the prior year. On November 19, 1997, STCNQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was converted to a Chapter 7 proceeding on August 10, 2000, and was terminated on November 30, 2007. As of February 9, 2009, the common stock of STCNQ was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of STCNQ had an average daily trading volume of 4,135 shares for the six months ended January 9, 2009.

4. Thorn Apple Valley, Inc. ("TAVI") (CIK No. 38851) is a dissolved Michigan corporation located in Southfield, Michigan with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TAVI 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 5, 1999, which reported a net loss of $34,425,663 for the prior forty weeks. On March 5, 1999, TAVI filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Michigan, which was converted to a Chapter 7 petition on July 31, 2001, and terminated on November 12, 2002. As of February 9, 2009, the common stock of TAVI was quoted on the Pink Sheets, had four market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of TAVI had an average daily trading volume of 2,857 shares for the six months ended January 9, 2009.

5. Universal Seismic Associates, Inc. (n/k/a Seismic Universal Associates, Inc.) ("Universal") (CIK No. 884802) is a Delaware corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Universal 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, 1998, which reported a net loss of $6,956,814 for the prior nine months. On September 7, 1999, Universal filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Texas which was terminated on May 29, 2002. On June 22, 2006, Universal changed its name in the Delaware state corporate records from Universal Seismic Associates, Inc. to Seismic Universal Associates, Inc. without reporting that change on Form 8-K or recording that change in the Commission's EDGAR database, as required by Commission rule.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

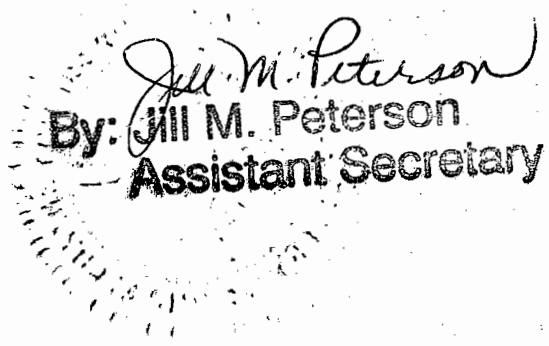
IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment



Appendix 1

Chart of Delinquent Filings

In the Matter of Minex Resources, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Minex Resources, Inc.					
	10-K	11/30/93	02/28/94	Filed without audited financial statements	180
	10-Q	2/28/94	04/14/94	Not filed	178
	10-Q	5/31/94	07/15/94	Not filed	175
	10-Q	8/31/94	10/17/94	Not filed	172
	10-K	11/30/94	02/28/95	Filed without audited financial statements	168
	10-QSB	2/28/95	04/14/95	Not filed	166
	10-QSB	5/31/95	07/17/95	Not filed	163
	10-QSB	8/31/95	10/16/95	Not filed	160
	10-KSB	11/30/95	02/28/96	Not filed	156
	10-QSB	2/29/96	04/15/96	Not filed	154
	10-QSB	5/31/96	07/15/96	Not filed	151
	10-QSB	8/31/96	10/15/96	Not filed	148
	10-KSB	11/30/96	02/28/97	Filed without audited financial statements	144
	10-QSB	2/28/97	04/14/97	Not filed	142
	10-QSB	5/31/97	07/15/97	Not filed	139
	10-QSB	8/31/97	10/15/97	Not filed	136
	10-KSB	11/30/97	03/02/98	Not filed	131
	10-QSB	2/28/98	04/14/98	Not filed	130
	10-QSB	5/31/98	07/15/98	Not filed	127
	10-QSB	8/31/98	10/15/98	Not filed	124
	10-KSB	11/30/98	03/01/99	Filed without audited financial statements	119
	10-QSB	2/28/99	04/14/99	Filed without auditor review of financial statements	118
	10-QSB	5/31/99	07/15/99	Not filed	115

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Minex Resources, Inc. ***(continued)***	*10-QSB*	8/31/99	10/15/99	Not filed	112
	10-KSB	11/30/99	02/28/00	Filed without audited financial statements	108
	10-QSB	02/29/00	04/14/00	Not filed	106
	10-QSB	05/31/00	07/17/00	Not filed	103
	10-QSB	08/31/00	10/16/00	Not filed	100
	10-KSB	11/30/00	02/28/01	Not filed	96
	10-QSB	02/28/01	04/16/01	Not filed	94
	10-QSB	05/31/01	07/16/01	Not filed	91
	10-QSB	08/31/01	10/15/01	Not filed	88
	10-KSB	11/30/01	02/28/02	Not filed	84
	10-QSB	02/28/02	04/15/02	Not filed	82
	10-QSB	05/31/02	07/15/02	Not filed	79
	10-QSB	08/31/02	10/15/02	Not filed	76
	10-KSB	11/30/02	02/28/03	Not filed	72
	10-QSB	02/28/03	04/14/03	Not filed	70
	10-QSB	05/31/03	07/15/03	Not filed	67
	10-QSB	08/31/03	10/15/03	Not filed	64
	10-KSB	11/30/03	03/01/04	Not filed	59
	10-QSB	02/29/04	04/14/04	Not filed	58
	10-QSB	05/31/04	07/15/04	Not filed	55
	10-QSB	08/31/04	10/15/04	Not filed	52
	10-KSB	11/30/04	02/28/05	Not filed	48
	10-QSB	02/28/05	04/14/05	Not filed	46
	10-QSB	05/31/05	07/15/05	Not filed	43
	10-QSB	08/31/05	10/17/05	Not filed	40
	10-KSB	11/30/05	02/28/06	Not filed	36
	10-QSB	02/28/06	04/14/06	Not filed	34
	10-QSB	05/31/06	07/17/06	Not filed	31
	10-QSB	08/31/06	10/16/06	Not filed	28
	10-KSB	11/30/06	02/28/07	Not filed	24
	10-QSB	02/28/07	04/16/07	Not filed	22

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Minex Resources, Inc. ***(continued)***	*10-QSB*	05/31/07	07/16/07	Not filed	19
	10-QSB	08/31/07	10/15/07	Not filed	16
	10-KSB	11/30/07	02/28/08	Not filed	12
	10-QSB	02/28/08	04/14/08	Not filed	10
	10-QSB	05/31/08	07/15/08	Not filed	7
	10-QSB	08/31/08	10/15/08	Not filed	4
Total Filings Delinquent and/or Deficient	60				
Powerhouse Resources, Inc.	*10-KSB*	09/30/95	12/29/95	Not filed	158
	10-QSB	12/31/95	02/14/96	Not filed	156
	10-QSB	03/31/96	05/15/96	Not filed	153
	10-QSB	06/30/96	08/14/96	Not filed	150
	10-KSB	09/30/96	12/30/96	Not filed	146
	10-QSB	12/31/96	02/14/97	Not filed	144
	10-QSB	03/31/97	05/15/97	Not filed	141
	10-QSB	06/30/97	08/14/97	Not filed	138
	10-KSB	09/30/97	12/29/97	Not filed	134
	10-QSB	12/31/97	02/17/98	Not filed	132
	10-QSB	03/31/98	05/15/98	Not filed	129
	10-QSB	06/30/98	08/14/98	Not filed	126
	10-KSB	09/30/98	12/29/98	Not filed	122
	10-QSB	12/31/98	02/16/99	Not filed	120
	10-QSB	03/31/99	05/17/99	Not filed	117
	10-QSB	06/30/99	08/16/99	Not filed	114
	10-KSB	09/30/99	12/29/99	Not filed	110
	10-QSB	12/31/99	02/14/00	Not filed	108
	10-QSB	03/31/00	05/15/00	Not filed	105
	10-QSB	06/30/00	08/14/00	Not filed	102
	10-KSB	09/30/00	12/29/00	Not filed	98
	10-QSB	12/31/00	02/14/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-KSB	09/30/01	12/31/01	Not filed	86
	10-QSB	12/31/01	02/14/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Powerhouse Resources, Inc. ***(continued)***	*10-KSB*	09/30/02	12/30/02	Not filed	74
	10-QSB	12/31/02	02/14/03	Not filed	72
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-KSB	09/30/03	12/29/03	Not filed	62
	10-QSB	12/31/03	02/17/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-KSB	09/30/04	12/29/04	Not filed	50
	10-QSB	12/31/04	02/14/05	Not filed	48
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-KSB	09/30/05	12/29/05	Not filed	38
	10-QSB	12/31/05	02/14/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-KSB	09/30/06	12/29/06	Not filed	26
	10-QSB	12/31/06	02/14/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-KSB	09/30/07	12/31/07	Not filed	14
	10-QSB	12/31/07	02/14/08	Not filed	12
	10-QSB	03/31/08	05/15/08	Not filed	9
	10-QSB	06/30/08	08/14/08	Not filed	6
	10-KSB	09/30/08	12/29/08	Not filed	2
Total Filings Delinquent	53				
SA Telecommunications, Inc.					
	10-QSB	03/31/98	05/15/98	Not filed	129
	10-QSB	06/30/98	08/14/98	Not filed	126
	10-QSB	09/30/98	11/16/98	Not filed	123
	10-KSB	12/31/98	03/31/99	Not filed	119
	10-QSB	03/31/99	05/17/99	Not filed	117
	10-QSB	06/30/99	08/16/99	Not filed	114
	10-QSB	09/30/99	11/15/99	Not filed	111
	10-KSB	12/31/99	03/30/00	Not filed	107
	10-QSB	03/31/00	05/15/00	Not filed	105

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
SA Telecommunications, Inc. ***(continued)***	*10-QSB*	06/30/00	08/14/00	Not filed	102
	10-QSB	09/30/00	11/14/00	Not filed	99
	10-KSB	12/31/00	04/02/01	Not filed	94
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-KSB	12/31/07	03/31/08	Not filed	11
	*10-Q**	03/31/08	05/15/08	Not filed	9
	*10-Q**	06/30/08	08/14/08	Not filed	6
	*10-Q**	09/30/08	11/14/08	Not filed	3

Total Filings Delinquent 43

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Thorn Apple Valley, Inc.					
	10-KSB	05/28/99	08/26/99	Not filed	114
	10-QSB	09/17/99	11/01/99	Not filed	111
	10-QSB	12/10/99	01/24/00	Not filed	109
	10-QSB	03/03/00	04/17/00	Not filed	106
	10-KSB	05/26/00	08/24/00	Not filed	102
	10-QSB	09/15/00	10/30/00	Not filed	100
	10-QSB	12/08/00	01/22/01	Not filed	97
	10-QSB	03/02/01	04/16/01	Not filed	94
	10-KSB	05/25/01	08/23/01	Not filed	90
	10-QSB	09/14/01	10/29/01	Not filed	88
	10-QSB	12/07/01	01/21/02	Not filed	85
	10-QSB	03/01/02	04/15/02	Not filed	82
	10-KSB	05/31/02	08/29/02	Not filed	78
	10-QSB	09/20/02	11/04/02	Not filed	75
	10-QSB	12/13/02	01/27/03	Not filed	73
	10-QSB	03/07/03	04/21/03	Not filed	70
	10-KSB	05/30/03	08/28/03	Not filed	66
	10-QSB	09/19/03	11/03/03	Not filed	63
	10-QSB	12/12/03	01/26/04	Not filed	61
	10-QSB	03/05/04	04/19/04	Not filed	58
	10-KSB	05/28/04	08/26/04	Not filed	54
	10-QSB	09/17/04	11/01/04	Not filed	51
	10-QSB	12/10/04	01/24/05	Not filed	49
	10-QSB	03/04/05	04/18/05	Not filed	46
	10-KSB	05/27/05	08/25/05	Not filed	42
	10-QSB	09/16/05	10/31/05	Not filed	40
	10-QSB	12/09/05	01/23/06	Not filed	37
	10-QSB	03/03/06	04/17/06	Not filed	34
	10-KSB	05/26/06	08/24/06	Not filed	30
	10-QSB	09/15/06	10/30/06	Not filed	28
	10-QSB	12/08/06	01/22/07	Not filed	25
	10-QSB	03/02/07	04/16/07	Not filed	22
	10-KSB	05/25/07	08/23/07	Not filed	18

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Thorn Apple Valley, Inc. ***(continued)***	*10-QSB*	09/14/07	10/29/07	Not filed	16
	10-QSB	12/07/07	01/21/08	Not filed	13
	10-QSB	02/29/08	04/14/08	Not filed	10
	10-KSB	05/30/08	08/28/08	Not filed	6
	*10-Q**	09/19/08	11/03/08	Not filed	3
	*10-Q**	12/12/08	01/26/09	Not filed	1
Total Filings Delinquent	39				
Universal Seismic Associates, Inc. ***(n/k/a Seismic Universal Associates, Inc.)***					
	10-KSB	06/30/98	09/28/98	Not filed	125
	10-QSB	09/30/98	11/16/98	Not filed	123
	10-QSB	12/31/98	02/16/99	Not filed	120
	10-QSB	03/31/99	05/17/99	Not filed	117
	10-KSB	06/30/99	09/28/99	Not filed	113
	10-QSB	09/30/99	11/15/99	Not filed	111
	10-QSB	12/31/99	02/14/00	Not filed	108
	10-QSB	03/31/00	05/15/00	Not filed	105
	10-KSB	06/30/00	09/28/00	Not filed	101
	10-QSB	09/30/00	11/14/00	Not filed	99
	10-QSB	12/31/00	02/14/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-KSB	06/30/01	09/28/01	Not filed	89
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-QSB	12/31/01	02/14/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-KSB	06/30/02	09/30/02	Not filed	77
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-QSB	12/31/02	02/14/03	Not filed	72
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-KSB	06/30/03	09/29/03	Not filed	65
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-QSB	12/31/03	02/17/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-KSB	06/30/04	09/28/04	Not filed	53
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-QSB	12/31/04	02/14/05	Not filed	48

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Universal Seismic Associates, Inc. (n/k/a Seismic Universal Associates Inc.) ***(continued)***	*10-QSB*	03/31/05	05/16/05	Not filed	45
	10-KSB	06/30/05	09/28/05	Not filed	41
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-QSB	12/31/05	02/14/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-KSB	06/30/06	09/28/06	Not filed	29
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-QSB	12/31/06	02/14/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-KSB	06/30/07	09/28/07	Not filed	17
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-QSB	12/31/07	02/14/08	Not filed	12
	10-QSB	03/31/08	05/15/08	Not filed	9
	10-KSB	06/30/08	09/29/08	Not filed	5
	*10-Q**	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	42				

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 12, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13371

In the Matter of **Carlyle Gaming & Entertainment Ltd., Daleigh Holdings Corp., Guy F. Atkinson Co. of California, Inc. (n/k/a ATKN Co. of California), Pegasus Gold, Inc., and Storm Technology, 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 Carlyle Gaming & Entertainment Ltd., Daleigh Holdings Corp., Guy F. Atkinson Co. of California, Inc. (n/k/a ATKN Co. of California), Pegasus Gold, Inc., and Storm Technology, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Carlyle Gaming & Entertainment Ltd. ("CGME")[1] (CIK No. 894847) is a Colorado corporation located in San Francisco, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CGME 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, 1996, which reported a net loss of $1,079,923 for the prior six months. The independent auditor's report accompanying CGME's financial statements for the period ended September 30, 1995 expressed doubt as to the company's ability to continue as a going concern based on its net losses and the fact that its current liabilities exceeded its current assets. As of

[1]The short form of each issuer's name is also its stock symbol.

February 9, 2009, the common stock of CGME was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had eight market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of CGME had an average daily trading volume of 18,554 shares for the six months ended January 9, 2009.

2. Daleigh Holdings Corp. ("DLGH") (CIK No. 318024) is an expired Utah corporation located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DLGH 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, 1996, which reported a net loss of $89,474 for the prior nine months. The financial statements filed with DLGH's Forms 10-K for the periods ended December 31, 1992, 1993, 1994, and 1995 were unaudited and therefore failed to comply with Commission rules. The unaudited financial statements filed for the period ended December 31, 1995 also expressed doubt as to the ability of DLGH to continue as a going concern. As of February 9, 2009, the common stock of DLGH was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of DLGH had an average daily trading volume of 357 shares for the six months ended January 9, 2009.

3. Guy F. Atkinson Co. of California, Inc. (n/k/a ATKN Co. of California) ("ATKQ") (CIK No. 8137) is a delinquent Delaware corporation located in San Bruno, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ATKQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 1997, which reported a net loss of $88,161,000 for the prior year. On August 10, 1997, ATKQ filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of California which was still pending as of February 9, 2009. On June 28, 2000, ATKQ changed its name in the Delaware corporate records to ATKN Co. of California, but failed to record that change in the Commission's records, as required by Commission rules. As of February 9, 2009, the common stock of ATKQ was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of ATKQ had an average daily trading volume of 756 shares for the six months ended January 9, 2009.

4. Pegasus Gold, Inc. ("PSGQF") (CIK No. 746961) is a British Columbia corporation located in Spokane, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PSGQF 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, which reported a net loss of $20,351,000 for the prior six months. On January 16, 1998, PSGQF filed a Chapter 11 petition in the United States Bankruptcy Court for the District of Nevada which was terminated on April 3, 2007. As of February 9, 2009, the common stock of PSGQF was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of PSGQF had an average daily trading volume of 2,482 shares for the six months ended January 9, 2009.

5. Storm Technology, Inc. ("STRIQ") (CIK No. 1017546) is a forfeited Delaware corporation located in Mountain View, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). STRIQ 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, which reported a net loss of $14,559,000 for the prior six months. On October 21, 1998, STRIQ filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of California, which was converted to a Chapter 7 proceeding on November 25, 1998, and terminated on February 15, 2005. As of February 9, 2009, the common stock of STRIQ was quoted on the Pink Sheets, had two market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of STRIQ had an average daily trading volume of 89 shares for the six months ended January 9, 2009.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings

In the Matter of Carlyle Gaming & Entertainment Ltd., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Carlyle Gaming & Entertainment Ltd.					
	10-QSB	06/30/96	08/14/96	Not filed	150
	10-KSB	09/30/96	12/30/96	Not filed	146
	10-QSB	12/31/96	02/14/97	Not filed	144
	10-QSB	03/31/97	05/15/97	Not filed	141
	10-QSB	06/30/97	08/14/97	Not filed	138
	10-KSB	09/30/97	12/29/97	Not filed	134
	10-QSB	12/31/97	02/17/98	Not filed	132
	10-QSB	03/31/98	05/15/98	Not filed	129
	10-QSB	06/30/98	08/14/98	Not filed	126
	10-KSB	09/30/98	12/29/98	Not filed	122
	10-QSB	12/31/98	02/16/99	Not filed	120
	10-QSB	03/31/99	05/17/99	Not filed	117
	10-QSB	06/30/99	08/16/99	Not filed	114
	10-KSB	09/30/99	12/29/99	Not filed	110
	10-QSB	12/31/99	02/14/00	Not filed	108
	10-QSB	03/31/00	05/15/00	Not filed	105
	10-QSB	06/30/00	08/14/00	Not filed	102
	10-KSB	09/30/00	12/29/00	Not filed	98
	10-QSB	12/31/00	02/14/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-KSB	09/30/01	12/31/01	Not filed	86
	10-QSB	12/31/01	02/14/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-KSB	09/30/02	12/30/02	Not filed	74
	10-QSB	12/31/02	02/14/03	Not filed	72
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-KSB	09/30/03	12/29/03	Not filed	62
	10-QSB	12/31/03	02/17/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	57

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Carlyle Gaming & Entertainment Ltd. ***(continued)***	*10-QSB*	06/30/04	08/16/04	Not filed	54
	10-KSB	09/30/04	12/29/04	Not filed	50
	10-QSB	12/31/04	02/14/05	Not filed	48
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-KSB	09/30/05	12/29/05	Not filed	38
	10-QSB	12/31/05	02/14/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-KSB	09/30/06	12/29/06	Not filed	26
	10-QSB	12/31/06	02/14/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-KSB	09/30/07	12/31/07	Not filed	14
	10-QSB	12/31/07	02/14/08	Not filed	12
	10-QSB	03/31/08	05/15/08	Not filed	9
	10-QSB	06/30/08	08/14/08	Not filed	6
	10-KSB	09/30/08	12/29/08	Not filed	2
Total Filings Delinquent	47				
Daleigh Holdings Corp.	*10-KSB*	12/31/96	03/31/97	Not filed	143
	10-QSB	03/31/97	05/15/97	Not filed	141
	10-QSB	06/30/97	08/14/97	Not filed	138
	10-QSB	09/30/97	11/14/97	Not filed	135
	10-KSB	12/31/97	03/31/98	Not filed	131
	10-QSB	03/31/98	05/15/98	Not filed	129
	10-QSB	06/30/98	08/14/98	Not filed	126
	10-QSB	09/30/98	11/16/98	Not filed	123
	10-KSB	12/31/98	03/31/99	Not filed	119
	10-QSB	03/31/99	05/17/99	Not filed	117
	10-QSB	06/30/99	08/16/99	Not filed	114
	10-QSB	09/30/99	11/15/99	Not filed	111
	10-KSB	12/31/99	03/30/00	Not filed	107
	10-QSB	03/31/00	05/15/00	Not filed	105
	10-QSB	06/30/00	08/14/00	Not filed	102
	10-QSB	09/30/00	11/14/00	Not filed	99
	10-KSB	12/31/00	04/02/01	Not filed	94

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Daleigh Holdings Corp. ***(continued)***	*10-QSB*	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-KSB	12/31/07	03/31/08	Not filed	11
	*10-Q**	03/31/08	05/15/08	Not filed	9
	*10-Q**	06/30/08	08/14/08	Not filed	6
	*10-Q**	09/30/08	11/14/08	Not filed	3

Total Filings Delinquent 48

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Guy F. Atkinson Co. of California, Inc. (n/k/a ATKN Co. of California)					
	10-Q	03/31/98	05/15/98	Not filed	129
	10-Q	06/30/98	08/14/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Guy F. Atkinson Co. of California, Inc. (n/k/a ATKN Co. of California) ***(continued)***	*10-Q*	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	43				
Pegasus Gold, Inc.					
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pegasus Gold, Inc. ***(continued)***	*10-Q*	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	41				
Storm Technology, Inc.					
	10-QSB	09/30/98	11/16/98	Not filed	123
	10-KSB	12/31/98	03/31/99	Not filed	119
	10-QSB	03/31/99	05/17/99	Not filed	117
	10-QSB	06/30/99	08/16/99	Not filed	114
	10-QSB	09/30/99	11/15/99	Not filed	111
	10-KSB	12/31/99	03/30/00	Not filed	107
	10-QSB	03/31/00	05/15/00	Not filed	105
	10-QSB	06/30/00	08/14/00	Not filed	102
	10-QSB	09/30/00	11/14/00	Not filed	99
	10-KSB	12/31/00	04/02/01	Not filed	94
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Storm Technology, Inc. ***(continued)***	*10-QSB*	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-KSB	12/31/07	03/31/08	Not filed	11
	*10-Q**	03/31/08	05/15/08	Not filed	9
	*10-Q**	06/30/08	08/14/08	Not filed	6
	*10-Q**	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	41				

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 12, 2009

In the Matter of

Carlyle Gaming & Entertainment Ltd.,
Daleigh Holdings Corp.,
Guy F. Atkinson Co. of California, Inc.
(n/k/a ATKN Co. of California),
Minex Resources, Inc.,
Pegasus Gold, Inc.,
Powerhouse Resources, Inc.,
SA Telecommunications, Inc.,
Storm Technology, Inc.,
Thorn Apple Valley, Inc., and
Universal Seismic Associates, Inc.
(n/k/a Pocketop Corp.)

File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Carlyle Gaming & Entertainment Ltd. because it has not filed any periodic reports since the period ended March 31, 1996.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Daleigh Holdings Corp. because it has not filed any periodic reports since the period ended September 30, 1996.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Guy F. Atkinson Co. of California, Inc. (n/k/a ATKN Company of California) because it has not filed any periodic reports since the period ended December 31, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Minex Resources, Inc. because it has not filed any periodic reports since the period ended November 30, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Pegasus Gold, 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 Powerhouse Resources, Inc. because it has not filed any periodic reports since the period ended June 30, 1995.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of SA Telecommunications, Inc. because it has not filed any periodic reports since the period ended December 31, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Storm Technology, 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 Thorn Apple Valley, Inc. because it has not filed any periodic reports since the period ended March 5, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Universal Seismic Associates, Inc. (n/k/a Pocketop Corp.) because it has not filed any periodic reports since the period ended March 31, 1998.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 12, 2009, through 11:59 p.m. EST on February 26, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59408 / February 13, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2841 / February 13, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13373

In the Matter of **RANDALL W. BANKS,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Banks, 41 years old, is a resident of LaGrange, Georgia. From September 27, 1994 to April 5, 2002, he was employed as a representative of a firm registered with the Commission as a broker-dealer and investment adviser.

2. On August 12, 2008, Banks pled guilty to 36 counts of theft by taking, in violation of O.C.G.A. §16-8-2, before the Superior Court of Troup County, Georgia, in State of Georgia v. Randall Wesley Banks, Docket No. 08-R-543 (2008).

3. The indictment indicates that Banks engaged in his investment fraud scheme beginning in January 1996 and lasting through April 2008. He thus defrauded investors while associated with the firm. Each of the counts to which Banks pled guilty alleged that he "did while being in lawful possession, appropriate United States currency, with a value exceeding $500.00, the property of [the owners], with the intention of depriving said owners of said property, contrary to the laws of the State of Georgia, the good order, peace and dignity thereof."

IV.

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

Accordingly, it is hereby ORDERED:

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59403 / February 13, 2009

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2840 / February 13, 2009

Admin. Proc. File No. 3-12716

In the Matter of

GARY M. KORNMAN
c/o Barry S. Pollack, Esq.
Sullivan & Worcester LLP
One Post Office Square
Boston, MA 02109
and
Janet K. DeCosta, Esq.
International Square
1825 Eye Street, N.W., Ste. 400
Washington, D.C. 20006

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING
INVESTMENT ADVISER PROCEEDING

Ground for Remedial Action

Criminal Conviction

Former associated person of a registered broker-dealer and of an investment adviser was criminally convicted of making a false statement to the Commission. Held, it is in the public interest to bar Respondent from association with any broker, dealer, or investment adviser.

APPEARANCES:

Barry S. Pollack, of Sullivan & Worcester LLP, and Janet K. DeCosta, of the Law Offices of Janet K. DeCosta, P.C., for Gary M. Kornman.

Toby M. Galloway and J. Kevin Edmundson, for the Division of Enforcement.

Appeal filed: October 30, 2007
Last brief received: May 9, 2008
Oral Argument: January 7, 2009

I.

Gary M. Kornman ("Kornman"), former owner and registered representative of Heritage Securities Corporation ("Heritage Securities"), appeals from a decision of an administrative law judge. 1/ The law judge found that on July 11, 2007, the United States District Court for the Northern District of Texas, based on his guilty plea, convicted Kornman of one count of making a false statement to the Commission in violation of 18 U.S.C. § 1001. 2/ The law judge barred Kornman from associating with any broker, dealer, or investment adviser. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 3/

II.

A. Background

From May 1992 to October 2006, Kornman was part owner and a registered representative of Heritage Securities, a registered broker-dealer, which sold variable life insurance and annuities. 4/ Kornman also served as the sole managing member of Heritage Advisory Group, L.L.C. ("Heritage Advisory"), a Delaware limited liability company organized

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1/ Gary M. Kornman, Initial Decision Rel. No. 335 (Oct. 9, 2007), 91 SEC Docket 2687.

2/ In pertinent part, 18 U.S.C. § 1001(a) provides: "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined . . . , imprisoned not more than 5 years . . . , or both."

3/ 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. Chairman Schapiro and Commissioner Walter conducted the required review.

4/ Heritage Securities was registered as a broker-dealer with the Commission from May 29, 1992, until October 4, 2006.

by Kornman in October 1998. 5/ Heritage Advisory was the general partner of two hedge funds, Heritage Capital Partners I, L.P., and Heritage Capital Opportunities Fund I, L.P. (collectively, the "Hedge Funds"), since their formation in October 1998 and September 1999, respectively. Kornman individually and through Heritage Advisory managed the trades of the Hedge Funds and received administrative fees and a percentage of any extraordinary profits for these services. 6/

On December 20, 2006, a federal grand jury handed down a four-count Superseding Indictment against Kornman before the United States District Court for the Northern District of Texas. The Superseding Indictment charged Kornman with two counts of securities fraud in connection with alleged insider trading of MiniMed, Inc., and Hollywood Casino Corp. stock, one count of providing false statements to the Commission, and one count of obstruction of justice. On April 9, 2007, Kornman pleaded guilty to making a false statement to the Commission in violation of 18 U.S.C. § 1001. Based on his plea agreement, the district court entered a judgment of conviction on July 13, 2007. 7/ The court dismissed the remaining three charges of the Superseding Indictment.

According to the Factual Resume accompanying his plea agreement, on October 29, 2003, Kornman participated "in a voluntary telephone interview with investigators" from the Commission (the "October interview"). During the October interview, Kornman "stated he did not know who possessed trading authority over the brokerage account for a hedge fund through which [Kornman] conducted trading activity in publicly traded stock." 8/ Kornman admitted to the district court that this statement was false and that he knew "he personally possessed trading authority over the brokerage account for the fund through which he conducted the trading activity that was under investigation by the [Commission]." Kornman further admitted that he made "the statement intentionally, knowing it was false[,] . . . [t]hat the statement was material," and that he made it "for the purpose of misleading the [Commission] in its investigation into his trading activity."

5/ Heritage Advisory has never been registered with the Commission in any capacity.

6/ At the time, Kornman was also an attorney, licenced in Alabama. Based on his conviction, the Alabama State Bar suspended his license for two years.

7/ United States v. Kornman, 3:05-CR-0298-P (N.D. Tex. July 13, 2007). The law judge used July 11, 2007, the day on which Kornman's sentencing hearing took place, as the date of Kornman's conviction. It appears from the record that the district court did not enter the conviction until July 13, 2007.

8/ Specifically, the investigators asked Kornman: "[W]ho is the person who had trading authority in the brokerage account for Heritage Capital Partners [I, L.P.]?" Kornman responded: "I'm sorry. I just don't know that."

By pleading guilty to 18 U.S.C. § 1001, Kornman faced, among other penalties, a possible sentence of up to five years in prison, a term of supervised release of not more than three years but not less than two, and a fine up to $250,000 or twice any pecuniary gain. At Kornman's sentencing hearing, the district court determined that Kornman's offense level and criminal history were low and that the recommended range under the Federal Sentencing Guidelines for Kornman was zero to six months in prison. Kornman apologized for his actions, stating: "I have strong regrets and wish I could change what has happened. I am focused on making sure that I remain far away from anything problematic in the future." Noting that this was Kornman's first offense, the district court sentenced Kornman to two years' probation, the minimum sentence, but rejected Kornman's request that the probation be unsupervised because of the felony nature of the offense.

In determining whether a financial penalty was appropriate, the district court inquired of Commission counsel, who was assisting the Assistant United States Attorney during the criminal case, whether the Commission would seek a monetary penalty in any civil case against Kornman for the same conduct. Commission counsel responded that it recommended the maximum fine of $250,000 for Kornman in the criminal case and its position "was that [] Kornman unjustly enriched himself by 140 some odd thousand by insider trading," which it then was seeking in settlement discussions in a civil proceeding against Kornman. 9/ Commission counsel informed the district court that the Commission also would likely seek a "permanent bar" in an administrative proceeding. The court concluded: "I think that $143,000 needs to be paid back . . . . [I]t needs to be disgorged. But I don't think we need to do it twice . . . . I don't want to order it here if you continue to seek it as part of your civil proceeding." Commission counsel agreed that "if 140 is awarded in the criminal case, we will not be seeking it in the civil case." Based on this colloquy, the district court ordered Kornman to pay $143,465, in what it characterized as "disgorgement" of unjust enrichment, a "condition of [Kornman's] parole," to distinguish the required payment from a fine.

B. Administrative Proceeding

On July 30, 2007, we authorized the institution of administrative proceedings against Kornman, pursuant to Section 15(b) of the Securities Exchange Act of the 1934 and Section 203(f) of the Investment Advisers Act of 1940, to determine whether he had been criminally convicted and, if so, whether any remedial action would be appropriate in the public interest. After a prehearing conference, the Division of Enforcement moved for summary disposition

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9/ At the time counsel made these representations, the district court previously had granted the Commission's motion to dismiss the civil action without prejudice on May 31, 2006. SEC v. Kornman, No. 3:04-CV-1803-L, 2006 U.S. Dist. LEXIS 37788 (N.D. Tex. May 31, 2006).

pursuant to Rule 250 of the Commission's Rules of Practice, 10/ based on Kornman's answer; conviction and supporting court documents; and certified copies of documents relating to Heritage Securities, Heritage Advisory, and the Hedge Funds.

Kornman opposed the Division's motion and attached, among other exhibits, an excerpted transcript of the October interview; character letters from various individuals to the district court submitted for consideration in sentencing; and the Certification of Gary Kornman ("Kornman Certification"). The Kornman Certification stated Kornman's educational background included a bachelor's degree and law degree, his remorse for the events leading to his conviction, his acceptance of "full responsibility for his misconduct," and a vow that he "will not repeat anything of the sort in the future." The Division's reply brief supplemented the record with a full version of the transcript to the October interview.

On October 9, 2007, the law judge found there was no genuine issue with regard to any material fact and granted the Division's motion pursuant to Rule 250. The law judge determined that Kornman was associated with a broker-dealer and investment adviser and that his felony conviction "'involves the purchase or sale of any security, the taking of a false oath, . . . conspiracy to commit any such offense, [or] arises out of the conduct of the business of a broker, dealer, [or] investment adviser' within the meaning of Sections 15(b)(4)(B) and 15(b)(6)(A)(ii) of the Exchange Act and Sections 203(e)(2) and 203(f) of the Advisers Act." After consideration of the public interest factors, the law judge concluded it appropriate to bar Kornman from associating with any broker, dealer, or investment adviser.

III.

A. Exchange Act Section 15(b) and Advisers Act Section 203(f)

Exchange Act Section 15(b) and Advisers Act Section 203(f) 11/ authorize the Commission to censure, place limitations on, suspend, or bar a person associated with a broker, dealer, or investment adviser when such sanctions are in the public interest, and such a person has been convicted within the past ten years of certain enumerated offenses. As relevant here, those offenses include any felony that the Commission finds "involves . . . the purchase or sale of any security, the taking of a false oath, [or] the making of a false report, . . . arises out of the conduct of the business of a broker, dealer, . . . [or] investment adviser, . . . [or] involves the violation of . . . chapter . . . 47 of title 18, United States Code . . . . " 12/

10/ 17 C.F.R. § 201.250.

11/ 15 U.S.C. §§ 78*o*(b), 80b-3(f) (referencing offenses enumerated in 15 U.S.C. § 80b-3(e)).

12/ 15 U.S.C. §§ 78*o*(b)(4)(B)(i)-(ii) and (iv), 80b-3(e)(2)(A)-(B) and (D).

We find that Kornman's conviction meets the statutory requirements of Exchange Act Section 15(b) and Advisers Act Section 203(f). The statute under which Kornman was convicted, 18 U.S.C. § 1001, is codified in chapter 47 of title 18 of the United States Code. Moreover, Kornman's conviction arose from a false statement he provided Commission staff during its investigation into possible insider trading in the brokerage account for one of the Hedge Funds, of which, as found below, Heritage Advisory was the investment adviser. Kornman's conduct thus arose "out of the conduct of the business of a broker, dealer, . . . [or] investment adviser." 13/

We also find that Kornman was an associated person of a broker, dealer, and investment adviser during the time relevant to his conviction. Until October 2006, Kornman was a registered representative and part owner of Heritage Securities, a registered broker-dealer, and thus Kornman was an associated person of a broker or dealer within the meaning of the Exchange Act. 14/

At the time of the October interview, Kornman was also associated with Heritage Advisory, which we find was an investment adviser within the meaning of the Advisers Act. Advisers Act Section 202(a)(11) defines an investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15/ As courts have held, hedge fund general partners "are 'investment advisers' within the meaning of the [Advisers Act]." 16/ Although hedge fund advisers are typically exempt from registration under Advisers Act Section 203(b)(3), we may sanction an associated person of an unregistered investment adviser under Advisers Act Section 203(f). 17/ The record, including private offering memoranda from the Hedge Funds, reflects that Heritage Advisory served as the general partner to the Hedge Funds, managing their investment portfolios

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13/ Kornman's conviction meets the requirements of Advisers Act Section 203(e)(3)(A) in that his offense was punishable up to five years. 15 U.S.C. § 80b-3(e)(3)(A).

14/ 15 U.S.C. § 78c(a)(18) (defining person associated with a broker or dealer as "any person directly or indirectly controlling a broker or dealer or any employee of such broker or dealer"). To the extent that Kornman claimed at oral argument that Heritage Securities ceased operating by June 2003, his claim is not supported by the record.

15/ 15 U.S.C. § 80b-2(a)(11).

16/ Abrahamson v. Fleschner, 568 F.2d 862, 869-71 (2d Cir. 1977), overruled, in part, on other grounds by Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); see also Goldstein v. SEC, 451 F.3d 873, 876 (D.C. Cir. 2006) ("Hedge fund general partners meet the definition of an 'investment adviser' in the Advisers Act.")

17/ See Teicher v. SEC, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

and earning fees and other compensation for such services. As sole managing member of Heritage Advisory, therefore, Kornman was an associated person of an investment adviser within the meaning of the Advisers Act. 18/

Kornman challenges our authority to institute this proceeding, asserting his conviction did not involve securities fraud and the false statement underlying it was not made "in connection with the purchase and sale of securities." Kornman contends further that his conviction did not involve obstruction of justice, a false oath, or a false report. Neither Exchange Act Section 15(b) nor Advisers Act Section 203(f), however, require that the underlying conviction involve securities fraud. The statutes use the disjunctive "or," meaning that any one basis in the statute is sufficient to establish our authority to proceed. Kornman cites nothing to suggest otherwise. The statutory bases discussed above provide ample authority for institution of these proceedings.

Kornman also asserts that 18 U.S.C. § 1001 is not among the "specified" offenses in Exchange Act Section 15(b)(4)(B) and Advisers Act Section 203(e)(2)-(3) that Congress intended to incorporate in Exchange Act Section 15(b)(6)(A)(ii) and Advisers Act Section 203(f) for sanctioning associated persons of a broker, dealer, and investment adviser. Rather, Kornman claims that:

> the drafters of Sections 15(b)(4) and (6) obviously intended to employ different standards before imposing sanctions on broker-dealers as opposed to associated persons convicted of criminal activity. As to a broker-dealer, the Commission may impose sanctions under Section 15(b)(4)(B)(iv) simply upon a conviction which "involves" various enumerated sections and Chapters 25 and 47 of the Criminal Code. Section 15(b)(6)(A)(ii), on the other hand, only allows the imposition of sanctions, and, concomitantly, the institution of proceedings, on those who have been convicted of specified offenses, as opposed to a generic group of offenses. 19/

In other words, Kornman contends that the Commission may bring proceedings against associated persons convicted of fraud using a fictitious name or address through the Postal

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18/ 15 U.S.C. § 80b-2(a)(17) (defining a person associated with an investment adviser as "any partner, officer, or director of such investment adviser (or any person performing similar functions)").

19/ According to Kornman, the Commission is limited to sanctioning associated persons only for "four specific violations of the criminal code." Kornman does not specifically identify which four, but consistent with his argument, they appear to be violations of "section[s] 152, 1341, 1342, or 1343" of title 18 of the United States Code. 15 U.S.C. §§ 78*o*(b)(4)(B)(iv); 80b-3(e)(2)(D); see also 18 U.S.C. §§ 152 (concealment of assets; false oaths and claims; bribery), 1341 (frauds and swindles), 1342 (fictitious name or address), 1343 (fraud by wire, radio, or television).

Service, because 18 U.S.C. § 1342 is referenced by its specific United States Code section in Exchange Act Section 15(b)(4)(B)(iv) and Advisers Act Section 203(e)(2)(D), but the Commission may not bring proceedings against associated persons based on a felony conviction that "involves the purchase or sale of a security, the taking of a false oath, the making of a false report, bribery, perjury" because such offenses lack a United States Code citation in Section 15(b)(4)(B) and Section 203(e)(2).

Kornman cites no Commission or judicial authority construing Exchange Act Section 15(b)(6)(A)(ii) or Advisers Act Section 203(f) in the way that he does. Indeed, there is nothing in the use of the term "specified" -- meaning to mention "definitely" or "fully" or "in detail" -- that suggests that Congress intended to limit sanctioning associated persons to only those felonies identified by a particular United States Code section in Sections 15(b)(4)(B) and 203(e)(2)-(3). 20/ Kornman's argument also is not supported by the legislative history of the Exchange Act or Advisers Act or by relevant case law. 21/ Contrary to Kornman's position, both Exchange Act Section 15(b)(6)(A)(ii) and Advisers Act Section 203(f) incorporate the entirety of Sections 15(b)(4)(B) and 203(e)(2)-(3), authorizing proceedings against associated persons for a conviction of any offense enumerated in those sections, including violations involved in title 18, chapter 47 and not merely the four violations suggested by Kornman. Kornman's narrow interpretation of the authorizing statutes would render nearly all of the criminal conduct set forth in Sections 15(b)(4)(B) and 203(e)(2)-(3), including the multitude of securities laws violations,

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20/ See Grapevine Imps., Ltd. v. United States, 71 Fed. Cl. 324, 339-40 & n.23 (2006) (rejecting notion that Congress's use of term "specified" limited provision's applicability to only direct references to IRS Code, in stating that "there is nothing about the use of the term 'specified' that suggests that Congress could not-and did not-intend the reference in section 6229(d) to refer back to section 6501 . . . 'specified' means to mention 'definitely' or 'fully' or 'in detail' and thus does not require that there be an explicit reference to a particular Code section") (citing XVI The Oxford English Dictionary 159-60 (2d ed. 1998) and Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119, 125 (2005)).

21/ See Securities Acts Amendments of 1964, Pub. L. No. 88-467, 78 Stat. 565 (1964); S. Rep. No. 88-379, at 44-45 (1963) (adopting Commission's recommendation to broaden disqualifying offenses for broker-dealers and their employees in Exchange Act Section 15(b) and to reflect a similar change to the Advisers Act); Report of Special Study of Securities Markets of the Securities and Exchange Commission H.R. Doc. No. 88-95, at 159 (1963) ("These statutory disqualifications should be combined and made applicable to all broker-dealer and investment adviser firms and certain categories of individuals in the securities business, such as principals, supervisors, and salesman."); see also Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) (applying Exchange Act Section 15(6)(A)(ii) to an associated person's conviction for both mail fraud and securities fraud, stating both are among the "specified offenses," and affirming Commission's decision to bar an associated person of a broker-dealer).

inapplicable to associated persons of brokers, dealers, and investment advisers, an interpretation that has no support in the law.

Kornman also suggests that the Commission may not sanction him because he is not currently, and was not "at the time of the alleged event, on which the request for relief is based," either associated or seeking to associate with a broker, dealer, or investment adviser. Kornman claims that the "alleged event" is his conviction date, which occurred on July 13, 2007, and by that time he was no longer associated with a broker-dealer nor was he associated with an investment adviser. This is incorrect. Exchange Act Section 15(b)(6)(A) and Advisers Act Section 203(f) do not use the term "alleged event," rather they state that a person must have been associated with a broker, dealer, or investment adviser "at the time of the alleged misconduct." 22/ Thus, the relevant date for purposes of our jurisdiction over Kornman is October 29, 2003, the day on which he provided his false statement to Commission investigators. 23/ As determined above, Kornman was an associated person of the broker-dealer Heritage Securities and the investment adviser Heritage Advisory on that date.

Kornman further argues that there is insufficient evidence that Heritage Advisory was an investment adviser "for compensation" on the date of the October interview, based on his assertion that "Heritage Advisory [] had ceased its trading activities in the market " before October 2003. The private offering memoranda for the Hedge Funds disclose that Heritage Advisory received for its advisory services a quarterly administrative fee equal to "0.25% [to 0.375%] of the balance of limited partner capital accounts" and an annual "extraordinary profit allocation" equal to 20% [to 50%] of each limited partner's share of net profits "in excess of the rate of return of the prior year's final 52 week U.S. Treasury Bill," minus any cumulative net loss. Kornman provides no evidence for his claim that the Hedge Funds ceased operating or receiving these fees by October 2003. 24/ To the contrary, certificates from Delaware's Secretary of State

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22/ 15 U.S.C. §§ 78*o*(b)(6)(A), 80b-3(f); see also Black's Law Dictionary 1013 (7th ed. 1999) (defining misconduct as "unlawful or improper behavior").

23/ See Securities and Exchange Commission Authorization Act of 1987, Pub. L. No. 100-181, 101 Stat. 1263 (1987); S. Rep. No. 100-105, at 2111 (1987) (amending language to "at the time of alleged misconduct" in Exchange Act Section 15(b)(6) and Advisers Act 203(f) to "make clear Congress' original intent that misconduct during a *past* association . . . as well as during a *present* . . . association, subjects a person to administrative proceedings and sanctions under the [] Exchange Act and [] Advisers Act.") (italics in original); see also John Kilpatrick, 48 S.E.C. 481, 487-88 (1986) (stating that to hold otherwise "would allow persons who violate the law while employed in the securities business to avoid administrative sanctions simply by leaving the business").

24/ We have stated that to survive a motion for summary disposition, the non-moving party must do more than "'simply show that there is some metaphysical doubt as to the material

(continued...)

show that the Hedge Funds remained active and in good standing in that State through at least June 9, 2005, and that Heritage Advisory remained manager of the Hedge Funds as their general partner.

Accordingly, we find that, pursuant to Exchange Act Section 15(b) and Advisers Act Section 203(f), we have authority to sanction Kornman if we determine that it is in the public interest to do so.

B. Public Interest Factors

When considering whether an administrative sanction serves the public interest, we consider the factors identified in Steadman v. SEC: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. 25/ "'[T]he Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive.'" 26/

The conduct underlying Kornman's conviction was egregious. His conviction was for making a material false statement to a federal official, and he admitted he did so intentionally and for the purpose of misleading our investigation. As we have stated: "The securities industry presents a great many opportunities for abuse and overreaching, and depends very heavily on the

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24/ (...continued)
facts.'" Jeffrey L. Gibson, Exchange Act Rel. No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2112 n.26 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)), appeal filed, No. 08-3377 (6th Cir. Apr. 3, 2008); see also Justin Ficken, Exchange Act Release No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 695 (finding on summary disposition that respondent failed to "produce testimony or affidavits to support his assertions of joint action"). At oral argument, Kornman asserted that trading at the Hedge Funds stopped in June 2003, referencing the Division's Declaration of Cory D. Childs, a former employee of Heritage Advisory. However, Childs's Declaration merely stated he left the firm in June of 2003.

25/ 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

26/ David Henry Disraeli, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875 (quoting Conrad P. Seghers, Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293 (collecting cases), petition denied, 548 F.3d 129 (D.C. Cir. 2008)), appeal filed, No. 08-1037 (D.C. Cir. Jan. 29, 2008).

integrity of its participants." 27/ Indeed, the importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business. 28/ Here, the egregiousness of Kornman's dishonest behavior is compounded because he made his false statement to Commission staff during an ongoing investigation into possible insider trading violations. Providing information to investigators is important to the effectiveness of the regulatory system, and the information provided must be truthful. We have consistently held that deliberate deception of regulatory authorities justifies the severest of sanctions. 29/

Kornman's conduct also exhibited a high degree of scienter. He admitted to the district court that he made his false statement "intentionally, knowing it was false . . . and . . . for the purpose of misleading the [] Commission." 30/

27/ Bruce Paul, 48 S.E.C. 126, 128 (1985).

28/ See, e.g., Ahmed Mohamed Soliman, 52 S.E.C. 227, 230-31 (1995) (revoking registration and imposing associational bars for submitting false documents to IRS, a misdemeanor conviction); Paul, 48 S.E.C. at 128-29 (imposing associational bar, with a right to reapply in non-propriety, non-supervisory capacity in two years, for perjury conviction); Benjamin Levy Sec., Inc., 46 S.E.C. 1145, 1146-47 (1978) (barring associated person based on conviction for making false statements in a loan application); cf. Paul K. Grassi, Jr., Exchange Act Rel. No. 52858 (Nov. 30, 2005), 86 SEC Docket 2494 (sustaining NYSE's imposition of a five-year bar on a member who forged his doctor's name on a blank prescription drug form); Boleslaw Wolny, 53 S.E.C. 590 (1998) (sustaining NASD's revocation of an associated person's registration based on his felony conviction for money laundering); see also John F. Yakimczyk, 51 S.E.C. 56, 58 (1992) (discussing a broker's duty of fair dealing with his clients); Joseph P. D'Angelo, 46 S.E.C. 736, 737 (1976) (discussing an investment adviser's fiduciary duty to his advisory clients), aff'd without opinion, 559 F.2d 1202 (2d Cir. 1977).

29/ See, e.g., Peter W. Schellenbach, 50 S.E.C. 798, 803 (1991), aff'd, 989 F.2d 907 (7th Cir. 1993); Rita Delaney, 48 S.E.C. 886, 890 (1987); Walter B. Bull, Jr., 48 S.E.C. 113, 116-17 (1985).

30/ See, e.g., Gibson, 92 SEC Docket at 2109 (stating that respondent's conduct "evince[d] a high degree of scienter" because "he knew [the private placement memorandum]'s representations with respect to the use of proceeds were misleading and that his actions were clearly contrary to those representations"); Phlo Corp., Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1110-11 (stating that respondent's refusal to complete transfer orders exhibited "extremely high" degree of scienter because respondent knew of statutory obligations from repeated discussions with Commission staff and clearing agent).

Kornman asserts his conduct was isolated, that he recognizes the wrongfulness of his conduct, and that he provides assurances against future misconduct. As he explained in the Kornman Certification: "For quite some time now, I have seen this matter much more clearly. I know that, during the call, I hoped to get information to learn what the call was about. Now I recognize that trying to get information did not justify the way I responded to the SEC attorneys." Kornman stated further: "I wish I had provided the full and entirely accurate response to the SEC attorney's question about authority over the brokerage account, or that I had simply terminated the call in order to consult with counsel. Instead, I overestimated my ability . . . to gather information without doing any harm." Kornman stated he "accept[s] full responsibility for the misconduct during the telephone call and will not repeat anything of the sort in the future."

Notwithstanding the lack of recurrence and Kornman's expressions of remorse and assurances against future violations, which for purposes of considering a summary disposition we accept as sincere, 31/ such factors do not outweigh our concern that Kornman will present a threat if we permit him to remain in the securities industry. The securities industry presents continual opportunities for dishonesty and abuse and depends heavily on the integrity of its participants and on investors' confidence. 32/ Kornman's deliberate attempt to deceive Commission investigators during an investigation into insider trading indicates a lack of honesty and integrity, as well as a fundamental unfitness to transact business associated with a broker or dealer and to advise clients as a fiduciary. 33/

Kornman makes multiple arguments that are essentially collateral attacks on his conviction and the admissions he made in his plea agreement and accompanying Factual Resume. Kornman is estopped from such attacks. The doctrine of collateral estoppel prevents relitigating the factual findings or the legal conclusions of an underlying criminal proceeding in a follow-on administrative proceeding. 34/ In any event, his arguments are unpersuasive.

31/ See 17 C.F.R. § 201.250(a) (stating that "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true . . . .").

32/ See Seghers, 91 SEC Docket at 2304 & n.42; Grassi, 86 SEC Docket at 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).

33/ See Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315 (1985) ("The primary objective of the federal securities laws [is the] protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.'") (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963)).

34/ See, e.g., Jose P. Zollino, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2604-05 & n.20 (stating the basis for a follow-on proceeding "is the action of

(continued...)

Kornman characterizes his misconduct as "a single 'dilatory I don't know' [answer] to SEC attorneys during one lengthy telephone call" and analogizes this response to "the 'exculpatory no' doctrine" based on the Fifth Amendment. According to Kornman, this doctrine restrains prosecutors "from pursuing false statement charges against parties who have done nothing more than state a false 'exculpatory no.'" 35/ Kornman asserts that a "'dilatory I don't know' is even less culpable than an 'exculpatory no.'" Kornman relies primarily on the concurring opinion in Brogan v. United States 36/ in which Justice Ginsburg discusses the "exculpatory no" doctrine and its implications on Fifth Amendment rights in a challenge to petitioner's conviction under 18 U.S.C. § 1001. Kornman's reliance on this concurrence is inapposite. The validity of Kornman's conviction is not at issue here. Moreover, the majority opinion in Brogan expressly rejected the "exculpatory no" doctrine in 18 U.S.C. § 1001 cases, 37/ and Justice Ginsburg ultimately concurred in upholding Brogan's conviction.

Kornman also challenges the materiality of his answer to Commission investigators, arguing that they "already possessed the information for which they asked," instructed Kornman "he could supplement his answers with documents," and did not ask any "follow-up questions regarding whether [] Kornman had authority over the brokerage account at issue after he stated that he did not know who possessed such authority." Kornman further asserts that he was not required to answer the investigator's questions during the October interview. With respect to his state of mind during the October interview, he asserts that there is nothing in the record that supports the law judge's finding that his scienter rose to a high degree.

In pleading guilty to 18 U.S.C. § 1001, Kornman admitted to each of its elements. In particular, Kornman admitted that he made his false statement "intentionally, knowing it was

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34/ (...continued)
district court -- in convicting and enjoining him -- and its purpose is not to revisit the factual basis for that action"); Robert Sayegh, 54 S.E.C. 46, 51 & n.19 (rejecting factual and legal challenges to underlying district court case); see also Montana v. United States, 440 U.S. 147, 153-54 (1979) (stating that collateral estoppel "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate" and thereby "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions").

35/ See generally United States v. Weiner, 96 F.3d 35, 37 (2d Cir. 1996) ("[T]he doctrine embodies the view that Section 1001 is generally not applicable to false statements that are essentially exculpatory denials of criminal activity.").

36/ 522 U.S. 398, 408 (1998) (Ginsburg, J., concurring).

37/ Id. at 402-05 (majority opinion).

false," that the statement was material, 38/ and that he made the false statement with the express "purpose of misleading" the Commission. Such unequivocal admissions on the gravity of his statement and the culpability involved belie his characterization that his false statement was trivial, "dilatory" in nature, and his mental state less than intentional.

Kornman argues that various factors should mitigate the sanction imposed, citing specifically his age, 39/ that he is winding down his career, that he has no prior criminal or disciplinary history, and that neither the Commission nor the investing public suffered any harm as a result of his conduct. Kornman contends that he has "already suffered substantial losses, including the loss of a once thriving company with a successful team of more than one hundred employees, while enmeshed in more than three years of litigation defending against now-dismissed SEC and criminal fraud charges." Kornman asserts further that a permanent bar would prevent him "from ever returning to his most readily available livelihood, namely, the sale of variable life insurance and annuities, which can require some form of association with a broker-dealer."

We do not view Kornman's age or lack of disciplinary history as mitigation to sanctions. 40/ More important for public interest purposes is whether Kornman's occupation will present opportunities for future violations. It is clear that, if permitted, Kornman intends to remain in the securities industry, further supporting our decision to bar Kornman.

We are unpersuaded by Kornman's claim that neither the investing public nor the Commission was harmed should mitigate the sanction. Although the district court stated in sentencing Kornman that no particular investor was directly harmed by Kornman's conduct, our focus is on the welfare of investors generally and the threat one poses to investors and the

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38/ To ensure against prosecutions for trivial falsifications, Congress amended 18 U.S.C. § 1001 in 1996 to include a materiality element for all of subsection (a). Pub. L. No. 104-292, § 2, 110 Stat. 3459 (1996) (codified as 18 U.S.C. § 1001 (2000)); H.R. Rep. No. 104-680 (1996)).

39/ According to the Central Registration Depository, Kornman was born in 1943.

40/ Morton Bruce Erenstein, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3129 n.37 ("[T]he risk to the investing public posed by an individual who thwarts the regulatory process may be the same regardless of that individual's age."), petition denied, No. 07-15736 (11th Cir. 2008) (unpublished); Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801 ("[T]he lack of disciplinary history is not mitigating for the purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."); see also Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006).

markets in the future. 41/ Moreover, contrary to Kornman's claims, the Commission's processes were harmed by Kornman's false statement to Commission staff. 42/

Our response to Kornman's assertions that he has "already suffered substantial losses" from the several proceedings is that the "[f]inancial loss to a wrongdoer as a result of his wrongdoing" does not mitigate the gravity of his conduct. 43/ The district court, in sentencing Kornman to two years' probation and ordering him to pay $143,465, rather than the maximum $250,000 fine recommended by Commission counsel, took into account that the Commission would likely seek a permanent bar in an administrative proceeding.

Kornman contends that a censure is a more appropriate sanction and cites several cases imposing lighter sanctions for what he perceives as similar misconduct. 44/ The appropriate sanction, however, depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings. 45/ Moreover, the cases upon which Kornman relies are inapposite. In Leo Glassman, 46/ we reduced the sanction imposed by the law judge for respondent's recordkeeping violations to a suspension based on respondent's

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41/ See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2003) (stating that public interest analysis extends beyond interests of a particular group of investors), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975) ("[W]e must weigh the effect of our action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally."), aff'd, 547 F.2d 171 (2d Cir. 1976).

42/ Brogan, 522 U.S. at 402 (stating that "any falsehood" relating to the subject of an investigation into wrongdoing perverts a proper governmental function as "the very *purpose* of an investigation is to uncover the truth") (emphasis in original).

43/ Robert L. Wallace, 53 S.E.C. 989, 996 (1998). Although we may consider respondent's financial losses in assessing one's inability to pay disgorgement, interest, or civil penalties, pursuant to proper motion, these sanctions are not at issue here. Cf. 17 C.F.R. § 201.630.

44/ Kornman charges that the law judge, in fact, failed to consider lesser sanctions as required under Steadman. Our review, however, of the proceeding is de novo, which cures any error that the law judge may have made of this nature. See Rita J. McConville, Exchange Act Rel. No 51950 (June 30, 2005), 85 SEC Docket 3127, 3150 n.61, petition denied, 465 F.3d 780 (7th Cir. 2006), reh'g denied, 2007 U.S. App. LEXIS 926 (7th Cir. 2007), cert. denied, 128 S. Ct. 48 (2007).

45/ See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Geiger v. SEC, 363 F.3d 481, 488 (D.C. Cir. 2004).

46/ 46 S.E.C. 209, 211 (1975).

cooperation with the Division in reconstructing records he had destroyed and our rejection of the law judge's finding of fraud in the transactions at issue. In Raymond L. Dirks, 47/ we reduced respondent's sanction to a censure because of respondent's role "in bringing [a] massive [insider trading] fraud to light." No such mitigating circumstances are present here. Further, J.H. Goddard & Co. 48/ was a settled proceeding. It is well established that "respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as avoidance of time-and-manpower-consuming adversary proceedings." 49/ Kornman's citation to a Pennsylvania Disciplinary Board decision, 50/ for an attorney's violation of Pennsylvania's Rules of Disciplinary Enforcement and Professional Conduct, is not relevant here. Our determination to sanction an individual based on a criminal conviction is guided by the public interest factors set forth above, which are designed to protect investors and uphold the integrity of our financial markets.

Based on our consideration of the factors above, we do not believe a censure, temporary or lesser sanction to be appropriate in the public interest for Kornman's serious misconduct. 51/ The imposition of a bar serves as a deterrent to others in the securities industry against attempts to mislead investigators during the course of their investigations. 52/

47/ 47 S.E.C. 434, 448-49 (1981), aff'd, 681 F.2d 824 (D.C. Cir. 1982), rev'd on other grounds, 463 U.S. 646 (1983).

48/ 42 S.E.C. 638, 642 (1965).

49/ Stonegate Sec., Inc., 55 S.E.C. 346, 355 (2001) (internal quotation marks omitted) (citing Butz, 411 U.S. at 187).

50/ See Office of Disciplinary Counsel v. Obod, 817 A.2d 448 (Pa. 2003) (imposing a retroactive one-year suspension on an attorney for his prior conviction under 18 U.S.C. § 1001).

51/ During oral argument, Kornman attempted to minimize his conduct by arguing that the district court only sentenced him to two years' probation and fined him $143,465 and that he was only suspended, rather than disbarred, as a lawyer from the Alabama State Bar. We view his felony conviction and other sanctions, in addition to the factors considered above, as underscoring the seriousness of his misconduct.

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

IV.

Kornman raises several procedural and other matters on appeal of the law judge's initial decision. He argues that the law judge erred by deciding this matter pursuant to a Rule 250 motion for summary disposition rather than holding an in-person hearing and by denying his request for discovery of materials from the Commission. He also contends that the imposition of a bar based solely on his criminal conviction violates the Double Jeopardy Clause of the Fifth Amendment and that this administrative proceeding is barred by the doctrine of res judicata.

A. Rule 250 of the Commission's Rules of Practice

Rule 250 of our Rules of Practice permits a hearing officer to consider and rule on a motion for summary disposition at any time after a respondent files an answer and the Division has made its documents available to that respondent for inspection and copying. 53/ Kornman asserts that this process violates "the plain language of Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act," which authorizes sanctions only after the Commission "finds, on the record after notice and opportunity for hearing," that such sanctions are in the public interest. 54/ Kornman further asserts that summary disposition was inappropriate because "multiple disputed issues" existed at the time the law judge granted summary disposition and that the law judge failed "to take as true all 'facts of the pleadings of the party against whom the motion [wa]s made,'" as required by Rule 250.

Neither Exchange Act Section 15(b)(4) nor Advisers Act Section 203(f) require holding a trial-like, in-person evidentiary hearing in every administrative proceeding brought under these provisions. The requirement that adjudicatory proceedings be "on the record after notice and opportunity for hearing" does not necessitate an in-person hearing. 55/ Numerous courts have upheld an administrative agency's decision to grant summary disposition, without holding an in-person hearing, when no material fact is in dispute. 56/ In addition, courts have sustained

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53/ 17 C.F.R. § 201.250(a).

54/ 15 U.S.C. § 78*o*(b)(4); 15 U.S.C. § 80b-3(f).

55/ See, e.g., Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743, 747-50 (6th Cir. 2004) (affirming the validity of the Department of Health and Human Services' internal procedure for summary judgment in a sanction proceeding, required by statute to be "on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person").

56/ E.g., Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 606-11 (1st Cir. 1994) (listing agencies that provide for summary disposition and affirming generally the validity of the procedure in administrative proceedings when there is no genuine issue of material

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Commission findings that sanctions were in the public interest following administrative hearings based on summary disposition. 57/ We have repeatedly upheld the use of summary disposition by a law judge in cases such as this one where the respondent has been enjoined or convicted of an offense listed in Exchange Act Section 15(b) and Advisers Act Section 203, the sole determination is the proper sanction, and no material fact is genuinely disputed. 58/

Rule 250 provides that a motion for summary disposition may be granted without the need for holding an in-person hearing if "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 59/ Rule 250(a) gives an advantage to the party opposing summary disposition: "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true . . . ." 60/ Once the Division showed that it had satisfied the criteria for summary disposition, Kornman had the opportunity to produce documents, affidavits, or some other evidence to demonstrate that there was a genuine and material factual dispute that the law judge could not resolve without a hearing. Under Rule 250(b), the hearing officer was required to deny or defer the motion if Kornman had established good cause why he could not present facts by affidavit essential to justify his opposition to the Division's motion. 61/

56/ (...continued)
fact); La. Land and Exploration Co. v. FERC, 788 F.2d 1132, 1137-38 (5th Cir. 1986) ("Where there are no issues of material fact presented which would require an evidentiary hearing, such a hearing is simply not required."); see also Crestview Parke, 373 F.3d at 750 ("[I]t would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact.").

57/ See Seghers v. SEC, 548 F.3d 129, 134-35 (D.C. Cir. 2008) (upholding use of summary disposition in follow-on proceeding); Brownson v. SEC, 66 F. App'x. 687, 688 (9th Cir. 2003) (upholding use of summary disposition during sanctioning) (unpublished); Michael Batterman, 57 S.E.C. 1031 (2004), aff'd, No. 05-0404 (2d Cir. 2005) (unpublished).

58/ See, e.g., Gibson, 92 SEC Docket 2104 (injunction); Seghers, 91 SEC Docket 2293 (injunction); Zollino, 89 SEC Docket 2598 (conviction and injunction); Batterman, 57 S.E.C. 1031 (injunction); Charles Trento, 57 S.E.C. 341 (2004) (conviction); Joseph P. Galluzzi, 55 S.E.C. 1110 (2002) (conviction and injunction); John S. Brownson, 55 S.E.C. 1023 (2002) (conviction), petition denied, 66 F. App'x. 687 (unpublished).

59/ 17 C.F.R. § 201.250.

60/ See Gibson, 92 SEC Docket at 2112 & n.25 (quoting 17 C.F.R. § 201.250(a)).

61/ 17 C.F.R. § 201.250(b).

Kornman's submission of materials before the law judge did not create a genuine issue necessitating an in-person hearing. Kornman attached no exhibits or other materials in his opposition to the Division's motion for summary disposition refuting the Division's exhibits that establish the statutory basis for this proceeding. Rather, Kornman's exhibits consisted solely of materials "relate[d] to the appropriateness of the sanction," which we considered fully above, "not the existence of a genuine issue of material fact." 62/

Kornman argues that, inconsistent with the requirements of Rule 250(a), the law judge failed to accept as true his claims of remorse and assurances against future misconduct. We disagree that the law judge did not accept his claims of remorse, and in any event, any error by the law judge in this regard is cured by our de novo review. 63/ As noted above, we accept these claims as sincere.

With regard to Kornman's assurances against future misconduct, the logic of Kornman's argument appears to be that, if we accept these assurances as true, there can be no risk of future misconduct warranting a bar. We disagree. Although we accept his assurances as sincerely given now, such assurances are not an absolute guarantee against misconduct in the future. As discussed above, we weighed his assurances against the other Steadman factors, particularly the egregiousness of the misconduct and the degree of scienter. We concluded that, notwithstanding the sincerity of his present assurances that he will not commit such misconduct again, the risk that he would not be able to fulfill his commitment is sufficiently great that permanent associational bars are required to protect the public interest.

Kornman fails to explain how an in-person hearing would have produced a fuller and more accurate disclosure of the facts pertinent to his case than the paper hearing process employed by the law judge. 64/ Although Kornman identifies issues that he claims specifically

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62/ Seghers, 548 F.3d at 134. We have stated that, in a follow-on proceeding, summary disposition may be inappropriate in certain rare circumstances when "a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct." See, e.g., Brownson, 55 S.E.C. at 1028 n.12. We do not believe the materials Kornman submitted raise a genuine issue of mitigation that requires holding an in-person hearing. See supra Section II.B.

63/ See supra note 44.

64/ See Sierra Ass'n for Env't v. FERC, 744 F.2d 661, 663 (9th Cir. 1984) (holding that "a trial-type hearing" is not always required because such a hearing was not necessary for a "full and true disclosure of the facts"); see also Cent. Freight Lines v. United States, 669 F.2d 1063, 1068 (5th Cir. 1982).

required an in-person hearing, 65/ he identifies no fact that we did not accept that, if proved, would have been material to the outcome and identifies no witness, document or other evidence that he might have adduced at an in-person hearing to prove these issues. 66/ Nor does Kornman address his failure, under Rule 250(b), to explain to the law judge why he could not present facts by affidavit essential to oppose the Division's motion. His claims, as presented, fail to establish that a genuine issue of material fact exists, but "relate[] to the appropriateness of the sanction, not the necessity of a hearing," as noted above. 67/

B. Kornman's Discovery Request

Kornman asserts that the law judge erred in denying his request for discovery of evidence that he claims will demonstrate his offense is less egregious than other offenses under 18 U.S.C. § 1001. Specifically, Kornman sought materials from the Division allegedly reflecting that Commission attorneys at the time of the October interview knew that Kornman was represented by counsel "in pending civil matters"; that "contrary to their statements during the [interview], the [] attorneys were already working with criminal investigators"; that the "attorneys already had the information they were requesting from [him]"; and "when and how government attorneys became aware that at least one witness on whom the government relied coached any witnesses against [] Kornman." Further, Kornman sought any notes the Commission attorneys made during the October interview. The law judge rejected Kornman's request, stating that "[a]ny challenge to the propriety of the [Commission's] staff's conduct" relating to the October interview should have been directed to the district court handling Kornman's criminal case.

We agree with the law judge that these requests appear to seek information supporting Kornman's allegations as to Commission staff misconduct during the criminal matter. 68/ As

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65/ In particular, Kornman cites the degree of his scienter, his recognition of his wrongful conduct, and his "plans for the future" as genuine issues in dispute.

66/ Kornman states that, if he were given an opportunity to testify, he would address more fully his remorse and plans for the future. However, the Kornman Certification addresses both issues, and he has not explained what else he will add to this submission or why he did not just put it in the certification.

67/ Seghers, 548 F.3d at 135.

68/ Kornman suggests that his "dilatory I don't know" was in some way the fault of improper conduct by Commission investigators. Kornman should have raised these defenses before the district court. See Harold F. Harris, Exchange Act Rel. No. 53122A (Jan. 13, 2006), 87 SEC Docket 362, 371 (rejecting claim of unclean hands by Division in underlying injunctive proceeding); Galluzzi, 55 S.E.C. at 1117 & n.23 (rejecting claim of

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discussed above, Kornman may not collaterally attack the underlying criminal proceeding, and the law judge acted appropriately in rejecting his requests. Moreover, the full transcript of the October interview shows that Commission investigators offered to defer their questions until Kornman consulted with an attorney, but Kornman stated to the investigators that he was not represented by counsel at the time and continued with the interview. Kornman does not explain the relevance of his assertion that Commission staff may have been working with criminal investigators. 69/ He also offers no bases for his other speculations. 70/

C. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." 71/ Kornman contends that imposing a permanent bar based solely on his criminal conviction violates the Double Jeopardy Clause because it represents a "second criminal punishment in a successive proceeding." Kornman asserts that "'jeopardy' attached when the [district] court accepted [his] guilty plea," precluding the imposition of associational bars in this administrative proceeding.

We rejected this argument with respect to a broker-dealer bar in William F. Lincoln. 72/ In Lincoln, we noted that the controlling Supreme Court case on this question, Hudson v. United

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68/ (...continued)
agency bad faith in underlying criminal matter); see also discussion, supra, concerning impermissible collateral attacks.

69/ See United States v. Stringer, 535 F.3d 929, 936-37 (9th Cir. 2008) (holding that, absent bad faith, the government has a right to conduct parallel civil and criminal investigations and to share information among agencies), cert. denied, 129 S. Ct. 662 (2008); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1376-77 (D.C. Cir. 1980) (en banc) (same).

70/ At oral argument, Kornman asserted that our recent decision in Byron S. Rainner, Exchange Act Rel. No. 59040 (Dec. 2, 2008), __ SEC Docket __, requires full discovery of the materials he seeks. However, in Rainner, we remanded the proceeding to the law judge for the Division's admitted failure, under Commission Rule 230(a), to make its entire investigative file available for inspection and copying to an incarcerated respondent. As explained in the text, Kornman's request does not pertain to existing information in the Division's investigative file, but to new discovery he seeks. Thus, Rainner is inapposite.

71/ U.S. Const. amend. V.

72/ 53 S.E.C. at 459-62.

States, 73/ held that the Double Jeopardy Clause does not protect against all additional sanctions "that could, in common parlance, be described as punishment," but "only against . . . multiple criminal punishments for the same offense." We stated in Lincoln that, based on our analysis of Hudson, "there is no indication, let alone 'the clearest proof' required by Hudson," that a broker-dealer bar is a criminal penalty. 74/ The same result applies to an investment adviser bar. As with a broker-dealer bar, no scienter finding is required, the sanction is remedial because it is designed to protect the public, and the sanction is not historically viewed as punishment. Moreover, the fact that Congress confers authority solely on the Commission to institute follow-on administrative proceedings under Exchange Act Section 15(b) and Advisers Act Section 203 is "prima facie evidence that Congress intended to provide for a civil sanction." 75/

Kornman attempts to distinguish Hudson on the basis that "the civil remedy [in Hudson] was imposed *in advance* of the criminal proceeding." 76/ Federal courts applying Hudson, however, have repeatedly upheld the imposition of civil sanctions subsequent to a criminal conviction, in the face of Double Jeopardy challenges. 77/ Kornman's citations to earlier

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73/ 522 U.S. 93, 98-99 (1997) (internal quotation marks omitted).

74/ Lincoln, 53 S.E.C. at 460. Kornman's references to Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996), and SEC v. Jones, 476 F. Supp. 2d 374 (S.D.N.Y. 2007), to argue that a bar constitutes a "penalty," are inapposite. Both cases pertain to the applicability of the five-year statute of limitations of 28 U.S.C. § 2462, which entails a different analysis from the constitutional question here. See Benjamin G. Sprecher, 52 S.E.C. 1296, 1301 n.25 (1997).

75/ Cox v. CFTC, 138 F.3d 268, 272 (7th Cir. 1998) (quoting Hudson, 522 U.S. at 103). In contrast, jurisdiction to bring criminal proceedings under the securities laws lies exclusively with the U.S. Attorney General, not the Commission. See 15 U.S.C. §§ 77t(b), 78u(d)(1), 80b-9.

76/ Emphasis in original.

77/ E.g., Cox, 138 F.3d at 272-74 (finding lifetime bar from commodities trading not a criminal punishment under Double Jeopardy Clause); SEC v. Palmisano, 135 F.3d 860, 864-65 (2d Cir. 1998) (finding disgorgement and civil penalty in Commission civil enforcement action not criminal punishment under Double Jeopardy Clause); see also Morse v. C.I.R., 419 F.3d 829, 834-35 (8th Cir. 2005); Myrie v. Comm'r, N.J. Dept. of Corr., 267 F.3d 251, 255-60 (3d Cir. 2001); Grossfeld v. CFTC, 137 F.3d 1300, 1302-04 (11th Cir. 1998).

Supreme Court decisions United States v. Halper 78/ and Montana v. Kurth Ranch 79/ are inapposite. The Court in Hudson rejected the Halper decision, describing Halper as "ill considered" because it deviated from traditional Double Jeopardy principles, failing to consider whether: (1) "the successive punishment at issue is a 'criminal punishment,'" and (2) "the 'statute on its face' provided for what amounted to a criminal sanction." 80/ Finding the Halper test "unworkable" for determining whether a particular sanction is punitive, the Court reinstated its earlier test for making this determination. 81/ Similarly, the Kurth Ranch decision, which relied on Halper, has minimal relevance in light of Hudson. 82/

D. Res judicata

The doctrine of res judicata, or claim preclusion, "bars litigation of any claim for relief that was available in a prior suit between the same parties or their privies, whether or not the claim was actually litigated." 83/ Kornman asserts that res judicata applies to this administrative proceeding because "[a]fter the dismissal of its civil action, attorneys for the Commission appeared at Mr. Kornman's [criminal] sentencing, requested disgorgement and, with Mr. Kornman's consent, received the requested amount of monetary relief." Kornman argues that the Commission's appearance in the criminal case precludes the institution of this proceeding.

78/ 490 U.S. 435 (1989).

79/ 511 U.S. 767 (1994).

80/ Hudson, 522 U.S. at 101-02.

81/ Id. at 99-100 (applying Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and United States v. Ward, 448 U.S. 242 (1980)); see also Cutshall v. Sundquist, 193 F.3d 466, 473-74 (6th Cir. 1999) ("In backing away from Halper, the [Hudson] Court voiced a concern about the wide variety of novel double jeopardy claims spawned in the wake of Halper . . . ."); Palmisano, 135 F.3d at 864 ("Even assuming that Palmisano's contentions . . . [are] valid under Halper, they are plainly meritless in light of Hudson . . . in which the Supreme Court largely 'disavow[ed] the method of analysis used in [] Halper.'").

82/ See United States v. Warneke, 199 F.3d 906, 908 (7th Cir. 1999) ("The analytical approach employed in Kurth Ranch, which actually came from []Halper . . . was jettisoned in Hudson . . . ."); see also Hudson, 522 U.S. at 106 (Scalia, J., concurring) (noting "absurdity of trying to force the Halper analysis upon the Montana tax scheme at issue in [] Kurth Ranch").

83/ Transaero, Inc. v. La Fuenza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) (internal quotation marks and citation omitted); see also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 n.5 (1979).

To sustain a res judicata defense, a party must establish: (1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits. 84/ Here, while a final judgment was entered in the criminal matter, the cause of action in the earlier proceeding is not identical to the later one. The basis for the criminal proceeding was Kornman's false answer to investigators, and the basis for this proceeding is the existence of the criminal conviction itself. 85/

The third requirement is not met, either, because there was no privity between the U.S. Attorney and our Enforcement Division during the criminal proceeding to preclude this follow-on proceeding. "Privity is a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." 86/ The Division did not enjoy the same rights as the U.S. Attorney during the criminal matter. The U.S. Attorney has no statutory right to bring an administrative proceeding seeking administrative sanctions or to seek the bars sought here in the context of a criminal proceeding, and the Commission has no right to join the criminal proceeding and seek the remedy we are imposing here. 87/ Moreover, Kornman's plea agreement acknowledged the possibility of future proceedings, including specifically an "administrative proceeding" such as this one: "This agreement is limited to the United States Attorney's Office for the Northern District of Texas and does not bind any other federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against Kornman or any property." Accordingly, for the above reasons, we reject Kornman's res judicata arguments.

* * * *

84/ Jones v. SEC, 115 F.3d 1173, 1178 (4th Cir. 1997) (internal quotation marks and citations omitted).

85/ Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 327-28 (1955) (holding that res judicata does not apply where claim advanced in the second suit did not exist at time of first suit); see also Prime Mgmt. Co. v. Steinegger, 904 F.2d 811, 816 (2d Cir. 1990) (same).

86/ Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005) (internal punctuation omitted) (quoting Sw. Airlines Co. v. Tex. Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir. 1977)).

87/ Compare 15 U.S.C. §§ 77t(b), 78u(d)(1), 80b-9(d) (conveying sole jurisdiction to U.S. Attorney General for instituting criminal proceedings under the securities laws), with 15 U.S.C. §§ 78*o*(b), 80b-3(f) (authorizing Commission to bring follow-on administrative proceedings); see also 17 C.F.R. § 205.5(f) ("[N]either the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.").

Kornman's conviction for providing a false statement to Commission staff during an investigation into possible insider trading raises serious doubts about his honesty and fitness to remain in the securities industry. Under the circumstances, we have determined it appropriate in the public interest to bar Kornman from associating with any broker, dealer, or investment adviser.

An appropriate order will issue. 88/

By the Commission (Chairman SCHAPIRO and Commissioners CASEY, WALTER, AGUILAR and PAREDES).

Elizabeth M. Murphy
Secretary

By: J Lynn Taylor
Assistant Secretary

88/ 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

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59403 / February 13, 2009

INVESTMENT ADVISES ACT OF 1940
Rel. No2840 / February 13, 2009

Admin. Proc. File No. 3-12716

In the Matter of

GARY M. KORNMAN
c/o Barry S. Pollack, Esq.
Sullivan & Worcester LLP
One Post Office Square
Boston, MA 02109
and
Janet K. DeCosta, Esq.
International Square
1825 Eye Street, N.W., Ste. 400
Washington, D.C. 20006

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Gary M. Kornman be barred from association with any broker or dealer; and it is

ORDERED that Gary M. Kornman be barred from association with any investment adviser.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

Chairman Schapiro and Commissioner Walter not participating

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59404 / February 13, 2009

Admin. Proc. File No. 3-12988

In the Matter of the Application of

LUIS MIGUEL CESPEDES
c/o Jonathan Schwartz, Esq.
Law Offices of Jonathan Schwartz
4640 Admiralty Way, Fifth Floor
Marina del Rey, CA 90292

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade
Unsuitable Recommendations

Former registered representative made unsuitable investment recommendations to customers. Held, association's findings of violations and the sanctions imposed are sustained.

APPEARANCES:

Jonathan Schwartz, of The Law Offices of Jonathan Schwartz, for Luis Miguel Cespedes.

Linda Riefberg, Tracy Timbers, Danielle Schanz, Ron Sannicandro, Dana Yoon, and Kelli Smith, for FINRA, on behalf of NYSE Regulation, Inc.

Appeal filed: March 11, 2008
Last brief received: June 2, 2008

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I.

Luis Miguel Cespedes, formerly a registered representative associated with Financial Industry Regulatory Authority ("FINRA") member firm A.G. Edwards and Sons, Inc. ("A.G. Edwards" or the "Firm"), appeals from an NYSE Regulation, Inc. (the "NYSE") disciplinary action against him. 1/ The NYSE found that Cespedes recommended and effected unsuitable transactions that resulted in high concentrations of technology sector unit investment trusts ("UITs") in the accounts of fourteen of his customers, 2/ frequently using margin debt, without due consideration of the age, investment experience, financial sophistication, and personal circumstances of the customers. The NYSE found that Cespedes's conduct was inconsistent with just and equitable principles of trade. 3/ The NYSE censured Cespedes and imposed a ten-year bar from membership, allied membership, approved person status, and from employment or association in any capacity with any NYSE member or member organization. Our findings are based on an independent review of the record.

II.

At issue in this proceeding are the recommendations and purchases that occurred in the accounts of fourteen Cespedes customers from 1999 to 2001. Eight of the customers at issue testified, either in person, by telephone, or by video conference, during the hearing. 4/ The

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1/ On July 26, 2007, the Commission approved proposed rule changes 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. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation were transferred to NASD, and the expanded NASD changed its name to the Financial Industry Regulatory Authority, or FINRA. See Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the proceeding was initiated by NYSE Regulation, we use the designation "NYSE" in this opinion.

2/ Section 4(2) of the Investment Company Act of 1940 defines a UIT as "an investment company which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities; but does not include a voting trust." 15 U.S.C. § 80a-4(2).

3/ NYSE Rule 476(a)(6) provides that members and their employees can be disciplined for conduct that is "inconsistent with just and equitable principles of trade."

4/ The testifying customers were Dolores A, Marilynn A, Carole D, Antonina G, Maria G, Yolanda G, Elaine K, and Edwin W. The non-testifying customers were Josephine F, James J, Lucille M, Hortence M, Norah P, and Joseph Z. At least one customer, Joseph

(continued...)

NYSE also introduced account documentation, including monthly statements, trading slips, correspondence records, arbitration pleadings, and complaint letters for both the testifying and non-testifying customers. 5/ The NYSE called an expert witness, and Cespedes and his former assistant at the Firm testified. The record also includes Cespedes's investigative testimony.

The testifying customers stated that they trusted Cespedes to make investment recommendations suited to their financial circumstances and that Cespedes recommended the investments in their accounts. During the relevant period, Cespedes recommended that all of the customers at issue purchase shares in UITs. UITs are baskets of stocks or bonds, often composed of the securities of companies within a specific sector of the economy, that form a defined portfolio for a pre-determined period of time. 6/ Unlike a typical mutual fund, a UIT is not actively managed, meaning that the portfolio generally will not change during the course of the UIT's existence regardless of any changes in market circumstances. UITs generally do not have management fees, which exist in most open-end mutual funds. None of the customers at issue had heard of UITs prior to Cespedes's recommendations.

Cespedes further recommended that all fourteen customers purchase significant concentrations of UITs in the technology sector, so that the vast majority and, in some cases, the entirety of the accounts were invested in technology sector UITs. First Trust Portfolios, which issued the majority of the technology sector UITs that Cespedes recommended here, stated in its promotional materials:

> Because the [UIT] portfolios place such an emphasis on concentration, many of the portfolios are subject to additional risks. For instance, portfolios that are heavily weighted in only a few stocks or portfolios that are focused on only one sector involve

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4/ (...continued)
Z, had died prior to the hearing. Customer James J, discussed in greater detail below, was unwilling to testify in part due to the fact that he had re-hired Cespedes as his broker subsequent to the settlement of an arbitration complaint he filed against A.G. Edwards.

5/ All fourteen customers at issue filed arbitration complaints against A.G. Edwards related to Cespedes's management of their accounts. The Firm reached settlement agreements with twelve of the customers for a total amount of approximately $1,100,000. Cespedes personally contributed $20,000 to the Firm's settlement with one of the customers, James J, but did not contribute to any of the other settlements. The record does not indicate the disposition of the arbitration proceedings brought by the two customers who did not receive settlement payments from the Firm.

6/ The owner of a share in a UIT receives a proportional ownership of the shares that constitute the UIT's portfolio, based on the dollar amount of the customer's investment. The price of a UIT share is based on the current net asset value of the share.

increased volatility. You should consider investing in more than one sector or pairing these types of portfolios with more diversified investments in your overall portfolio.

During Cespedes's hearing, the NYSE introduced charts showing volatility and sharp price drops in the UITs Cespedes recommended to these customers during the relevant time period. The NYSE's expert witness also testified that the technology UITs recommended by Cespedes experienced a significant degree of volatility during the time period and experienced significant losses in share price. 7/ Investments in the accounts that were not in UITs also tended to be in the technology sector.

Cespedes also recommended that his customers use margin debt to make purchases in many of the customer accounts. Margin increased the amount of loss the customers suffered when the share prices of the UIT or other security declined because the customers were forced to sell securities from their accounts at a loss to cover margin calls and to pay interest on the margin debt their accounts accrued. The testifying customers with margin accounts stated that they did not understand margin and that Cespedes did not explain margin to them or tell them that their accounts had accrued margin debt to purchase securities. Below we discuss the transactions in the accounts of some representative customers.

Marilynn A. Marilynn A worked as an administrative assistant at a high school with an annual salary of $35,000 and was in her late forties when she opened an A.G. Edwards account with Cespedes in February 2000. Marilynn A retired from her position at the school in April 2006. Marilynn A's sole prior investment experience was her participation in an employer-sponsored retirement plan, which was worth less than $10,000.

Marilynn A inherited a sizeable amount of money when her parents died in 1999. Because she had never before invested that much money, Marilynn A sought financial advice from Cespedes, with whom her husband had an account. After a meeting with Marilynn A in late 1999, Cespedes provided a handwritten list of his suggested investments for her account. This list included UITs, but Cespedes never explained to Marilynn A what UITs were. 8/ Cespedes also did not explain to Marilynn A that he intended to use margin debt to purchase securities in her account.

7/ For example, the First Trust Technology Growth Fund #12 had a price per share of over $10 on March 24, 2000. After a period of volatility, the price of the shares began a steady decline on or about September 8, 2000, before ultimately reaching a price of just over $2 per share on or about September 7, 2001. Other technology sector UITs that Cespedes recommended exhibited similar patterns of volatility and share price decline during this period.

8/ The list assumed that Marilynn A would invest $430,000 and recommended that Marilynn A invest $200,000 of this amount in technology sector UITs.

Marilynn A opened her account in March 2000 with $275,000, nearly her entire liquid net worth. Soon thereafter, she withdrew approximately $55,000 to pay bills and for other expenses. At the time, Marilynn A told Cespedes that she "didn't want to lose [her] principal no matter what." Almost immediately after Marilynn A's initial deposit, Cespedes invested the entire amount of Marilynn A's account in UITs, representing approximately 103% of her account value (the "Total Account Value," the term used on A.G. Edwards account statements, which is the full value of the securities in the account minus margin debt), with over half of those UITs in the technology sector. 9/ In September 2000, Cespedes increased the concentration of the account in technology sector UITs. In October 2000, after Cespedes purchased even more technology sector UITs on margin, technology sector UITs represented 137.5% of the Total Account Value at the end of that month, with a margin balance of approximately $36,500.

During 2000, Marilynn A's husband became seriously ill. Marilynn A testified that Cespedes was aware of her husband's condition. In 2000 and 2001, Marilynn A wrote a number of checks against her account, totaling approximately $36,000, including a check to purchase an automobile for her son. Marilynn A testified that Cespedes told her to notify him when she wanted to write checks against her account, so that he could sell securities to cover the checks. Marilynn A contacted Cespedes's office as soon as she wrote each of the checks against her account and spoke either to Cespedes personally or to one of his assistants. Marilynn A further testified that she only wrote checks against her account when the value of the securities in the account had increased and that she assumed that Cespedes would sell the securities necessary to cover the checks. However, Marilynn A later learned that no such liquidations took place, and the checks simply added to the margin debt in her account. By October 2000, Marilynn A's account maintained a margin balance of $56,000.

Before Marilynn A ultimately closed her account and moved her investments to a different firm, Marilynn A testified that her Total Account Value dropped from the initial investment of approximately $220,000 to $24,000. Marilynn A's July 2001 account statement (the last A.G. Edwards account statement included in the record) shows her account invested 100% in technology sector UITs, with a Total Account Value of approximately $37,000.

Antonina and Maria G. The G sisters were age thirty-six and thirty-two respectively. Neither sister had any investment experience prior to opening their accounts with Cespedes, and both trusted Cespedes to make suitable investment recommendations for them. Their modest savings and liquid net worth derived in large part from a one-time lawsuit settlement.

Antonina G maintained both a personal and an IRA account with Cespedes during the relevant period. In July 2000, the majority of Antonina G's personal account was invested in technology sector UITs, and most of the remainder of the account was invested in other securities

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9/ The UIT investments represented over 100% of the Total Account Value because of the use of margin debt. Cespedes used the margin debt to purchase securities in the account with a greater value than the customer's amount invested.

in the technology sector. In February 2001, Antonina G's entire IRA account was invested in securities in the technology sector. Maria G's entire account was invested in technology sector UITs during the relevant period. Both sisters lost significant portions of their already modest savings and net worths during the relevant period.

Hortence M. Hortence M was a 79-year-old retired nurse with an annual income of $45,000. Hortence M did not testify at the hearing, but her new account documents state that, when she opened her account in May 1999, she had a net worth of $815,000 and thirty-eight years of prior investment experience. However, Cespedes stated during his investigative testimony that Hortence M "was not truly savvy about investing." He further admitted that Hortence M did not request that Cespedes invest her account heavily in technology sector UITs, but rather that Cespedes recommended the strategy to her. Cespedes stated that Hortence M's decision to sell off her "conservative" investments to buy more technology sector UITs "was [Cespedes's] advice, not hers. [Hortence M] only wanted to get her dividends."

In July 2000, when Cespedes began to sell off Hortence M's investments in other sectors to increase her concentration in the technology sector, Hortence M's Total Account Value was approximately $563,000. By February 2001, Hortence M's previously diversified account was invested 140.3% in technology sector UITs, owing to a margin balance of over $109,000, and the Total Account Value had decreased to approximately $266,000.

Carole D. Carole D opened an A.G. Edwards account with Cespedes in 1995, when she was employed as the marketing director of an architectural firm. In 2000, Carole D left her job with the architectural firm with a $120,000 severance payment. She then sold her home and received an additional $66,000 from the proceeds of that sale. She invested these funds with Cespedes. Carole D had previously made a few relatively small investments in penny stocks on the recommendation of her former employer and a friend and participated in the architectural firm's profit-sharing plan, but otherwise lacked investment experience prior to opening her accounts with Cespedes.

Carole D testified that she made clear to Cespedes that she needed to protect her $186,000 investment, describing it as "[her] nut, and it's got to be protected, it just has to be." Carole D told Cespedes that she intended to start her own business as an interior decorator and hoped to withdraw approximately $1,500 a month from her A.G. Edwards account for living expenses. Carole D testified that she understood that margin was "like a credit card," but Cespedes never told her that he intended to use margin in her account. As Carole D made her regular $1,500 withdrawals, she was under the mistaken impression that Cespedes sold securities in her account to provide the funds. Instead, each withdrawal increased the margin debt in the account.

In May 2000, shortly after Carole D had deposited the $186,000 in her account, Cespedes had invested 89.9% of the Total Account Value in UITs, over 60% of which were in the technology sector. At that time, the Total Account Value was approximately $160,000. By

February 2001, UITs totaled 193% of the Total Account Value, owing partly to a margin balance of nearly $54,000. The Total Account Value at that time was approximately $44,000. At that time, twelve of the thirteen UITs in Carole D's account were in the technology sector, including several different semiconductor UITs. Carole D's account, which she started with an initial investment of approximately $186,000, had a Total Account Value of approximately $33,000 when she closed the account in 2001.

Dolores A. At the time Dolores A opened her A.G. Edwards accounts (an IRA and a personal account), she was sixty-one years old, divorced, about to retire as a dispatch clerk, and served as the sole source of financial support for teenage children. Dolores A had accumulated her employer's stock through a regular payroll deduction plan, which represented her only prior investment experience. Cespedes did not discuss with Dolores A the use of margin in her accounts, and Dolores A testified that she did not understand what margin was. However, Cespedes asked her to sign a margin agreement at the time she opened the accounts. When Dolores A noticed a margin balance on her account statement and asked Cespedes to explain it to her, Dolores A testified, "[Cespedes] said not to worry about that, he was buying stuff and that we would be making money and he would take care of that. After all, [Cespedes] said, he knew what he was doing."

In late 1996, the Total Account Value of Dolores A's IRA account was approximately $137,000, over 82% invested in mutual funds across various sectors (including one technology sector mutual fund). By November 2000, however, the IRA account was invested over 78% in the shares of Intel Corporation, call options in the same stock (although Dolores A testified that she did not understand options trading and never discussed it with Cespedes), and nearly 25% in technology sector UITs. At that time, the Total Account Value of the IRA account was approximately $238,000. By the time of the 2006 hearing, Dolores A's IRA account had a value of approximately $88,000.

In October 1997, the Total Account Value of Dolores A's personal account was approximately $60,000, and the account was invested over 90% in the equities of three technology companies. The account had a margin balance equal to 1.3% of the Total Account Value. By September 2000, however, an equity position in a single technology stock represented over 202% of the Total Account Value, and technology sector UITs represented 117.6% of the Total Account Value. The margin balance of the account was over $72,000 at the time, and the Total Account Value had decreased to approximately $33,000. Dolores A testified that, at the time she closed her account, her entire personal account was liquidated to cover margin calls and, at age seventy-two, she took a job as a parking attendant to make ends meet.

* * *

The remaining customers at issue in this proceeding shared many of the same characteristics as the customers discussed above: (1) they had reached, or were near, retirement age; (2) they had relatively modest annual incomes and net worths; (3) the total size of their

investment accounts was relatively modest; and (4) they lacked significant prior investment experience. Cespedes nonetheless recommended that their accounts be concentrated in the technology sector. Appendix A, attached hereto, includes specific information about the age, employment status, income and net worth, and investment experience of all of the Cespedes customers at issue. Appendix B, attached hereto, provides detailed information about the technology sector concentrations in and the overall size of the accounts.

III.

Pursuant to Section 19(e) of the Securities Exchange Act of 1934, 10/ we will sustain the NYSE's decision if the record shows that Cespedes engaged in the violative conduct that the NYSE found and that the NYSE applied its rules in a manner consistent with the purposes of the Exchange Act. Based on our independent review of the record, we find that a preponderance of the evidence supports the NYSE's findings of violation against Cespedes. 11/

A registered representative is obligated to make "a customer-specific determination of suitability and to tailor his recommendations to the customer's financial profile and investment objectives." 12/ Even if a customer understands a broker's recommendation and decides to follow it, this does not relieve the broker of the obligation to make reasonable

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10/ 15 U.S.C. § 78s(e).

11/ Cespedes states that "the accepted standard for evidence to support the findings of an administrative determination is that such evidence be 'substantial,' such that a reasonable mind would accept it as adequate to support a conclusion," citing Richardson v. Perales, 402 U.S. 389 (1971). That case, however, articulates the standard for judicial review of an administrative determination. It is well-established that preponderance of the evidence is the applicable standard of proof the Commission applies in its review of self-regulatory organization disciplinary proceedings. See, e.g., David M. Levine, 57 S.E.C. 50, 73 n.42 (2003) (holding that preponderance of the evidence is the standard of proof in self-regulatory organization disciplinary proceedings); Kirk A. Knapp, 51 S.E.C. 115, 130 n.65 (1992) (stating that "the correct standard is preponderance of the evidence" in an NASD proceeding).

We also note that the preponderance standard is a higher standard of proof than substantial evidence. See, e.g., FPL Energy Maine Hydro LLC v. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002) ("The 'substantial evidence' standard requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.").

12/ F.J. Kaufman & Co. Of Virginia, 50 S.E.C. 160, 164 (1989).

recommendations. 13/ By recommending unsuitable transactions, a registered representative acts inconsistently with just and equitable principles of trade. 14/

Each of the investors here had similar profiles with respect to their financial situations and needs. With the exception of the G sisters, Cespedes's customers were retired or close to retirement, indicating a lack of future earning capacity and consequent greater dependence on their investments for day-to-day living expenses. For example, Dolores A, discussed above, was near retirement, with relatively modest savings, and had financial responsibility for teenage children. Several of the customers, including Marilynn A and Carole D, testified that they told Cespedes that they needed to protect their principal and that it represented their entire life savings. 15/

Although Antonina and Maria G were younger than the other customers at issue, and the size of their accounts relative to their age and potential future earning power was greater than for the other investors, they had obtained a significant portion of their initial investments through a one-time lawsuit settlement, and their modest income levels militated in favor of the avoidance of risk. 16/ We have observed that the relative youth of a customer of modest means who lacks significant investment experience does not justify a broker's recommendations that the customer invest in a highly concentrated and risky manner. 17/

Cespedes also knew that some of the customers made regular withdrawals from their accounts for their daily living expenses. For example, Cespedes was aware that customer Carole

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13/ Clinton Hugh Holland, Jr., 52 S.E.C. 562, 566 (1995) (citing Paul F. Wickswat, 50 S.E.C. 785, 786-87 (1991)), aff'd 105 F.3d 665 (9th Cir. 1997); Eugene Erdos, 47 S.E.C. 985, 989 (1983), aff'd, 742 F.2d 507 (9th Cir. 1984)).

14/ See, e.g., id.

15/ The NYSE expressly found each of the testifying witnesses to have testified credibly. Credibility determinations of an initial fact finder are entitled to considerable weight. Joseph Abbondante, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 209 n. 21 (citing Laurie Jones Canady, 54 S.E.C. 65, 78 n.23 (1999) (citing Anthony Tricarico, 51 S.E.C. 457, 460 (1993)), petition denied, 230 F.3d 362 (D.C. Cir. 2000)), petition denied, 209 Fed. Appx. 6 (2d Cir. 2006) (unpublished).

16/ See James B. Chase, 56 S.E.C. 149, 152 (2003) (finding that an unmarried college student, with low income and lacking investment experience "demanded an investment strategy that limited risk").

17/ Chase, 56 S.E.C. at 158 (finding unsuitable broker's recommendation that customer invest entire account in a single security even though customer was "young with a lifetime of earning potential").

D needed to make $1,500 monthly withdrawals from her account to pay for her living expenses. Cespedes also knew that Marilynn A and other customers wrote checks against their accounts in order to make car payments and for other ordinary living expenses. All of the customers had relatively modest incomes and thus lacked the capacity to recoup any investment losses quickly by returning to or continuing to work.

Because the starting sizes of most of the accounts were relatively modest and represented all or substantially all of each individual's liquid net worth, the preservation of principal was of paramount concern - since there was little margin for error or loss in any investment plan. For example, taking into consideration that Marilynn A was in her late forties and planning an early retirement, had a husband who was seriously ill and unable to work, and that her approximately $220,000 initial Total Account Value represented nearly her entire life savings and liquid net worth, Marilynn A required an investment portfolio focused on preservation of the account principal. Carole D's approximately $160,000 account represented her entire liquid net worth and life savings.

Most of the customers lacked investment experience and relied significantly on Cespedes's advice. This lack of investment experience argued against employing more risky investment strategies, such as heavy concentration in a single sector and the use of margin debt to purchase securities, that the customers would not have been likely to comprehend. Although Hortence M's new account forms indicated that she had thirty-eight years of investment experience and she deposited $563,000 upon opening her account, Cespedes testified that Hortence M was not a "savvy" investor and followed Cespedes's advice to dispose of her diversified portfolio and shift into a heavy concentration in technology UITs. There is nothing in the record that, given her age and retirement, would suggest that she could afford to lose nearly $300,000 between July 2000 and February 2001.

We have previously held that risky investments are unsuitable recommendations for investors with relatively modest wealth and limited investment experience. 18/ We have also found that recommendations leading to high concentration of customer accounts in particular securities is "beyond what is consistent with the objective of safe, non-speculative investing." 19/ Highly speculative investment strategies are "suitable only for an individual who could withstand the loss of the entire principal amount." 20/

18/ Stephen Thorlief Rangen, 52 S.E.C. 1304, 1307 (1997).

19/ Id. at 1308 ("by concentrating so much of [the customers'] equity in particular securities, [the broker] increased the risk of loss for these individuals beyond what is consistent with the objective of safe, non-speculative investing").

20/ Venters, 51 S.E.C. at 293-94.

Nonetheless, Cespedes recommended that these fourteen customers concentrate their accounts heavily in technology sector securities and UITs in the technology sector. As discussed above, the First Trust marketing materials for the technology sector UITs (Cespedes had recommended) discouraged investors, irrespective of background, from heavy concentrations in individual sectors and encouraged diversified portfolios. NYSE expert witness Christopher Franke testified that over-concentration in individual sector UITs was a risky investment profile for any customer because it exposed the customer disproportionately to the volatility of the sector. In fact, before the time period at issue, some of the accounts were diversified among different sectors and different types of investments and had experienced growth in the account values over the course of several years. However, as shown in Appendix B, Cespedes recommended that the customers invest these previously diversified accounts in either significant concentrations or entirely in the technology sector, either through UITs or individual securities, during the relevant period. 21/

Trading on margin also increases the risk of loss to a customer. The customer is at risk to lose more than the amount invested if the value of the security depreciates sufficiently, giving rise to a margin call in the account. The customer also is required to pay interest on the margin loan, adding to the investor's cost of maintaining the account and increasing the amount by which his or her investment must appreciate before the customer realizes a net gain. 22/ Many of the accounts maintained significant margin balances during the period at issue. Most of the customers were unsophisticated investors and did not appreciate the risk that the use of margin in their accounts entailed. Dolores A, who had no experience with margin, lost the entire value of her personal account and a significant portion of her life savings to margin calls. Several of the customers testified that they had the mistaken understanding that Cespedes would liquidate securities in their accounts to cover checks written against the accounts. In reality, those checks simply increased the margin debt of the accounts, forcing the customers to expend significant funds paying margin interest and covering margin calls, even though the financial needs and circumstances of these customers indicated that preservation of principal was of paramount importance to them.

For these reasons, we find that Cespedes's recommendations that these customers invest with significant concentrations in the technology sector, often using margin to purchase the

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21/ For example, the accounts of Marilynn A and those of the G sisters, which represented their entire life savings and liquid net worth, were invested entirely in the technology sector. Marilynn A's Total Account Value decreased from approximately $220,000 to $24,000, and both G sisters also lost significant portions of their account values during the relevant period. Hortence M's Total Account Value decreased by nearly $300,000 between July 2000 and February 2001, the same period during which Cespedes recommended that she sell her diversified positions and concentrate her account entirely in technology sector UITs, with a margin balance of over $109,000.

22/ See Chase, 56 S.E.C. at 157-58 (citing Rangen, 52 S.E.C. at 1308).

securities in their accounts, were unsuitable and inconsistent with just and equitable principles of trade.

IV.

On appeal, Cespedes does not claim that any of the recommendations at issue were suitable. He also does not challenge the accuracy or truthfulness of the customers who testified during his hearing. 23/ Instead, Cespedes argues that the NYSE's proceeding was unfair and, as a result, requests that the proceeding "be vacated and the matter returned to the Hearing Board for further action." Specifically, he argues that: 1) NYSE expert witness Christopher Franke was biased in favor of Cespedes's customers in assessing whether Cespedes's recommendations were suitable and 2) Franke's testimony was based on insufficient evidence to support his conclusions.

Cespedes also objects to the decision by the Hearing Board to admit into evidence audiotapes and written transcripts of telephone conversations between Cespedes and customer James J. We discuss that objection in Section V below.

Alleged Expert Witness Bias

After setting forth Franke's educational and professional background, including his previous employment for over twenty years as a senior compliance officer with two different broker-dealers and his eight years as a Vice President at NASD "responsible for the trading and oversight of the NASDAQ market," the NYSE offered Franke as an expert witness on questions of suitability and compliance. Cespedes did not object to Franke's qualifications.

Franke testified that, in preparation for the hearing, he reviewed transcripts of the on-the-record testimony of Cespedes and others, the account statements, new account forms, and arbitration complaints of the customers at issue (as well as A.G. Edwards's responses where applicable), A.G. Edwards's compliance manual, and the relevant UIT prospectuses. On the basis of this review, Franke opined that Cespedes had made unsuitable recommendations and purchases of high concentrations in technology sector UITs in all of the accounts at issue. He also opined that the use of margin debt to purchase securities in some of the accounts was unsuitable.

On cross-examination about his opinion of Cespedes's recommendations to customer Carole D, Franke acknowledged that he had reviewed, in preparation for testimony, Carole D's arbitration complaint and A.G. Edwards's response to Carole D's complaint. He further stated:

23/ See n. 15, supra.

> I got an impression about [Carole D] based on who she was and the nature of the person she was, I got an impression from the [A.G. Edwards] response, so I needed to go to the empirical data to see whether there was anything that would support one side more than the other. And in the context of this, when I looked at this account and I said, well, these – this account follows a similar pattern to the others, therefore my bias is going to be a little bit more towards the customer.

Cespedes claims that this quotation indicates an inherent bias on the part of Franke that "taints the entire matter with unfairness." We disagree. Franke states that his conclusion was "in the context of" his review of the "empirical data" related to the account. His reference to a "bias" referred to whether the empirical data about the particulars of Carole D's account supported the customer or Cespedes more than the other. He did not, as Cespedes suggests, reach his conclusion that Carole D's account was managed unsuitably simply because the investments resembled those made in the accounts of other Cespedes customers. Further, Franke testified in a more general statement of his approach to the case as a whole that he "didn't have a bias" and formed his opinion based on his review of the evidence presented to him without any pressure or discussion of the case from the NYSE.

In any event, Cespedes cites no authority to support his contention that the alleged bias of an expert witness in an NYSE disciplinary proceeding warrants that the decision be vacated and the matter remanded for a new hearing, and we are aware of none. Cespedes was free to call an expert witness of his own to challenge Franke's testimony, but he did not do so. The Hearing Board understood that Franke had been hired and paid by the NYSE to provide expert testimony, reviewed his background, observed his testimony and demeanor, and found him to be a credible witness.

Cespedes has not argued that the Hearing Board itself was biased, nor does our independent review of the record find any support for such a notion. The Hearing Board reviewed the documentary evidence that Franke reviewed in making his assessment and based its determination on that review and the testimony, as well as Franke's discussion of his review. The Hearing Board found Carole D's testimony, as well as the testimony of Cespedes's other customers, to be credible. The record supports the Hearing Board's determination that Cespedes's recommendations were incompatible with his customers' financial situations and needs, even without Franke's testimony. Thus, we reject Cespedes's assertion that Franke was biased and do not believe that the quoted passage in any way prejudiced Cespedes.

Allegation that Expert's Testimony Was Based on Insufficient Evidence

Cespedes contends that Franke relied excessively on the customers' new account forms and account statements in making his suitability assessments and that these documents do not provide a sufficient basis to support his opinion. The new account forms contained important information in assessing the suitability of investment recommendations, including the customer's age, income, net worth, employment status, and investment experience. The account statements

exhibited the high concentrations of all of the accounts in the technology sector and showed the use of margin in many of the accounts. Cespedes also ignores Franke's testimony that he relied on other documents, including transcripts of testimony, arbitration complaints and responses, A.G. Edwards's compliance manual, and UIT prospectuses. The Hearing Board was aware that Franke relied on these documents, had the opportunity to review the exhibits themselves and to observe Franke's demeanor and testimony to assess his credibility, and determined to credit Franke's suitability assessment. We agree with that assessment.

Cespedes also suggests the possibility that the new account forms did not accurately reflect the customers' ages and investment preferences and that it is possible that "the customer's intentions changed over time, albeit without appropriate changes on the account forms." 24/ Cespedes has introduced no evidence to indicate that any of his customers requested that he invest their accounts in the manner that he did. To the contrary, the testifying customers stated universally and credibly that they did not understand UITs or margin and that they relied on Cespedes's recommendations. We have held that "[t]he test for whether [a broker's] recommendations were suitable is not whether [the customer] acquiesced in them, but whether [the broker's] recommendations were consistent with [the customer's] financial situation and needs." 25/ As we found above, Cespedes's recommendations to these customers were not.

24/ Customer Carole D acknowledged that she had misrepresented her age on her initial new account form by listing her birth year as 1948, rather than 1938. Carole D testified that this was a practice she routinely followed when filling out forms that requested a birth date "just to sort of protect [herself]." However, Carole D updated her account documentation to reflect her correct age in 2000, when she invested approximately $160,000 as discussed above. Cespedes made the investment recommendations at issue here after Carole D's account information had been corrected.

Cespedes has introduced no evidence to suggest that the age on any other customer's new account form was incorrect or that his recommendations to Carole D would have been suitable, given her financial situation and experience, if she had been born in 1948. In addition, the testimony and other record evidence presented supported the accuracy of the new account forms with respect to the customers' ages and other information important to a suitability assessment.

25/ Chase, 56 S.E.C. at 153 n. 23 (citing Reynolds, 50 S.E.C. at 809 (regardless of whether customer wanted to engage in aggressive and speculative trading, representative was obligated to abstain from making recommendations that were inconsistent with the customer's financial situation), amended on other grounds, Exchange Act Rel. No. 30036A (Feb. 25, 1992), 50 SEC Docket 1839); see also Gordon Scott Venters, 51 S.E.C. 292, 295 (1993).

V.

Our review of the NYSE's sanctions is governed by Exchange Act Section 19(e)(2). 26/ Section 19(e)(2) provides that the Commission will sustain the NYSE's sanctions unless it finds, 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. 27/ On appeal, neither Cespedes nor the NYSE has specifically addressed the appropriateness of the sanctions imposed.

The NYSE censured Cespedes and imposed a ten-year bar for his violations of Rule 476(a)(6). Cespedes has not worked in the securities industry since July 2007. The NYSE elected not to impose restitution or any monetary sanction on Cespedes. In determining the appropriate sanction to impose on Cespedes, the NYSE stated, "There is precedent for imposing a permanent bar in cases involving unsuitable transactions that were accompanied by other violations, such as unauthorized trading." 28/ The NYSE noted that Cespedes's recommendations were repeated with a significant number of customers and caused the customers to lose all or almost all of their liquid net worth. The NYSE decided, however, that a lifetime bar was too severe because Cespedes had only committed violations involving one NYSE Rule.

We agree with the NYSE's assessment of Cespedes's conduct and find that Cespedes's violations were very serious. We have also looked to FINRA's Sanction Guidelines. 29/ The Sanction Guidelines have been promulgated by FINRA in an effort to achieve greater

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26/ 15 U.S.C. § 78s(e)(2).

27/ Cespedes does not claim, and the record does not show, that the NYSE's action imposed an unnecessary or inappropriate burden on competition.

28/ The NYSE cited William Floyd Gibbs, Sr., Decision 06-41 (NYSE Hearing Board Mar. 27, 2006) (consenting to permanent bar for unsuitable trades in 144 customer accounts and exercising discretion without prior written authorization), and Grant Ross, Decision 94-177 (NYSE Hearing Board Dec. 22, 1994) (permanent bar imposed by default in light of uncontested allegations of unsuitable and unauthorized trading, misstatements to customers and firm, and violations of NYSE Rules on options).

29/ FINRA Sanction Guidelines 99 (2006 ed.), available at http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf. See note 1, supra.

consistency, uniformity, and fairness in the sanctions that are imposed for violations. 30/ FINRA's Sanction Guidelines discuss violations of this type and provide useful guidance in our sanctions analysis on appeal. FINRA's Sanction Guidelines recommend imposition of a monetary sanction of between $2,500 and $75,000 for unsuitable recommendations and a suspension for a period of ten business days to one year, and, in egregious cases, consideration of a longer suspension (of up to two years) or a bar.

Cespedes recommended that all of the customers at issue invest the majority, and in many cases all, of their account values in the technology sector. Many of the customers were of an advanced age and already retired or about to retire. At least one customer was forced to return to work at a low-paying job to pay for her living expenses. Many of the customers had relatively modest incomes and net worth and relied significantly on Cespedes to provide investment recommendations suitable to their life situations and needs. Cespedes failed to explain adequately to these inexperienced customers the significant risk of loss that his recommendations of highly concentrated technology sector portfolios entailed.

The customers in whose accounts Cespedes used margin did not understand what margin was. Several of the customers testified that they had the impression that Cespedes sold securities in their accounts to cover checks they wrote to make purchases, including at least two automobile purchases. These customers later learned that no securities had been sold and that they had, instead, incurred significant margin debt in connection with these checks. The numerous violations of suitability provisions and the significant harm suffered by vulnerable and unsophisticated customers warrant the imposition of serious sanctions against Cespedes.

Furthermore, Cespedes fails to recognize the wrongfulness of his conduct. Although Cespedes knew that his customers lacked investment experience and, based on their financial situations and needs, could not afford to suffer the losses to which his recommendations made them susceptible, he continues to suggest that he merely fulfilled the wishes of the customers by following an aggressive, risky investment strategy in all of their accounts. Cespedes introduced no evidence to show that the customers wanted to invest with heavy concentrations in the technology sector, including purchases of securities on margin in many accounts.

In assessing its sanctions, the NYSE identified three examples of what it termed bad faith by Cespedes. We agree with the NYSE's assessment that these instances were each aggravating factors appropriately weighed in imposing sanctions on Cespedes. The NYSE found that Cespedes called customer Edwin W's friend Stanley K after Stanley K contacted the Firm to complain about Cespedes's management of Edwin W's account, and Cespedes told Stanley K, "Don't do that again. If you want to contact anybody, contact me. Don't contact the office."

30/ See Perpetual Sec. Inc., Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489, 2506 n.56. Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

The NYSE found this conduct to be "highly improper and dangerous because it has the potential to undermine the entire regulatory framework."

The NYSE also found that Cespedes called customer Carole D after the conclusion of the initial three days of his hearing. Cespedes asked Carole D to submit to the NYSE an affidavit indicating that she had overstated her claims against Cespedes in her arbitration proceeding. When Carole D refused Cespedes's request, she testified that Cespedes threatened to expose alleged unspecified "funny business" in connection with Carole D's small business. The NYSE found Cespedes "actually attempted – in a shocking, abusive, and highly unethical manner – to fabricate a mitigating circumstance."

NYSE also cited taped telephone conversations between Cespedes and customer James J. James J, at his home in New Jersey, recorded five telephone conversations he had with Cespedes, who was in California at the time, in September and November 2002. 31/ During the taped conversations, Cespedes acknowledged that a heavy concentration of securities in the technology sector was unsuitable for someone of James J's age and that James J "never truly understood" the use of margin in his account. Cespedes further encouraged James J to file an arbitration claim against the Firm as a way to recoup some of the money James J lost as a result of Cespedes's unsuitable recommendations. The NYSE felt that this was an unethical attempt by Cespedes to "make the entire problem go away by persuading his customer [James J] that they were on the same side and encouraging [James J] to obtain money from the firm." 32/

Cespedes objects to the admission of the tape and transcripts. Cespedes does not dispute the authenticity of the tape and transcripts. Cespedes, however, claims that the use of the tapes in his NYSE disciplinary proceeding was illegal under California law because he was not aware that he was being recorded and did not consent to the taping. Cespedes argues that, as a California resident, he "is entitled to the protection of its laws." 33/

31/ The Hearing Board permitted NYSE Enforcement to play the audio cassette of one of the conversations during the hearing and admitted into evidence the transcripts of three of the other conversations. The Hearing Officer determined that the final tape was inaudible and did not admit it into evidence.

32/ Cespedes contributed $20,000 to A.G. Edwards's settlement with James J. This was the only arbitration settlement of these fourteen customers to which Cespedes contributed.

33/ The relevant provision of California law is Penal Code Section 632(d); Cal. Penal Code § 632, which prohibits the taping of telephone conversations without the consent of all parties to the conversation.

Cespedes cites Kearney v. Salomon Smith Barney, Inc., 39 Cal.4th 95 (2006), in which the California Supreme Court found that California residents whose telephone

(continued...)

However, SRO proceedings are informal and are not bound by the same rules of procedure and evidence that apply in court proceedings. 34/ Unlike a federal or state court, the NYSE lacks subpoena power, and the record indicates that James J was unwilling to testify at the hearing. The Hearing Board made a reasonable determination that the tapes provided a source of useful information about Cespedes's conduct with respect to James J's accounts. For these reasons, we find that the NYSE's determination to admit the audiotape and written transcripts was appropriate, and we agree with the NYSE's finding that Cespedes's statements on the tapes exhibits bad faith and is an aggravating factor in our sanctions analysis.

Cespedes has failed to cite, and our review of the record does not indicate the existence of, any mitigating factors that would argue in favor of a lesser sanction than the ten-year bar the NYSE imposed on Cespedes. Given Cespedes's conduct and his attempts to prevent detection of his conduct and to influence prospective witnesses in this proceeding, a ten-year bar will have the remedial effect of protecting the investing public from harm by preventing Cespedes from continuing to invest customer funds without adequate consideration of the customer's age, financial situation, and needs. The sanction will also deter other registered representatives from making similarly unsuitable recommendations in customer accounts in the future. 35/ Although we might have reached a different conclusion as to the appropriate sanction for Cespedes's conduct, we do not have authority to increase a sanction imposed by an SRO, but only to

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33/ (...continued)
conversations with businesses located in Georgia were being recorded without the California residents' knowledge maintained the right to pursue an injunctive action against the Georgia businesses because the recordings were illegal under California law, although they were legal under Georgia law.

34/ See Rita H. Malm, 52 S.E.C. 64, 72 n. 37 (1994) ("SRO proceedings are 'informal' when compared to 'formal' proceedings in federal and state courts where rules of evidence and procedure apply. For example, in SRO proceedings, Hearing Boards have great latitude in permitting evidence and testimony from witnesses that might be excluded on relevance and hearsay grounds before other tribunals.")

35/ See SEC v. PAZ Sec., Inc., 494 F.3d 1059, 1066 (D.C. Cir. 2007) (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)).

determine whether the sanction is excessive or oppressive. We find that the censure and ten-year bar the NYSE imposed against Cespedes are neither excessive nor oppressive, and we sustain the NYSE's findings of violations. 36/

An appropriate order will issue.

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

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

36/ 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. 59404 / February 13, 2009

Admin. Proc. File No. 3-12988

In the Matter of the Application of

LUIS MIGUEL CESPEDES
c/o Jonathan Schwartz, Esq.
Law Offices of Jonathan Schwartz
4640 Admiralty Way, Fifth Floor
Marina del Rey, CA 90292

For Review of Disciplinary Action Taken By

NYSE REGULATION, INC.

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the findings of violation and imposition of sanctions by NYSE Regulation, Inc. against Luis Miguel Cespedes be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary

By J. Lynn Taylor
Assistant Secretary

Chairman Schapiro and Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 9007 / February 17, 2009

In the Matter of **Wachovia Securities, LLC,** **Respondent.**	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(b)(4) and 602(c)(2) DISQUALIFICATION PROVISIONS**

I.

Wachovia Securities, LLC ("Wachovia" or "Respondent") has submitted a letter, dated January 27, 2009, requesting a waiver of the Rule 602(b)(4) and Rule 602(c)(2) disqualifications from the exemption from registration under Regulation E arising from Wachovia's settlement of an injunctive action commenced by the Commission.

II.

On February 5, 2009, the Commission filed a civil injunctive action in the United States District Court for the Northern District of Illinois alleging that Wachovia, a registered broker-dealer, violated the broker-dealer anti-fraud provisions of the Securities Exchange Act of 1934 ("Exchange Act"). In its complaint, the Commission alleged that Wachovia misled its customers about the fundamental nature and increasing risks associated with auction rate securities that Wachovia underwrote, marketed and sold. Without admitting or deny the allegations of the complaint, Wachovia consented to entry of a Judgment, entered on February 17, 2009, permanently enjoining it from violating Section 15(c) of the Exchange Act.

III.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if such issuer or any of its affiliates is subject to a court order entered within the past five years "permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities" or any of its directors, officers or principal security holders, any investment adviser or underwriter of the securities to be offered, or any partner, director or officer of any such investment

adviser or underwriter of the securities to be offered is "temporarily or permanently restrained or enjoined by any court from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser." Rule 602(e) of the Securities Act of 1933 ("Securities Act") provides, however, that the disqualification "shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied." 17 C.F.R. § 230.602(e).

IV.

Based upon the representations set forth in Respondent's request, the Commission has determined that pursuant to Rule 602(e) under the Securities Act, a showing of good cause has been made that it is not necessary under the circumstances that the exemption be denied as a result of the Judgment.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provisions of Rule 602(b)(4) and Rule 602(c)(2) under the Securities Act resulting from the entry of the Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

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

Chairman Schapiro and Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9008 / February 18, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59414 / February 18, 2009

In the Matter of **WACHOVIA SECURITIES, LLC,** **Respondent.**	**ORDER UNDER SECTION 27A(b) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, GRANTING WAIVERS OF THE DISQUALIFICATION PROVISIONS OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO WACHOVIA SECURITIES, LLC AND ITS AFFILIATES**

Wachovia Securities, LLC ("Wachovia") has submitted a letter on behalf of itself and any of its current and future affiliates, dated January 27, 2009, for a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from its settlement of an injunctive action filed by the Commission.

On February 5, 2009, the Commission filed a civil injunctive action in the United States District Court for the Northern District of Illinois alleging that Wachovia, a registered broker-dealer, violated the broker-dealer anti-fraud provisions of the Exchange Act. In its complaint, the Commission alleged that Wachovia misled its customers about the fundamental nature and increasing risks associated with auction rate securities that Wachovia underwrote, marketed and sold. Without admitting or deny the allegations of the complaint, Wachovia consented to entry of a Judgment, entered on February 17, 2009, permanently enjoining it from violating Section 15(c) of the Exchange Act.

The safe harbor provisions of Section 27A(c) of the Securities Act and Section 21E(c) of the Exchange Act are not available for any forward-looking statement that is "made with respect to the business or operations of an issuer, if the issuer . . . during the 3-year period preceding the date on which the statement was first made . . . has been made the subject of a judicial . . . order arising out of a government action that . . . prohibits future violations of the antifraud provisions of the federal securities laws." Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act. The disqualifications apply except "to the extent otherwise specifically provided by rule, regulation or order of the Commission." Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act.

Based on the representations set forth in Wachovia's letter, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the entry of the Judgment is appropriate and should be granted.

Accordingly, **IT IS ORDERED,** pursuant to Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act, that a waiver from the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to Wachovia and any of its current or future affiliates resulting from the entry of the Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro and Commissioner Walter not participating

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-28618; 812-13632]

Wachovia Securities, LLC, et al.; Notice of Application and Temporary Order

February 18, 2009

Agency: Securities and Exchange Commission ("Commission").

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against Wachovia Securities, LLC ("Wachovia Securities") on February 17, 2009 by the United States District Court for the Northern District of Illinois ("Injunction"), until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: Wachovia Securities, Evergreen Investment Management Company, LLC ("Evergreen Investment Management"), Tattersall Advisory Group, Inc. ("Tattersall"), First International Advisors, LLC ("First International"), Metropolitan West Capital Management, LLC ("Metropolitan West"), J.L. Kaplan Associates, LLC ("J.L. Kaplan"), Golden Capital Management, LLC ("Golden Capital"), Evergreen Investment Services, Inc. ("Evergreen Investment Services"), Prudential Investment Management, Inc. ("PIM, Inc."), Prudential Investments LLC ("PI LLC"), The Prudential Insurance Company of America ("Prudential Insurance"), Jennison Associates LLC ("Jennison"), Prudential Bache Asset Management, Inc. ("Bache"), Quantitative Management Associates LLC ("QMA LLC"), Pruco Securities, LLC ("Pruco"), AST Investment Services, Inc. ("AST

Investment"), Prudential Annuities Distributors, Inc. ("PAD"), Prudential Investment Management Services LLC ("PIMS LLC"), Pruco Life Insurance Company ("Pruco Life"), Pruco Life Insurance Company of New Jersey ("Pruco Life NJ"), Prudential Annuities Life Assurance Corporation ("PALAC"), Prudential Retirement Insurance and Annuity Company ("PRIAC"), Wells Fargo Funds Management, LLC ("WF Funds Management"), Wells Capital Management Incorporated ("Wells Capital Management"), Peregrine Capital Management, Inc. ("Peregrine"), Galliard Capital Management, Inc. ("Galliard"), Wells Fargo Private Investment Advisors, LLC d/b/a Nelson Capital Management ("Nelson"), Wells Fargo Funds Distributor, LLC ("WF Funds Distributor"), Lowry Hill Investment Advisors, Inc. ("Lowry Hill"), and Wells Fargo Alternative Asset Management, LLC ("WFAAM") (collectively, other than Wachovia Securities, the "Fund Servicing Applicants" and together with Wachovia Securities, the "Applicants").[1]

Filing Date: The application was filed on February 18, 2009.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 16, 2009, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons

[1] Applicants request that any relief granted pursuant to the application also apply to any other company of which Wachovia Securities is or may become an affiliated person (together with the Applicants, the "Covered Persons").

who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants: Wachovia Securities, One North Jefferson Avenue, St. Louis, MO 63103; Evergreen Investment Management, J.L. Kaplan and Evergreen Investment Services, 200 Berkeley Street, Boston, MA 02116; Tattersall, 6802 Paragon Place, Suite 200, Richmond, VA 23230; First International, 3 Bishopsgate, London, England UK EC2N3AB; Metropolitan West, 610 Newport Center Drive, Suite 1000, Newport Beach, CA 92660; Golden Capital, 5 Resource Square, Suite 150, 10715 David Taylor Drive, Charlotte, NC 28262; PIM, Inc. and QMA LLC, 100 Mulberry Street, Gateway Center Two, Newark, NJ 07102; PI LLC and PIMS LLC, 100 Mulberry Street, Gateway Center Three, Newark, NJ 07102; Prudential Insurance and Pruco, 751 Broad Street, Newark, NJ 07102; Jennison, 466 Lexington Avenue, New York, NY 10017; Bache, One New York Plaza, 13th Floor, New York, NY 10292; AST Investment, PAD and PALAC, One Corporate Drive, Shelton, CT 06484; Pruco Life and Pruco Life NJ, 213 Washington Street, Newark, NJ 07102; PRIAC, 280 Trumbull Street, Hartford, CT 06103-3509; WF Funds Management and WF Funds Distributor, 525 Market Street, 12th Floor, San Francisco, CA 94105; Wells Capital Management, 525 Market Street, 10th Floor, San Francisco, CA 94105; Peregrine, 800 LaSalle Avenue, Suite 1850, Minneapolis, MN 55402; Galliard, 800 LaSalle Avenue, Suite 2060, Minneapolis, MN 55402; Nelson, 1860 Embarcadero Road, #140, Palo Alto, CA 94303; Lowry Hill, 90 South Seventh Street, Suite 5300, Minneapolis, MN 55402; and WFAAM, 333 Market Street, 29th Floor, MAC# A0119-291, San Francisco, CA 94105.

For Further Information Contact: Steven I. Amchan, Attorney Adviser, at (202) 551-6826, or Julia Kim Gilmer, Branch Chief, at (202) 551-6821, (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1520 (tel. 202-551-5850).

Applicants' Representations:

1. Wells Fargo & Company ("Wells Fargo"), a financial holding company and bank holding company, offers banking, brokerage, advisory and other financial services to institutional and individual customers worldwide. On December 31, 2008, Wells Fargo acquired all of the outstanding voting shares of Wachovia Corporation. Wells Fargo indirectly owns 75% to 77% of Wachovia Securities Financial Holdings, LLC ("WSFH") and Prudential Financial, Inc. ("Prudential") indirectly owns 23% to 25% of WSFH. Wachovia Securities is a wholly-owned subsidiary of WSFH, and an affiliated person of each Fund Servicing Applicant within the meaning of section 2(a)(3) of the Act (by virtue of being under common control with the Fund Servicing Applicants). Wachovia Securities offers a wide array of financial advisory, brokerage, asset management and other financial services in more than 3,700 locations nationwide.

2. Evergreen Investment Management, Tattersall, First International, Metropolitan West, J.L. Kaplan, Golden Capital, PIM, Inc., PI LLC, Jennison, Bache, QMA LLC, AST Investment, WF Funds Management, Wells Capital Management, Peregrine, Galliard, Nelson, Lowry Hill, and WFAAM are registered as investment

advisers under the Investment Advisers Act of 1940, as amended ("Advisers Act") and provide investment advisory or subadvisory services to registered investment companies ("Funds"). Evergreen Investment Services, Pruco, PAD, PIMS LLC, and WF Funds Distributor are broker-dealers registered under the Securities Exchange Act of 1934, as amended ("Exchange Act") and serve as principal underwriters to open-end Funds and registered unit investment trusts ("UITs", included in the term "Funds"). Prudential Insurance, Pruco Life, Pruco Life NJ, PALAC, and PRIAC serve as depositors to registered separate accounts, all of which are Funds ("Registered Separate Accounts").

3. On February 17, 2009, the United States District Court for the Northern District of Illinois entered a judgment against Wachovia Securities ("Judgment") in a matter brought by the Commission.[2] The Commission alleged in the complaint ("Complaint") that Wachovia Securities violated section 15(c) of the Exchange Act by marketing auction rate securities as highly liquid investments comparable to cash or money market instruments and by selling auction rate securities to its customers without adequately disclosing the risks involved in purchasing such securities. Without admitting or denying the allegations in the Complaint, except as to jurisdiction, Wachovia Securities consented to the entry of the Judgment that included, among other things, the entry of the Injunction and other equitable relief including undertakings to take various remedial actions for the benefit of purchasers of certain auction rate securities.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from, among other things, engaging in or continuing any conduct or practice in

[2] Securities and Exchange Commission v. Wachovia Securities, LLC, Judgment on Consent Against Defendant Wachovia Securities, LLC, 09 Civ. 00743 (N.D. Ill. February 17, 2009).

connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered unit investment trust or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that Wachovia Securities is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that the entry of the Injunction results in Applicants being subject to the disqualification provisions of section 9(a) of the Act.

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to the Applicants, are unduly or disproportionately severe or that the Applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting them and Covered Persons from the disqualification provisions of section 9(a) of the Act.

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would

be unduly and disproportionately severe and that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants acting in the capacity of investment adviser, subadviser or depositor to any Fund or in the capacity of principal underwriter for any open-end Fund, UIT, or registered face-amount certificate company. Applicants also state that none of the current or former directors, officers, or employees of the Fund Servicing Applicants had any responsibility for, or had any involvement in, the conduct alleged in the Complaint. Applicants further state that the personnel at Wachovia Securities who were involved in the violations alleged in the Complaint have had no and will not have any future involvement in providing investment advisory, subadvisory, depository or underwriting services to Funds.

5. Applicants state that their inability to continue to provide investment advisory, subadvisory and underwriting services to Funds and serve as depositor to the Registered Separate Accounts would result in potential hardship for the Funds and their shareholders. Applicants state that they will, as soon as reasonably practical, distribute written materials, including an offer to meet in person to discuss the materials, to the boards of directors of the Funds ("Boards") for which the Applicants serve as investment adviser, investment subadviser or principal underwriter, including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Funds, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, relating to the circumstances that led to the Injunction, any impact on the Funds, and the application.

Applicants state they will provide the Boards with all information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if they were barred from providing services to the Funds, the effect on their businesses and employees would be severe. Applicants state that they have committed substantial resources to establish an expertise in providing advisory and distribution services to Funds, and depository services to the Registered Separate Accounts. Applicants further state that prohibiting them from providing such services would not only adversely affect their businesses, but would also adversely affect over 3700 employees who are involved in those activities.

7. Applicants previously have received exemptions under section 9(c) as the result of conduct that triggered section 9(a) as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including, without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from February 17, 2009, until the Commission takes final action on their application for a permanent order.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Chairman Schapiro and Commissioner Aguilar Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59422 / February 19, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2938 / February 19, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-9171

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

On October 21, 1996, Greg Steven Kaplan, CPA ("Kaplan") was denied the privilege of appearing or practicing as an accountant before the Commission as a result of settled public administrative proceedings instituted by the Commission against Kaplan pursuant to Rule 102(e) of the Commission's Rules of Practice.[1] Kaplan consented to the entry of the order without admitting or denying the findings therein. This order is issued in response to Kaplan's application for reinstatement to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

The Commission found that during 1992 and 1993 Kaplan willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Rules 10b-5 and 13b2-2 thereunder in connection with his conduct as the Chief Financial Officer of Pace American Group, Inc ("Pace"). Kaplan was reckless in the performance of his professional duties, namely in his failure to account for loss reserves in conformity with Generally Accepted Accounting Principles in consolidated financial statements filed with the Commission. In addition, Kaplan failed to disclose material information and signed a misleading management representation letter to Pace's auditors.

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

[1] *See* Accounting and Auditing Enforcement Release No. 844 dated October 21, 1996. Kaplan was permitted, pursuant to the order, to apply for reinstatement after five years upon making certain showings.

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

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

On the basis of information supplied, representations made, and undertakings agreed to by Kaplan and by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, Kaplan has shown good cause for reinstatement. Therefore, it is accordingly,

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

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

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

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13375

In the Matter of	
Janex International, Inc., **Jet Energy Corp.,** **JobSort, Inc.,** **Jones Plumbing Systems, Inc.,** **Jore Corp., and** **Journey's End Resorts, Inc.,**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**
Respondents.	

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Janex International, Inc., Jet Energy Corp., JobSort, Inc., Jones Plumbing Systems, Inc., Jore Corp., and Journey's End Resorts, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Janex International, Inc. (CIK No. 800454) is a dissolved Colorado corporation located in El Cajon, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Janex is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2001, which reported a net loss of $1.5 million for the prior six months. As of February 17, 2009, the company's common stock (symbol "JANX") was traded on the over-the-counter markets.

2. Jet Energy Corp. (CIK No. 943397) is a British Columbia corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Jet Energy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the fiscal year ended November 30, 1996.

3. JobSort, Inc. (CIK No. 1081969) 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). JobSort 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 $18,355 since inception on October 15, 1998.

4. Jones Plumbing Systems, Inc. (CIK No. 96653) is an inactive Minnesota corporation located in Birmingham, Alabama with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Jones Plumbing 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, 1995, which reported a net loss of over $4.6 million for the prior six months.

5. Jore Corp. (CIK No. 1081207) is a revoked Montana corporation located in Ronan, Montana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Jore 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 $7.5 million for the prior three months. On May 22, 2001, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Montana, and the case was terminated on February 7, 2008. As of February 17, 2009, the company's common stock (symbol "JOREQ") was traded on the over-the-counter markets.

6. Journey's End Resorts, Inc. (CIK No. 825797) is a Nevada corporation located in Ambergis Caye, Belize with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Journeys End 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, 1993, which reported a net loss of $253,240 for the prior nine months.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

By: J. Lynn Taylor
Assistant Secretary

Appendix 1

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

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Janex International, Inc.					
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	06/30/03	08/14/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-KSB	12/31/07	03/31/08	Not filed	11
	10-Q[1]	03/31/08	05/15/08	Not filed	9
	10-Q[1]	06/30/08	08/14/08	Not filed	6
	10-Q[1]	09/30/08	11/14/08	Not filed	3

Total Filings Delinquent 29

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Jet Energy Corp.					
	20-F	11/30/97	06/01/98	Not filed	128
	20-F	11/30/98	05/31/99	Not filed	117
	20-F	11/30/99	05/31/00	Not filed	105
	20-F	11/30/00	05/31/01	Not filed	93
	20-F	11/30/01	05/31/02	Not filed	81
	20-F	11/30/02	06/02/03	Not filed	68
	20-F	11/30/03	05/31/04	Not filed	57
	20-F	11/30/04	05/31/05	Not filed	45
	20-F	11/30/05	05/31/06	Not filed	33
	20-F	11/30/06	05/31/07	Not filed	21
	20-F	11/30/07	06/02/08	Not filed	8
Total Filings Delinquent	11				
JobSort, Inc.					
	10-QSB	09/30/00	11/14/00	Not filed	99
	10-KSB	12/31/00	04/02/01	Not filed	94
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-QSB	06/30/01	08/14/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-KSB	12/31/01	04/01/02	Not filed	82
	10-QSB	03/31/02	05/15/02	Not filed	81
	10-QSB	06/30/02	08/14/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-KSB	12/31/02	03/31/03	Not filed	71
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-KSB	12/31/03	03/30/04	Not filed	59
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-QSB	06/30/04	08/16/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-KSB	12/31/04	03/31/05	Not filed	47
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-QSB	06/30/05	08/15/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-KSB	12/31/05	03/31/06	Not filed	35
	10-QSB	03/31/06	05/15/06	Not filed	33

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
JobSort, Inc.					
	10-QSB	06/30/06	08/14/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-KSB	12/31/06	04/02/07	Not filed	22
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-QSB	06/30/07	08/14/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-KSB	12/31/07	03/31/08	Not filed	11
	10-Q[1]	03/31/08	05/15/08	Not filed	9
	10-Q[1]	06/30/08	08/14/08	Not filed	6
	10-Q[1]	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	32				
Jones Plumbing Systems, Inc.					
	10-Q	09/30/95	11/14/95	Not filed	159
	10-K	12/31/95	04/01/96	Not filed	154
	10-Q	03/31/96	05/15/96	Not filed	153
	10-Q	06/30/96	08/14/96	Not filed	150
	10-Q	09/30/96	11/14/96	Not filed	147
	10-K	12/31/96	03/31/97	Not filed	143
	10-Q	03/31/97	05/15/97	Not filed	141
	10-Q	06/30/97	08/14/97	Not filed	138
	10-Q	09/30/97	11/14/97	Not filed	135
	10-K	12/31/97	03/31/98	Not filed	131
	10-Q	03/31/98	05/15/98	Not filed	129
	10-Q	06/30/98	08/14/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Jones Plumbing Systems, Inc.					
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	53				
Jore Corp.					
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Jore Corp.					
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	30				
Journey's End Resorts, Inc.					
	10-K	12/31/93	03/31/94	Not filed	179
	10-Q	03/31/94	05/16/94	Not filed	177
	10-Q	06/30/94	08/15/94	Not filed	174
	10-Q	09/30/94	11/14/94	Not filed	171
	10-K	12/31/94	03/31/95	Not filed	167
	10-Q	03/31/95	05/15/95	Not filed	165
	10-Q	06/30/95	08/14/95	Not filed	162

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Journey's End Resorts, Inc.					
	10-Q	09/30/95	11/14/95	Not filed	159
	10-K	12/31/95	04/01/96	Not filed	154
	10-Q	03/31/96	05/15/96	Not filed	153
	10-Q	06/30/96	08/14/96	Not filed	150
	10-Q	09/30/96	11/14/96	Not filed	147
	10-K	12/31/96	03/31/97	Not filed	143
	10-Q	03/31/97	05/15/97	Not filed	141
	10-Q	06/30/97	08/14/97	Not filed	138
	10-Q	09/30/97	11/14/97	Not filed	135
	10-K	12/31/97	03/31/98	Not filed	131
	10-Q	03/31/98	05/15/98	Not filed	129
	10-Q	06/30/98	08/14/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Journey's End Resorts, Inc.					
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	60				

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59438 / February 24, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13378

In the Matter of **OPPENHEIMER & CO. INC.,** **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 Oppenheimer & Co. Inc. ("OPCO" or "Respondent").

II.

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

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

A. Summary

From May 2003 to August 2004 (the "relevant period"), OPCO failed reasonably to supervise Frank Lu ("Lu"), a former salesperson at OPCO, with a view to preventing and detecting Lu's violations of the federal securities laws. During this period, Lu and Victor P. Machado ("Machado"), a former trader at two related entities, Leumi Investment Services Inc. and Bank Leumi USA, (collectively referred to as "Leumi"), engaged in a fraudulent scheme that resulted in a substantial increase of order flow from Leumi to OPCO. Pursuant to their scheme, Lu provided Machado with secret gratuities and entertainment and Machado, in violation of his duties to Leumi and its customers, directed a substantial flow of orders to OPCO for execution at prices that were favorable to OPCO and detrimental to Leumi's customers. As a result of this arrangement, on certain trades, Lu and Machado also positioned OPCO between Leumi and other broker-dealers offering better prices that Machado could have obtained for Leumi. Lu's and Machado's scheme caused significant harm to Leumi's customers.

During the relevant period, Lu and Machado conducted their trading and most of their communications by e-mail on the Bloomberg Mail messaging system.[2] Several e-mail exchanges between Lu and Machado presented red flags indicating that Machado was directing order flow to Lu, and in turn, Lu was providing secret gratuities to Machado. Because of a deficiency in OPCO's e-mail review procedures, none of Lu's Bloomberg e-mails was reviewed by OPCO staff, as required by OPCO's electronic communications policy. If OPCO had monitored Lu's Bloomberg e-mail communications, OPCO supervisors likely would have seen these messages and could have prevented Lu's misconduct or detected it at an earlier time. Accordingly, OPCO failed reasonably to supervise Lu, within the meaning of Section 15(b)(4) of the Exchange Act, by its failure to implement reasonable procedures for preventing or detecting Lu's violations of the federal securities laws.

B. Respondent

Oppenheimer & Co. Inc. is a New York corporation with its principal office in New York, New York. OPCO is registered with the Commission as both a broker-dealer and investment adviser.

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

[2] Bloomberg Mail is a proprietary electronic messaging and e-mail system operated by Bloomberg L.P.

C. Facts

1. Lu's and Machado's Scheme

From January 2003 until he resigned in March 2006, Lu was a salesperson at OPCO specializing in emerging market securities. As a salesperson, Lu performed various services for his customers, including soliciting trades and processing their orders. During the relevant period, Lu was compensated based solely on a percentage of the revenue generated by his customers' orders.

Lu and Machado began trading emerging market securities in 2000. In mid-2003, Lu and Machado secretly agreed that Machado would direct orders to Lu for execution at prices favorable to OPCO and, in exchange, Lu would provide Machado with gratuities and entertainment. The arrangement ensured that Lu received increased order flow, which, in turn, meant that Lu's compensation increased.

During 2003 and 2004, Lu entertained Machado numerous times per year. Each evening of entertainment typically cost at least a thousand dollars and was paid for by Lu in cash. In addition, approximately half a dozen times per year, Lu gave Machado gifts. Neither Lu nor Machado reported these gratuities and entertainment, as required under OPCO's and Leumi's respective policies.[3]

Under their secret arrangement, Machado frequently changed Lu's quoted price to make it more favorable to OPCO and, consequently, less favorable to Leumi and its customers. For example, if Leumi placed an order to buy a security and Lu quoted a price for that security to Machado at $99.50, Machado instead would pay OPCO $100 for the security.

As part of their arrangement, Lu and Machado also positioned OPCO between Leumi and other broker-dealers that offered better prices to Leumi. For example, after Machado received a favorable price quote from another broker-dealer, instead of executing the trade directly with that firm, Machado would direct Lu to contact that broker-dealer to buy or sell the securities in question at the favorable quoted price. Thereafter, Machado would execute Leumi's order with Lu at a price that was less favorable to Leumi and its customers than the price initially quoted by the other broker-dealer.

As a result of this secret arrangement, the average number of monthly trades that Machado executed with Lu through OPCO increased by approximately 450 percent during the relevant period. As a result of Lu's and Machado's scheme, Leumi and its customers were harmed by approximately $1.1 million.

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[3] FINRA Rule 3060 (which was in effect during the relevant period) prohibits a person associated with a broker-dealer from directly or indirectly giving anything of value, including gratuities, in excess of one hundred dollars per individual per year to any person where such payment or gratuity is in relation to the business of the employer of the recipient of the payment or gratuity. The rule also requires that the broker-dealer retain a record of all payments or gratuities in any amount known to it.

By the conduct described above, Lu violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted Machado's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

2. OPCO's Failure to Review Lu's E-mail Communications

During the relevant period, OPCO's electronic communications policy required that supervisors (or their designees) review for each employee twenty-five percent of the daily outgoing e-mails, 100 percent of the daily incoming e-mails, and 100 percent of quarantined e-mails.[4] To satisfy this requirement, OPCO employed a computer system that was designed to load all employees' daily electronic communications (including Bloomberg e-mail) into a database, which would then be reviewed by supervisors or their designees. However, based on a deficiency in OPCO's procedures, Lu's Bloomberg e-mails never were obtained by OPCO, loaded into OPCO's computer system, or reviewed by any OPCO supervisor during the entire period of the scheme.

During the relevant period, at the end of each workday, OPCO's computer system was to obtain from Bloomberg all e-mail for each OPCO employee who had a Bloomberg account and used the Bloomberg e-mail system. After identifying those e-mails, OPCO's computer system was programmed to download the e-mail into a database for review by each employee's supervisor (or the supervisor's designee). During this period, OPCO failed to implement reasonable procedures for identifying which OPCO employees had Bloomberg accounts, and programming that information into its computer system. As a result of this deficiency, for more than four years, OPCO's computer system did not retrieve from Bloomberg, or load into OPCO's database for supervisory review, the Bloomberg e-mail messages for approximately 370 OPCO employees (including Lu). This failure was not detected by OPCO supervisors (or their designees) in the course of their daily reviews of employee e-mail.

During the relevant period, Lu and Machado conducted their trading and most of their communications over the Bloomberg messaging system. Several Bloomberg e-mail exchanges between Lu and Machado presented red flags indicating that Machado was directing order flow to Lu, and in exchange, Lu was providing secret gratuities to Machado. If OPCO had monitored Lu's Bloomberg e-mail communications as required under OPCO's electronic communications policy, OPCO likely would have prevented Lu's misconduct or detected it at an earlier time. Given that Lu received most of his order flow from Leumi and that the amount of business that Lu received from Leumi had increased dramatically during the period that these e-mails were being sent, the messages likely would have alerted Lu's supervisor to the improper dealings between Lu and Machado.

OPCO's failure to review any of Lu's Bloomberg messages for an extended period – contrary to OPCO's policy – constitutes a failure to implement reasonable procedures for preventing or detecting Lu's fraudulent conduct.

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[4] Under OPCO's e-mail review system, e-mails containing certain words or phrases were quarantined for supervisory review.

E. Violations

Section 15(b)(4)(E) of the Exchange Act gives the Commission the authority to censure, suspend, or revoke the registration of any broker or dealer who has failed reasonably to supervise associated persons, with a view toward preventing and detecting violations of the federal securities laws. Section 15(b)(4) states that a broker-dealer may discharge its supervisory responsibilities by having "established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect" these violations.

"The Commission has repeatedly emphasized that the duty to supervise is a critical component of the federal regulatory scheme." *In the Matter of Oechsle International Advisors, L.L.C.*, Admin. Proc. File No. 3-10554, 5 (August 10, 2001). "Where there has been an underlying violation of the federal securities laws, the failure to have or follow compliance procedures has frequently been found to evidence a failure reasonably to supervise the primary violator." *In the Matter of William V. Giordano*, Admin. Proc. File No. 3-8933 (January 19, 1996). In addition to adopting effective procedures for supervision, broker-dealers "must provide effective staffing, sufficient resources and a system of follow up and review to determine that any responsibility to supervise delegated to compliance officers, branch managers and other personnel is being diligently exercised." *In the Matter of Mabon, Nugent & Co.*, Admin. Proc. File No. 3-6207 (January 13, 1983).

As discussed in paragraph C 2 above, OPCO's electronic communications review procedure required OPCO's supervisors to review daily a significant percentage of the Bloomberg e-mail for its employees, including Lu. However, OPCO failed to implement reasonable procedures for identifying these employees and, as a result, failed to retrieve from Bloomberg, or load into OPCO's database for supervisory review, these employees' Bloomberg e-mails. Consequently, OPCO failed to review the Bloomberg e-mails for approximately 370 employees, including Lu, for more than four years. During this period, OPCO did not provide "sufficient resources and a system of follow up and review to determine" whether its supervisors were, in fact, reviewing all of the Bloomberg e-mail communications of its employees. Effective implementation of its communication review policies likely would have enabled OPCO to prevent and detect Lu's improper dealings with Machado.

By engaging in the conduct described above, OPCO failed reasonably to supervise Lu with a view toward preventing and detecting Lu's violations of the federal securities laws.

F. Undertakings

OPCO has undertaken to review its policies, procedures and systems regarding the capture and reviewing of electronic communications by its employees. Within ninety days of the issuance of this Order, unless otherwise extended by the staff of the Commission for good cause shown, OPCO shall submit a report to the Commission describing the review performed and the conclusions and changes made as a result of this review. Further, at the time that OPCO submits the report, OPCO shall certify to the Commission in writing that it has established procedures, and

a system for applying such procedures, which are reasonably expected to prevent and detect, insofar as practicable, the violations described in this Order.

IV.

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

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

A. OPCO be, and hereby is censured;

B. IT IS FURTHER ORDERED that OPCO shall, within 10 days of the entry of this Order, pay a civil money penalty of $850,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies OPCO as a respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Antonia Chion, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-8549; and

C. OPCO shall comply with the undertaking enumerated in Section III, paragraph F above.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59437 / February 24, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13377

In the Matter of **LEUMI INVESTMENT SERVICES INC.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Leumi Investment Services Inc. ("LISI" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

A. Summary

From May 2003 to August 2004 (the "relevant period"), LISI failed reasonably to supervise Victor P. Machado ("Machado"), a former fixed income trader at LISI, with a view to preventing and detecting Machado's violations of the federal securities laws. During this period, Machado and Frank Lu, a former salesperson at Oppenheimer & Co. Inc. ("OPCO"), a registered broker-dealer and investment adviser, engaged in a fraudulent scheme that resulted in a substantial increase of order flow from Leumi to OPCO. As a fixed income trader, Machado was responsible for executing LISI's customer orders. Pursuant to their scheme, Lu provided Machado with secret gratuities and entertainment and Machado, in violation of his duties to LISI and its customers, directed a substantial flow of orders to OPCO for execution at prices that were favorable to OPCO and detrimental to LISI's customers. As a result of this arrangement, on certain trades, Machado and Lu also positioned OPCO between LISI and other broker-dealers offering better prices that Machado could have obtained for LISI. Machado's and Lu's scheme caused significant harm to LISI's customers.[2]

During the relevant period, LISI did not implement reasonable procedures to prevent and detect unauthorized changes to trade tickets by its personnel. Machado frequently improperly changed and falsified order tickets in an effort to conceal the fraudulent scheme. Had LISI implemented reasonable procedures concerning changes to trade tickets, Machado's supervisor could have detected Machado's falsification of the trade tickets and uncovered Machado's fraudulent scheme. Accordingly, LISI failed reasonably to supervise Machado, within the meaning of Section 15(b)(4) of the Exchange Act, with a view to preventing and detecting Machado's violations of the federal securities laws. LISI also violated Exchange Act Section 17(a) and Rule 17a-3 thereunder because false information was entered into LISI's books and records by Machado.

B. Respondent

Leumi Investment Services Inc. is a New York corporation with its principal office in New York, New York. LISI is a wholly-owned subsidiary of Bank Leumi USA, a New York State chartered, Federal Deposit Insurance Corporation insured, full service commercial bank. LISI has been registered with the Commission as a broker-dealer since May 2001.

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

[2] During the relevant period, Machado was a dual employee of LISI and Bank Leumi USA ("BLUSA"), a commercial bank that is the parent company of LISI. Machado's fraudulent conduct arose from both his execution of customer orders as an employee of LISI and as an employee of BLUSA.

C. Facts

From September 1999 until he was dismissed on August 31, 2004, Machado was a fixed income trader on LISI's trading desk, primarily engaged in executing orders in emerging market fixed income securities. Upon receiving a customer order, Machado was responsible for determining the best prices available in the market and executing trades on behalf of LISI's customers.

During the relevant period, Lu specialized in emerging market securities. Lu's compensation was based solely on a percentage of the revenue generated by his customers' orders.

Machado and Lu began trading emerging market securities in 2000. In mid-2003, Machado and Lu secretly agreed that Machado would direct orders to Lu for execution at prices favorable to OPCO and, in exchange, Lu would provide Machado with gratuities and entertainment. The arrangement ensured that Lu received increased order flow, which, in turn, meant that Lu's compensation increased.

During 2003 and 2004, Lu entertained Machado numerous times per year. Each evening of entertainment typically cost at least a thousand dollars and was paid for by Lu in cash. In addition, approximately half a dozen times per year, Lu gave Machado gifts. Neither Lu nor Machado reported these gratuities and entertainment, as required under OPCO's and Leumi's respective policies.[3]

Under their secret arrangement, Machado frequently changed Lu's quoted price to make it more favorable to OPCO and, consequently, less favorable to LISI and its customers. For example, if LISI placed an order to buy a security and Lu quoted a price for that security to Machado at $99.50, Machado instead would pay OPCO $100 for the security.

As part of their arrangement, Machado and Lu also positioned OPCO between LISI and other broker-dealers that offered better prices to LISI. For example, after Machado received a favorable price quote from another broker-dealer, instead of executing the trade directly with that firm, Machado would direct Lu to contact that broker-dealer to buy or sell the securities in question at the favorable quoted price. Thereafter, Machado would execute LISI's order with Lu at a price that was less favorable to LISI and its customers than the price initially quoted by the other broker-dealer.

As a result of this secret arrangement, the average number of monthly trades that Machado executed with Lu through OPCO increased by approximately 450 percent during the relevant period. As a result of Machado's and Lu's scheme, LISI and its customers were harmed

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[3] FINRA Rule 3060 (which was in effect during the relevant period) prohibits a person associated with a broker-dealer from directly or indirectly giving anything of value, including gratuities, in excess of one hundred dollars per individual per year to any person where such payment or gratuity is in relation to the business of the employer of the recipient of the payment or gratuity. The rule also requires that the broker-dealer retain a record of all payments or gratuities in any amount known to it.

by approximately $785,208. The scheme also harmed customers of BLUSA by approximately $317,828.[4]

In order to carry out his improper trading with Lu, Machado violated LISI's policies and procedures with regard to LISI's trade blotter and trade tickets. Machado omitted information and entered false and misleading information into LISI's trade blotter in an effort to prevent his supervisor from detecting that he was trading repeatedly with Lu. Machado often would not enter OPCO's name on LISI's trade blotter and, instead, would insert the name of another broker-dealer that was not involved with the trade.

Machado also falsified LISI's trade tickets in order to conceal his trades with Lu from his supervisor. After executing a trade with Lu, Machado often prepared a counterparty trade ticket that falsely stated that he had closed the trade with a different counterparty. After obtaining the initials of his supervisor (or another LISI trader) on the falsified counterparty trade ticket, Machado changed the name of the bogus counterparty on the trade ticket to the correct counterparty by inserting the names of OPCO and Lu. Frequently, Machado changed the falsified ticket after it had been submitted for processing to LISI's back office. In these instances, Machado would retrieve the trade ticket from the back office himself or the back office would return it to him after discovering that the incorrect counterparty had been listed on the ticket. After crossing out the bogus counterparty name and inserting the names of OPCO and Lu on the trade ticket, Machado would return the changed ticket to the back office without having his supervisor initial the changed ticket, as required by LISI's policy.

Also, Machado and LISI's back office personnel repeatedly did not comply with LISI's written policy for changes to trade tickets, which required that a Trade Amendment Form ("TAF") be prepared each time an order ticket was changed. Neither Machado nor LISI's back office personnel prepared a TAF for each order ticket that Machado improperly changed.

By the conduct described above, Machado violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted LISI's violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

E. Violations

Section 15(b)(4)(E) of the Exchange Act gives the Commission the authority to censure, suspend, or revoke the registration of any broker or dealer who has failed reasonably to supervise associated persons, with a view toward preventing and detecting violations of the federal securities laws. Section 15(b)(4) states that a broker-dealer may discharge its supervisory responsibilities by having "established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect" these violations.

"The Commission has repeatedly emphasized that the duty to supervise is a critical component of the federal regulatory scheme." *In the Matter of Oechsle International Advisors,*

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[4] . After learning of the scheme, LISI and BLUSA reimbursed their customers by approximately $1.2 million (including interest) for the harm attributable to the conduct of Machado and Lu.

L.L.C., Admin. Proc. File No. 3-10554, 5 (August 10, 2001). "Where there has been an underlying violation of the federal securities laws, the failure to have or follow compliance procedures has frequently been found to evidence a failure reasonably to supervise the primary violator." *In the Matter of William V. Giordano*, Admin. Proc. File No. 3-8933 (January 19, 1996). In addition to adopting effective procedures for supervision, broker-dealers "must provide effective staffing, sufficient resources and a system of follow up and review to determine that any responsibility to supervise delegated to compliance officers, branch managers and other personnel is being diligently exercised." *In the Matter of Mabon, Nugent & Co.*, Admin. Proc. File No. 3-6207 (January 13, 1983).

During the relevant period, LISI did not implement reasonable procedures for preventing traders from tampering with trade tickets. In particular, LISI did not develop a system for implementing the requirement in LISI's written policy that a Trade Amendment Form be prepared for each change made to an order ticket. The procedures required the trader to complete the TAF and explain the reason for the change. The TAF had to be signed by both the trader and the supervisor, and maintained in the trade processing area of the firm. Notwithstanding its written policy and procedures, LISI never created the TAF, and never trained its employees on the policy and procedures. For example, LISI's trading desk supervisors had never used TAFs to document and explain changes made to trade tickets, and LISI's back office personnel were unaware of the requirement. If LISI had implemented reasonable procedures for preventing unauthorized changes to trade tickets, Machado's supervisor would have been made aware of Machado's repeated falsification of the trade tickets, and uncovered or prevented Machado's fraudulent scheme.

By engaging in the conduct described above, LISI failed reasonably to supervise Machado with a view toward preventing and detecting Machado's violations of the federal securities laws.

Section 17(a) of the Exchange Act and Rule 17a-3 thereunder require that registered brokers and dealers make and keep current certain specified books and records relating to their business. Among the records broker-dealers are required to make and keep are: (1) blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities [Rule 17a-3(a)(1)]; and (2) "[a] memorandum of each purchase and sale for the account of the member, broker, or dealer showing the price and, to the extent feasible, the time of execution" [Rule 17a-3(a)(7)].

By engaging in the conduct described above, LISI willfully[5] violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

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

F. **Respondent's Remedial Efforts**

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent (including reimbursement to its customers) and cooperation afforded the Commission staff.

G. **Undertakings**

LISI has undertaken to review its policies, procedures and systems regarding the (i) processing, changing, and supervisory review of trade tickets; (ii) monitoring of LISI's trade blotter; and (iii) monitoring of electronic communications by LISI's Trading Room personnel. Within ninety days of the issuance of this Order, unless otherwise extended by the staff of the Commission for good cause shown, LISI shall submit a report to the Commission describing the review performed and the conclusions and changes made as a result of this review. Further, at the time that LISI submits the report, LISI shall certify to the Commission in writing that it has established procedures, and a system for applying such procedures, which are reasonably expected to prevent and detect, insofar as practicable, the violations described in this Order.

IV.

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

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

A. Respondent cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

B. Respondent be, and hereby is censured.

C. Respondent shall comply with the undertaking enumerated in Section III, paragraph G above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59439 / February 24, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13379

In the Matter of **RBC Capital Markets Corporation** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b)(4), 15B(c)(2) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4), 15B(c)(2) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against RBC Capital Markets Corporation ("RBC" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b)(4), 15B(c)(2) and 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that

SUMMARY

1. These proceedings arise out of violations by RBC of the fair dealing, gifts and gratuities, and supervisory rules of the Municipal Securities Rulemaking Board ("MSRB") for advances made on behalf of and expenses reimbursed to one of its municipal clients (the "City") during the City's municipal bond issuance process. As part of the process of regularly issuing bonds to raise capital to fund its operations, the City obtained credit ratings for its bond offerings from rating agencies based in New York City. City officials traveled to New York on a nearly annual basis to meet with analysts from the rating agencies ("Rating Trip"). On Rating Trips taken in 2004 and 2005, City officials were accompanied by family members, dined at upscale restaurants, attended Broadway shows and sporting events, and had access to a private car service. These two trips lasted six days, even though meetings with the ratings agencies were held on one or two days. After receiving instructions from a representative of the City regarding activities of interest to City officials and family members, RBC organized the activities for each trip, and then advanced the payment for nearly all of the expenses incurred by the City officials and their family members. RBC then obtained, with the knowledge and approval of certain City officials, reimbursement for all expenses incurred on the Rating Trips as a cost of issuance, directly from bond proceeds at closing.

RESPONDENT

2. RBC Capital Markets Corporation ("RBC"), formerly known as RBC Dain Rauscher, Inc., is a Minnesota corporation headquartered in Minneapolis, Minnesota, with offices nationwide. RBC has been registered with the Commission as a broker-dealer since 1992, with the MSRB since 1993, and with FINRA since 1993. RBC is a wholly-owned subsidiary of the Royal Bank of Canada, which has been registered with the Commission since 1981 and trades on the New York Stock Exchange under the symbol "RY."

FACTS

BACKGROUND

3. Since in or about 1990, RBC has acted as financial advisor to the City. As the City's financial advisor, RBC has assisted the City in: (1) putting together its bond issues, (2) getting its bond issues rated by rating agencies, (3) scheduling trips to meet with rating agencies, (4) structuring the bond issues, (5) working with the underwriters for the bonds, (6) advising on general economic matters affecting the City, and (7) advising the City on special development projects.

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[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.

4. Throughout its relationship with RBC, the City has undertaken nearly annual bond offerings to raise capital for its day-to-day operations, as well as for specific infrastructure projects such as roads, sewerage, and parks.

5. As a routine part of its bond offerings, the City has sought ratings for its bonds from national rating agencies. As part of the process of obtaining municipal bond ratings, RBC and City officials traveled to New York to meet face-to-face with rating agency analysts.

6. In advance of each Rating Trip, City officials coordinated with RBC to plan and organize various activities. RBC scheduled the official meetings with the rating agencies, made hotel reservations for the Rating Trip participants, and in some years reserved a private car service to transport the City officials around New York City. City officials typically advised RBC regarding entertainment activities (such as theater or sports events) and restaurants it had selected, and thereafter RBC made the necessary reservations and advanced the funds to purchase the requested entertainment tickets.

7. Following each Rating Trip, RBC reimbursed the City officials for expenses they incurred during the Rating Trip, including expenses for meals and entertainment. Then, at the close of the City's annual bond offerings and with the City's knowledge and approval, RBC obtained reimbursement for all Rating Trip expenses that it paid or advanced as part of the Rating Trip as a cost of issuance from the proceeds of that year's municipal bond offerings.

2004 RATING TRIP

8. In early 2004, the City decided that it wanted to meet face-to-face with two rating agencies in support of its annual municipal bond offerings ("2004 Rating Trip"). On the City's behalf, RBC scheduled the relevant meetings to take place in New York on Monday, March 22.

9. RBC's Fixed Income Banking Department Manual, dated February 2004, stated that "before an [RBC] employee provides meals, entertainment, or any other item of value to a public official, it is vital that the employee ascertain whether the gift is permitted under applicable state or local laws."

10. The City's rules and regulations set forth, among other things, certain policies that applied to City employees while traveling on official City business, including the following:

- Travel times for official trips should not exceed one-half day prior to and one-half day following business meetings.
- City employees are expected to select the mode of transportation most economical to the City, and if private vehicles are used, the cost should not exceed the comparable cost of a public vehicle.
- Lodging expenses will be reimbursed for the actual number of days of the meeting (with an allowance for travel time).
- City employees will not be reimbursed for bar bills or entertainment expenses.
- Spouses or other family members may accompany City employees on official trips, but that employee shall pay all incremental costs related to having that family

member along. Examples of incremental costs include the difference in lodging costs between single and double occupancy, and all meal and incidental costs of the family member.

11. Once the official meeting dates were set for the 2004 Rating Trip, the City selected five officials to meet with the rating agencies: the Mayor, the Deputy Mayor Pro Tem, the City Manager, the Director of Finance, and a Councilman. To accompany them on the trip, the Mayor brought along his spouse and two daughters, the Deputy Mayor Pro Tem brought her daughter and grandson, and the Councilman brought his spouse.

12. Even though the meetings were scheduled to take place on Monday, March 22, the Mayor, the Deputy Mayor Pro Tem, the Councilman, and their respective family members arrived in New York on Wednesday, March 17. The City Manager and the Director of Finance arrived in New York on Friday, March 19. Two RBC representatives arrived in New York on Sunday, March 21, the day before the rating agency meetings.

13. Less than a week before the 2004 Rating Trip, RBC sent the City a draft approval letter, with an itinerary and cost estimate for the trip attached thereto. The approval letter stated that the City had reviewed and approved the itinerary and cost estimate, and also indicated that it was appropriate for the individuals taking part in the trip to attend. The letter further set forth that the City authorized RBC to "finalize the arrangements and coordinate the billing of appropriate travel costs to the City at the completion of the financing." The City's Director of Finance adopted the letter verbatim, printed it out on City letterhead, signed it, and returned it to RBC.

14. On the 2004 Rating Trip, City officials and their family members stayed at the Westin New York at Times Square at a cost of $8,958. Three of the five City officials stayed in "regular" rooms, while the Mayor and the Councilman (and their respective family members) stayed in "junior suites" at a higher cost per night than the "regular" rooms. RBC made the reservations and advanced the payment for all of the City's hotel rooms.

15. During the 2004 Rating Trip, City officials and their family members dined at Tavern on the Green, Rocco's on 22nd Street, Del Frisco's Steakhouse, Le Cirque, and Mr. Chow's at a cost of $7,552.

16. During the 2004 Rating Trip, City officials and their family members attended the Broadway plays Mama Mia, The Lion King, Chicago, and The Producers, as well as a New York Knicks basketball game, at a cost of $7,250.

17. For the 2004 Rating Trip, RBC arranged for the City officials and their family members to have access to private car service to drive them to and from the airport, hotel, restaurants, entertainment venues, shopping excursions, and business meetings. The car service for the 2004 Rating Trip cost $8,883, but only $1,000 of that amount was attributable to use by the City officials on Monday, March 22, the day they met with the rating agencies.

18. After returning from the 2004 Rating Trip, City officials sent reimbursement requests to RBC for out-of-pocket expenses incurred during the trip, including hotel and restaurant

expenses not previously paid for by RBC. RBC processed the requests and issued reimbursement checks to each City official for their respective out-of-pocket expenses. In total, RBC advanced $33,452 for expenses incurred by City officials and their family members during the 2004 Rating Trip, including restaurant, car service, hotel, and entertainment expenses.

19. The City officials did not reimburse the City for incremental costs related to having family members along on the trip, entertainment and meal expenses, the costs of a private car service in excess of the cost of public vehicles, or for lodging expenses incurred on the days in addition to the day of the rating agency meetings (with an allowance for travel time).

20. When the City's 2004 bond offerings closed, RBC sought and obtained reimbursement for all of the 2004 Rating Trip expenses directly out of the proceeds of the bond offerings as a cost of issuance. In total, the expenses incurred during the 2004 Rating Trip accounted for approximately eight percent of the City's 2004 bond issuance costs.

SEC EXAMINATION

21. In August and September 2004, a team of SEC examiners ("Exam Staff") conducted an examination of RBC and its municipal bond underwriting and financial advisory activities. The Exam Staff identified certain areas of concern regarding Rating Trips, which it discussed with RBC upon completion of the exam, including (a) the types of expenses being advanced to clients, (b) the fact that RBC was paying expenses for family members of clients, and (c) the possible excessiveness of Rating Trip expenses.

22. On September 8, 2004, RBC circulated an e-mail concerning the propriety of certain expenses incurred on Rating Trips, reminding employees that such expenses may be subject to the scrutiny of regulators and the media.

23. Several months later, on February 14, 2005, RBC circulated another e-mail concerning the propriety of gift and entertainment expenses. The memorandum reminded RBC employees that the payment of meals and sporting or theatrical tickets was allowed and did not count against the $100 gift limit *only if* (a) an RBC representative is personally acting as host and is present throughout the entertainment, and (b) the entertainment is not so frequent or expensive as to raise a suggestion of impropriety.

2005 RATING TRIP

24. In support of the City's 2005 municipal bond offerings, City officials again decided to meet face-to-face with representatives from the rating agencies, and asked RBC to help plan a Rating Trip on the City's behalf ("2005 Rating Trip").

25. The City selected five officials to meet with the rating agencies for the 2005 Rating Trip: the Mayor, Deputy Mayor Pro Tem, Director of Finance, City Manager, and a Councilman. To accompany them on the trip, the Mayor brought his spouse and two children, the Deputy Mayor Pro Tem brought his spouse and two children, the Councilman brought his spouse and child, and

the City Manager brought his spouse. In total, the City contingent increased from 11 in 2004 to 14 in 2005.

26. For the 2005 Rating Trip, RBC scheduled the City's meetings with one rating agency on Monday, March 14, and another on Tuesday, March 15. The itinerary for the City officials and their family members, however, spanned six days, from Friday, March 11 to Wednesday, March 16. Two RBC representatives traveled to New York on Sunday, March 13, the day before the rating agency meetings.

27. On February 25, 2005, two weeks prior to the 2005 Rating Trip, RBC sent a letter to the City's Director of Finance, advising him and the City about certain expense issues (the "February 2005 Letter"). The February 2005 Letter, which was reviewed and approved by several RBC supervisors, advised that (a) spouses of City officials, while welcome to attend the Rating Trip, should pay their own expenses; (b) when entertainment and related transportation expenses are charged to the City, the individual should reimburse the City; and (c) when meal and related transportation expenses are charged to the City, the City should determine whether the individuals should reimburse some portion of the expense. The City's Director of Finance countersigned the letter on behalf of the City and returned it to RBC.

28. In preparation for the 2005 Rating Trip, RBC worked with City officials to determine where they and their family members wanted to stay and dine, and what Broadway shows and events the officials and their family members wanted to attend. As it had done in 2004, the City advised RBC concerning the entertainment activities and restaurants it had selected, and RBC thereafter located tickets to the entertainment events, made hotel and restaurant reservations, and coordinated the itinerary of activities for all Rating Trip attendees. RBC also advanced the payment for those items.

29. For the 2005 Rating Trip, City officials and their family members stayed at the Westin New York at Times Square at a cost of $13,262. Two of the five City officials stayed in "regular" rooms, while the Mayor, Deputy Mayor Pro Tem, and Councilman (and their respective family members) stayed in "junior suites" at a higher cost per night than the "regular" rooms.

30. During the 2005 Rating Trip, City officials and family members dined at Sea Grill, Tavern on the Green, Bouley, Del Frisco's Steakhouse, 21 Club, and Shula's Steakhouse, at a cost of $5,690, and attended the Broadway shows Beauty and the Beast, Wicked, the Lion King, The Producers, and Hairspray, as well as the Metropolitan Opera, at a cost of $8,450.

31. For the 2005 Rating Trip, RBC again arranged for the City officials and their family members to have access to private car service to drive them to-and-from the airport, hotel, restaurants, entertainment venues, shopping excursions, and business meetings. The car service for the 2005 Rating Trip cost $14,370.

32. Shortly after the 2005 Rating Trip, City officials sent reimbursement requests to RBC for out-of-pocket expenses incurred during the trip, including hotel and restaurant expenses for them and their family members. As it had done in 2004, RBC processed the requests and issued reimbursement checks to the City officials.

33. On April 26, 2005, as part of the process of compiling the final "cost of issuance" figure for the City's 2005 bond offerings, RBC asked the City officials to detail any additional costs that they had incurred on the 2005 Rating Trip. The following day, the Director of Finance listed $3,639.51 in additional costs incurred by City officials and family members on the 2005 Rating Trip, which RBC then reimbursed. These additional amounts brought the cost of the 2005 Rating Trip (including hotel, car service, food, and entertainment) – and the amount advanced by RBC – to $42,213.

34. RBC then prepared a comprehensive spreadsheet detailing the total costs of issuance, which included a separate line item for RBC's Rating Trip expenses. This line item included expenses incurred by family members of City officials, entertainment and transportation related expenses, and meal and transportation related expenses.

35. On April 27, at or around the same time RBC was compiling expenses incurred on the 2005 Rating Trip in order to calculate the costs of issuance for the City's 2005 bond offerings, RBC sent the City a letter (the "April 2005 Letter") that reiterated the concerns RBC had raised in the February 2005 Letter, and attached a complete, detailed retrospective itinerary that included all activities, participants, and costs.

36. On May 5, 2005, in anticipation of the closing of the City's bond offerings, RBC sent the City an invoice for RBC's fees and expenses incurred relating to the City's 2005 bond offerings. RBC's invoice contained the following four categories of fees and expenses: (1) financial advisory services: $128,166.25; (2) structuring fee: $32,041.56; (3) out-of-pocket expenses [in town]: $4,500; and (4) out-of-pocket expenses [out of town]: $42,213.48.

37. The "out-of-pocket expenses [out of town]" listed on the invoice were expenses incurred entirely in connection with the 2005 Rating Trip, which amounted to approximately 11 percent of the City's 2005 municipal bond issuance costs. RBC sought and obtained reimbursement for these expenses as a "cost of issuance" from the City's 2005 bond proceeds.

38. Notwithstanding the concerns set forth in both the February 2005 Letter and the April 2005 Letter, RBC reimbursed City officials for 2005 Rating Trip expenses incurred (a) by family members, (b) for entertainment and related transportation expenses, and (c) for meal and related transportation expenses. Supervisors at RBC reviewed these reimbursements. RBC then sought and obtained reimbursement for the 2005 Rating Trip expenses from the City's bond proceeds as a "cost of issuance."

39. The City officials did not reimburse the City for incremental costs related to having family members along on the trip, entertainment and meal expenses, the costs of a private car service in excess of the cost of public vehicles, or for lodging expenses incurred on the days in addition to the days of the rating agency meetings (with an allowance for travel time).

40. RBC employees and supervisors reviewed the expenses incurred by City officials on the 2004 and 2005 Rating Trips. RBC thereafter reimbursed City officials for those expenses,

which, under the City's travel policies, the City officials would not have been able to obtain reimbursement from the City.

41. Because the City officials did not reimburse the City for certain expenses incurred on the Rating Trips, the funds for which were advanced by RBC and recouped as a cost of issuance from bond proceeds, the City officials and their family members received, at no cost to them, thousands of dollars of entertainment tickets, private transportation, hotel rooms, and meals.

42. By obtaining reimbursement for all expenses incurred on the Rating Trips as a cost of issuance from the City's bond proceeds, RBC engaged in a deceptive, dishonest, or unfair practice with its client, the City.

43. Since the 2005 Rating Trip, RBC has taken significant steps to improve the way it organizes and oversees Rating Trips taken by its clients. These steps are reflected in RBC's employee policy manuals and employee training programs. Among other things, RBC now requires its clients to arrange and pay for expenses incurred on Rating Trips involving entertainment, transportation, and meals.

VIOLATIONS

44. Section 15B(b) of the Exchange act established the MSRB and empowered it to propose and adopt rules with respect to transactions in municipal securities by brokers, dealers, and municipal securities dealers. Section 15B(c)(1) prohibits a broker, dealer or municipal securities dealer from using the mails or any instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in violation of any MSRB rule. As a municipal securities dealer, RBC was subject to Section 15B(c)(1) of the Exchange Act and the MSRB rules.

45. As a result of the conduct set forth above, RBC violated MSRB Rule G-17, which requires municipal securities dealers to deal fairly with all persons and not to engage in any deceptive, dishonest, or unfair practice.

46. As a result of the conduct set forth above, RBC violated MSRB Rule G-20(a), which prohibits any broker, dealer, or municipal securities dealer from, directly or indirectly, giving or permitting to be given any thing or service of value, including gratuities, in excess of $100 per year to a person other than an employee or partner of such broker, dealer, or municipal securities dealer, if such payments or services are in relation to the municipal securities activities of the recipient's employer.

47. As a result of the conduct set forth above, RBC violated MSRB Rule G-27, which requires, among other things, that (a) each broker, dealer and municipal securities dealer supervise the conduct of its municipal securities business and the municipal securities activities of its associated persons to ensure compliance with MSRB rules as well as the applicable provisions of the Exchange Act and the rules promulgated thereunder; and (b) each broker, dealer and municipal securities dealer to adopt, maintain, and enforce written supervisory procedures reasonably designed to ensure compliance with the same rules and Exchange Act provisions.

48. As a result of RBC's violations of MSRB Rules G-17, G-20, and G-27, RBC willfully[2] violated Section 15B(c)(1) of the Exchange Act.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer. Accordingly, pursuant to Sections 15(b)(4), 15B(c)(2) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent is censured.

B. Respondent cease and desist from committing or causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act, and MSRB Rules G-17, G-20, and G-27.

C. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $125,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies RBC as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Stephen Korotash, Division of Enforcement, Securities and Exchange Commission, 801 Cherry Street, 19th Floor, Fort Worth, TX 76102.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

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

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 24, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13380

In the Matter of **Alan Brian Baiocchi,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Alan Brian Baiocchi ("Baiocchi").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From 1995 to 1997, Baiocchi, age 54, was the president and operator of Intro Technology Services ("ITS"), a telemarketing boiler room based in Newport Beach, California. While engaged in the conduct underlying the indictment, Baiocchi was associated with ITS, a broker dealer, and made use of the mails and other means and instrumentalities of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, securities. Beginning in 1995, Baiocchi and his telemarketers, which included telemarketers in Newport Beach and Montreal, Canada, cold-called people around the country soliciting investments in the form of fractional undivided interests in oil and gas programs in Oklahoma. Baiocchi is currently incarcerated at the United States Penitentiary in Lompoc, California. He formerly resided in Laguna Niguel, California.

B. RESPONDENT'S CRIMINAL CONVICTION

1. On September 23, 2004, Baiocchi was convicted on two counts of wire fraud in violation of 18 U.S.C. § 1343 in the United States District Court for the Central District of California, in United States v. Baiocchi, Case No. 8:02-cr-00089. Baiocchi was sentenced to a prison term of 63 months to be followed by three years of supervised release. Baiocchi was also ordered to make restitution in the amount of $3,800,000. On July 13, 2007, the Court of Appeals for the Ninth Circuit affirmed Baiocchi's conviction. United States v. Baiocchi, 2007 U.S. App. LEXIS 18494 (9th Cir. July 31, 2007).

2. The counts of the criminal indictment on which Baiocchi was convicted alleged, among other things, that Baiocchi defrauded investors and obtained money and property by means of materially false and misleading statements in connection with the fraudulent offer and sale of securities in the form of fractional undivided interests in oil and gas drilling programs.

III.

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

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

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

IV.

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

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

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

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

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 201

[Release Nos. 33-9009; 34-59449; IA-2845; IC-28635]

Adjustments to Civil Monetary Penalty Amounts

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: This rule implements the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. The Commission is adopting a rule adjusting for inflation the maximum amount of civil monetary penalties under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002.

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

FOR FURTHER INFORMATION CONTACT: Richard A. Levine, Assistant General Counsel, at (202) 551-5168, or James A. Cappoli, Office of the General Counsel, at (202) 551-7923.

SUPPLEMENTARY INFORMATION:

I. Background

This rule implements the Debt Collection Improvement Act of 1996 ("DCIA").[1] The DCIA amended the Federal Civil Penalties Inflation Adjustment Act of 1990 ("FCPIAA")[2] to require each federal agency to adopt regulations at least once every four

[1] Pub. L. No. 104-134, 110 Stat. 1321-373 (1996) (codified at 28 U.S.C. 2461 note).

[2] 28 U.S.C. 2461 note.

years that adjust for inflation the maximum amount of the civil monetary penalties ("CMPs") under the statutes administered by the agency.[3]

A civil monetary penalty ("CMP") is defined in relevant part as any penalty, fine, or other sanction that: (1) is for a specific amount, or has a maximum amount, as provided by federal law; and (2) is assessed or enforced by an agency in an administrative proceeding or by a federal court pursuant to federal law.[4] This definition covers the monetary penalty provisions contained in the statutes administered by the Commission. In addition, this definition encompasses the civil monetary penalties that may be imposed by the Public Company Accounting Oversight Board (the "PCAOB") in its disciplinary proceedings pursuant to 15 U.S.C. 7215(c)(4)(D).[5]

The DCIA requires that the penalties be adjusted by the cost-of-living adjustment set forth in Section 5 of the FCPIAA.[6] The cost-of-living adjustment is defined in the FCPIAA as the percentage by which the U.S. Department of Labor's Consumer Price Index for all-urban consumers ("CPI-U")[7] for the month of June for the year preceding the adjustment exceeds the CPI-U for the month of June for the year in which the amount of the penalty was last set or adjusted pursuant to law.[8] The statute contains specific

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[3] Increased CMPs apply only to violations that occur after the increase takes effect.

[4] 28 U.S.C. 2461 note (3)(2).

[5] The Commission may by order affirm, modify, remand, or set aside sanctions, including civil monetary penalties, imposed by the PCAOB. See Section 107(c) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217. The Commission may enforce such orders in federal district court pursuant to Section 21(e) of the Securities Exchange Act of 1934. As a result, penalties assessed by the PCAOB in its disciplinary proceedings are penalties "enforced" by the Commission for purposes of the Act. See Adjustments to Civil Monetary Penalty Amounts, Release No. 33-8530 (Feb. 4, 2005) [70 FR 7606 (Feb. 14, 2005)].

[6] 28 U.S.C. 2461 note (5).

[7] 28 U.S.C. 2461 note (3)(3).

[8] 28 U.S.C. 2461 note (5)(b).

rules for rounding each increase based on the size of the penalty.[9] Agencies do not have discretion over whether to adjust a maximum CMP, or the method used to determine the adjustment. Although the DCIA imposes a 10 percent maximum increase for each penalty for the first adjustment pursuant thereto, that limitation does not apply to subsequent adjustments.

The Commission administers four statutes that provide for civil monetary penalties: the Securities Act of 1933; the Securities Exchange Act of 1934; the Investment Company Act of 1940; and the Investment Advisers Act of 1940. In addition, the Sarbanes-Oxley Act of 2002 provides the PCAOB (over which the Commission has jurisdiction) authority to levy civil monetary penalties in its disciplinary proceedings.[10] Penalties administered by the Commission were last adjusted by rules effective February 14, 2005.[11] The DCIA requires the civil monetary penalties to be adjusted for inflation at least once every four years. The Commission is therefore obligated by statute to increase the maximum amount of each penalty by the appropriate formulated amount.

Accordingly, the Commission is adopting an amendment to 17 CFR Part 201 to add § 201.1004 and Table IV to Subpart E, increasing the amount of each civil monetary penalty authorized by the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002. The adjustments set forth in the amendment apply to violations occurring after the effective date of the amendment.

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[9] 28 U.S.C. 2461 note (5)(a)(1) - (6).

[10] 15 U.S.C. 7215(c)(4)(D).

[11] See 17 CFR 201.1003.

II. Summary of the Calculation

To explain the inflation adjustment calculation for CMP amounts that were last adjusted in 2005, we will use the following example. Under the current provisions, the Commission may impose a maximum CMP of $1,275,000 for certain insider trading violations by a controlling person. To determine the new CMP amounts under the amendment, first we determine the appropriate CPI-U for June of the calendar year preceding the year of adjustment. Because we are adjusting CMPs in 2009, we use the CPI-U for June of 2008, which was 218.815. We must also determine the CPI-U for June of the year the CMP was last adjusted for inflation. Because the Commission last adjusted this CMP in 2005, we use the CPI-U for June of 2005, which was 194.5.

Second, we calculate the cost-of-living adjustment or inflation factor. To do this we divide the CPI for June of 2008 (218.815) by the CPI for June of 2005 (194.5). Our result is 1.1250.

Third, we calculate the raw inflation adjustment (the inflation adjustment before rounding). To do this, we multiply the maximum penalty amounts by the inflation factor. In our example, $1,275,000 multiplied by the inflation factor of 1.1250 equals $1,434,391.

Fourth, we round the raw inflation amounts according to the rounding rules in Section 5(a) of the FCPIAA. Since we round only the increase amount, we calculate the increased amount by subtracting the current maximum penalty amounts from the raw maximum inflation adjustments. Accordingly, the increase amount for the maximum penalty in our example is $159,391 (i.e., $1,434,391 less $1,275,000). Under the rounding rules, if the *penalty* is greater than $200,000, we round the *increase* to the

nearest multiple of $25,000. Therefore, the maximum penalty increase in our example is $150,000.

Fifth, we add the rounded increase to the maximum penalty amount last set or adjusted. In our example, $1,275,000 plus $150,000 yields a maximum inflation adjustment penalty amount of $1,425,000.[12]

III. Related Matters

A. Administrative Procedure Act - Immediate Effectiveness of Final Rule

Under the Administrative Procedure Act ("APA"), a final rule may be issued without public notice and comment if the agency finds good cause that notice and comment are impractical, unnecessary, or contrary to public interest.[13] Because the Commission is required by statute to adjust the civil monetary penalties within its jurisdiction by the cost-of-living adjustment formula set forth in Section 5 of the FCPIAA, the Commission finds that good cause exists to dispense with public notice and comment pursuant to the notice and comment provisions of the APA.[14] Specifically, the Commission finds that because the adjustment is mandated by Congress and does not involve the exercise of Commission discretion or any policy judgments, public notice and comment is unnecessary.[15]

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[12] The adjustments in Table IV to Subpart E of Part 201 reflect that the operation of the statutorily mandated computation, together with rounding rules, does not result in any adjustment to one penalty. This particular penalty will be subject to slightly different treatment when calculating the next adjustment. Under the statute, when we next adjust these penalties, we will be required to use the CPI-U for June of the year when this particular penalty was "last adjusted," rather than the CPI-U for 2009.

[13] 5 U.S.C. 553(b)(3)(B).

[14] 5 U.S.C. 553(b)(3)(B).

[15] A regulatory flexibility analysis under the Regulatory Flexibility Act ("RFA") is required only when an agency must publish a general notice of proposed rulemaking for notice and comment. See 5 U.S.C. 603. As noted above, notice and comment are not required for this final rule. Therefore, the RFA does not apply.

Under the DCIA, agencies must make the required inflation adjustment to civil monetary penalties: (1) according to a very specific formula in the statute; and (2) within four years of the last inflation adjustment. Agencies have no discretion as to the amount of the adjustment and have limited discretion as to the timing of the adjustment, in that agencies are required to make the adjustment at least once every four years. The regulation discussed herein is ministerial, technical, and noncontroversial. Furthermore, because the regulation concerns penalties for conduct that is already illegal under existing law, there is no need for affected parties to have thirty days prior to the effectiveness of the regulation and amendments to adjust their conduct. Accordingly, the Commission believes that there is good cause to make this regulation effective immediately upon publication.[16]

B. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits that result from its rules. This regulation merely adjusts civil monetary penalties in accordance with inflation as required by the DCIA, and has no impact on disclosure or compliance costs. The benefit provided by the inflationary adjustment to the maximum civil monetary penalties is that of maintaining the level of deterrence effectuated by the civil monetary penalties, and not allowing such deterrent effect to be diminished by inflation. Furthermore, Congress, in mandating the inflationary adjustments, has already determined that any possible increase in costs is justified by the overall benefits of such adjustments.

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[16] Additionally, this finding satisfies the requirements for immediate effectiveness under the Small Business Regulatory Enforcement Fairness Act. See 5 U.S.C. 808(2); see also id. 801(a)(4).

C. Paperwork Reduction Act

This rule does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995 as amended.[17]

D. Statutory Basis

The Commission is adopting these amendments to 17 CFR Part 201, Subpart E pursuant to the directives and authority of the DCIA, Pub. L. No. 104-134, 110 Stat. 1321-373 (1996).

List of Subjects in 17 CFR Part 201

Administrative practice and procedure, Claims, Confidential business information, Lawyers, Securities.

Text of Amendment

For the reasons set forth in the preamble, part 201, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 201 – RULES OF PRACTICE

SUBPART E – ADJUSTMENT OF CIVIL MONETARY PENALTIES

1. The authority citation for Part 201, Subpart E, is revised to read as follows:

Authority: 28 U.S.C. 2461 note.

2. Section 201.1004 and Table IV to Subpart E are added to read as follows:

§ 201.1004 Adjustment of civil monetary penalties – 2009.

As required by the Debt Collection Improvement Act of 1996, the maximum amounts of all civil monetary penalties under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers

[17] 44 U.S.C. 3501 et. seq.

Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002 are adjusted for inflation in accordance with Table IV to this subpart. The adjustments set forth in Table IV apply to violations occurring after [insert date of publication in the Federal Register].

Table IV to Subpart E	**Civil Monetary Penalty Inflation Adjustments**			
U.S. Code Citation	Civil Monetary Penalty Description	Year Penalty Amount Was Last Adjusted	Maximum Penalty Amount Pursuant To Last Adjustment	Adjusted Maximum Penalty Amount
Securities and Exchange Commission				
15 U.S.C. 77t(d)	For natural person	2001	$6,500	$7,500
	For any other person	2005	65,000	75,000
	For natural person / fraud	2005	65,000	75,000
	For any other person / fraud	2005	325,000	375,000
	For natural person / substantial losses or risk of losses to others	2005	130,000	150,000
	For any other person / substantial losses or risk of losses to others	2005	650,000	725,000
15 U.S.C. 78ff(b)	Exchange Act / failure to file information documents, reports	1996	110	110
15 U.S.C. 78ff(c)(1)(B)	Foreign Corrupt Practices – any issuer	1996	11,000	16,000
15 U.S.C. 78ff(c)(2)(C)	Foreign Corrupt Practices – any agent or stockholder acting on behalf of issuer	1996	11,000	16,000
15 U.S.C. 78u-1(a)(3)	Insider Trading – controlling person	2005	1,275,000	1,425,000
15 U.S.C. 78u-2	For natural person	2001	6,500	7,500
	For any other person	2005	65,000	75,000
	For natural person / fraud	2005	65,000	75,000
	For any other person / fraud	2005	325,000	375,000
	For natural person / substantial losses to others / gains to self	2005	130,000	150,000
	For any other person / substantial losses to others /gain to self	2005	650,000	725,000
15 U.S.C. 78u(d)(3)	For natural person	2001	6,500	7,500
	For any other person	2005	65,000	75,000
	For natural person / fraud	2005	65,000	75,000
	For any other person / fraud	2005	325,000	375,000
	For natural person / substantial losses or risk of losses to others	2005	130,000	150,000
	For any other person / substantial losses or risk of losses to others	2005	650,000	725,000

Table IV to Subpart E	**Civil Monetary Penalty Inflation Adjustments**			
U.S. Code Citation	Civil Monetary Penalty Description	Year Penalty Amount Was Last Adjusted	Maximum Penalty Amount Pursuant To Last Adjustment	Adjusted Maximum Penalty Amount
15 U.S.C. 80a-9(d)	For natural person	2001	$6,500	$7,500
	For any other person	2005	65,000	75,000
	For natural person / fraud	2005	65,000	75,000
	For any other person / fraud	2005	325,000	375,000
	For natural person / substantial losses to others / gains to self	2005	130,000	150,000
	For any other person / substantial losses to others /gain to self	2005	650,000	725,000
15 U.S.C. 80a-41(e)	For natural person	2001	6,500	7,500
	For any other person	2005	65,000	75,000
	For natural person / fraud	2005	65,000	75,000
	For any other person / fraud	2005	325,000	375,000
	For natural person / substantial losses or risk of losses to others	2005	130,000	150,000
	For any other person / substantial losses or risk of losses to others	2005	650,000	725,000
15 U.S.C. 80b-3(i)	For natural person	2001	6,500	7,500
	For any other person	2005	65,000	75,000
	For natural person / fraud	2005	65,000	75,000
	For any other person / fraud	2005	325,000	375,000
	For natural person / substantial losses to others / gains to self	2005	130,000	150,000
	For any other person / substantial losses to others /gain to self	2005	650,000	725,000
15 U.S.C. 80b-9(e)	For natural person	2001	6,500	7,500
	For any other person	2005	65,000	75,000
	For natural person / fraud	2005	65,000	75,000
	For any other person / fraud	2005	325,000	375,000
	For natural person / substantial losses or risk of losses to others	2005	130,000	150,000
	For any other person / substantial losses or risk of losses to others	2005	650,000	725,000

Table IV to Subpart E	**Civil Monetary Penalty Inflation Adjustments**			
U.S. Code Citation	Civil Monetary Penalty Description	Year Penalty Amount Was Last Adjusted	Maximum Penalty Amount Pursuant To Last Adjustment	Adjusted Maximum Penalty Amount
15 U.S.C. 7215(c)(4)(D)(i)	For natural person	2005	110,000	120,000
	For any other person	2005	2,100,000	2,375,000
15 U.S.C. 7215(c)(4)(D)(ii)	For natural person	2005	800,000	900,000
	For any other person	2005	15,825,000	17,800,000

By the Commission.

Elizabeth M. Murphy

February 25, 2009

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59461 / February 26, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13383

In the Matter of **James Michael Leonard, Esq.** **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 James Michael Leonard, Esq. ("Leonard") 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. Leonard is an attorney admitted to practice law in California.

2. On August 9, 2002, Leonard was indicted in the United States District Court for the Eastern District of New York for conspiracy and securities fraud. The indictment alleged that Leonard knowingly and willfully participated in various fraudulent schemes to defraud members of the investing public by, among other things, preparing and drafting offering materials for securities that contained untrue statements of material fact and omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading. This conduct, according to the indictment, would and did operate as a fraud and deceit upon members of the investing public in connection with the purchase of these securities.

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[1]Rule 102(e)(2) provides in pertinent part: "[a]ny person who has been convicted of a felony or misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

3. On October 5, 2007, a jury convicted Leonard of conspiracy and securities fraud.

4. On September 19, 2008, a judgment was entered by the United States District Court for the Eastern District of New York convicting Leonard of conspiracy and securities fraud and sentencing him to 6 months home detention and five years probation.

III.

In view of the foregoing, the Commission finds that Leonard is an attorney who has been convicted of a felony involving moral turpitude within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice. Accordingly, it is ORDERED, that James Michael Leonard 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.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59428 / February 20, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2843 / February 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13376

In the Matter of **Diamondback Capital Management, LLC,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 203(e) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Diamondback Capital Management, LLC ("Diamondback" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 203(e) of the Investment

Advisers Act of 1940 and Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Diamondback, an investment adviser of two hedge funds. On four occasions from August 2005 to October 2005 ("the relevant period"), Respondent violated Rule 105 of Regulation M in connection with short sales made in advance of public offerings by Axis Capital Holdings Limited ("Axis"), Endurance Specialty Holdings Limited ("Endurance"), Everest Re Group Limited ("Everest") and IPC Holdings Limited ("IPC Holdings"). Diamondback had sold securities short within five business days before the pricing of each offering, and covered the short sales with shares purchased in the offerings. The profits on these trades totaled $94,014.

Respondent

1. Diamondback Capital Management, LLC, is a Delaware limited liability company that has its headquarters and principal place of business in Stamford, Connecticut. Diamondback has been registered with the Commission as an investment adviser since 2006 and serves as an investment adviser for two hedge fund clients that invest their assets through a single trading vehicle, Diamondback Master Fund Ltd., a Cayman Islands exempt limited company.

Other Relevant Entities

2. Axis is a holding company domiciled in Bermuda. Axis' stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange.

3. Endurance is a holding company domiciled in Bermuda. Endurance's stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange.

4. Everest is a holding company domiciled in Bermuda. Everest's stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange.

5. IPC Holdings is a holding company domiciled in Bermuda. IPC Holdings' stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the NASDAQ.

Background

6. At all relevant times, Rule 105 of Regulation M, "Short Selling in Connection with a Public Offering," ("Rule 105") provided, in pertinent part:

> In connection with an offering of securities for cash pursuant to a registration statement ... filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such short sale occurred during the ... period beginning five business days before the pricing of the offered securities and ending with such pricing . . .

17 C.F.R. § 242.105(a)(1). This five business day or shorter period is referred to herein as the "restricted period." Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

7. During the relevant period, Diamondback violated Rule 105 in connection with short sales made prior to public offerings by four companies, Axis, Endurance, Everest and IPC Holdings, resulting in profits of $94,014.

8. On August 8, 2005, Diamondback sold short a total of 25,000 Axis shares.

9. After the close of the market on August 8, 2005, Axis priced a follow-on offering of 7,819,362 shares of its common stock at $29.50 per share. Certain selling shareholders of Axis offered the shares to the public through an underwriter on a firm commitment basis. Accordingly, the Rule 105 restricted period was August 2, 2005 through August 8, 2005.

10. Diamondback covered the short position it established during the Rule 105 restricted period using Axis shares purchased in the follow-on offering. Diamondback's profit on these transactions was $12,578.

11. On September 26, 2005, Diamondback sold short a total of 60,000 Endurance shares.

12. Before the opening of the market on October 3, 2005, Endurance priced a follow-on offering of 6,079,000 shares of its common stock at $33.15 per share. Endurance offered the shares to the public through an underwriter on a firm commitment basis. Accordingly, the Rule 105 restricted period was September 26, 2005 through September 30, 2005.

13. Diamondback covered the short position it established during the Rule 105 restricted period using Endurance shares purchased in the follow-on offering. Diamondback's profit on these transactions was $41,505.

14. On October 6, 2005, Diamondback sold short a total of 11,800 Everest shares.

15. After the close of the market on October 6, 2005, Everest priced a follow-on offering of 5.2 million shares of its common stock at $92.50 per share. Everest offered the shares to the public through an underwriter on a firm commitment basis. Accordingly, the Rule 105 restricted period was September 30, 2005 through October 6, 2005.

16. Diamondback covered the short position it established during the Rule 105 restricted period using Everest shares purchased in the offering. Diamondback's profit on these transactions was $14,901.

17. On October 25, 26 and 28, 2005, Diamondback sold short a total of 61,104 IPC Holdings shares.

18. After the close of the market on October 31, 2005, IPC Holdings priced a follow-on offering of 13,820,000 shares of its common stock at $26.25 per share. IPC Holdings offered the shares to the public through an underwriter on a firm commitment basis. Accordingly, the Rule 105 restricted period was October 25, 2005 to October 31, 2005.

19. Diamondback covered a portion of the short position it established using 50,000 IPC Holdings shares purchased in the follow-on offering. Diamondback's profit on these transactions was $25,030.

20. As a result of the conduct described above, Diamondback willfully[1] violated Rule 105 of Regulation M, which made it "unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in an offering, if such short sales occurred during the . . . period beginning five business days before pricing of the offered securities and ending with such pricing."

Diamondback's Remedial Efforts

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded to the Commission staff.

IV.

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

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

Accordingly, pursuant to Section 21C of the Exchange Act and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Diamondback cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M.

B. Respondent Diamondback is censured.

C. IT IS FURTHER ORDERED that Respondent Diamondback shall, within ten (10) days of the entry of this Order, pay disgorgement in the amount of $94,014 and prejudgment interest in the amount of $21,154 and a civil penalty of $47,007 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. 3717. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312, Stop 0-3; and (D) submitted under cover letter that identifies Diamondback Capital Management, LLC as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to John T. Dugan, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02210.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 27, 2009

In the Matter of

Cincinnati Microwave, Inc.,
Core Technologies Pennsylvania, Inc.,
First Central Financial Corp.,
Imark Technologies, Inc.
(n/k/a Pharm Control Ltd.),
Molten Metal Technology, Inc.,
MRS Technology, Inc.,
Sun Television & Appliances, Inc., and
Telegroup, Inc.,

File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cincinnati Microwave, Inc. because it has not filed any periodic reports since the period ended September 29, 1996.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Core Technologies Pennsylvania, Inc. because it has not filed any periodic reports since the period ended September 30, 1998, except for a Form 10-Q it filed for the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of First Central Financial Corp. because it has not filed any periodic reports since the period ended June 30, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Imark Technologies, Inc. (n/k/a Pharm Control Ltd.) because it has not filed any periodic reports since the period ended March 31, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Molten Metal Technology, Inc. because it has not filed any periodic reports since the period ended September 30, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of MRS Technology, Inc. because it has not filed any periodic reports since the period ended September 30, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Sun Television & Appliances, Inc. because it has not filed any periodic reports since the period ended November 28, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Telegroup, Inc. because it has not filed any periodic reports since the period ended September 30, 1998.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 27, 2009, through 11:59 p.m. EDT on March 12, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13385

In the Matter of **Chemfix Technologies, Inc., Bagdad Chase, Inc., Cincinnati Microwave, Inc., Sun Television & Appliances, Inc., and Telegroup, 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 Chemfix Technologies, Inc., Bagdad Chase, Inc., Cincinnati Microwave, Inc., Sun Television & Appliances, Inc., and Telegroup, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Chemfix Technologies, Inc. ("Chemfix") (CIK No. 354278) is a void Delaware corporation located in Metairie, Louisiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Chemfix 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 November 30, 1997, which reported a net loss of $1,069,403 for the prior three months. On August 11, 1995, Chemfix filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Louisiana which was terminated on July 13, 1998.

2. Bagdad Chase, Inc. ("BGDD") [1] (CIK No. 9128) is a Nevada corporation located in Temecula, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BGDD is delinquent in its periodic filings with

[1]Where applicable, the short form of each issuer's name is also its stock symbol.

the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2008. The company's Form 10-K for the period ended December 31, 2007 failed to comply with the Exchange Act and regulations thereunder because it did not include audited financial statements. Moreover, for many years, BGDD failed to file audited financial statements with its annual reports or reviewed financial statements with its quarterly reports as required by Commission rules. As of February 24, 2009, the common stock of BGDD was traded on the over-the-counter markets.

3. Cincinnati Microwave, Inc. ("CNMWQ") (CIK No. 729583) is a cancelled Ohio corporation located in Cincinnati, Ohio with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CNMWQ 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 29, 1996, which reported a net loss of $12,822,000 for the prior nine months. On February 14, 1997, CNMWQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Ohio which was terminated on December 16, 2002. As of February 24, 2009, the common stock of CNMWQ was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had three market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of CNMWQ had an average daily trading volume of 3,808 shares for the six months ended February 23, 2009.

4. Sun Television & Appliances, Inc. ("SNTVQ") (CIK No. 874690) is a cancelled Ohio corporation located in Groveport, Ohio with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SNTVQ 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 November 28, 1998, which reported a net loss of $100,191,000 for the eight months ended October 31, 1998, and a deficiency in net assets available in liquidation of $43,031,000 as of November 28, 1998. On September 16, 1998, SNTVQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware which was terminated on February 1, 2007. As of February 24, 2009, the common stock of SNTVQ was quoted on the Pink Sheets, had four market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of SNTVQ had an average daily trading volume of 600 shares for the six months ended February 23, 2009.

5. Telegroup, Inc. ("TGRPQ") (CIK No. 1037535) is an inactive Iowa corporation located in Fairfield, Iowa with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TGRPQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1998, which reported a net loss of $46,674,786 for the prior nine months. On February 10, 1999, TGRPQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey which was terminated on April 13, 2006. As of February 24, 2009, the common stock of TGRPQ was quoted on the Pink Sheets, had four market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of TGRPQ had an average daily trading volume of 2,134 shares for the six months ended February 23, 2009..

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

A. Whether the allegations contained in Section II hereof 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 hereof 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].

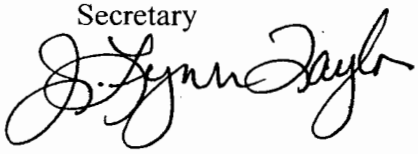
This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

Attachment

Appendix 1

Chart of Delinquent Filings

In the Matter of Chemfix Technologies, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Chemfix Technologies, Inc.					
	10-Q	02/28/98	04/14/98	Not filed	130
	10-Q	05/31/98	07/15/98	Not filed	127
	10-K	08/31/98	11/30/98	Not filed	123
	10-Q	11/30/98	01/14/99	Not filed	121
	10-Q	02/28/99	04/14/99	Not filed	118
	10-Q	05/31/99	07/15/99	Not filed	115
	10-K	08/31/99	11/29/99	Not filed	111
	10-Q	11/30/99	01/14/00	Not filed	109
	10-Q	02/29/00	04/14/00	Not filed	106
	10-Q	05/31/00	07/17/00	Not filed	103
	10-K	08/31/00	11/29/00	Not filed	99
	10-Q	11/30/00	01/16/01	Not filed	97
	10-Q	02/28/01	04/16/01	Not filed	94
	10-Q	05/31/01	07/16/01	Not filed	91
	10-K	08/31/01	11/29/01	Not filed	87
	10-Q	11/30/01	01/14/02	Not filed	85
	10-Q	02/28/02	04/15/02	Not filed	82
	10-Q	05/31/02	07/15/02	Not filed	79
	10-K	08/31/02	11/29/02	Not filed	75
	10-Q	11/30/02	01/14/03	Not filed	73
	10-Q	02/28/03	04/14/03	Not filed	70
	10-Q	05/31/03	07/15/03	Not filed	67
	10-K	08/31/03	12/01/03	Not filed	62
	10-Q	11/30/03	01/14/04	Not filed	61
	10-Q	02/29/04	04/14/04	Not filed	58
	10-Q	05/31/04	07/15/04	Not filed	55
	10-K	08/31/04	11/29/04	Not filed	51
	10-Q	11/30/04	01/14/05	Not filed	49
	10-Q	02/28/05	04/14/05	Not filed	46
	10-Q	05/31/05	07/15/05	Not filed	43
	10-K	08/31/05	11/29/05	Not filed	39
	10-Q	11/30/05	01/17/06	Not filed	37
	10-Q	02/28/06	04/14/06	Not filed	34
	10-Q	05/31/06	07/17/06	Not filed	31

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Chemfix Technologies, Inc. ***(continued)***	*10-K*	08/31/06	11/29/06	Not filed	27
	10-Q	11/30/06	01/16/07	Not filed	25
	10-Q	02/28/07	04/16/07	Not filed	22
	10-Q	05/31/07	07/16/07	Not filed	19
	10-K	08/31/07	11/29/07	Not filed	15
	10-Q	11/30/07	01/14/08	Not filed	13
	10-Q	02/29/08	04/14/08	Not filed	10
	10-Q	05/31/08	07/15/08	Not filed	7
	10-K	08/31/08	12/01/08	Not filed	2
	10-Q	11/30/08	01/14/09	Not filed	1
Total Filings Delinquent	44				
Bagdad Chase, Inc.					
	10-K	12/31/96	03/31/97	Filed without audited financial statements	143
	10-Q	03/31/97	05/15/97	Financial statements not reviewed by auditor	141
	10-Q	06/30/97	08/14/97	Not filed	138
	10-Q	09/30/97	11/14/97	Not filed	135
	10-K	12/31/97	03/31/98	Not filed	131
	10-Q	03/31/98	05/15/98	Financial statements not reviewed by auditor	129
	10-Q	06/30/98	08/14/98	Financial statements not reviewed by auditor	126
	10-Q	09/30/98	11/16/98	Financial statements not reviewed by auditor	123
	10-K	12/31/98	03/31/99	Filed without audited financial statements	119
	10-Q	03/31/99	05/17/99	Not filed	117

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Bagdad Chase, Inc. ***(continued)***	*10-Q*	06/30/99	08/16/99	Financial statements not reviewed by auditor	114
	10-Q	09/30/99	11/15/99	Financial statements not reviewed by auditor	111
	10-K	12/31/99	03/30/00	Filed without audited financial statements	107
	10-Q	03/31/00	05/15/00	Financial statements not reviewed by auditor	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Financial statements not reviewed by auditor	90
	10-Q	09/30/01	11/14/01	Financial statements not reviewed by auditor	87
	10-K	12/31/01	04/01/02	Filed without audited financial statements	82
	10-Q	03/31/02	05/15/02	Financial statements not reviewed by auditor	81
	10-Q	06/30/02	08/14/02	Financial statements not reviewed by auditor	78
	10-Q	09/30/02	11/14/02	Financial statements not reviewed by auditor	75
	10-K	12/31/02	03/31/03	Filed without audited financial statements	71

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Bagdad Chase, Inc. ***(continued)***	*10-Q*	03/31/03	05/15/03	Financial statements not reviewed by auditor	69
	10-Q	06/30/03	08/14/03	Financial statements not reviewed by auditor	66
	10-Q	09/30/03	11/14/03	Financial statements not reviewed by auditor	63
	10-K	12/31/03	03/30/04	Filed without audited financial statements	59
	10-Q	03/31/04	05/17/04	Financial statements not reviewed by auditor	57
	10-Q	06/30/04	08/16/04	Financial statements not reviewed by auditor	54
	10-Q	09/30/04	11/15/04	Financial statements not reviewed by auditor	51
	10-K	12/31/04	03/31/05	Filed without audited financial statements	47
	10-K	12/31/05	03/31/06	Filed without audited financial statements	35
	10-K	12/31/06	04/02/07	Filed without audited financial statements	22
	10-K	12/31/07	03/31/08	Filed without audited financial statements	11
	10-Q	09/30/08	11/14/08	Not filed	3

Total Delinquent or Deficient Filings 37

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Cincinnati Microwave, Inc.					
	10-K	12/29/96	03/31/97	Not filed	143
	10-Q	03/30/97	05/14/97	Not filed	141
	10-Q	06/29/97	08/13/97	Not filed	138
	10-Q	09/28/97	11/12/97	Not filed	135
	10-K	12/28/97	03/30/98	Not filed	131
	10-Q	03/29/98	05/13/98	Not filed	129
	10-Q	06/28/98	08/12/98	Not filed	126
	10-Q	09/27/98	11/11/98	Not filed	123
	10-K	12/27/98	03/29/99	Not filed	119
	10-Q	03/28/99	05/12/99	Not filed	117
	10-Q	06/27/99	08/11/99	Not filed	114
	10-Q	09/26/99	11/10/99	Not filed	111
	10-K	12/26/99	03/27/00	Not filed	107
	10-Q	04/02/00	05/17/00	Not filed	105
	10-Q	07/02/00	08/16/00	Not filed	102
	10-Q	10/01/00	11/15/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	04/01/01	05/16/01	Not filed	93
	10-Q	07/01/01	08/15/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/30/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/29/02	11/13/02	Not filed	75
	10-K	12/29/02	03/31/03	Not filed	71
	10-Q	03/30/03	05/14/03	Not filed	69
	10-Q	06/29/03	08/13/03	Not filed	66
	10-Q	09/28/03	11/12/03	Not filed	63
	10-K	12/28/03	03/29/04	Not filed	59
	10-Q	03/28/04	05/12/04	Not filed	57
	10-Q	06/27/04	08/11/04	Not filed	54
	10-Q	09/26/04	11/10/04	Not filed	51
	10-K	12/26/04	03/28/05	Not filed	47
	10-Q	03/27/05	05/11/05	Not filed	45
	10-Q	06/26/05	08/10/05	Not filed	42
	10-Q	09/25/05	11/09/05	Not filed	39
	10-K	12/25/05	03/27/06	Not filed	35
	10-Q	04/02/06	05/17/06	Not filed	33
	10-Q	07/02/06	08/16/06	Not filed	30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Cincinnati Microwave, Inc. ***(continued)***	*10-Q*	10/01/06	11/15/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	04/01/07	05/16/07	Not filed	21
	10-Q	07/01/07	08/15/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/30/07	03/31/08	Not filed	11
	10-Q	03/30/08	05/14/08	Not filed	9
	10-Q	06/29/08	08/13/08	Not filed	6
	10-Q	09/28/08	11/12/08	Not filed	3
Total Filings Delinquent	48				
Sun Television & Appliances, Inc.					
	10-K	02/27/99	05/28/99	Not filed	117
	10-Q	05/29/99	07/13/99	Not filed	115
	10-Q	08/28/99	10/12/99	Not filed	112
	10-Q	11/27/99	01/11/00	Not filed	109
	10-K	02/26/00	05/26/00	Not filed	105
	10-Q	05/27/00	07/11/00	Not filed	103
	10-Q	08/26/00	10/10/00	Not filed	100
	10-Q	11/25/00	01/09/01	Not filed	97
	10-K	03/03/01	06/01/01	Not filed	92
	10-Q	06/02/01	07/17/01	Not filed	91
	10-Q	09/01/01	10/16/01	Not filed	88
	10-Q	12/01/01	01/15/02	Not filed	85
	10-K	03/02/02	05/31/02	Not filed	81
	10-Q	06/01/02	07/16/02	Not filed	79
	10-Q	08/31/02	10/15/02	Not filed	76
	10-Q	11/30/02	01/14/03	Not filed	73
	10-K	03/01/03	05/30/03	Not filed	69
	10-Q	05/31/03	07/15/03	Not filed	67
	10-Q	08/30/03	10/14/03	Not filed	64
	10-Q	11/29/03	01/13/04	Not filed	61
	10-K	02/28/04	05/28/04	Not filed	57
	10-Q	05/29/04	07/13/04	Not filed	55
	10-Q	08/28/04	10/12/04	Not filed	52
	10-Q	11/27/04	01/11/05	Not filed	49
	10-K	02/26/05	05/27/05	Not filed	45

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Sun Television & Appliances, Inc. ***(continued)***	*10-Q*	05/28/05	07/12/05	Not filed	43
	10-Q	08/27/05	10/11/05	Not filed	40
	10-Q	11/26/05	01/10/06	Not filed	37
	10-K	02/25/06	05/26/06	Not filed	33
	10-Q	05/27/06	07/11/06	Not filed	31
	10-Q	08/26/06	10/10/06	Not filed	28
	10-Q	11/25/06	01/09/07	Not filed	25
	10-K	03/03/07	06/01/07	Not filed	20
	10-Q	06/02/07	07/17/07	Not filed	19
	10-Q	09/01/07	10/16/07	Not filed	16
	10-Q	12/01/07	01/15/08	Not filed	13
	10-K	03/01/08	05/30/08	Not filed	9
	10-Q	05/31/08	07/15/08	Not filed	7
	10-Q	08/30/08	10/14/08	Not filed	4
	10-Q	12/01/08	01/15/09	Not filed	1
Total Filings Delinquent	40				
Telegroup, Inc.					
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Telegroup, Inc. ***(continued)***	*10-K*	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	46				

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59476 / February 27, 2009

Admin. Proc. File No. 3-13147

In the Matter of

MARKLAND TECHNOLOGIES, INC.
c/o Gersten Savage LLP
600 Lexington Avenue
New York, New York 10022

ORDER DISMISSING REVIEW PROCEEDING AND NOTICE OF FINALITY

On December 15, 2008, an administrative law judge issued an initial decision, pursuant to Section 12(j) of the Securities Exchange Act of 1934, 1/ revoking the registration of the common stock of Markland Technologies, Inc. ("Markland"). 2/ The law judge found that Markland had violated Exchange Act Section 13(a), and Exchange Act Rules 13a-1 and 13a-13, 3/ thereunder, by failing to file its required quarterly and annual reports for periods after September 30, 2005.

On January 6, 2009, our Office of the General Counsel, acting pursuant to delegated authority, issued an order granting Markland's petition for review of the law judge's initial decision and setting a schedule requiring that a brief in support of the petition for review be filed

1/ 15 U.S.C. § 78l(j).

2/ Markland Technologies, Inc., Initial Decision Rel. No. 364 (Dec. 15, 2008), __ SEC Docket ____.

3/ Exchange Act Section 13(a) requires issuers of securities registered pursuant to Exchange Act Section 12 to file periodic and other reports with the Commission in accordance with rules established by the Commission. 15 U.S.C. § 78m(a). Rule 13a-1, 17 C.F.R. § 240.13a-1, requires issuers to file annual reports with the Commission, and Rule 13a-13, 17 C.F.R. § 240.13a-13, requires issuers to file quarterly reports with the Commission.

by February 9, 2009. The order further stated that, pursuant to Rule of Practice 180(c), 4/ "failure to file a brief in support of the petition may result in dismissal of this review proceeding as to that petitioner." Notwithstanding this order, Markland failed to file a brief, extension request, or anything else with respect to its appeal subsequent to its petition for review. It thus appears that Markland has abandoned its appeal. Under the circumstances, we find that dismissal is appropriate. 5/

Accordingly, it is ORDERED that this review proceeding be, and it hereby is, dismissed.

We also hereby give notice that the December 15, 2008 initial decision of the administrative law judge has become the final decision of the Commission with respect to Markland Technologies, Inc. The order contained in that decision revoking the registration of the registered securities of Markland Technologies, Inc. is hereby declared effective.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

4/ 17 C.F.R. § 201.180(c).

5/ See, e.g., Apollo Publ'n Corp., Securities Act Rel. No. 8678 (Apr. 13, 2006), 87 SEC Docket 2498 (dismissing appeal based on respondent's failure to file supporting brief, as provided in Commission's briefing order).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13384

In the Matter of **Core Technologies Pennsylvania, Inc., First Central Financial Corp., Imark Technologies, Inc., Molten Metal Technology, Inc., and MRS Technology, 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 Core Technologies Pennsylvania, Inc., First Central Financial Corp., Imark Technologies, Inc., Molten Metal Technology, Inc., and MRS Technology, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Core Technologies Pennsylvania, Inc. ("CCOR")[1] (CIK No. 826330) is a void Delaware corporation located in Villanova, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CCOR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1998, except for a Form 10-Q it filed for the period ended September 30, 2008, which reported no revenues or expenses for the prior nine months. On January 28, 2000, CCOR terminated substantially all of its employees, ceased operations, and began the process of winding down its business. As of February 24, 2009, the common stock of CCOR was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had seven market

[1]Where applicable, the short form of each issuer's name is also its stock symbol.

makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of CCOR had an average daily trading volume of 1,843 shares for the six months ended February 23, 2009.

2. First Central Financial Corp. ("FCCX") (CIK No. 759441) is an inactive New York corporation located in Lynnbrook, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FCCX 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, 1997, which reported a net loss of $9,032,491 for the prior six months. On March 5, 1998, FCCX filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of New York, which was converted to a Chapter 7 proceeding on April 30, 1998, and was still pending as of February 24, 2009. As of February 24, 2009, the common stock of FCCX was quoted on the Pink Sheets, had four market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of FCCX had an average daily trading volume of 2,362 shares for the six months ended February 23, 2009.

3. Imark Technologies, Inc. (CIK No. 1015457) ("Imark") is a void Delaware corporation located in Herndon, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Imark 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, 1998, which reported a net loss of $2,305,810 for the prior nine months. On October 29, 1998, Imark filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Virginia which was terminated on February 14, 2000.

4. Molten Metal Technology, Inc. ("MLTNQ") (CIK No. 895517) is a delinquent Delaware corporation located in Fall River, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MLTNQ 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, 1997, which reported a net loss of $112,460,182 for the prior nine months. On December 3, 1997, MLTNQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts which was terminated on April 7, 2008. As of February 24, 2009, the common stock of MLTNQ was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of MLTNQ had an average daily trading volume of 5,970 shares for the six months ended February 23, 2009.

5. MRS Technology, Inc. ("MRSIQ") (CIK No. 906768) is a dissolved Massachusetts corporation located in North Andover, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MRSIQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1998, which reported a net loss of $2,280,108 for the prior six months. On July 1, 1998, MRSIQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts which was converted to a Chapter 7 proceeding on February 18, 1999, and was terminated on October 12, 1999. As of February 24, 2009, the common stock of

MRSIQ was quoted on the Pink Sheets, had two market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of MRSIQ had an average daily trading volume of 1,174 shares for the six months ended February 23, 2009.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

A. Whether the allegations contained in Section II hereof 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 hereof 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 permitted by the Commission Rules of Practice.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

By: J. Lynn Taylor
Assistant Secretary

Appendix 1

Chart of Delinquent Filings

In the Matter of Core Technologies Pennsylvania, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Core Technologies Pennsylvania, Inc.					
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Core Technologies Pennsylvania, Inc. ***(continued)***	*10-K*	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	40				
First Central Financial Corp.					
	10-Q	09/30/97	11/14/97	Not filed	135
	10-K	12/31/97	03/31/98	Not filed	131
	10-Q	03/31/98	05/15/98	Not filed	129
	10-Q	06/30/98	08/14/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-K	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
First Central Financial Corp. ***(continued)***	*10-Q*	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
Total Filings Delinquent	45				
Imark Technologies, Inc.	*10-KSB*	06/30/98	09/28/98	Not filed	125
	10-QSB	09/30/98	11/16/98	Not filed	123
	10-QSB	12/31/98	02/16/99	Not filed	120
	10-QSB	03/31/99	05/17/99	Not filed	117
	10-KSB	06/30/99	09/28/99	Not filed	113
	10-QSB	09/30/99	11/15/99	Not filed	111
	10-QSB	12/31/99	02/14/00	Not filed	108
	10-QSB	03/31/00	05/15/00	Not filed	105
	10-KSB	06/30/00	09/28/00	Not filed	101
	10-QSB	09/30/00	11/14/00	Not filed	99
	10-QSB	12/31/00	02/14/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	93
	10-KSB	06/30/01	09/28/01	Not filed	89
	10-QSB	09/30/01	11/14/01	Not filed	87
	10-QSB	12/31/01	02/14/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	81

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Imark Technologies, Inc. ***(continued)***	*10-KSB*	06/30/02	09/30/02	Not filed	77
	10-QSB	09/30/02	11/14/02	Not filed	75
	10-QSB	12/31/02	02/14/03	Not filed	72
	10-QSB	03/31/03	05/15/03	Not filed	69
	10-KSB	06/30/03	09/29/03	Not filed	65
	10-QSB	09/30/03	11/14/03	Not filed	63
	10-QSB	12/31/03	02/17/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	57
	10-KSB	06/30/04	09/28/04	Not filed	53
	10-QSB	09/30/04	11/15/04	Not filed	51
	10-QSB	12/31/04	02/14/05	Not filed	48
	10-QSB	03/31/05	05/16/05	Not filed	45
	10-KSB	06/30/05	09/28/05	Not filed	41
	10-QSB	09/30/05	11/14/05	Not filed	39
	10-QSB	12/31/05	02/14/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	33
	10-KSB	06/30/06	09/28/06	Not filed	29
	10-QSB	09/30/06	11/14/06	Not filed	27
	10-QSB	12/31/06	02/14/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	21
	10-KSB	06/30/07	09/28/07	Not filed	17
	10-QSB	09/30/07	11/14/07	Not filed	15
	10-QSB	12/31/07	02/14/08	Not filed	12
	10-QSB	03/31/08	05/15/08	Not filed	9
	10-KSB	06/30/08	09/29/08	Not filed	5
	*10-Q**	09/30/08	11/14/08	Not filed	3
	*10-Q**	12/31/08	02/17/09	Not filed	0
Total Filings Delinquent	43				
Molten Metal Technology, Inc.					
	10-K	12/31/97	03/31/98	Not filed	131
	10-Q	03/31/98	05/15/98	Not filed	129
	10-Q	06/30/98	08/14/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	123
	10-K	12/31/98	03/31/99	Not filed	119
	10-Q	03/31/99	05/17/99	Not filed	117
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Molten Metal Technology, Inc. ***(continued)***	*10-K*	12/31/99	03/30/00	Not filed	107
	10-Q	03/31/00	05/15/00	Not filed	105
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-K	12/31/00	04/02/01	Not filed	94
	10-Q	03/31/01	05/15/01	Not filed	93
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-K	12/31/01	04/01/02	Not filed	82
	10-Q	03/31/02	05/15/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-K	12/31/02	03/31/03	Not filed	71
	10-Q	03/31/03	05/15/03	Not filed	69
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-K	12/31/03	03/30/04	Not filed	59
	10-Q	03/31/04	05/17/04	Not filed	57
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-K	12/31/04	03/31/05	Not filed	47
	10-Q	03/31/05	05/16/05	Not filed	45
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-K	12/31/05	03/31/06	Not filed	35
	10-Q	03/31/06	05/15/06	Not filed	33
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-K	12/31/06	04/02/07	Not filed	22
	10-Q	03/31/07	05/15/07	Not filed	21
	10-Q	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-K	12/31/07	03/31/08	Not filed	11
	10-Q	03/31/08	05/15/08	Not filed	9
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3

Total Filings Delinquent 44

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
MRS Technology, Inc.					
	10-Q	12/31/98	02/16/99	Not filed	120
	10-K	03/31/99	06/29/99	Not filed	116
	10-Q	06/30/99	08/16/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	111
	10-Q	12/31/99	02/14/00	Not filed	108
	10-K	03/31/00	06/29/00	Not filed	104
	10-Q	06/30/00	08/14/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	99
	10-Q	12/31/00	02/14/01	Not filed	96
	10-K	03/31/01	06/29/01	Not filed	92
	10-Q	06/30/01	08/14/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	87
	10-Q	12/31/01	02/14/02	Not filed	84
	10-K	03/31/02	07/01/02	Not filed	79
	10-Q	06/30/02	08/14/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	75
	10-Q	12/31/02	02/14/03	Not filed	72
	10-K	03/31/03	06/30/03	Not filed	68
	10-Q	06/30/03	08/14/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	63
	10-Q	12/31/03	02/17/04	Not filed	60
	10-K	03/31/04	06/29/04	Not filed	56
	10-Q	06/30/04	08/16/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	51
	10-Q	12/31/04	02/14/05	Not filed	48
	10-K	03/31/05	06/29/05	Not filed	44
	10-Q	06/30/05	08/15/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	39
	10-Q	12/31/05	02/14/06	Not filed	36
	10-K	03/31/06	06/29/06	Not filed	32
	10-Q	06/30/06	08/14/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	27
	10-Q	12/31/06	02/14/07	Not filed	24
	10-K	03/31/07	06/29/07	Not filed	20

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
MRS Technology, Inc. ***(continued)***	*10-Q*	06/30/07	08/14/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	15
	10-Q	12/31/07	02/14/08	Not filed	12
	10-K	03/31/08	06/30/08	Not filed	8
	10-Q	06/30/08	08/14/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	3
	10-Q	12/31/08	02/17/09	Not filed	0
Total Filings Delinquent	41				

*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
[Release No. 34-59477/February 27, 2009]

Order Making Fiscal Year 2009 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934

I. Background

Section 31 of the Securities Exchange Act of 1934 ("Exchange Act") requires each national securities exchange and national securities association to pay transaction fees to the Commission.[1] Specifically, Section 31(b) requires each national securities exchange to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted on the exchange.[2] Section 31(c) requires each national securities association to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted by or through any member of the association other than on an exchange.[3]

Sections 31(j)(1) and (3) require the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates for fiscal year 2012 and beyond.[4] Section 31(j)(2) requires the Commission, in certain circumstances, to make a mid-year adjustment to the fee rates in fiscal years 2002 through 2011.[5] The annual and mid-year adjustments are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section

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1 15 U.S.C. 78ee.

2 15 U.S.C. 78ee(b).

3 15 U.S.C. 78ee(c).

4 15 U.S.C. 78ee(j)(1) and (j)(3).

5 15 U.S.C. 78ee(j)(2).

31 equal to the "target offsetting collection amount" specified in Section 31(l)(1) for that fiscal year.[6] For fiscal year 2009, the target offsetting collection amount is $1,023,000,000.[7]

II. Determination of the Need for a Mid-Year Adjustment in Fiscal 2009

Under Section 31(j)(2) of the Exchange Act, the Commission must make a mid-year adjustment to the fee rates under Sections 31(b) and (c) in fiscal year 2009 if it determines, based on the actual aggregate dollar volume of sales during the first five months of the fiscal year, that the baseline estimate $113,703,210,464,919 is reasonably likely to be 10% (or more) greater or less than the actual aggregate dollar volume of sales for fiscal year 2009.[8] To make this determination, the Commission must estimate the actual aggregate dollar volume of sales for fiscal year 2009.

Based on data provided by the national securities exchanges and the national securities association that are subject to Section 31,[9] the actual aggregate dollar volume of sales during the first four months of fiscal year 2009 was $24,218,758,303,585.[10] Using these data and a methodology for estimating the aggregate dollar amount of sales for the remainder of fiscal year

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6 15 U.S.C. 78ee(l)(1).

7 Id.

8 The amount $113,703,210,464,919 is the baseline estimate of the aggregate dollar amount of sales for fiscal year 2009 calculated by the Commission in its Order Making Fiscal 2009 Annual Adjustments to the Fee Rates Applicable Under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b) and 31(c) of the Securities Exchange Act of 1934, Rel. No. 33-8916 (May 2, 2008), 73 FR 25795 (May 7, 2008).

9 The Financial Industry Regulatory Authority, Inc. ("FINRA") and each exchange is required to file a monthly report on Form R31 containing dollar volume data on sales of securities subject to Section 31. The report is due on the 10th business day following the month for which the exchange or association provides dollar volume data.

10 Although Section 31(j)(2) indicates that the Commission should determine the actual aggregate dollar volume of sales for fiscal 2009 "based on the actual aggregate dollar volume of sales during the first 5 months of such fiscal year," data are only available for the first four months of the fiscal year as of the date the Commission is required to issue this order, i.e., March 1, 2009. Dollar volume data on sales of securities subject to Section 31 for February 2009 will not be available from the exchanges and FINRA for several weeks.

2009 (developed after consultation with the Congressional Budget Office and the OMB),[11] the Commission estimates that the aggregate dollar amount of sales for the remainder of fiscal year 2009 to be $42,139,232,747,921. Thus, the Commission estimates that the actual aggregate dollar volume of sales for all of fiscal year 2009 will be $66,357,991,051,506.

Because the baseline estimate of $113,703,210,464,919 is more than 10% greater than the $66,357,991,051,506 estimated actual aggregate dollar volume of sales for fiscal year 2009, Section 31(j)(2) of the Exchange Act requires the Commission to issue an order adjusting the fee rates under Sections 31(b) and (c).

III. Calculation of the Uniform Adjusted Rate

Section 31(j)(2) specifies the method for determining the mid-year adjustment for fiscal 2009. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a "uniform adjusted rate that, when applied to the revised estimate of the aggregate dollar amount of sales for the remainder of fiscal year 2009, is reasonably likely to produce aggregate fee collections under Section 31 (including fees collected during such 5-month period and assessments collected under Section 31(d)) that are equal to $1,023,000,000."[12] In other words, the uniform adjusted rate is determined by subtracting fees collected prior to the effective date of the new rate and assessments collected under Section 31(d) during all of fiscal year 2009 from $1,023,000,000, which is the target offsetting collection amount for fiscal year 2009. That

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[11] See Appendix A.

[12] 15 U.S.C. 78ee(j)(2). The term "fees collected" is not defined in Section 31. Because national securities exchanges and national securities associations are not required to pay the first installment of Section 31 fees for fiscal 2009 until March 15, the Commission will not "collect" any fees in the first five months of fiscal 2009. See 15 U.S.C. 78ee(e). However, the Commission believes that, for purposes of calculating the mid-year adjustment, Congress, by stating in Section 31(j)(2) that the "uniform adjusted rate . . . is reasonably likely to produce aggregate fee collections under Section 31 . . . that are equal to [$1,023,000,000]," intended the Commission to include the fees that the Commission will collect based on transactions in the six months before the effective date of the mid-year adjustment.

difference is then divided by the revised estimate of the aggregate dollar volume of sales for the remainder of the fiscal year following the effective date of the new rate.

The Commission estimates that it will collect $190,542,394 in fees for the period prior to the effective date of the mid-year adjustment[13] and $8,640 in assessments on round turn transactions in security futures products during all of fiscal year 2009. Using the methodology referenced in Part II above, the Commission estimates that the aggregate dollar volume of sales for the remainder of fiscal year 2009 following the effective date of the new rate will be $32,332,563,584,044. This amount reflects more recent information on the dollar amount of sales of securities than was available at the time of the setting of the initial fee rate for fiscal year 2009, and indicates a significant reduction in sales. Based on these estimates, and employing the mid-year adjustment mechanism established by statute, the uniform adjusted rate is $25.70 per million of the aggregate dollar amount of sales of securities.[14] The aggregate dollar amount of sales of securities subject to Section 31 fees is illustrated in Appendix A.

IV. Effective Date of the Uniform Adjusted Rate

Section 31(j)(4)(B) of the Exchange Act provides that a mid-year adjustment shall take effect on April 1 of the fiscal year in which such rate applies. However, it is possible that the effective date will be delayed this fiscal year because of the lapse of appropriation provision in Section 31(k) of the Exchange Act. That section provides that, if on the first day of the fiscal year a regular appropriation to the Commission has not been enacted, the Commission shall continue to collect fees at the rate in effect during the preceding fiscal year, until 30 days after

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[13] This calculation is based on the assumption that the mid-year adjustment will go into effect on April 1, 2009 pursuant to Section 31(j)(4)(B) of the Exchange Act. However, see the discussion below regarding the actual effective date of the mid-year adjustment.

[14] The calculation is as follows: ($1,023,000,000 - $190,542,394 - $8,640)/ $32,332,563,584,044 = $0.0000257467. Round this result to the seventh decimal point, yielding a rate of $25.70 per million.

the date such a regular appropriation is enacted. Therefore, the exchanges and the national securities association that are subject to Section 31 fees must pay fees under Sections 31(b) and (c) at the uniform adjusted rate of $25.70 per million for sales of securities transacted on the later of (i) April 1, 2009, or (ii) 30 days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted. This fee rate will remain in place until the fee rate for fiscal year 2010 takes effect.[15]

V. Conclusion

Accordingly, pursuant to Section 31 of the Exchange Act,[16]

IT IS HEREBY ORDERED that each of the fee rates under Sections 31(b) and (c) of the Exchange Act shall be $25.70 per $1,000,000 of the aggregate dollar amount of sales of securities subject to these sections, effective on the later of (i) April 1, 2009, or (ii) 30 days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted..

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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[15] Section 31(j)(1) and Section 31(g) of the Exchange Act require the Commission to issue an order no later than April 30, 2009, adjusting the fee rates applicable under Sections 31(b) and (c) for fiscal 2010. These fee rates for fiscal 2010 will be effective on the later of October 1, 2009 or thirty days after the date of enactment of the Commission's regular appropriation for fiscal 2010.

[16] 15 U.S.C. 78ee.

APPENDIX A

A. Baseline estimate of the aggregate dollar amount of sales.

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (January 1999 - January 2009). The data obtained from the exchanges and FINRA are presented in Table A. The monthly aggregate dollar amount of sales from all exchanges and FINRA is contained in column C.

Next, calculate the change in the natural logarithm of ADS from month-to-month. The average monthly change in the logarithm of ADS over the entire sample is 0.007 and the standard deviation 0.130. Assume the monthly percentage change in ADS follows a random walk. The expected monthly percentage growth rate of ADS is 1.6 percent.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for January 2009 ($233,508,979,959) to forecast ADS for February 2009 ($237,184,035,788 = $233,508,979,959 x 1.016).[17] Multiply by the number of trading days in February 2009 (19) to obtain a forecast of the total dollar volume for the month ($4,506,496,679,977). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column G of Table A. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).

2. For each month t, calculate the change in ADS from the previous month as $\Delta_t = \log (ADS_t / ADS_{t-1})$, where log (x) denotes the natural logarithm of x.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, \ldots, \Delta_{120}\}$. These are given by $\mu = 0.007$ and $\sigma = 0.130$, respectively.

4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t.

5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t / ADS_{t-1} is given by $\exp(\mu + \sigma^2/2)$, or on average $ADS_t = 1.016 \times ADS_{t-1}$.

6. For February 2009, this gives a forecast ADS of 1.016 × $233,508,979,959 = $237,184,035,788. Multiply this figure by the 19 trading days in February 2009 to obtain a total dollar volume forecast of $4,506,496,679,977.

7. For March 2009, multiply the February 2009 ADS forecast by 1.016 to obtain a forecast ADS of $240,916,931,086. Multiply this figure by the 22 trading days in March 2009 to obtain a total dollar volume forecast of $5,300,172,483,900.

[17] The value 1.016 has been rounded. All computations are done with the unrounded value.

8. Repeat this procedure for subsequent months.

B. Using the forecasts from A to calculate the new fee rate.

1. Determine the actual and projected aggregate dollar volume of sales between 10/1/08 and 3/31/09 to be $34,025,427,467,462. Multiply this amount by the fee rate of $5.60 per million dollars in sales during this period and get an estimate of $190,542,394 in actual and projected fees collected during 10/1/08 and 3/31/09.

2. Estimate the amount of assessments on security futures products collected during 10/1/08 and 9/30/09 to be $8,640 by summing the amounts collected through January of $3,096 with projections of a 1.6% monthly increase in subsequent months.

3. Determine the projected aggregate dollar volume of sales between 4/1/09 and 9/30/09 to be $32,332,563,584,044.

4. The rate necessary to collect the target $1,023,000,000 in fee revenues is then calculated as: ($1,023,000,000 - $190,542,394 - $8,640) ÷ $32,332,563,584,044 = 0.0000257467.

5. Round the result to the seventh decimal point, yielding a rate of 0.0000257000 (or $25.70 per million).

Table A. Estimation of baseline of the aggregate dollar amount of sales.
(Methodology developed in consultation with the Office of Management and Budget and the Congressional Budget Office.)

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/08 to 3/31/09 ($Millions)	34,025,427
b. Baseline estimate of the aggregate dollar amount of sales, 4/1/09 to 9/30/09 ($Millions)	32,332,564
c. Estimated collections in assessments on security futures products in FY 2009 ($Millions)	0.009
d. Implied fee rate (($1,023,000,000 - 0.0000056*a - c) /b)	$25.70

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Jan-99	19	1,884,555,055,910	99,187,108,206	-		
Feb-99	19	1,656,058,202,765	87,160,958,040	-0.129		
Mar-99	23	1,908,967,664,074	82,998,594,090	-0.049		
Apr-99	21	2,177,601,770,622	103,695,322,411	0.223		
May-99	20	1,784,400,906,987	89,220,045,349	-0.150		
Jun-99	22	1,697,339,227,503	77,151,783,068	-0.145		
Jul-99	21	1,767,035,098,986	84,144,528,523	0.087		
Aug-99	22	1,692,907,150,726	76,950,325,033	-0.089		
Sep-99	21	1,730,505,881,178	82,405,041,961	0.068		
Oct-99	21	2,017,474,765,542	96,070,226,931	0.153		
Nov-99	21	2,348,374,009,334	111,827,333,778	0.152		
Dec-99	22	2,686,788,531,991	122,126,751,454	0.088		
Jan-00	20	3,057,831,397,113	152,891,569,856	0.225		
Feb-00	20	2,973,119,888,063	148,655,994,403	-0.028		
Mar-00	23	4,135,152,366,234	179,789,233,315	0.190		
Apr-00	19	3,174,694,525,687	167,089,185,562	-0.073		
May-00	22	2,649,273,207,318	120,421,509,424	-0.328		
Jun-00	22	2,883,513,997,781	131,068,818,081	0.085		
Jul-00	20	2,804,753,395,361	140,237,669,768	0.068		
Aug-00	23	2,720,788,395,832	118,295,147,645	-0.170		
Sep-00	20	2,930,188,809,012	146,509,440,451	0.214		
Oct-00	22	3,485,926,307,727	158,451,195,806	0.078		
Nov-00	21	2,795,778,876,887	133,132,327,471	-0.174		
Dec-00	20	2,809,917,349,851	140,495,867,493	0.054		
Jan-01	21	3,143,501,125,244	149,690,529,774	0.063		
Feb-01	19	2,372,420,523,286	124,864,238,068	-0.181		
Mar-01	22	2,554,419,085,113	116,109,958,414	-0.073		
Apr-01	20	2,324,349,507,745	116,217,475,387	0.001		
May-01	22	2,353,179,388,303	106,962,699,468	-0.083		
Jun-01	21	2,111,922,113,236	100,567,719,678	-0.062		
Jul-01	21	2,004,384,034,554	95,446,858,788	-0.052		
Aug-01	23	1,803,565,337,795	78,415,884,252	-0.197		
Sep-01	15	1,573,484,946,383	104,898,996,426	0.291		
Oct-01	23	2,147,238,873,044	93,358,211,871	-0.117		
Nov-01	21	1,939,427,217,518	92,353,677,025	-0.011		
Dec-01	20	1,921,098,738,113	96,054,936,906	0.039		
Jan-02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb-02	19	1,928,830,595,585	101,517,399,768	-0.008		
Mar-02	20	2,002,216,374,514	100,110,818,726	-0.014		
Apr-02	22	2,062,101,866,506	93,731,903,023	-0.066		
May-02	22	1,985,859,756,557	90,266,352,571	-0.038		
Jun-02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul-02	22	2,349,564,490,189	106,798,385,918	0.126		
Aug-02	22	1,793,429,904,079	81,519,541,095	-0.270		
Sep-02	20	1,518,944,367,204	75,947,218,360	-0.071		
Oct-02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov-02	20	1,780,816,458,122	89,040,822,906	-0.038		
Dec-02	21	1,561,092,215,646	74,337,724,555	-0.180		

Jan-03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb-03	19	1,411,722,405,357	74,301,179,229	-0.100		
Mar-03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr-03	21	1,759,751,025,279	83,797,667,870	0.035		
May-03	21	1,871,390,985,678	89,113,856,461	0.062		
Jun-03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul-03	22	2,100,812,973,956	95,491,498,816	-0.057		
Aug-03	21	1,766,527,686,224	84,120,366,011	-0.127		
Sep-03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov-03	19	1,903,726,129,859	100,196,112,098	-0.012		
Dec-03	22	2,066,530,151,383	93,933,188,699	-0.065		
Jan-04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb-04	19	2,177,765,594,701	114,619,241,826	-0.042		
Mar-04	23	2,613,808,754,550	113,643,858,893	-0.009		
Apr-04	21	2,418,663,760,191	115,174,464,771	0.013		
May-04	20	2,259,243,404,459	112,962,170,223	-0.019		
Jun-04	21	2,112,826,072,876	100,610,765,375	-0.116		
Jul-04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug-04	22	2,033,343,354,640	92,424,697,938	-0.130		
Sep-04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct-04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov-04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,847,200,448	129,092,360,022	0.060		
Feb-05	19	2,532,202,408,589	133,273,810,978	0.032		
Mar-05	22	3,030,474,897,226	137,748,858,965	0.033		
Apr-05	21	2,906,386,944,434	138,399,378,306	0.005		
May-05	21	2,697,414,503,460	128,448,309,689	-0.075		
Jun-05	22	2,825,962,273,624	128,452,830,619	0.000		
Jul-05	20	2,604,021,263,875	130,201,063,194	0.014		
Aug-05	23	2,846,115,585,965	123,744,155,912	-0.051		
Sep-05	21	3,009,640,645,370	143,316,221,208	0.147		
Oct-05	21	3,279,847,331,057	156,183,206,241	0.086		
Nov-05	21	3,163,453,821,548	150,640,658,169	-0.036		
Dec-05	21	3,090,212,715,561	147,152,986,455	-0.023		
Jan-06	20	3,573,372,724,766	178,668,636,238	0.194		
Feb-06	19	3,314,259,849,456	174,434,728,919	-0.024		
Mar-06	23	3,807,974,821,564	165,564,122,677	-0.052		
Apr-06	19	3,257,478,138,851	171,446,217,834	0.035		
May-06	22	4,206,447,844,451	191,202,174,748	0.109		
Jun-06	22	3,995,113,357,316	181,596,061,696	-0.052		
Jul-06	20	3,339,658,009,357	166,982,900,468	-0.084		
Aug-06	23	3,410,187,280,845	148,269,012,211	-0.119		
Sep-06	20	3,407,409,863,673	170,370,493,184	0.139		
Oct-06	22	3,980,070,216,912	180,912,282,587	0.060		
Nov-06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec-06	20	3,715,146,848,695	185,757,342,435	-0.008		
Jan-07	20	4,263,986,570,973	213,199,328,549	0.138		
Feb-07	19	3,946,799,860,532	207,726,308,449	-0.026		
Mar-07	22	5,245,051,744,090	238,411,442,913	0.138		
Apr-07	20	4,274,665,072,437	213,733,253,622	-0.109		
May-07	22	5,172,568,357,522	235,116,743,524	0.095		
Jun-07	21	5,586,337,010,802	266,016,048,133	0.123		
Jul-07	21	5,938,330,480,139	282,777,641,911	0.061		
Aug-07	23	7,713,644,229,032	335,375,836,045	0.171		
Sep-07	19	4,805,676,596,099	252,930,347,163	-0.282		
Oct-07	23	6,499,651,716,225	282,593,552,879	0.111		
Nov-07	21	7,176,290,763,989	341,728,131,619	0.190		
Dec-07	20	5,512,903,594,564	275,645,179,728	-0.215		
Jan-08	21	7,997,242,071,529	380,821,051,025	0.323		
Feb-08	20	6,139,080,448,887	306,954,022,444	-0.216		
Mar-08	20	6,767,852,332,381	338,392,616,619	0.098		
Apr-08	22	6,150,017,772,735	279,546,262,397	-0.191		

May-08	21	6,080,169,766,807	289,531,893,657	0.035		
Jun-08	21	6,962,199,302,412	331,533,300,115	0.135		
Jul-08	22	8,104,256,787,805	368,375,308,537	0.105		
Aug-08	21	6,106,057,711,009	290,764,652,905	-0.237		
Sep-08	21	8,156,991,919,103	388,428,186,624	0.290		
Oct-08	23	8,644,538,213,244	375,849,487,532	-0.033		
Nov-08	19	5,727,999,173,523	301,473,640,712	-0.221		
Dec-08	22	5,176,041,317,640	235,274,605,347	-0.248		
Jan-09	20	4,670,179,599,178	233,508,979,959	-0.008		
Feb-09	19				237,184,035,788	4,506,496,679,977
Mar-09	22				240,916,931,086	5,300,172,483,900
Apr-09	21				244,708,576,153	5,138,880,099,223
May-09	20				248,559,895,616	4,971,197,912,328
Jun-09	22				252,471,828,654	5,554,380,230,393
Jul-09	22				256,445,329,227	5,641,797,242,997
Aug-09	21				260,481,366,309	5,470,108,692,492
Sep-09	21				264,580,924,124	5,556,199,406,610

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59470 / February 27, 2009

Administrative Proceeding
File No. 3-13386

In the Matter of **DANIEL BALDWIN, JR.,** **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 Daniel Baldwin, Jr. ("Baldwin" or "Respondent").

II.

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

III.

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

1. Daniel Baldwin, Jr., age 51, is a resident of Randallstown, Maryland. At the time of the conduct at issue, he was a registered representative, holding Series 7 and 63 licenses, and held the position of Senior Vice President, Institutional Sales for The Chapman Company, a broker-dealer registered with the Commission. He began his employment with The Chapman Company in January 1989.

2. On February 10, 2009, a final judgment was entered by consent against Baldwin, 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, in the civil action entitled Securities and Exchange Commission v. Nathan A. Chapman, Jr., et al., Civil Action Number 03-1877 (WDQ), in the United States District Court for the District of Maryland.

3. The Commission's complaint alleges fraudulent conduct in connection with an effort to rescue the failing initial public offering ("IPO") of eChapman, Inc., including, among other conduct: backdating of trades; unauthorized sales of IPO stock to brokerage customers; placing close to one-third of the IPO shares into the account of an advisory client; manipulating the market for the IPO stock for months following the IPO; and filing false and misleading reports with the Commission. eChapman, Inc. was the parent corporation of the broker-dealer with which Baldwin was associated, and of an investment adviser, both of which were registered with the Commission. As a result of the fraudulent conduct, investors lost millions of dollars. Specifically as to Baldwin, the complaint alleged that defendant Baldwin made unauthorized trades and placed IPO shares in at least 37 customer accounts. These customers included elderly investors and individuals who had specifically requested low-risk investments. Many of these customers knew nothing about investing or the stock market and relied on Baldwin to make their investment decisions.

IV.

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

Accordingly, it is hereby ORDERED, pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Baldwin be, and hereby is barred from association with any broker or dealer.

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

customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary