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 **April 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:

MARY L. SCHAPIRO, CHAIRMAN

KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

(59 Documents)

Commissioner Walter Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9021 / April 1, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59674 / April 1, 2009

INVESTMENT COMPANY ACT OF 1940
Release No. 28684 / April 1, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-11579

In the Matter of **INVIVA, INC. and JEFFERSON NATIONAL LIFE INSURANCE COMPANY,** **Respondents.**	**ORDER AMENDING ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940**

I.

On August 9, 2004, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 against Inviva, Inc. ("Inviva") and Jefferson National Life Insurance Company ("Jefferson National") (together, "Respondents").

II.

In anticipation of these proceedings, Inviva and Jefferson National consented to the entry of an Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Sections 9(b)

and 9(f) of the Investment Company Act of 1940 (the "2004 Order").[1] Among other things, the 2004 Order required Inviva and Jefferson National to cease and desist from further violations of the federal securities laws, directed Respondents to pay disgorgement and civil money penalties, and directed Respondents to comply with various undertakings.

Among the undertakings required by the 2004 Order, Inviva and Jefferson National undertook to retain a compliance consultant to conduct a review of their compliance policies and procedures, and undertook to undergo, at least every other year, a compliance review by a third party concerning Inviva's and Jefferson National's "supervisory, compliance, and other policies and procedures designed to prevent and detect market timing and related practices that may violate the federal securities laws as they apply to Respondents' variable annuity business." 2004 Order, Section III, paragraph 42.

III.

Inviva and Jefferson National have submitted an Amended Offer of Settlement (the "Offer") proposing to relieve them of their obligation to continue to have a third party periodically review their compliance controls, which the Commission has determined to accept. Solely for purposes 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, Inviva and Jefferson National consent to the entry of this Order Amending Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"), as set forth below.

IV.

The Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, IT IS HEREBY ORDERED that:

A. Section III, paragraph 42 of the 2004 Order is amended as follows to order:

42. *Compliance Review*. Commencing in 2005, Respondents shall undergo a compliance review by a third party, who is not an interested person, as defined in the Investment Company Act, of Respondents. At the conclusion of the review, the third party shall issue a report of its findings and recommendations concerning Respondents' supervisory, compliance, and other policies and procedures designed to prevent and detect market timing and related practices that may violate the federal securities laws as they apply to Respondents' variable annuity

[1] See Securities Act Rel. No. 8456, Aug. 9, 2004, Admin. Proc. File No. 3-11579.

business. The report shall be promptly delivered to the Respondents' Chief Compliance Officer.

B. All other provisions of the 2004 Order remain in effect.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 1, 2009

In the Matter of Continan Communications, Inc. **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of Continan Communications, Inc. ("Continan"). Questions have been raised about the accuracy and adequacy of publicly disseminated information concerning, among other things, the current liabilities of the company. Continan securities are quoted on the OTC Bulletin Board and the Pink Sheets operated by Pink OTC Markets Inc. under the trading symbol CNTN.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Continan is suspended for the period from 9:30 a.m. EDT on April 1, 2009, through 11:59 p.m. EDT on April 15, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

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

ADMINISTRATIVE PROCEEDING
File No. 3-13426

In the Matter of **Childrobics, Inc.,** **Churchill Technology, Inc.,** **Complete Management, Inc.,** **Global Intellicom, Inc.,** **Tenney Engineering, Inc., and** **The Score Board, 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 Childrobics, Inc., Churchill Technology, Inc., Complete Management, Inc., Global Intellicom, Inc., Tenney Engineering, Inc., and The Score Board, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Childrobics, Inc. ("CDRB[1]") (CIK No. 921685) is an inactive New York corporation located in Hauppauge, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CDRB 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, 1997, which reported a net loss of $2,448,470 for the prior six months. On November 18, 1997, an involuntary Chapter 7 petition was filed against CDRB in the U.S. Bankruptcy Court for the Eastern District of New York which was terminated on September 30, 2003. As of March 30, 2009, the common stock of CDRB was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink

[1]The short form of each issuer's name is also its stock symbol.

Sheets") had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Churchill Technology, Inc. ("CHUR") (CIK No. 721233) is a delinquent Colorado corporation located in Lewiston, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CHUR 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, 1996, which reported a net loss of $3,405,284 for the prior nine months. On November 27, 1996, CHUR filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Western District of New York, which was converted to a Chapter 11 petition on August 2, 2000, and was still pending as of March 31, 2009. As of March 30, 2009, the common stock of CHUR was quoted on the Pink Sheets, had six market makers, was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 21,289 shares for the prior six months.

3. Complete Management, Inc. ("CPMIQ") (CIK No. 1002063) is an inactive New York corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CPMIQ 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 $61,829,000 for the prior nine months. On October 12, 1999, CPMIQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of New York which was terminated on December 18, 2007. As of March 30, 2009, the common stock of CPMIQ was quoted on the Pink Sheets, had four market makers, was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 9,640 shares for the prior six months.

4. Global Intellicom, Inc. ("GBITQ") (CIK No. 946355) is a defaulted Nevada corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GBITQ 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. On September 24, 1999, GBITQ filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Southern District of New York which was terminated on May 2, 2005. As of March 30, 2009, the common stock of GBITQ was quoted on the Pink Sheets, had five market makers, was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 523 shares for the prior six months.

5. Tenney Engineering, Inc. ("TNNYB") (CIK No. 97184) is a revoked New Jersey corporation located in Union, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TNNYB 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, 1998. On August 25, 1998, TNNYB filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey, which was converted to a Chapter 7 proceeding on May 31, 2000, and terminated on August 16, 2005. As of March 30, 2009, the common stock of TNNYB was quoted on the Pink Sheets, had four market makers, was eligible for the "piggyback" exception of Exchange

Act Rule 15c2-11(f)(3), and had an average daily trading volume of 3 shares for the prior six months.

6. The Score Board, Inc. ("BSBLQ") (CIK No. 813013) is a New Jersey corporation located in Cherry Hill, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BSBLQ 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 $1,646,000 for the prior nine months. On March 18, 1998, BSBLQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey which was terminated on August 21, 2003. As of March 30, 2009, the common stock of BSBLQ was traded on the over-the-counter markets and had an average daily trading volume of 170 shares for the prior six months.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

A. Whether the allegations contained in Section II 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

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

Appendix 1

Chart of Delinquent Filings

In the Matter of Childrobics, Inc. , et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Childrobics, Inc.					
	10-KSB	06/30/97	09/29/97	Not filed	138
	10-QSB	09/30/97	11/14/97	Not filed	136
	10-QSB	12/31/97	02/17/98	Not filed	133
	10-QSB	03/31/98	05/15/98	Not filed	130
	10-KSB	06/30/98	09/28/98	Not filed	126
	10-QSB	09/30/98	11/16/98	Not filed	124
	10-QSB	12/31/98	02/16/99	Not filed	121
	10-QSB	03/31/99	05/17/99	Not filed	118
	10-KSB	06/30/99	09/28/99	Not filed	114
	10-QSB	09/30/99	11/15/99	Not filed	112
	10-QSB	12/31/99	02/14/00	Not filed	109
	10-QSB	03/31/00	05/15/00	Not filed	106
	10-KSB	06/30/00	09/28/00	Not filed	102
	10-QSB	09/30/00	11/14/00	Not filed	100
	10-QSB	12/31/00	02/14/01	Not filed	97
	10-QSB	03/31/01	05/15/01	Not filed	94
	10-KSB	06/30/01	09/28/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	88
	10-QSB	12/31/01	02/14/02	Not filed	85
	10-QSB	03/31/02	05/15/02	Not filed	82
	10-KSB	06/30/02	09/30/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	76
	10-QSB	12/31/02	02/14/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	70
	10-KSB	06/30/03	09/29/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	64
	10-QSB	12/31/03	02/17/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	58
	10-KSB	06/30/04	09/28/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	52
	10-QSB	12/31/04	02/14/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	46
	10-KSB	06/30/05	09/28/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	40
	10-QSB	12/31/05	02/14/06	Not filed	37

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Childrobics, Inc. ***(continued)***	*10-QSB*	03/31/06	05/15/06	Not filed	34
	10-KSB	06/30/06	09/28/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	28
	10-QSB	12/31/06	02/14/07	Not filed	25
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-KSB	06/30/07	09/28/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	16
	10-QSB	03/31/08	05/15/08	Not filed	10
	10-KSB	06/30/08	09/29/08	Not filed	6
	10-QSB	09/30/08	11/14/08	Not filed	4
	10-QSB	12/31/08	02/17/09	Not filed	1
Total Filings Delinquent	46				
Churchill Technology, Inc.					
	10-KSB	09/30/96	12/30/96	Not filed	147
	10-QSB	12/31/96	02/14/97	Not filed	145
	10-QSB	03/31/97	05/15/97	Not filed	142
	10-QSB	06/30/97	08/14/97	Not filed	139
	10-KSB	09/30/97	12/29/97	Not filed	135
	10-QSB	12/31/97	02/17/98	Not filed	133
	10-QSB	03/31/98	05/15/98	Not filed	130
	10-QSB	06/30/98	08/14/98	Not filed	127
	10-KSB	09/30/98	12/29/98	Not filed	123
	10-QSB	12/31/98	02/16/99	Not filed	121
	10-QSB	03/31/99	05/17/99	Not filed	118
	10-QSB	06/30/99	08/16/99	Not filed	115
	10-KSB	09/30/99	12/29/99	Not filed	111
	10-QSB	12/31/99	02/14/00	Not filed	109
	10-QSB	03/31/00	05/15/00	Not filed	106
	10-QSB	06/30/00	08/14/00	Not filed	103
	10-KSB	09/30/00	12/29/00	Not filed	99
	10-QSB	12/31/00	02/14/01	Not filed	97
	10-QSB	03/31/01	05/15/01	Not filed	94
	10-QSB	06/30/01	08/14/01	Not filed	91
	10-KSB	09/30/01	12/31/01	Not filed	87
	10-QSB	12/31/01	02/14/02	Not filed	85
	10-QSB	03/31/02	05/15/02	Not filed	82
	10-QSB	06/30/02	08/14/02	Not filed	79
	10-KSB	09/30/02	12/30/02	Not filed	75

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Churchill Technology, Inc. ***(continued)***	*10-QSB*	12/31/02	02/14/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	70
	10-QSB	06/30/03	08/14/03	Not filed	67
	10-KSB	09/30/03	12/29/03	Not filed	63
	10-QSB	12/31/03	02/17/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	58
	10-QSB	06/30/04	08/16/04	Not filed	55
	10-KSB	09/30/04	12/29/04	Not filed	51
	10-QSB	12/31/04	02/14/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	46
	10-QSB	06/30/05	08/15/05	Not filed	43
	10-KSB	09/30/05	12/29/05	Not filed	39
	10-QSB	12/31/05	02/14/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	34
	10-QSB	06/30/06	08/14/06	Not filed	31
	10-KSB	09/30/06	12/29/06	Not filed	27
	10-QSB	12/31/06	02/14/07	Not filed	25
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-QSB	06/30/07	08/14/07	Not filed	19
	10-KSB	09/30/07	12/29/07	Not filed	15
	10-QSB	12/31/07	02/14/08	Not filed	13
	10-QSB	03/31/08	05/15/08	Not filed	10
	10-QSB	06/30/08	08/14/08	Not filed	7
	10-KSB	09/30/08	12/29/08	Not filed	3
	10-QSB	12/31/08	02/17/09	Not filed	1
Total Filings Delinquent	50				
Complete Management, Inc.					
	10-KSB	12/31/98	03/31/99	Not filed	120
	10-QSB	03/31/99	05/17/99	Not filed	118
	10-QSB	06/30/99	08/16/99	Not filed	115
	10-QSB	09/30/99	11/15/99	Not filed	112
	10-KSB	12/31/99	03/30/00	Not filed	108
	10-QSB	03/31/00	05/15/00	Not filed	106
	10-QSB	06/30/00	08/14/00	Not filed	103
	10-QSB	09/30/00	11/14/00	Not filed	100
	10-KSB	12/31/00	04/02/01	Not filed	95
	10-QSB	03/31/01	05/15/01	Not filed	94

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Complete Management, Inc. ***(continued)***	*10-QSB*	06/30/01	08/14/01	Not filed	91
	10-QSB	09/30/01	11/14/01	Not filed	88
	10-KSB	12/31/01	04/01/02	Not filed	83
	10-QSB	03/31/02	05/15/02	Not filed	82
	10-QSB	06/30/02	08/14/02	Not filed	79
	10-QSB	09/30/02	11/14/02	Not filed	76
	10-KSB	12/31/02	03/31/03	Not filed	72
	10-QSB	03/31/03	05/15/03	Not filed	70
	10-QSB	06/30/03	08/14/03	Not filed	67
	10-QSB	09/30/03	11/14/03	Not filed	64
	10-KSB	12/31/03	03/30/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	58
	10-QSB	06/30/04	08/16/04	Not filed	55
	10-QSB	09/30/04	11/15/04	Not filed	52
	10-KSB	12/31/04	03/31/05	Not filed	48
	10-QSB	03/31/05	05/16/05	Not filed	46
	10-QSB	06/30/05	08/15/05	Not filed	43
	10-QSB	09/30/05	11/14/05	Not filed	40
	10-KSB	12/31/05	03/31/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	34
	10-QSB	06/30/06	08/14/06	Not filed	31
	10-QSB	09/30/06	11/14/06	Not filed	28
	10-KSB	12/31/06	04/02/07	Not filed	23
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-QSB	06/30/07	08/14/07	Not filed	19
	10-QSB	09/30/07	11/14/07	Not filed	16
	10-KSB	12/31/07	03/31/08	Not filed	12
	*10-Q**	03/31/08	05/15/08	Not filed	10
	*10-Q**	06/30/08	08/14/08	Not filed	7
	*10-Q**	09/30/08	11/14/08	Not filed	4
	*10-K**	12/31/08	03/31/09	Not filed	0
Total Filings Delinquent	41				
Global Intellicom, Inc.					
	10-K	12/31/98	03/31/99	Not filed	120
	10-Q	03/31/99	05/17/99	Not filed	118
	10-Q	06/30/99	08/16/99	Not filed	115
	10-Q	09/30/99	11/15/99	Not filed	112
	10-K	12/31/99	03/30/00	Not filed	108
	10-Q	03/31/00	05/15/00	Not filed	106

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Global Intellicom, Inc. ***(continued)***	*10-Q*	06/30/00	08/14/00	Not filed	103
	10-Q	09/30/00	11/14/00	Not filed	100
	10-K	12/31/00	04/02/01	Not filed	95
	10-Q	03/31/01	05/15/01	Not filed	94
	10-Q	06/30/01	08/14/01	Not filed	91
	10-Q	09/30/01	11/14/01	Not filed	88
	10-K	12/31/01	04/01/02	Not filed	83
	10-Q	03/31/02	05/15/02	Not filed	82
	10-Q	06/30/02	08/14/02	Not filed	79
	10-Q	09/30/02	11/14/02	Not filed	76
	10-K	12/31/02	03/31/03	Not filed	72
	10-Q	03/31/03	05/15/03	Not filed	70
	10-Q	06/30/03	08/14/03	Not filed	67
	10-Q	09/30/03	11/14/03	Not filed	64
	10-K	12/31/03	03/30/04	Not filed	60
	10-Q	03/31/04	05/17/04	Not filed	58
	10-Q	06/30/04	08/16/04	Not filed	55
	10-Q	09/30/04	11/15/04	Not filed	52
	10-K	12/31/04	03/31/05	Not filed	48
	10-Q	03/31/05	05/16/05	Not filed	46
	10-Q	06/30/05	08/15/05	Not filed	43
	10-Q	09/30/05	11/14/05	Not filed	40
	10-K	12/31/05	03/31/06	Not filed	36
	10-Q	03/31/06	05/15/06	Not filed	34
	10-Q	06/30/06	08/14/06	Not filed	31
	10-Q	09/30/06	11/14/06	Not filed	28
	10-K	12/31/06	04/02/07	Not filed	23
	10-Q	03/31/07	05/15/07	Not filed	22
	10-Q	06/30/07	08/14/07	Not filed	19
	10-Q	09/30/07	11/14/07	Not filed	16
	10-K	12/31/07	03/31/08	Not filed	12
	10-Q	03/31/08	05/15/08	Not filed	10
	10-Q	06/30/08	08/14/08	Not filed	7
	10-Q	09/30/08	11/14/08	Not filed	4
	10-K	12/31/08	03/31/09	Not filed	0

Total Filings Delinquent 41

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Tenney Engineering, Inc.					
	10-QSB	09/30/98	11/16/98	Not filed	124
	10-KSB	12/31/98	03/31/99	Not filed	120
	10-QSB	03/31/99	05/17/99	Not filed	118
	10-QSB	06/30/99	08/16/99	Not filed	115
	10-QSB	09/30/99	11/15/99	Not filed	112
	10-KSB	12/31/99	03/30/00	Not filed	108
	10-QSB	03/31/00	05/15/00	Not filed	106
	10-QSB	06/30/00	08/14/00	Not filed	103
	10-QSB	09/30/00	11/14/00	Not filed	100
	10-KSB	12/31/00	04/02/01	Not filed	95
	10-QSB	03/31/01	05/15/01	Not filed	94
	10-QSB	06/30/01	08/14/01	Not filed	91
	10-QSB	09/30/01	11/14/01	Not filed	88
	10-KSB	12/31/01	04/01/02	Not filed	83
	10-QSB	03/31/02	05/15/02	Not filed	82
	10-QSB	06/30/02	08/14/02	Not filed	79
	10-QSB	09/30/02	11/14/02	Not filed	76
	10-KSB	12/31/02	03/31/03	Not filed	72
	10-QSB	03/31/03	05/15/03	Not filed	70
	10-QSB	06/30/03	08/14/03	Not filed	67
	10-QSB	09/30/03	11/14/03	Not filed	64
	10-KSB	12/31/03	03/30/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	58
	10-QSB	06/30/04	08/16/04	Not filed	55
	10-QSB	09/30/04	11/15/04	Not filed	52
	10-KSB	12/31/04	03/31/05	Not filed	48
	10-QSB	03/31/05	05/16/05	Not filed	46
	10-QSB	06/30/05	08/15/05	Not filed	43
	10-QSB	09/30/05	11/14/05	Not filed	40
	10-KSB	12/31/05	03/31/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	34
	10-QSB	06/30/06	08/14/06	Not filed	31
	10-QSB	09/30/06	11/14/06	Not filed	28
	10-KSB	12/31/06	04/02/07	Not filed	23
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-QSB	06/30/07	08/14/07	Not filed	19
	10-QSB	09/30/07	11/14/07	Not filed	16
	10-KSB	12/31/07	03/31/08	Not filed	12

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Tenney Engineering, Inc. ***(continued)***	*10-Q**	03/31/08	05/15/08	Not filed	10
	*10-Q**	06/30/08	08/14/08	Not filed	7
	*10-Q**	09/30/08	11/14/08	Not filed	4
	*10-K**	12/31/08	03/31/09	Not filed	0
Total Filings Delinquent	42				
The Score Board, Inc.					
	10-K	12/31/97	03/31/98	Not filed	132
	10-Q	03/31/98	05/15/98	Not filed	130
	10-Q	06/30/98	08/14/98	Not filed	127
	10-Q	09/30/98	11/16/98	Not filed	124
	10-K	12/31/98	03/31/99	Not filed	120
	10-Q	03/31/99	05/17/99	Not filed	118
	10-Q	06/30/99	08/16/99	Not filed	115
	10-Q	09/30/99	11/15/99	Not filed	112
	10-K	12/31/99	03/30/00	Not filed	108
	10-Q	03/31/00	05/15/00	Not filed	106
	10-Q	06/30/00	08/14/00	Not filed	103
	10-Q	09/30/00	11/14/00	Not filed	100
	10-K	12/31/00	04/02/01	Not filed	95
	10-Q	03/31/01	05/15/01	Not filed	94
	10-Q	06/30/01	08/14/01	Not filed	91
	10-Q	09/30/01	11/14/01	Not filed	88
	10-K	12/31/01	04/01/02	Not filed	83
	10-Q	03/31/02	05/15/02	Not filed	82
	10-Q	06/30/02	08/14/02	Not filed	79
	10-Q	09/30/02	11/14/02	Not filed	76
	10-K	12/31/02	03/31/03	Not filed	72
	10-Q	03/31/03	05/15/03	Not filed	70
	10-Q	06/30/03	08/14/03	Not filed	67
	10-Q	09/30/03	11/14/03	Not filed	64
	10-K	12/31/03	03/30/04	Not filed	60
	10-Q	03/31/04	05/17/04	Not filed	58
	10-Q	06/30/04	08/16/04	Not filed	55
	10-Q	09/30/04	11/15/04	Not filed	52
	10-K	12/31/04	03/31/05	Not filed	48
	10-Q	03/31/05	05/16/05	Not filed	46
	10-Q	06/30/05	08/15/05	Not filed	43
	10-Q	09/30/05	11/14/05	Not filed	40
	10-K	12/31/05	03/31/06	Not filed	36

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
The Score Board, Inc.	*10-Q*	03/31/06	05/15/06	Not filed	34
(continued)	*10-Q*	06/30/06	08/14/06	Not filed	31
	10-Q	09/30/06	11/14/06	Not filed	28
	10-K	12/31/06	04/02/07	Not filed	23
	10-Q	03/31/07	05/15/07	Not filed	22
	10-Q	06/30/07	08/14/07	Not filed	19
	10-Q	09/30/07	11/14/07	Not filed	16
	10-K	12/31/07	03/31/08	Not filed	12
	10-Q	03/31/08	05/15/08	Not filed	10
	10-Q	06/30/08	08/14/08	Not filed	7
	10-Q	09/30/08	11/14/08	Not filed	4
	10-K	12/31/08	03/31/09	Not filed	0

Total Filings Delinquent 45

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB are 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) 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

April 2, 2009

In the Matter of **Aegis Consumer Funding Group, Inc.,** **APS Holding Corp.,** **Childrobics, Inc.,** **Churchill Technology, Inc.,** **Complete Management, Inc.,** **Dakota Mining Corp.,** **Digital Communications Technology Corp.,** **Global Intellicom, Inc.,** **Horn Silver Mines, Inc.,** **TCC Industries, Inc., and** **Tenney Engineering, 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 Aegis Consumer Funding Group, Inc. 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 APS Holding Corp. because it has not filed any periodic reports since the period ended July 25, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Childrobics, Inc. because it has not filed any periodic reports since the period ended March 31, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Churchill Technology, Inc. because it has not filed any periodic reports since the period ended June 30, 1996.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Complete Management, 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 Dakota Mining Corp. 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 Digital Communications Technology Corp. 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 Global Intellicom, 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 Horn Silver Mines, 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 TCC Industries, 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 Tenney Engineering, Inc. because it has not filed any periodic reports since the period ended June 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. EDT on April 2, 2009, through 11:59 p.m. EDT on April 16, 2009.

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
April 2, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13425

In the Matter of Aegis Consumer Funding Group, Inc., APS Holding Corp., Dakota Mining Corp., Digital Communications Technology Corp., Horn Silver Mines, Inc., and TCC Industries, 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 Aegis Consumer Funding Group, Inc., APS Holding Corp., Dakota Mining Corp., Digital Communications Technology Corp., Horn Silver Mines, Inc., and TCC Industries, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Aegis Consumer Funding Group, Inc. ("ACAR")[1] (CIK No. 932278) is a void Delaware corporation located in Marietta, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ACAR 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 $29,262,571 for the prior nine months. As of March 30, 2009, the common stock of ACAR was quoted on the Pink Sheets, operated by Pink OTC Markets, Inc., Inc. ("Pink Sheets"), had six market makers, was eligible for the "piggyback" exception of

[1]The short form of each issuer's name is also its stock symbol.

Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 1,931 shares for the prior six months.

2. APS Holding Corp. ("APSIQ") (CIK No. 860420) is a void Delaware corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). APSIQ 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 25, 1998, which reported a net loss of $47,022,000 for the prior six months. On February 2, 1998, APSIQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware which was terminated on July 6, 2004. As of March 30, 2009, the common stock of APSIQ was quoted on the Pink Sheets, had four market makers, was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 1,245 shares for the prior six months.

3. Dakota Mining Corp. ("DAKMF") (CIK No. 848448) is a dissolved Canadian corporation located in Denver, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DAKMF 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 $5,026,729 for the prior nine months. As of March 30, 2009, the common stock of DAKMF was quoted on the Pink Sheets, had six market makers, was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 2,096 shares for the prior six months.

4. Digital Communications Technology Corp. ("DGCT") (CIK No. 743051) is a forfeited Delaware corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DGCT 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 $7,976,907 for the prior nine months. As of March 30, 2009, the common stock of DGCT was quoted on the Pink Sheets, had four market makers, was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 919 shares for the prior six months.

5. Horn Silver Mines, Inc. ("HRNS") (CIK No. 48474) is a Utah corporation located in Salt Lake City, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). HRNS 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, 1998, which reported a net loss of $5,055 for the prior six months. As of March 30, 2009, the common stock of HRNS was quoted on the Pink Sheets, had six market makers, was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 1,579 shares for the prior six months.

6. TCC Industries, Inc. ("TELC") (CIK No. 96918) is a forfeited Texas corporation located in Austin, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TELC 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 $1,792,000 for the prior nine months. On December 7, 2000, RDMG filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Western District of Texas which was terminated on March 25, 2002. As of March 30, 2009, the common stock of TELC was quoted on the Pink Sheets, had six market makers, was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), and had an average daily trading volume of 7,926 shares for the prior six months.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

A. Whether the allegations contained in Section II 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: Jill M. Peterson
Assistant Secretary

Appendix 1

Chart of Delinquent Filings

In the Matter of Aegis Consumer Funding Group, Inc. , et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Aegis Consumer Funding Group, Inc.					
	10-K	06/30/98	09/28/98	Not filed	126
	10-Q	09/30/98	11/16/98	Not filed	124
	10-Q	12/31/98	02/16/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	118
	10-K	06/30/99	09/28/99	Not filed	114
	10-Q	09/30/99	11/15/99	Not filed	112
	10-Q	12/31/99	02/14/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	106
	10-K	06/30/00	09/28/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	100
	10-Q	12/31/00	02/14/01	Not filed	97
	10-Q	03/31/01	05/15/01	Not filed	94
	10-K	06/30/01	09/28/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	88
	10-Q	12/31/01	02/14/02	Not filed	85
	10-Q	03/31/02	05/15/02	Not filed	82
	10-K	06/30/02	09/30/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	76
	10-Q	12/31/02	02/14/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	70
	10-K	06/30/03	09/29/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	64
	10-Q	12/31/03	02/17/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	58
	10-K	06/30/04	09/28/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	52
	10-Q	12/31/04	02/14/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	46
	10-K	06/30/05	09/28/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	40
	10-Q	12/31/05	02/14/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	34
	10-K	06/30/06	09/28/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	28

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Aegis Consumer Funding Group, Inc. ***(continued)***	*10-Q*	12/31/06	02/14/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	22
	10-K	06/30/07	09/28/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	16
	10-Q	12/31/07	02/14/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	10
	10-K	06/30/08	09/29/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	4
	10-Q	12/31/08	02/17/09	Not filed	1
Total Filings Delinquent	43				
APS Holding Corp.					
	10-Q	10/31/98	12/15/98	Not filed	123
	10-K	01/30/99	04/30/99	Not filed	119
	10-Q	04/24/99	06/08/99	Not filed	117
	10-Q	07/31/99	09/14/99	Not filed	114
	10-Q	10/30/99	12/14/99	Not filed	111
	10-K	01/29/00	04/28/00	Not filed	107
	10-Q	04/29/00	06/13/00	Not filed	105
	10-Q	07/29/00	09/12/00	Not filed	102
	10-Q	10/28/00	12/12/00	Not filed	99
	10-K	01/27/01	04/27/01	Not filed	95
	10-Q	04/28/01	06/12/01	Not filed	93
	10-Q	07/28/01	09/11/01	Not filed	90
	10-Q	10/27/01	12/11/01	Not filed	87
	10-K	01/26/02	04/26/02	Not filed	83
	10-Q	04/27/02	06/11/02	Not filed	81
	10-Q	07/27/02	09/10/02	Not filed	78
	10-Q	10/26/02	12/10/02	Not filed	75
	10-K	01/25/03	04/25/03	Not filed	71
	10-Q	04/26/03	06/10/03	Not filed	69
	10-Q	07/26/03	09/09/03	Not filed	66
	10-Q	10/25/03	12/09/03	Not filed	63
	10-K	01/31/04	04/30/04	Not filed	59
	10-Q	04/24/04	06/08/04	Not filed	57
	10-Q	07/31/04	09/14/04	Not filed	54
	10-Q	10/30/04	12/14/04	Not filed	51
	10-K	01/29/05	04/29/05	Not filed	47

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
APS Holding Corp. ***(continued)***	*10-Q*	04/30/05	06/14/05	Not filed	45
	10-Q	07/30/05	09/13/05	Not filed	42
	10-Q	10/29/05	12/13/05	Not filed	39
	10-K	01/28/06	04/28/06	Not filed	35
	10-Q	04/29/06	06/13/06	Not filed	33
	10-Q	07/29/06	09/12/06	Not filed	30
	10-Q	10/28/06	12/12/06	Not filed	27
	10-K	01/27/07	04/27/07	Not filed	23
	10-Q	04/28/07	06/12/07	Not filed	21
	10-Q	07/28/07	09/11/07	Not filed	18
	10-Q	10/27/07	12/11/07	Not filed	15
	10-K	01/26/08	04/25/08	Not filed	11
	10-Q	04/26/08	06/10/08	Not filed	9
	10-Q	07/26/08	09/09/08	Not filed	6
	10-Q	10/25/08	12/09/08	Not filed	3
Total Filings Delinquent	41				
Dakota Mining Corp.					
	10-K	12/31/97	03/31/98	Not filed	132
	10-Q	03/31/98	05/15/98	Not filed	130
	10-Q	06/30/98	08/14/98	Not filed	127
	10-Q	09/30/98	11/16/98	Not filed	124
	10-K	12/31/98	03/31/99	Not filed	120
	10-Q	03/31/99	05/17/99	Not filed	118
	10-Q	06/30/99	08/16/99	Not filed	115
	10-Q	09/30/99	11/15/99	Not filed	112
	10-K	12/31/99	03/30/00	Not filed	108
	10-Q	03/31/00	05/15/00	Not filed	106
	10-Q	06/30/00	08/14/00	Not filed	103
	10-Q	09/30/00	11/14/00	Not filed	100
	10-K	12/31/00	04/02/01	Not filed	95
	10-Q	03/31/01	05/15/01	Not filed	94
	10-Q	06/30/01	08/14/01	Not filed	91
	10-Q	09/30/01	11/14/01	Not filed	88
	10-K	12/31/01	04/01/02	Not filed	83
	10-Q	03/31/02	05/15/02	Not filed	82
	10-Q	06/30/02	08/14/02	Not filed	79
	10-Q	09/30/02	11/14/02	Not filed	76
	10-K	12/31/02	03/31/03	Not filed	72

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Dakota Mining Corp. ***(continued)***	*10-Q*	03/31/03	05/15/03	Not filed	70
	10-Q	06/30/03	08/14/03	Not filed	67
	10-Q	09/30/03	11/14/03	Not filed	64
	10-K	12/31/03	03/30/04	Not filed	60
	10-Q	03/31/04	05/17/04	Not filed	58
	10-Q	06/30/04	08/16/04	Not filed	55
	10-Q	09/30/04	11/15/04	Not filed	52
	10-K	12/31/04	03/31/05	Not filed	48
	10-Q	03/31/05	05/16/05	Not filed	46
	10-Q	06/30/05	08/15/05	Not filed	43
	10-Q	09/30/05	11/14/05	Not filed	40
	10-K	12/31/05	03/31/06	Not filed	36
	10-Q	03/31/06	05/15/06	Not filed	34
	10-Q	06/30/06	08/14/06	Not filed	31
	10-Q	09/30/06	11/14/06	Not filed	28
	10-K	12/31/06	04/02/07	Not filed	23
	10-Q	03/31/07	05/15/07	Not filed	22
	10-Q	06/30/07	08/14/07	Not filed	19
	10-Q	09/30/07	11/14/07	Not filed	16
	10-K	12/31/07	03/31/08	Not filed	12
	10-Q	03/31/08	05/15/08	Not filed	10
	10-Q	06/30/08	08/14/08	Not filed	7
	10-Q	09/30/08	11/14/08	Not filed	4
	10-K	12/31/08	03/31/09	Not filed	0
Total Filings Delinquent	45				
Digital Communications Technology Corp.					
	10-KSB	06/30/98	09/28/98	Not filed	126
	10-QSB	09/30/98	11/16/98	Not filed	124
	10-QSB	12/31/98	02/16/99	Not filed	121
	10-QSB	03/31/99	05/17/99	Not filed	118
	10-KSB	06/30/99	09/28/99	Not filed	114
	10-QSB	09/30/99	11/15/99	Not filed	112
	10-QSB	12/31/99	02/14/00	Not filed	109
	10-QSB	03/31/00	05/15/00	Not filed	106
	10-KSB	06/30/00	09/28/00	Not filed	102
	10-QSB	09/30/00	11/14/00	Not filed	100
	10-QSB	12/31/00	02/14/01	Not filed	97
	10-QSB	03/31/01	05/15/01	Not filed	94

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Digital Communications Technology Corp. ***(continued)***	*10-KSB*	06/30/01	09/28/01	Not filed	90
	10-QSB	09/30/01	11/14/01	Not filed	88
	10-QSB	12/31/01	02/14/02	Not filed	85
	10-QSB	03/31/02	05/15/02	Not filed	82
	10-KSB	06/30/02	09/30/02	Not filed	78
	10-QSB	09/30/02	11/14/02	Not filed	76
	10-QSB	12/31/02	02/14/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	70
	10-KSB	06/30/03	09/29/03	Not filed	66
	10-QSB	09/30/03	11/14/03	Not filed	64
	10-QSB	12/31/03	02/17/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	58
	10-KSB	06/30/04	09/28/04	Not filed	54
	10-QSB	09/30/04	11/15/04	Not filed	52
	10-QSB	12/31/04	02/14/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	46
	10-KSB	06/30/05	09/28/05	Not filed	42
	10-QSB	09/30/05	11/14/05	Not filed	40
	10-QSB	12/31/05	02/14/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	34
	10-KSB	06/30/06	09/28/06	Not filed	30
	10-QSB	09/30/06	11/14/06	Not filed	28
	10-QSB	12/31/06	02/14/07	Not filed	25
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-KSB	06/30/07	09/28/07	Not filed	18
	10-QSB	09/30/07	11/14/07	Not filed	16
	10-QSB	12/31/07	02/14/08	Not filed	13
	10-QSB	03/31/08	05/15/08	Not filed	10
	10-KSB	06/30/08	09/29/08	Not filed	6
	*10-Q**	09/30/08	11/14/08	Not filed	4
	*10-Q**	12/31/08	02/17/09	Not filed	1
Total Filings Delinquent	43				
Horn Silver Mines, Inc.					
	10-QSB	09/30/98	11/16/98	Not filed	124
	10-KSB	12/31/98	03/31/99	Not filed	120
	10-QSB	03/31/99	05/17/99	Not filed	118
	10-QSB	06/30/99	08/16/99	Not filed	115
	10-QSB	09/30/99	11/15/99	Not filed	112

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Horn Silver Mines, Inc. ***(continued)***	*10-KSB*	12/31/99	03/30/00	Not filed	108
	10-QSB	03/31/00	05/15/00	Not filed	106
	10-QSB	06/30/00	08/14/00	Not filed	103
	10-QSB	09/30/00	11/14/00	Not filed	100
	10-KSB	12/31/00	04/02/01	Not filed	95
	10-QSB	03/31/01	05/15/01	Not filed	94
	10-QSB	06/30/01	08/14/01	Not filed	91
	10-QSB	09/30/01	11/14/01	Not filed	88
	10-KSB	12/31/01	04/01/02	Not filed	83
	10-QSB	03/31/02	05/15/02	Not filed	82
	10-QSB	06/30/02	08/14/02	Not filed	79
	10-QSB	09/30/02	11/14/02	Not filed	76
	10-KSB	12/31/02	03/31/03	Not filed	72
	10-QSB	03/31/03	05/15/03	Not filed	70
	10-QSB	06/30/03	08/14/03	Not filed	67
	10-QSB	09/30/03	11/14/03	Not filed	64
	10-KSB	12/31/03	03/30/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	58
	10-QSB	06/30/04	08/16/04	Not filed	55
	10-QSB	09/30/04	11/15/04	Not filed	52
	10-KSB	12/31/04	03/31/05	Not filed	48
	10-QSB	03/31/05	05/16/05	Not filed	46
	10-QSB	06/30/05	08/15/05	Not filed	43
	10-QSB	09/30/05	11/14/05	Not filed	40
	10-KSB	12/31/05	03/31/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	34
	10-QSB	06/30/06	08/14/06	Not filed	31
	10-QSB	09/30/06	11/14/06	Not filed	28
	10-KSB	12/31/06	04/02/07	Not filed	23
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-QSB	06/30/07	08/14/07	Not filed	19
	10-QSB	09/30/07	11/14/07	Not filed	16
	10-KSB	12/31/07	03/31/08	Not filed	12
	*10-Q**	03/31/08	05/15/08	Not filed	10
	*10-Q**	06/30/08	08/14/08	Not filed	7
	*10-Q**	09/30/08	11/14/08	Not filed	4
	*10-K**	12/31/08	03/31/09	Not filed	0

Total Filings Delinquent 42

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
TCC Industries, Inc.					
	10-K	12/31/98	03/31/99	Not filed	120
	10-Q	03/31/99	05/17/99	Not filed	118
	10-Q	06/30/99	08/16/99	Not filed	115
	10-Q	09/30/99	11/15/99	Not filed	112
	10-K	12/31/99	03/30/00	Not filed	108
	10-Q	03/31/00	05/15/00	Not filed	106
	10-Q	06/30/00	08/14/00	Not filed	103
	10-Q	09/30/00	11/14/00	Not filed	100
	10-K	12/31/00	04/02/01	Not filed	95
	10-Q	03/31/01	05/15/01	Not filed	94
	10-Q	06/30/01	08/14/01	Not filed	91
	10-Q	09/30/01	11/14/01	Not filed	88
	10-K	12/31/01	04/01/02	Not filed	83
	10-Q	03/31/02	05/15/02	Not filed	82
	10-Q	06/30/02	08/14/02	Not filed	79
	10-Q	09/30/02	11/14/02	Not filed	76
	10-K	12/31/02	03/31/03	Not filed	72
	10-Q	03/31/03	05/15/03	Not filed	70
	10-Q	06/30/03	08/14/03	Not filed	67
	10-Q	09/30/03	11/14/03	Not filed	64
	10-K	12/31/03	03/30/04	Not filed	60
	10-Q	03/31/04	05/17/04	Not filed	58
	10-Q	06/30/04	08/16/04	Not filed	55
	10-Q	09/30/04	11/15/04	Not filed	52
	10-K	12/31/04	03/31/05	Not filed	48
	10-Q	03/31/05	05/16/05	Not filed	46
	10-Q	06/30/05	08/15/05	Not filed	43
	10-Q	09/30/05	11/14/05	Not filed	40
	10-K	12/31/05	03/31/06	Not filed	36
	10-Q	03/31/06	05/15/06	Not filed	34
	10-Q	06/30/06	08/14/06	Not filed	31
	10-Q	09/30/06	11/14/06	Not filed	28
	10-K	12/31/06	04/02/07	Not filed	23
	10-Q	03/31/07	05/15/07	Not filed	22
	10-Q	06/30/07	08/14/07	Not filed	19
	10-Q	09/30/07	11/14/07	Not filed	16
	10-K	12/31/07	03/31/08	Not filed	12

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
TCC Industries, Inc.	*10-Q*	03/31/08	05/15/08	Not filed	10
(continued)	*10-Q*	06/30/08	08/14/08	Not filed	7
	10-Q	09/30/08	11/14/08	Not filed	4
	10-K	12/31/08	03/31/09	Not filed	0
Total Filings Delinquent	41				

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB are 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) 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

April 2, 2009

IN THE MATTER OF **FCS Laboratories, Inc.** **Federal Resources Corp.,** **Filene's Basement Corp. (n/k/a FBC Distribution Corp.), and** **Film & Music Entertainment, 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 FCS Laboratories, Inc. 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 Federal Resources Corp. because it has not filed any periodic reports since the period ended December 31, 1993.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Filene's Basement Corp. (n/k/a FBC Distribution Corp.) because it has not filed any periodic reports since the period ended October 30, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Film & Music

Entertainment, Inc. because it has not filed any periodic reports since the period ended September 30, 2005.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on April 2, 2009, through 11:59 p.m. EDT on April 16, 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
April 2, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13427

In the Matter of	
F&C International, Inc., **The FAPA Insurance Co.,** **Farm Fish, Inc.,** **FCS Laboratories, Inc.,** **Federal Resources Corp.,** **Filene's Basement Corp. (n/k/a FBC Distribution Corp.), and** **Film & Music Entertainment, 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 F&C International, Inc., The FAPA Insurance Co., Farm Fish, Inc., FCS Laboratories, Inc., Federal Resources Corp., Filene's Basement Corp. (n/k/a FBC Distribution Corp.), and Film & Music Entertainment, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. F&C International, Inc. (CIK No. 837429) is an Ohio corporation not in good standing located in Cincinnati, Ohio with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). F&C 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, 1993. In 1993, F&C filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Ohio, and a reorganization plan was confirmed by the Court on March 31, 1994, which called for the transfer of substantially all of F&C's assets and the end of the company's existence on July 2, 1994.

2. The FAPA Insurance Co. (CIK No. 1012867) is a Grand Cayman corporation located in Grand Cayman, Cayman Islands, British West Indies with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FAPA is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed its Form 20-FR registration statement on April 30, 2006.

3. Farm Fish, Inc. (CIK No. 34551) is an inactive Mississippi corporation located in Jackson, Mississippi with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Farm Fish is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB registration for the period ended December 31, 2002, which reported that the company's assets were liquidated on May 28, 2002.

4. FCS Laboratories, Inc. (CIK No. 719130) is a dissolved Arizona corporation located in Tempe, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FCS 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 $247,335 for the prior nine months. As of March 31, 2009, the company's common stock (symbol "FCSI") 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).

5. Federal Resources Corp. (CIK No. 34907) is a Nevada corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Federal 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, 1993, which reported a net loss of over $1.225 million for the prior twelve months. As of March 31, 2009, the company's common stock (symbol "FDRC") 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).

6. Filene's Basement Corp. (n/k/a FBC Distribution Corp.) (CIK No. 875404) is a Massachusetts corporation located in Wellesley, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Filene's is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 30, 1999, which reported a net loss of over $51 million for the prior thirteen weeks. On August 23, 1999, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts, which is still pending. In February 2000, Filene's agreed to sell virtually all of its assets. As of March 31, 2009, the company's common stock (symbol "BSMTQ") 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).

7. Film & Music Entertainment, Inc. (CIK No. 1309152) is a Nevada corporation located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Film & Music is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of

$445,718 for the prior nine months. As of March 31, 2009, the company's stock (symbol "FLME") was quoted on the Pink Sheets, had seven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and

place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them 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 F&C International, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
F&C International, Inc.					
	10-KSB	06/30/93	09/28/93	Not filed	186
	10-QSB	09/30/93	11/15/93	Not filed	184
	10-QSB	12/31/93	02/14/94	Not filed	181
	10-KSB	06/30/94	09/28/94	Not filed	174
	10-QSB	09/30/94	11/14/94	Not filed	172
	10-QSB	12/31/94	02/14/95	Not filed	169
	10-QSB	03/31/95	05/15/95	Not filed	166
	10-KSB	06/30/95	09/28/95	Not filed	162
	10-QSB	09/30/95	11/14/95	Not filed	160
	10-QSB	12/31/95	02/14/96	Not filed	157
	10-QSB	03/31/96	05/15/96	Not filed	154
	10-KSB	06/30/96	09/30/96	Not filed	150
	10-QSB	09/30/96	11/14/96	Not filed	148
	10-QSB	12/31/96	02/14/97	Not filed	145
	10-QSB	03/31/97	05/15/97	Not filed	142
	10-KSB	06/30/97	09/29/97	Not filed	138
	10-QSB	09/30/97	11/14/97	Not filed	136
	10-QSB	12/31/97	02/17/98	Not filed	133
	10-QSB	03/31/98	05/15/98	Not filed	130
	10-KSB	06/30/98	09/28/98	Not filed	126
	10-QSB	09/30/98	11/16/98	Not filed	124
	10-QSB	12/31/98	02/16/99	Not filed	121
	10-QSB	03/31/99	05/17/99	Not filed	118
	10-KSB	06/30/99	09/28/99	Not filed	114
	10-QSB	09/30/99	11/15/99	Not filed	112
	10-QSB	12/31/99	02/14/00	Not filed	109
	10-QSB	03/31/00	05/15/00	Not filed	106
	10-K	06/30/00	09/28/00	Not filed	102
	10-Q	09/30/00	11/14/00	Not filed	100
	10-Q	12/31/00	02/14/01	Not filed	97
	10-Q	03/31/01	05/15/01	Not filed	94
	10-K	06/30/01	09/28/01	Not filed	90
	10-Q	09/30/01	11/14/01	Not filed	88
	10-Q	12/31/01	02/14/02	Not filed	85

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
F&C International, Inc.					
	10-Q	03/31/02	05/15/02	Not filed	82
	10-K	06/30/02	09/30/02	Not filed	78
	10-Q	09/30/02	11/14/02	Not filed	76
	10-Q	12/31/02	02/14/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	70
	10-K	06/30/03	09/29/03	Not filed	66
	10-Q	09/30/03	11/14/03	Not filed	64
	10-Q	12/31/03	02/17/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	58
	10-K	06/30/04	09/28/04	Not filed	54
	10-Q	09/30/04	11/15/04	Not filed	52
	10-Q	12/31/04	02/14/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	46
	10-K	06/30/05	09/28/05	Not filed	42
	10-Q	09/30/05	11/14/05	Not filed	40
	10-Q	12/31/05	02/14/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	34
	10-K	06/30/06	09/28/06	Not filed	30
	10-Q	09/30/06	11/14/06	Not filed	28
	10-Q	12/31/06	02/14/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	22
	10-K	06/30/07	09/28/07	Not filed	18
	10-Q	09/30/07	11/14/07	Not filed	16
	10-Q	12/31/07	02/14/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	10
	10-K	06/30/08	09/29/08	Not filed	6
	10-Q	09/30/08	11/14/08	Not filed	4
	10-Q	12/31/08	02/17/09	Not filed	1
Total Filings Delinquent	62				
The FAPA Insurance Co.					
	20-F	12/31/95	07/01/96	Not filed	152
	20-F	12/31/96	06/30/97	Not filed	141
	20-F	12/31/97	06/30/98	Not filed	129
	20-F	12/31/98	06/30/99	Not filed	117
	20-F	12/31/99	06/30/00	Not filed	105
	20-F	12/31/00	07/02/01	Not filed	92

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
The FAPA Insurance Co.					
	20-F	12/31/01	07/01/02	Not filed	80
	20-F	12/31/02	06/30/03	Not filed	69
	20-F	12/31/03	06/30/04	Not filed	57
	20-F	12/31/04	06/30/05	Not filed	45
	20-F	12/31/05	06/30/06	Not filed	33
	20-F	12/31/06	07/02/07	Not filed	20
	20-F	12/31/07	06/30/08	Not filed	9
Total Filings Delinquent	13				
Farm Fish, Inc.					
	10-QSB	03/31/01	05/15/01	Not filed	94
	10-QSB	03/31/02	05/15/02	Not filed	82
	10-QSB	06/30/02	08/14/02	Not filed	79
	10-QSB	09/30/02	11/14/02	Not filed	76
	10-QSB	03/31/03	05/15/03	Not filed	70
	10-QSB	06/30/03	08/14/03	Not filed	67
	10-QSB	09/30/03	11/14/03	Not filed	64
	10-KSB	12/31/03	03/30/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	58
	10-QSB	06/30/04	08/16/04	Not filed	55
	10-QSB	09/30/04	11/15/04	Not filed	52
	10-KSB	12/31/04	03/31/05	Not filed	48
	10-QSB	03/31/05	05/16/05	Not filed	46
	10-QSB	06/30/05	08/15/05	Not filed	43
	10-QSB	09/30/05	11/14/05	Not filed	40
	10-KSB	12/31/05	03/31/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	34
	10-QSB	06/30/06	08/14/06	Not filed	31
	10-QSB	09/30/06	11/14/06	Not filed	28
	10-KSB	12/31/06	04/02/07	Not filed	23
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-QSB	06/30/07	08/14/07	Not filed	19
	10-QSB	09/30/07	11/14/07	Not filed	16
	10-KSB	12/31/07	03/31/08	Not filed	12
	10-Q[1]	03/31/08	05/15/08	Not filed	10
	10-Q[1]	06/30/08	08/14/08	Not filed	7

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Farm Fish, Inc.	*10-Q*[1]	09/30/08	11/14/08	Not filed	4
	10-K[1]	12/31/08	03/31/09	Not filed	0
Total Filings Delinquent	28				
FCS Laboratories, Inc.					
	10-K	09/30/97	12/29/97	Not filed	135
	10-Q	12/31/97	02/17/98	Not filed	133
	10-Q	03/31/98	05/15/98	Not filed	130
	10-Q	06/30/98	08/14/98	Not filed	127
	10-K	09/30/98	12/29/98	Not filed	123
	10-Q	12/31/98	02/16/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	118
	10-Q	06/30/99	08/16/99	Not filed	115
	10-K	09/30/99	12/29/99	Not filed	111
	10-Q	12/31/99	02/14/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	106
	10-Q	06/30/00	08/14/00	Not filed	103
	10-K	09/30/00	12/29/00	Not filed	99
	10-Q	12/31/00	02/14/01	Not filed	97
	10-Q	03/31/01	05/15/01	Not filed	94
	10-Q	06/30/01	08/14/01	Not filed	91
	10-K	09/30/01	12/31/01	Not filed	87
	10-Q	12/31/01	02/14/02	Not filed	85
	10-Q	03/31/02	05/15/02	Not filed	82
	10-Q	06/30/02	08/14/02	Not filed	79
	10-K	09/30/02	12/30/02	Not filed	75
	10-Q	12/31/02	02/14/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	70
	10-Q	06/30/03	08/14/03	Not filed	67
	10-K	09/30/03	12/29/03	Not filed	63
	10-Q	12/31/03	02/17/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	58
	10-Q	06/30/04	08/16/04	Not filed	55
	10-K	09/30/04	12/29/04	Not filed	51
	10-Q	12/31/04	02/14/05	Not filed	49

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
FCS Laboratories, Inc.					
	10-Q	03/31/05	05/16/05	Not filed	46
	10-Q	06/30/05	08/15/05	Not filed	43
	10-K	09/30/05	12/29/05	Not filed	39
	10-Q	12/31/05	02/14/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	34
	10-Q	06/30/06	08/14/06	Not filed	31
	10-K	09/30/06	12/29/06	Not filed	27
	10-Q	12/31/06	02/14/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	22
	10-Q	06/30/07	08/14/07	Not filed	19
	10-K	09/30/07	12/29/07	Not filed	15
	10-Q	12/31/07	02/14/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	10
	10-Q	06/30/08	08/14/08	Not filed	7
	10-K	09/30/08	12/29/08	Not filed	3
	10-Q	12/31/08	02/17/09	Not filed	1
Total Filings Delinquent	46				
Federal Resources Corp.					
	10-QSB	03/31/94	05/16/94	Not filed	178
	10-QSB	06/30/94	08/15/94	Not filed	175
	10-QSB	09/30/94	11/14/94	Not filed	172
	10-KSB	12/31/94	03/31/95	Not filed	168
	10-QSB	03/31/95	05/15/95	Not filed	166
	10-QSB	06/30/95	08/14/95	Not filed	163
	10-QSB	09/30/95	11/14/95	Not filed	160
	10-KSB	12/31/95	04/01/96	Not filed	155
	10-QSB	03/31/96	05/15/96	Not filed	154
	10-QSB	06/30/96	08/14/96	Not filed	151
	10-QSB	09/30/96	11/14/96	Not filed	148
	10-KSB	12/31/96	03/31/97	Not filed	144
	10-QSB	03/31/97	05/15/97	Not filed	142
	10-QSB	06/30/97	08/14/97	Not filed	139
	10-QSB	09/30/97	11/14/97	Not filed	136
	10-KSB	12/31/97	03/31/98	Not filed	132
	10-QSB	03/31/98	05/15/98	Not filed	130

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Federal Resources Corp.					
	10-QSB	06/30/98	08/14/98	Not filed	127
	10-QSB	09/30/98	11/16/98	Not filed	124
	10-KSB	12/31/98	03/31/99	Not filed	120
	10-QSB	03/31/99	05/17/99	Not filed	118
	10-QSB	06/30/99	08/16/99	Not filed	115
	10-QSB	09/30/99	11/15/99	Not filed	112
	10-KSB	12/31/99	03/30/00	Not filed	108
	10-QSB	03/31/00	05/15/00	Not filed	106
	10-QSB	06/30/00	08/14/00	Not filed	103
	10-QSB	09/30/00	11/14/00	Not filed	100
	10-KSB	12/31/00	04/02/01	Not filed	95
	10-QSB	03/31/01	05/15/01	Not filed	94
	10-QSB	06/30/01	08/14/01	Not filed	91
	10-QSB	09/30/01	11/14/01	Not filed	88
	10-KSB	12/31/01	04/01/02	Not filed	83
	10-QSB	03/31/02	05/15/02	Not filed	82
	10-QSB	06/30/02	08/14/02	Not filed	79
	10-QSB	09/30/02	11/14/02	Not filed	76
	10-KSB	12/31/02	03/31/03	Not filed	72
	10-QSB	03/31/03	05/15/03	Not filed	70
	10-QSB	06/30/03	08/14/03	Not filed	67
	10-QSB	09/30/03	11/14/03	Not filed	64
	10-KSB	12/31/03	03/30/04	Not filed	60
	10-QSB	03/31/04	05/17/04	Not filed	58
	10-QSB	06/30/04	08/16/04	Not filed	55
	10-QSB	09/30/04	11/15/04	Not filed	52
	10-KSB	12/31/04	03/31/05	Not filed	48
	10-QSB	03/31/05	05/16/05	Not filed	46
	10-QSB	06/30/05	08/15/05	Not filed	43
	10-QSB	09/30/05	11/14/05	Not filed	40
	10-KSB	12/31/05	03/31/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	34
	10-QSB	06/30/06	08/14/06	Not filed	31
	10-QSB	09/30/06	11/14/06	Not filed	28
	10-KSB	12/31/06	04/02/07	Not filed	23
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-QSB	06/30/07	08/14/07	Not filed	19
	10-QSB	09/30/07	11/14/07	Not filed	16
	10-KSB	12/31/07	03/31/08	Not filed	12

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Federal Resources Corp.					
	10-Q[1]	03/31/08	05/15/08	Not filed	10
	10-Q[1]	06/30/08	08/14/08	Not filed	7
	10-Q[1]	09/30/08	11/14/08	Not filed	4
	10-K[1]	12/31/08	03/31/09	Not filed	0
Total Filings Delinquent	60				
Filene's Basement Corp. (n/k/a FBC Distribution Corp.)					
	10-K	01/29/00	04/28/00	Not filed	107
	10-Q	04/29/00	06/13/00	Not filed	105
	10-Q	07/29/00	09/12/00	Not filed	102
	10-Q	10/28/00	12/12/00	Not filed	99
	10-K	01/27/01	04/27/01	Not filed	95
	10-Q	04/28/01	06/12/01	Not filed	93
	10-Q	07/28/01	09/11/01	Not filed	90
	10-Q	10/27/01	12/11/01	Not filed	87
	10-K	01/26/02	04/26/02	Not filed	83
	10-Q	04/27/02	06/11/02	Not filed	81
	10-Q	07/27/02	09/10/02	Not filed	78
	10-Q	10/26/02	12/10/02	Not filed	75
	10-K	01/25/03	04/25/03	Not filed	71
	10-Q	04/26/03	06/10/03	Not filed	69
	10-Q	07/26/03	09/09/03	Not filed	66
	10-Q	10/25/03	12/09/03	Not filed	63
	10-K	01/24/04	04/23/04	Not filed	59
	10-Q	04/24/04	06/08/04	Not filed	57
	10-Q	07/24/04	09/07/04	Not filed	54
	10-Q	10/23/04	12/07/04	Not filed	51
	10-K	01/22/05	04/22/05	Not filed	47
	10-Q	04/23/05	06/07/05	Not filed	45
	10-Q	07/23/05	09/06/05	Not filed	42
	10-Q	10/22/05	12/06/05	Not filed	39
	10-K	01/21/06	04/21/06	Not filed	35
	10-Q	04/22/06	06/06/06	Not filed	33
	10-Q	07/22/06	09/05/06	Not filed	30
	10-Q	10/21/06	12/05/06	Not filed	27
	10-K	01/20/07	04/20/07	Not filed	23

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Filene's Basement Corp. (n/k/a FBC Distribution Corp.)					
	10-Q	04/21/07	06/05/07	Not filed	21
	10-Q	07/21/07	09/04/07	Not filed	18
	10-Q	10/20/07	12/04/07	Not filed	15
	10-K	01/19/08	04/18/08	Not filed	11
	10-Q	04/19/08	06/03/08	Not filed	9
	10-Q	07/19/08	09/02/08	Not filed	6
	10-Q	10/18/08	12/02/08	Not filed	3
Total Filings Delinquent	36				
Film & Music Entertainment, Inc.					
	10-KSB	12/31/05	03/31/06	Not filed	36
	10-QSB	03/31/06	05/15/06	Not filed	34
	10-QSB	06/30/06	08/14/06	Not filed	31
	10-QSB	09/30/06	11/14/06	Not filed	28
	10-KSB	12/31/06	04/02/07	Not filed	23
	10-QSB	03/31/07	05/15/07	Not filed	22
	10-QSB	06/30/07	08/14/07	Not filed	19
	10-QSB	09/30/07	11/14/07	Not filed	16
	10-KSB	12/31/07	03/31/08	Not filed	12
	10-Q[1]	03/31/08	05/15/08	Not filed	10
	10-Q[1]	06/30/08	08/14/08	Not filed	7
	10-Q[1]	09/30/08	11/14/08	Not filed	4
	10-K[1]	12/31/08	03/31/09	Not filed	0
Total Filings Delinquent	12				

[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

April 3, 2009

IN THE MATTER OF	
Xino Corp. (n/k/a Asher Xino Corp.), Xstream Mobile Solutions Corp., Yellowbubble.com, Inc., (n/k/a Reality Racing, Inc.), Yes! Entertainment Corp., and Yifan Communications, Inc.,	**ORDER OF SUSPENSION OF TRADING**
File No. 500-1	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Xino Corp. (n/k/a Asher Xino Corp.) because it has not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Xstream Mobile Solutions Corp. because it has not filed any periodic reports since it filed a Form 10-KSB for the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Yellowbubble.com, Inc. (n/k/a Reality Racing, Inc.) because it has not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Yes! Entertainment Corp. because it has not filed filed any periodic reports since it filed a Form 10-Q for 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 Yifan Communications, Inc. because it has not filed filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2006.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on April 3, 2009, through 11:59 p.m. EDT on April 17, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 3, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13428

In the Matter of	
Xino Corp. (n/k/a Asher Xino Corp.), Xstream Mobile Solutions Corp., Yellowbubble.com, Inc., Yes! Entertainment Corp., and Yifan Communications, 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") Xino Corp. (n/k/a Asher Xino Corp.), Xstream Mobile Solutions Corp., Yellowbubble.com, Inc., Yes! Entertainment Corp., and Yifan Communications, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Xino Corp. (n/k/a Asher Xino Corp.) (CIK No. 700890) is a Delaware corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Xino is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2002, which reported a net loss of $1,913,627 for the prior nine months. As of March 31, 2009, the company's common stock (symbol "XNCP") was quoted on the Pink Sheets operated by OTC Markets, Inc. ("Pink Sheets"), had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Xstream Mobile Solutions Corp. (CIK No. 842919) is a Delaware corporation located in New Lenox, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Xstream Mobile Solutions Corp. 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 September 30, 2006, which reported a net loss of $1,139,854 for the prior twelve months. As of March 31, 2009, the company's stock (symbol "XMSC") was quoted on the Pink Sheets, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Yellowbubble.com, Inc. (n/k/a Reality Racing, Inc.) (CIK No. 1090503) is a defaulted Nevada corporation located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Yellowbubble.com 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 $566,174 for the prior three months. On November 6, 2006, a Form 15 filed for the company to voluntarily deregister the securities was filed by an unauthorized third party, and was therefore invalid. As of February 26, 2009, the company's common stock (symbol "RRGI") was quoted on the Pink Sheets, had thirteen market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Yes! Entertainment Corp. (CIK No. 943747) is a delinquent Delaware corporation located in Pleasanton, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Yes! Entertainment 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 $2,861,000 for the prior nine months. On February 9, 1999, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was terminated on June 11, 2007. As of March 31, 2009, the company's common stock (symbol "YESS") was quoted on the Pink Sheets, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Yifan Communications, Inc. (CIK No. 915766) 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). Yifan Communications is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2006, which reported a net loss of $238,867 for the prior three months. As of March 31, 2009, the company's common stock (symbol "YFCM") was quoted on the Pink Sheets, had eight market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

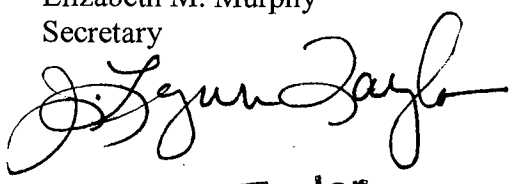
This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means of verifiable delivery.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

Attachment

Appendix 1

Chart of Delinquent Filings

In the Matter of Xino Corp. (n/k/a Asher Xino Corp.), et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Xino Corp. (n/k/a Asher Xino Corp.)					
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	**25**				
Xstream Mobile Solutions Corp.					
	10-QSB	12/31/06	02/14/07	Not filed	26
	10-QSB	03/31/07	05/15/07	Not filed	23

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Xstream Mobile Solutions Corp. (Continued)	*10-QSB*	06/30/07	08/14/07	Not filed	20
	10-KSB	09/30/07	12/31/07	Not filed	16
	10-QSB	12/31/07	02/14/08	Not filed	14
	10-QSB	03/31/08	05/15/08	Not filed	11
	10-QSB	06/30/08	08/14/08	Not filed	8
	10-KSB	09/30/08	12/29/08	Not filed	4
	*10-Q**	12/31/08	02/17/09	Not filed	2
Total Filings Delinquent	**9**				
Yellowbubble.com, Inc.	*10-QSB*	06/30/01	08/14/01	Not filed	92
	10-QSB	09/30/01	11/14/01	Not filed	89
	10-KSB	12/31/01	04/01/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-QSB	06/30/02	08/14/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	77
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Yellowbubble.com, Inc. *(Continued)*	*10-QSB*	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	**31**				
Yes! Entertainment Corp.					
	10-K	12/31/98	03/31/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-K	12/31/99	03/30/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Yes! Entertainment Corp. *(Continued)*	*10-Q*	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	**41**				
Yifan Communications, Inc.					
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Yifan Communications, Inc. *(Continued)*	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1

Total Filings Delinquent **10**

* Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now 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) 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
April 3, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13429

In the Matter of	
IDM Participating Income Co., **IDM Participating Income Co. II,** **IDM Participating Income Co. III,** **IDM Participating Income Co. IV,** **IDM Participating Income Co. V,** **IDM Participating Income Co. VII, and** **IDM Participating Income Co. 90,**	**ORDER INSTITUTING ADMINISTRATIVE 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 IDM Participating Income Co., IDM Participating Income Co. II, IDM Participating Income Co. III, IDM Participating Income Co. IV, IDM Participating Income Co. V, IDM Participating Income Co. VII, and IDM Participating Income Co. 90.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. IDM Participating Income Co. (CIK No. 813814) is a canceled California limited partnership located in Long Beach, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDM Participating Income Co. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1993.

2. IDM Participating Income Co. II (CIK No. 832475) is a canceled California limited partnership located in Torrance, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDM

Participating Income Co. II is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K/A for the fiscal year ended December 31, 2000.

3. IDM Participating Income Co. III (CIK No. 832476) is a canceled California limited partnership located in Long Beach, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDM Participating Income Co. III is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1993.

4. IDM Participating Income Co. IV (CIK No. 842812) is a canceled California limited partnership located in Long Beach, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDM Participating Income Co. IV is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1993.

5. IDM Participating Income Co. V (CIK No. 849623) is a canceled California limited partnership located in Long Beach, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDM Participating Income Co. V is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1993.

6. IDM Participating Income Co. VII (CIK No. 875347) is a canceled California limited partnership located in Long Beach, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDM Participating Income Co. VII is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1993.

7. IDM Participating Income Co. 90 (CIK No. 858484) is a canceled California limited partnership located in Long Beach, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDM Participating Income Co. 90 is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1993.

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 issuers to file quarterly reports.

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

By: J. Lynn Taylor
Assistant Secretary

Appendix 1

Chart of Delinquent Filings
In the Matter of IDM Participating Income Co., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co.					
	10-Q	09/30/93	11/15/93	Not filed	185
	10-K	12/31/93	03/31/94	Not filed	181
	10-Q	03/31/94	05/16/94	Not filed	179
	10-Q	06/30/94	08/15/94	Not filed	176
	10-Q	09/30/94	11/14/94	Not filed	173
	10-K	12/31/94	03/31/95	Not filed	169
	10-Q	03/31/95	05/15/95	Not filed	167
	10-Q	06/30/95	08/14/95	Not filed	164
	10-Q	09/30/95	11/14/95	Not filed	161
	10-K	12/31/95	04/01/96	Not filed	156
	10-Q	03/31/96	05/15/96	Not filed	155
	10-Q	06/30/96	08/14/96	Not filed	152
	10-Q	09/30/96	11/14/96	Not filed	149
	10-K	12/31/96	03/31/97	Not filed	145
	10-Q	03/31/97	05/15/97	Not filed	143
	10-Q	06/30/97	08/14/97	Not filed	140
	10-Q	09/30/97	11/14/97	Not filed	137
	10-K	12/31/97	03/31/98	Not filed	133
	10-Q	03/31/98	05/15/98	Not filed	131
	10-Q	06/30/98	08/14/98	Not filed	128
	10-Q	09/30/98	11/16/98	Not filed	125
	10-K	12/31/98	03/31/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-K	12/31/99	03/30/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co.					
(continued)	*10-K*	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	62				
IDM Participating Income Co. II					
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. II					
(continued)	*10-Q*	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	32				
IDM Participating Income Co. III					
	10-Q	09/30/93	11/15/93	Not filed	185
	10-K	12/31/93	03/31/94	Not filed	181
	10-Q	03/31/94	05/16/94	Not filed	179
	10-Q	06/30/94	08/15/94	Not filed	176
	10-Q	09/30/94	11/14/94	Not filed	173
	10-K	12/31/94	03/31/95	Not filed	169
	10-Q	03/31/95	05/15/95	Not filed	167
	10-Q	06/30/95	08/14/95	Not filed	164

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. III ***(continued)***	*10-Q*	09/30/95	11/14/95	Not filed	161
	10-K	12/31/95	04/01/96	Not filed	156
	10-Q	03/31/96	05/15/96	Not filed	155
	10-Q	06/30/96	08/14/96	Not filed	152
	10-Q	09/30/96	11/14/96	Not filed	149
	10-K	12/31/96	03/31/97	Not filed	145
	10-Q	03/31/97	05/15/97	Not filed	143
	10-Q	06/30/97	08/14/97	Not filed	140
	10-Q	09/30/97	11/14/97	Not filed	137
	10-K	12/31/97	03/31/98	Not filed	133
	10-Q	03/31/98	05/15/98	Not filed	131
	10-Q	06/30/98	08/14/98	Not filed	128
	10-Q	09/30/98	11/16/98	Not filed	125
	10-K	12/31/98	03/31/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-K	12/31/99	03/30/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. III ***(continued)***	*10-Q*	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	62				
IDM Participating Income Co. IV					
	10-Q	09/30/93	11/15/93	Not filed	185
	10-K	12/31/93	03/31/94	Not filed	181
	10-Q	03/31/94	05/16/94	Not filed	179
	10-Q	06/30/94	08/15/94	Not filed	176
	10-Q	09/30/94	11/14/94	Not filed	173
	10-K	12/31/94	03/31/95	Not filed	169
	10-Q	03/31/95	05/15/95	Not filed	167
	10-Q	06/30/95	08/14/95	Not filed	164
	10-Q	09/30/95	11/14/95	Not filed	161
	10-K	12/31/95	04/01/96	Not filed	156
	10-Q	03/31/96	05/15/96	Not filed	155
	10-Q	06/30/96	08/14/96	Not filed	152
	10-Q	09/30/96	11/14/96	Not filed	149
	10-K	12/31/96	03/31/97	Not filed	145
	10-Q	03/31/97	05/15/97	Not filed	143
	10-Q	06/30/97	08/14/97	Not filed	140
	10-Q	09/30/97	11/14/97	Not filed	137

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. IV ***(continued)***	*10-K*	12/31/97	03/31/98	Not filed	133
	10-Q	03/31/98	05/15/98	Not filed	131
	10-Q	06/30/98	08/14/98	Not filed	128
	10-Q	09/30/98	11/16/98	Not filed	125
	10-K	12/31/98	03/31/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-K	12/31/99	03/30/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. IV ***(continued)***	*10-Q*	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	62				
IDM Participating Income Co. V					
	10-Q	09/30/93	11/15/93	Not filed	185
	10-K	12/31/93	03/31/94	Not filed	181
	10-Q	03/31/94	05/16/94	Not filed	179
	10-Q	06/30/94	08/15/94	Not filed	176
	10-Q	09/30/94	11/14/94	Not filed	173
	10-K	12/31/94	03/31/95	Not filed	169
	10-Q	03/31/95	05/15/95	Not filed	167
	10-Q	06/30/95	08/14/95	Not filed	164
	10-Q	09/30/95	11/14/95	Not filed	161
	10-Q	06/30/96	08/14/96	Not filed	152
	10-Q	09/30/96	11/14/96	Not filed	149
	10-K	12/31/96	03/31/97	Not filed	145
	10-Q	03/31/97	05/15/97	Not filed	143
	10-Q	06/30/97	08/14/97	Not filed	140
	10-Q	09/30/97	11/14/97	Not filed	137
	10-K	12/31/97	03/31/98	Not filed	133
	10-Q	03/31/98	05/15/98	Not filed	131
	10-Q	06/30/98	08/14/98	Not filed	128
	10-Q	09/30/98	11/16/98	Not filed	125
	10-K	12/31/98	03/31/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-K	12/31/99	03/30/00	Not filed	109

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. V (continued)	*10-Q*	03/31/00	05/15/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. V					
(continued)	*10-K*	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	60				
IDM Participating Income Co. VII					
	10-Q	09/30/93	11/15/93	Not filed	185
	10-K	12/31/93	03/31/94	Not filed	181
	10-Q	03/31/94	05/16/94	Not filed	179
	10-Q	06/30/94	08/15/94	Not filed	176
	10-Q	09/30/94	11/14/94	Not filed	173
	10-K	12/31/94	03/31/95	Not filed	169
	10-Q	03/31/95	05/15/95	Not filed	167
	10-Q	06/30/95	08/14/95	Not filed	164
	10-Q	09/30/95	11/14/95	Not filed	161
	10-K	12/31/95	04/01/96	Not filed	156
	10-Q	03/31/96	05/15/96	Not filed	155
	10-Q	06/30/96	08/14/96	Not filed	152
	10-Q	09/30/96	11/14/96	Not filed	149
	10-K	12/31/96	03/31/97	Not filed	145
	10-Q	03/31/97	05/15/97	Not filed	143
	10-Q	06/30/97	08/14/97	Not filed	140
	10-Q	09/30/97	11/14/97	Not filed	137
	10-K	12/31/97	03/31/98	Not filed	133
	10-Q	03/31/98	05/15/98	Not filed	131
	10-Q	06/30/98	08/14/98	Not filed	128
	10-Q	09/30/98	11/16/98	Not filed	125
	10-K	12/31/98	03/31/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-K	12/31/99	03/30/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. VII					
(continued)	*10-Q*	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	62				
IDM Participating Income Co. 90					
	10-Q	09/30/93	11/15/93	Not filed	185

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. 90					
(continued)	*10-K*	12/31/93	03/31/94	Not filed	181
	10-Q	03/31/94	05/16/94	Not filed	179
	10-Q	06/30/94	08/15/94	Not filed	176
	10-Q	09/30/94	11/14/94	Not filed	173
	10-K	12/31/94	03/31/95	Not filed	169
	10-Q	03/31/95	05/15/95	Not filed	167
	10-Q	06/30/95	08/14/95	Not filed	164
	10-Q	09/30/95	11/14/95	Not filed	161
	10-K	12/31/95	04/01/96	Not filed	156
	10-Q	03/31/96	05/15/96	Not filed	155
	10-Q	06/30/96	08/14/96	Not filed	152
	10-Q	09/30/96	11/14/96	Not filed	149
	10-K	12/31/96	03/31/97	Not filed	145
	10-Q	03/31/97	05/15/97	Not filed	143
	10-Q	06/30/97	08/14/97	Not filed	140
	10-Q	09/30/97	11/14/97	Not filed	137
	10-K	12/31/97	03/31/98	Not filed	133
	10-Q	03/31/98	05/15/98	Not filed	131
	10-Q	06/30/98	08/14/98	Not filed	128
	10-Q	09/30/98	11/16/98	Not filed	125
	10-K	12/31/98	03/31/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-K	12/31/99	03/30/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Participating Income Co. 90 (continued)	*10-Q*	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1

Total Filings Delinquent 62

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59703 / April 3, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2959 / April 3, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13430

In the Matter of DAN WISE, CPA, a/k/a DANNY WISE, CPA, Respondent.	ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Dan Wise, CPA ("Wise") 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. Wise has been licensed as a certified public accountant in California since 1983 and in Arizona since 1994.

[1] Rule 102(e)(2) provides in pertinent part: "any person whose license to practice as an accountant . . . has been revoked or suspended in any State . . . shall be forthwith suspended from appearing or practicing before the Commission."

2. On December 10, 2008, the Arizona State Board of Accountancy issued a decision and order, by consent, against Wise, finding that Wise committed ethical violations and failed to respond to client allegations regarding misappropriation of client funds intended as payments to the Internal Revenue Service.

3. As a result of this decision and order, Wise's Arizona license as a certified public accountant was revoked.

III.

In view of the foregoing, the Commission finds that Wise's license as a certified public accountant has been revoked within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED that Dan Wise 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. 59711 / April 6, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2863 / April 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13309

In the Matter of

MICHAEL W. CROW and ROBERT DAVID FUCHS,

Respondents.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AS TO RESPONDENT ROBERT DAVID FUCHS

I.

On December 12, 2008, the Securities and Exchange Commission ("Commission") instituted administrative proceedings 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 Michael W. Crow ("Crow") and Robert David Fuchs ("Fuchs" or the "Respondent").

II.

Respondent Fuchs 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.5 and III.6 below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 as to Respondent Robert David Fuchs ("Order"), as set forth below.

III.

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

1. Fuchs, age 59, is a resident of New Rochelle, New York. Through his wholly-owned entity, Fuchs was the sole owner of Duncan Capital LLC ("Duncan Capital"), which was, at all relevant times, a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and was a member of the National Association of Securities Dealers. Duncan Capital's principal place of business was in New York, New York. Fuchs was also Duncan Capital's nominal president, compliance officer and registered financial and operations principal ("FINOP").

2. Michael Crow, age 49, is a resident of Fairfield, Connecticut. In 2002, Crow founded Duncan Capital Group LLC ("Duncan Capital Group"), an entity organized under Delaware law, having its principal place of business in New York. At no time was Duncan Capital Group registered with the Commission.

3. On May 15, 2007, the Commission filed a civil action against Crow, Fuchs, Duncan Capital, Duncan Capital Group, and others, in the United States District Court for the Southern District of New York. See Securities and Exchange Commission v. Michael W. Crow, et al., Civil Action Number 07 Civ. 3814 (CM). On August 17, 2007, the Commission filed an Amended Complaint alleging, among other things, that Crow unlawfully acted as an unregistered principal of Duncan Capital, with Fuchs' knowledge and substantial assistance. The Complaint further alleged that Duncan Capital's regulatory filings, signed by Fuchs, falsely omitted to state both Crow's control of the firm and his prior regulatory history. Fuchs, the owner and nominal president of Duncan Capital, not only acquiesced in Crow's undisclosed control of the firm, but also facilitated it by, among other things, transferring Duncan Capital's profits to entities Crow controlled. Duncan Capital, with the knowledge and substantial assistance of Crow and Fuchs, also failed to register both Crow and another individual, who was the firm's senior managing director. Also, with Crow's and Fuchs' knowledge and substantial assistance, Duncan Capital Group acted an as unregistered broker.

4. During the period of the alleged violations, Crow and Fuchs were associated with an unregistered investment adviser through which they managed a hedge fund, as well as being associated with Duncan Capital, a registered broker-dealer and, in Crow's case, Duncan Capital Group, an unregistered broker-dealer.

5. On November 5, 2008, following a bench trial, the Honorable Colleen McMahon issued the Court's findings of fact and conclusions of law. The Court found that Crow and Fuchs aided and abetted Duncan Capital's violations of Sections 15(b)(1) and 15(b)(7) of the Exchange Act and Rules 15b3-1 and 15b7-1 thereunder; that Crow and Fuchs aided and abetted Duncan Capital Group's violations of Section 15(a) of the Exchange Act; and that Fuchs aided and

abetted Duncan Capital's violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(12) thereunder.

6. On November 13, 2008, on the bases of the Court's findings of fact and conclusions of law, the Court entered the Final Judgment as to Defendants Michael W. Crow, Robert David Fuchs, Duncan Capital LLC, Duncan Capital Group LLC and Relief Defendants (the "Judgment"). The Judgment, among other things, permanently enjoins Crow from aiding and abetting violations of Sections 15(a), 15(b)(1) and 15(b)(7) of the Exchange Act and Rules 15b3-1 and 15b7-1 thereunder; and permanently enjoins Fuchs from aiding and abetting violations of Sections 15(a), 15(b)(1), 15(b)(7) and 17(a) of the Exchange Act and Rules 15b3-1, 15b7-1 and 17a-3(a)(12) 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 Fuchs' 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 Fuchs 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

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 28688 / April 7, 2009

In the Matter of

AUTOMATED TRADING DESK SPECIALISTS, LLC
401 S. LaSalle Street, Suite 901
Chicago, IL 60605

CITIGROUP GLOBAL MARKETS INC.
787 Seventh Avenue, 32nd Floor
New York, NY 10019

CEFOF GP I CORP.
CELFOF GP CORP.
CITIGROUP CAPITAL PARTNERS I GP I CORP.
CITIGROUP CAPITAL PARTNERS I GP II CORP.
388 Greenwich Street
New York, NY 10013

CITIBANK, N.A.
399 Park Avenue
New York, NY 10043

CITIGROUP ALTERNATIVE INVESTMENTS LLC
731 Lexington Avenue, 28th Floor
New York, NY 10022

CITIGROUP INVESTMENT ADVISORY SERVICES INC.
787 Seventh Avenue, 15th Floor
New York, NY 10019

(812-13641)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

Automated Trading Desk Specialists, LLC ("ATDS"), Citigroup Global Markets Inc., CEFOF GP I Corp., CELFOF GP Corp., Citibank, N.A., Citigroup Alternative Investments LLC, Citigroup Investment Advisory Services Inc., Citigroup Capital Partners I GP I Corp. and

Citigroup Capital Partners I GP II Corp. (collectively, "Applicants") filed an application on March 12, 2009, requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting Applicants and any other company of which ATDS is or hereafter becomes an affiliated person within the meaning of section 2(a)(3) of the Act (together with Applicants, "Covered Persons") from section 9(a) of the Act with respect to an injunction entered by the United States District Court for the Southern District of New York on March 11, 2009.

On March 12, 2009, the Commission simultaneously issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act from March 11, 2009 until the Commission takes final action on the application for a permanent order (Investment Company Act Release No. 28647). The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the prohibitions of section 9(a) as applied to the Applicants would be unduly and disproportionately severe and the conduct of the Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application filed by ATDS et al. (File No. 812-13641), that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, entered by the United States District Court for the Southern District of New York on March 11, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 7, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13431

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

RESPONDENT

1. IAC Holdings, Inc. ("IAC" or "Respondent") is a Florida corporation headquartered in Orlando, Florida. IAC purported to operate three injury and accident clinics in Florida providing chiropractic treatment and services. IAC's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. IAC's stock is not currently quoted or traded.

DELINQUENT FILINGS

2. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in current and periodic reports, even if the registration under Section 12(g) is voluntary.

Specifically, Rule 13a-11 requires issuers to file current reports on Form 8-K disclosing the occurrence of any one or more of the significant events specified in that form. Rule 13a-13 requires issuers to file quarterly reports.

3. IAC filed its last Form 10-Q for the quarter ended March 31, 2008 on June 13, 2008. Since then, IAC Holdings has not filed any periodic reports.

4. IAC is delinquent on the following periodic filings: (1) Form 10-Q for the period ended June 30, 2008 due on August 14, 2008; and (2) Form 10-Q for the period ended September 30, 2008 due on November 14, 2008.

5. IAC also failed to file a Form 8-K to report the termination of the Company's relationship with its auditor.

6. As a result of the conduct described above, IAC has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-11 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 to institute public administrative proceedings to determine:

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

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220 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 it upon consideration of this Order, the allegations of which may be

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

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

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

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 8, 2009

IN THE MATTER OF All Line, 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 All Line, Inc. ("All Line"), which is quoted on the Pink Sheets under the ticker symbol ALIN. Trading in the securities of All Line appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly-traded corporation by making false statements to a court and transfer agent, in order to gain control of the corporation. A new CUSIP and ticker symbol appear to have been obtained based on false representations regarding the identity of the corporation. The accuracy and adequacy of publicly disseminated information concerning, among other things, the corporate history and identity of All Line are questionable.

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 of the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, April 8, 2009 through 11:59 p.m. EDT, on April 22, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

15 of 59

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 8, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13433

In the Matter of **DOUGLAS F. SAMUELS,** **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 Douglas F. Samuels ("Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From 1979 to 1998, Respondent worked for John Dawson & Associates, Inc. ("JDAI"), a broker-dealer registered with the Commission. Respondent began as an accountant at JDAI and eventually became Chief Financial Officer.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On November 8, 2007, Respondent pleaded guilty to one count of wire fraud under 18 U.S.C. §§ 1343 and 1346 before the United States District Court for the Northern District of Illinois, in United States v. Cho, et al., Crim. Indictment No. 04-CR-166. An order of conviction was entered against Respondent on June 19, 2008. He was sentenced to a term of imprisonment of 12 months and one day, ordered to pay restitution in the amount of $2,312,484 and placed on 3 years probation following his release from prison.

3. The count of the criminal indictment to which Respondent pled guilty alleged, inter alia, that Respondent for the purpose of executing a scheme to defraud caused and directed fraudulent "trade allocations" by creating, assigning, and/or transferring profitable

securities and options trades to certain firm, employee, and customer accounts, and losing trades to other accounts.

III.

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

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

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

IV.

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

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

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

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

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Chairman Schapiro not participating
Commissioner Aguilar not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59729 / April 8, 2009

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2684 / April 8, 2009

Admin. Proc. File No. 3-13009

In the Matter of

SCOTT B. GANN
c/o Randall G. Walters
Walters, Balido & Crain, LLP
900 Jackson Street
Suite 600
Dallas, Texas 75202

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING
INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Former associated person of registered broker-dealer and investment adviser was permanently enjoined from violating antifraud provisions of the federal securities laws. Held, it is in the public interest to bar Respondent from association with any broker, dealer, or investment adviser.

APPEARANCES:

Randall G. Walters, of Walters, Balido & Crain, LLP, for Scott B. Gann.

Jeffrey A. Cohen and Toby M. Galloway, for the Division of Enforcement.

Appeal filed: September 29, 2008
Last brief received: December 16, 2008

I.

Scott B. Gann, formerly a senior vice-president and associated person with Southwest Securities, Inc. ("SWS"), a broker-dealer and investment adviser registered with the Commission, appeals from the decision of an administrative law judge. 1/ The law judge barred Gann from association with any broker, dealer, or investment adviser based on Gann's injunction from violation of the antifraud provisions of the federal securities laws. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

On January 10, 2005, the Commission filed an injunctive complaint ("Injunctive Complaint") in the Northern District of Texas against Gann and George B. Fasciano, another SWS representative, alleging violations of Exchange Act Section 10(b) 2/ and Rule 10b-5 thereunder. 3/ The Injunctive Complaint alleged that, between February and September 2003, Gann and Fasciano used fraudulent devices to facilitate thousands of deceptive market-timing mutual-fund trades on behalf of Haidar Capital Management and Capital Advisor ("HCM"), a hedge-fund client of the firm. 4/

On March 31, 2008, after a three-day bench-trial, the district court entered a Memorandum Opinion and Order finding that Gann violated Exchange Act Section 10(b) and Exchange Act Rule 10b-5. 5/ On April 4, 2008, the district court entered a final judgment

---

1/ As of June 5, 2008, Gann was associated with Sanders, Morris, Harris, a Dallas-based broker-dealer, as a registered representative.

2/ 15 U.S.C. § 78j(b).

3/ 17 C.F.R. § 240.10b-5.

4/ "Market timing is a 'trading strategy in which traders rapidly buy and sell mutual fund shares to exploit brief discrepancies between the official stock prices used to determine[] the value of the mutual fund shares, and the prices at which the stocks are actually trading'" Justin F. Ficken, Securities Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10888 n.1 (quoting SEC v. Druffner, 517 F. Supp.2d 502, 506 (D. Mass. 2007)). Market timing, while not illegal, is strongly disfavored by mutual fund companies because it dilutes the value of the shares held by long-term shareholders, disrupts portfolio management, and increases trading costs.

5/ SEC v. Gann, No. 3:05-CV-0063-L/NDTX (N.D. Tex. Mar. 31, 2008). Fasciano settled with the Commission before trial. The district court entered a final judgment as to Fasciano on April 23, 2007, enjoining him from violations of Exchange Act Section 10(b)

(continued...)

against Gann permanently enjoining him from further violations of the securities laws, ordering him to pay $56,640.67 in disgorgement, $13,568.68 in prejudgment interest, and $50,000 in civil penalties. 6/ We summarize here the district court's findings, which establish the factual framework within which we consider Gann's appeal.

In or around November 2002, Fasciano introduced Gann to HCM after HCM had approached Fasciano about facilitating its market-timing trades. Gann investigated HCM as a potential customer over several months. Gann knew that mutual fund companies employed compliance monitors, commonly referred to as the "market timing police," tasked with preventing market-timing trades. In his investigation, Gann learned that HCM employed various tactics at other broker-dealer firms such as using multiple accounts and accounts with multiple identification numbers (whether for clients, representatives, or offices, or all three) to circumvent the mutual funds' rules prohibiting market timing. As one witness testified, these tactics enabled brokers to "circumvent block notices and get transactions executed in mutual funds that imposed trading restrictions on market timers." Gann's contact at HCM testified that the use of multiple representative numbers was "designed to basically hide the identity of the investor to be able to continue to trade."

All HCM trades were placed through one SWS trader, Fred Turner, at a central trading desk. Turner "was expected to understand the trading rules of the fund, to enter all orders, and to create and maintain relationships with the funds." Fasciano testified that "it was up to Turner to contact the mutual fund to determine if a given trade was compliant."

Between January 23 and May 6, 2003, Gann and Fasciano opened twenty-one SWS accounts for nine different HCM affiliates. Gann and Fasciano used three registered representative numbers for their HCM trading (one number for each of their names and one joint number for their partnership). Gann's number was listed on nine accounts, Fasciano's on nine, and the partnership's on three.

Gann and Fasciano placed the first market-timing trade for HCM on February 10, 2003. The district court found that, by September 2003, "Gann and Fasciano had executed approximately 2,500 trades on behalf of HCM in fifty-six mutual fund families, and in 165

5/ (...continued)
and Exchange Act Rule 10b-5, and ordering Fasciano to disgorge $56,000, plus prejudgment interest, and to pay a $30,000 civil money penalty. Fasciano subsequently consented to a bar from association with a broker, dealer or investment advisor with a right to reapply in two years. George B. Fasciano, Exchange Act Rel. No. 55763 (May 15, 2007), 90 SEC Docket 1962.

6/ Gann appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. SEC v. Gann, No. 08-10404 (5th Cir.). That appeal is pending.

mutual funds, with an aggregate value of $650 million." Gann was paid $56,640.67 in pretax commissions for his work on the HCM account.

The district court found that, "[o]f the 2,500 trades executed on behalf of HCM, there were sixty-nine block notices sent from thirty-four mutual fund families." "Block notices" are "communications from a mutual fund company prohibiting market-timing trading" that "typically include a statement of a mutual fund's objection to market timing and a notification of restrictions on market timing trading, including the prohibition of future trades in specific blocked accounts, of trades by a particular broker, or of future trades bearing a particular branch office identification number." Gann and Fasciano received their first block notice on February 25, 2003, fifteen days after they began trading. In the injunctive proceeding, Gann stipulated that he was aware of the block notices. SWS did not permit trading to continue after receipt of a block notice: a block notice was the "final word." The district court found that "[t]here is no evidence in the record that a single mutual fund family gave Gann permission to continue trading in their funds after sending SWS a block notice."

The district court found that Gann made material misrepresentations. The court detailed HCM's trading in six mutual funds and concluded that, after receiving block notices, Gann and Fasciano executed a total of 117 trades in those six mutual funds. "Gann tried to make it appear as if different brokers and clients were making trades" through the "use of multiple accounts and representative numbers, as well as the change in the branch office identifier." The court found these misrepresentations were material to the mutual funds, which had tried to prevent Gann's trading. Gann employed these deceptive devices so that he could continue trading for HCM despite the mutual funds' attempts to prohibit his trades.

The district court also rejected Gann's argument that he had no intent to deceive or defraud the mutual funds. The district court stated that the "overwhelming testimony and evidence, however, undercut Gann's credibility." The district court concluded that Gann had acted with scienter, finding that his "actions were intentionally geared toward evading detection by the mutual fund managers" and that his "continuing behavior in trying to make trades in funds after receiving block notices indicates his intent to deceive the mutual funds." The district court also observed that Gann knew SWS's procedures for mutual funds were not being followed. Further, the court stated that, while Gann and Fasciano "may have contacted the mutual funds before any trades were made [in an attempt to comply with the funds' rules], after trading began, they adopted an entirely new branch number to continue trading after their trades were blocked." 7/ The district court found that injunctive relief was warranted given "the repeated nature of Gann's misrepresentations, the number of mutual funds to which he made such misrepresentations, Gann's continued refusal to recognize that his actions involved deception, and that he continues to act as a stockbroker."

7/ Emphasis in original.

On April 17, 2008, we initiated this administrative proceeding. Gann admitted in his answer to the Order Instituting Proceedings that he was associated with SWS and that an injunction had been entered against him in connection with the purchase or sale of securities. The Division of Enforcement moved for summary disposition pursuant to Commission Rule of Practice 250. 8/ Gann attached an affidavit to his brief before the law judge in which he stated that he "will always hold the belief [he] did not have the intent to defraud any mutual fund company" and that "[he] cannot admit that [his] personal actions were wrong when [he] sincerely [does] not believe that [he] had the intent to deceive any person, investor, or fund company."

On September 9, 2008, the law judge granted the Division's motion. The law judge found that barring Gann from association with any broker, dealer, or investment adviser was "necessary and appropriate to protect the public interest." The law judge found that Gann's actions were "egregious and recurrent," that he acted with "a high degree of scienter," and that he has "not admitted the wrongful nature of his conduct." While the law judge found that Gann had provided assurances against future violations, he determined that Gann's continuance in the securities industry would provide him with "additional opportunities to violate securities laws." This appeal followed.

III.

Exchange Act Sections 15(b)(4) and (6) and Advisers Act Sections 203(e) and (f) allow for imposition of sanctions on a person associated with a broker or dealer or investment adviser, consistent with the public interest, if the person has been permanently enjoined from engaging in any conduct or practice in connection with the purchase or sale of securities. 9/ We find that Gann satisfies the requirements for imposition of sanctions. As Gann admitted before the law judge, at the time of the conduct at issue in this proceeding, Gann was associated with SWS, a broker-dealer and investment adviser registered with the Commission, and he has been permanently enjoined in connection with the purchase or sale of securities. 10/

8/ 17 C.F.R. § 201.250.

9/ 15 U.S.C. §§ 78*o*(b)(4) and (6); 15 U.S.C. §§ 80b-3(e) and (f).

10/ Gann has moved pursuant to Commission Rule of Practice 401, 17 C.F.R. § 201.401, for a stay of these proceedings pending the decision of the Fifth Circuit on his appeal, SEC v. Gann, No. 08-10404 (5th Cir.). We deny Gann's motion. It is well established that a pending judicial appeal does not affect the injunction's status as a basis for an administrative proceeding. James E. Franklin, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2714 n.15 (collecting cases). To the extent Gann prevails in his appeal, he would be entitled to file a motion to vacate the opinion and order in this matter. Id. (citing Jimmy Dale Swink, 52 S.E.C. 379 (1995) (granting motion to vacate

(continued...)

To determine the appropriate remedial sanction we evaluate the following factors: the egregiousness of respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that respondent's occupation will present opportunities for future violations. 11/ No single factor is dispositive.

We have consistently found that antifraud violations, such as those committed by Gann, are "especially serious and subject to the severest sanctions." 12/ We are responsible for protecting the public interest, and "[f]idelity to the public interest" requires severe sanctions for fraudulent conduct because the "securities business is one in which opportunities for dishonesty recur constantly." 13/ In fact, "ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to . . . bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions." 14/ We have found that "an antifraud injunction can, in the first instance, indicate the appropriateness in the public interest of . . . [a] bar from participation in the securities industry." 15/

The district court found that Gann engaged in fraudulent market timing from February until September 2003. 16/ Knowing that the mutual funds intended to halt his market-timing trades by issuing block notices, Gann used deceptive devices to enable him to continue trading. The district court found that "Gann responded to block notices by changing the representative

---

10/ (...continued)
bar upon appellate reversal of criminal conviction that was basis for bar in administrative proceeding)).

11/ SEC v. Steadman, 603 F.2d 1126, 1140 (5th Cir. 1979).

12/ Jose P. Zollino, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2608; Marshall E. Melton, 56 S.E.C. 695, 713 (2003).

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

14/ Melton, 56 S.E.C. at 713.

15/ Id. at 710.

16/ We note that, around this time, the Commission and other regulators instituted a series of investigations and injunctive and administrative actions with respect to market timing. See, e.g. Martin J. Druffner, Litigation Rel. No. 18444 (Nov. 4, 2003), 81 SEC Docket 2196 (filing of injunctive complaint alleging fraudulent market timing); SEC v. Sec. Trust Co., Litigation Rel. No. 18479 (Nov. 25, 2003), 81 SEC Docket 2835 (same); SEC v. Mutuals.com, Inc., Litigation Rel. No. 18489 (Dec. 4, 2003), 81 SEC Docket 2932 (same).

number or account number and by continuing to execute trades to circumvent the mutual funds' attempts to prohibit his trades." The district court also described "the repeated nature of Gann's misrepresentations, [and] the number of mutual funds to which he made such misrepresentations."

Gann argues that, despite the district court's findings, his conduct was not egregious or recurrent. He contends that his actions involved trading for a single client, for a brief period over five years ago, and has not been followed by other violations of the securities laws. Contrary to Gann's assertion, his violative conduct occurred over an eight-month period from February to September, during which Gann facilitated thousands of market-timing trades in fifty-six mutual fund families, and in 165 mutual funds, with an aggregate value of $650 million. Gann received sixty-nine block notices from thirty-four mutual fund families and used deceptive devices to circumvent these measures taken by the funds to prohibit his trading. With respect to the six mutual funds that the district court discussed in detail, Gann and Fasciano executed a total of 117 trades after receiving block notices. Accordingly, we find that Gann's misconduct was egregious and recurrent.

Gann asserts that he engaged in the 2003 conduct "only after conducting extensive due diligence in an attempt to comply with the mutual funds' rules." The district court stated that there was "some evidence that Gann and Fasciano contacted mutual fund companies . . . in an attempt to comply with the companies' rules." However, the district court also found that Gann "continued to execute trades in mutual funds after those funds had issued block notices . . . ." The court stated that "[s]everal witnesses testified that this in and of itself demonstrates that [Gann] did not intend to comply with the mutual funds' rules . . . ." Moreover, the district court found that Gann's initial attempts to comply were abandoned soon after trading began.

Gann argues that he had no previous experience with mutual fund trading or market timing and that he "relied on others" to ensure that his trading complied with the securities laws. Gann asserts that he "was told by HCM that HCM had lawyers for compliance and its own compliance department and that HCM's legal counsel had done due diligence and approved the market timing business." He also contends that it was the job of Fred Turner, who operated SWS's mutual fund trading desk, to understand the funds' "trading rules" and to "determine if a given trade was compliant." According to Gann, Turner sometimes stated that Gann "could continue trading in a fund even after receiving a block notice." Gann's arguments are without merit. Gann as a participant in the securities industry was responsible for compliance with the applicable regulatory requirements and cannot excuse his conduct by claiming a lack of experience or by reliance on others to ensure his compliance. 17/ To the extent that Gann asserts

---

17/ Vincent M. Uberti, Exchange Act Rel. No. 58917 (Nov. 7, 2008), 94 SEC Docket 11406, 11412 n.11 (inexperience no excuse for violation of NASD Rules); Thomas C. Kocherhans, 52 S.E.C. 528, 531 (1995) (holding that participants in the securities industry are responsible for regulatory compliance and cannot excuse their conduct by

(continued...)

that he acted on advice of counsel, he has not made the factual showing required by that defense. 18/ Gann has introduced no evidence that he disclosed the mechanics of his market-timing to an attorney and received advice that those trades complied with the securities laws. Moreover, Gann may not rely on counsel for HCM because its counsel could not be relied on to give disinterested advice to Gann. 19/

In any event, Gann's infractions involved a high degree of scienter, and, in the face of this scienter, Gann's assertion that he sought to comply with the federal securities laws cannot survive. The district court found that "Gann's continuing behavior in trying to make trades in [mutual] funds after receiving block notices indicates his intent to deceive the mutual funds." The district court found that Gann used devices to disguise his identity and to continue to trade in response to block notices, and his "actions 'were intentionally geared toward evading detection by the mutual fund managers.'" 20/ Although Gann acknowledges the district court's finding that he committed fraud, he denies that he acted with a "high degree" of scienter. That Gann used deceptive devices to continue trading after receiving block notices undermines his claim that he did not act with a high degree of scienter. He asserts that he never disguised his name, but that is not evidence of a lack of scienter because the funds with which he traded on behalf of HCM identified traders and customers by identification number, not by name.

Gann has provided some assurances that he will not commit further infractions. Gann has not traded mutual funds since 2005, represents that he does not intend to trade mutual funds in the future, and is willing to surrender his Series 65 license, which permits such trading. However, Gann currently works as a registered representative at a Dallas-based brokerage where

---

17/ (...continued)
lack of knowledge or understanding of the rules or by reliance on a supervisor); Jeffrey D. Field, 51 S.E.C. 1074, 1076 (1994) (finding that "[p]articipants in the industry must take responsibility for their compliance [with applicable regulatory requirements] and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements") (quoting Kirk A. Knapp, 51 S.E.C. 115, 134 (1992)).

18/ John A. Carley, Securities Act Rel. No. 8888 (Jan. 31, 2008), 92 SEC Docket 1693, 1712 (holding that reliance on advice of counsel requires that respondent "made complete disclosure to counsel, sought advice as to the legality of his conduct, received advise that his conduct was legal and relied on that advice in good faith") (quoting Markowski v. SEC, 34 F.3d 99, 104-05 (2d Cir. 1994)), appeal filed, No. 08-1141 (D.C. Cir. Mar. 31, 2008).

19/ See Carley, 92 SEC Docket at 1734 n.137 (stating "[o]ne cannot rely on the advice of another's counsel because that counsel cannot be relied upon to provide disinterested advice").

20/ See SEC v. Druffner, 517 F. Supp. 2d at 509.

he maintains an array of licenses that permit him to work in the industry. Gann's occupation will provide future opportunities for violation. 21/ Moreover, Gann's claims that he will "[a]lways hold the belief that [he] did not have the intent to defraud any mutual fund company" and that "[he] cannot admit [his] personal actions were wrong" reveal a fundamental misunderstanding of the duties of a securities industry professional that presents a significant likelihood that he will commit similar violations in the future. Gann's lack of disciplinary history since the conduct at issue is also not a mitigating factor. 22/

Gann also asserts as mitigating his reliance on his employment as a registered representative to pay the disgorgement, interest, and civil penalties imposed by the district court in the injunctive action and that he is the sole support of his wife and two daughters, one of whom is disabled. The need to protect the public given Gann's egregious and repeated misconduct outweighs any increase in the likelihood of Gann's timely payment and his need to fulfill his financial obligations.

Based on a consideration of the relevant factors, and all of the circumstances in this case, we find that the barring Gann from association with any broker, dealer, or investment adviser serves the public interest and is remedial because, as discussed, it will protect the investing public from the significant likelihood that Gann will commit future violations of the federal securities laws.

An appropriate order will issue. 23/

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

By: Florence E. Harmon
Deputy Secretary

Elizabeth M. Murphy
Secretary

21/ Spangler, 46 S.E.C. at 252 (stating that, in the industry, opportunities for wrongdoing "recur constantly").

22/ John Audifferen, Exchange Act Rel. No. 58230 (July 25, 2008), 93 SEC Docket 8129, 8148 ("[T]he Commission has consistently rejected the argument that a lack of disciplinary history should be considered as a mitigating factor in connection with the imposition of sanctions in FINRA proceedings."); Michael A. Rooms, Exchange Act Rel. No. 51467 (Apr. 1, 2005), 85 SEC Docket 444, 450 (same), aff'd 444 F.3d 1208 (10th Cir. 2006).

23/ 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. 59729 /April 8, 2009

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2684 / April 8, 2009

Admin. Proc. File No. 3-13009

In the Matter of

SCOTT B. GANN
c/o Randall G. Waters
Walters, Balido & Crain, LLP
900 Jackson Street
Suite 600
Dallas, Texas 75202

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Scott B. Gann be, and he hereby is, barred from association with any broker, dealer, or investment adviser.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 8, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13434

In the Matter of **RAVI YANAMADULA,** **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 Ravi Yanamadula ("Yanamadula" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From 1993 through February 1998 Respondent was employed at John Dawson & Associates ("JDAI"), a broker-dealer registered with the Commission, as JDAI's Head Trader. Respondent owned approximately 10% of JDAI and had primary responsibility for managing the trading functions at the firm.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On August 3, 2007, Respondent pleaded guilty to six counts of wire fraud under 18 U.S.C. §§ 1343 and 1346 before the United States District Court for the Northern District of Illinois, in United States v. Cho, et al., Crim. Indictment No. 04-CR-166. An order of conviction was entered against Yanamadula on June 2, 2008, and he was sentenced to a term of imprisonment of 42 months, ordered to pay restitution in the amount of $3,695,032 and placed on 3 years probation following his release from prison.

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

caused favorable trades to be reallocated from certain JDAI proprietary firm accounts to his account at JDAI and that these after-the-fact trade allocations either profited Respondent's account or served to avoid losses in his account.

III.

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

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

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

IV.

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

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

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

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

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33-9022; 34-59728; 39-2464; IC-28691]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. The revisions are being made primarily to update EDGAR to support the potential rule where domestic and foreign large accelerated filers that use U.S. Generally Accepted Accounting Principles (GAAP) would provide to the Commission a new exhibit to their filings for their reporting periods that end as per the details specified in the final eXtensible Business Reporting Language (XBRL) rule. Revisions are also made to support EDGAR submission types: SH-ER, SH-ER/A, SH-NT, SH-NT/A; removal of rescinded EDGAR submission types: 10SB12B, 10SB12B/A, 10SB12G, 10SB12G/A, 10QSB, 10QSB/A, SB-1, SB-1/A, SB-1MEF, SB-2, SB-2/A, SB-2MEF; a change in the description of 8-K Items 2.04 and 5.02; minor Form D screen changes; the addition of FINRA and ARCA as new Self-Regulatory Organizations (SRO); the addition of Office of Thrift Supervision (OTS) as an Appropriate Regulatory Agency (ARA) on Form Type TA-2; and update of the OMB expiration date on Form TA-W.

The revisions to the Filer Manual reflect changes within Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 10 (December 2008). The updated manual will be incorporated by reference into the Code of Federal Regulations.

EFFECTIVE DATE: [Insert date of publication in the Federal Register.] The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: In the Office of Information Technology, Rick Heroux, at (202) 551-8800; in the Office of Interactive Disclosure for questions concerning the XBRL mandate contact Jeffrey Naumann, Assistant Director of the Office of Interactive Disclosure, at (202) 551-5352; in the Division of Corporation Finance for questions regarding rescinded form types and Form D screen changes contact Gerry Laporte, Chief, Office of Small Business Policy, at (202) 551-3465, the addition of submission form types SH-ER, SH-ER/A, SH-NT, and SH-NT/A, contact Nicholas P. Panos, Office of Mergers and Acquisitions, Senior Special Counsel, at (202) 551-3266, and changes to 8-K item descriptions, contact Cecile Peters, Office of Information Technology, Office Chief, at (202) 551-8135; and in the Division of Trading and Markets for the addition of FINRA and ARCA as new Self-Regulatory Organizations (SRO) and Thrift Supervision (OTS) as a new Appropriate Regulatory Agency (ARA) contact Carol Charnock, Regulation Specialist, at (202) 551-5542.

SUPPLEMENTARY INFORMATION: Today we are adopting an updated EDGAR Filer Manual, Volume II. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink[2] and the Online Forms/XML Web site.

---

[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33-6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on September 24, 2008. See Release No. 33-8956 (September 18, 2008) [73 FR 54943].

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers may consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

In support of the potential rule regarding filing using XBRL and the other revisions being made, the EDGAR system is scheduled to be upgraded to Release 9.14 on December 15, 2008. Specifically for XBRL support, EDGARLink is being updated to allow domestic and foreign large accelerated filers that use U.S. Generally Accepted Accounting Principles (GAAP) to provide to the Commission a new exhibit to their filings for their reporting periods that end as per the details specified in the final eXtensible Business Reporting Language (XBRL) rule. All filings submitted to EDGAR must use the US GAAP 1.0 Final taxonomy. As part of this update, EDGAR will be performing a set of custom XBRL validation rules. Should a filing violate one of these rules, EDGAR will notify the filer. Submissions using the ICI taxonomies[5] and older versions of US GAAP taxonomy will not be validated using these additional rules.

---

[3] See Rule 301 of Regulation S-T (17 CFR 232.301).

[4] See Release No. 33-8956 (September 18, 2008) [73 FR 54943] in which we implemented EDGAR Release 9.13. For a complete history of Filer Manual rules, please see the cites therein.

[5] The Commission also proposed to tag mutual fund risk/return summaries using XBRL. See Interactive Data for Mutual Fund Risk/Return Summary (Proposing Release No. 33-8929). We are not proposing changes to the EDGAR Filer Manual for the mutual fund XBRL rule at this time, because it is anticipated that compliance with the rules will not be required until 2010. The EDGAR Filer Manual will be updated, to the extent necessary, before the compliance date for the mutual fund XBRL rule.

EDGARLink submission templates 1 and 3 are also being updated to remove submission form types 10SB12B, 10SB12B/A, 10SB12G, 10SB12G/A, 10QSB, 10QSB/A, SB-1, SB-1/A, SB-1MEF, SB-2, SB-2/A, and SB-2MEF, implementing the Commission's elimination of Forms SB-1, SB-2, 10-SB, 10-QSB, and 10-KSB in Release No. 33-8876 (Dec. 19, 2007). EDGARLink submission template 3 was previously updated to add submission form types SH-ER, SH-ER/A, SH-NT, and SH-NT/A. It is highly recommended that filers download, install, and use the new EDGARLink software and submission templates to ensure that submissions will be processed successfully. Previous versions of the templates may not work properly. Notice of the update has previously been provided on the EDGAR Filing Web site and on the Commission's public Web site. The discrete updates are reflected on the EDGAR Filing Web site and in the updated Filer Manual, Volume II.

The Commission will change the 8-K item 2.04 and 5.02 descriptions for submission form types 8-K, 8-K/A, 8-K12B, 8-K12B/A, 8-K12G3, 8-K12G3/A, 8-K15D5, and 8-K15D5/A. Item 2.04 will be called "Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation-under an Off-Balance Sheet Arrangement." Item 5.02 will be called "Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers."

Some Form D screen elements and Form D functionality will be updated. The Form D online application can be accessed from the EDGAR OnlineForms/XML Web site (https://www.onlineforms.edgarfiling.sec.gov) by logging in and selecting the "File Form D" link. Filers can also log in by clicking the "Would you like to File a Form D?" link from the EDGAR Portal Web site (http://www.portal.edgarfiling.sec.gov). The changes will be as follows:

The Form D – OMB Approval information will be corrected to reflect the estimated average burden hours per response to be 4.0.

- The "Accept" and "Decline" buttons on the signature page will be removed. When a filer clicks the Submit button, each issuer identified is acknowledging that the contents of the filing are true.
- The menu on the left side of the Form D screen will be updated from "FORM D SECTIONS" to "FORM D ITEMS."
- Item 7 – "Type of Filing" will be updated so that the "Date of First Sale" will be enabled when the filing is an amendment of a previous filing.
- Item 6 and Item 9: A warning message will appear when a filer un-checks "Pooled Investment Fund." Pooled Investment Fund will be automatically checked by the system in Item 9 when the filer selects Investment Company Act Section 3(c) in Item 6.
- The Print screen, Form Description box will be updated to reflect that Form D is entitled "Notice of Exempt Offering of Securities."

The SRO options list in EDGARLink submission template 1, 2, and 3 will be updated to include FINRA and ARCA.

The EDGARLite Form TA–2 (Annual Report of Transfer Agent activities filed pursuant to the Securities Exchange Act of 1934) is being updated to add the "Office of Thrift Supervision" to the option list of Appropriate Regulatory Agency (ARA). Validations associated with ARA value and the registrants file number will be added for the "Office of Thrift Supervision" such that the file number prefix must be "085-" and file number sequence number must be between 10000 and 14999. In addition, the validation for the "Comptroller of the Currency" will be modified such

that the file number prefix must begin with "085" and have a sequence number between 10000 and 14999.

The EDGARLite Form TA-W (Notice of Withdrawal from Registration as Transfer Agent) OMB expiration date displayed will be corrected to be "July 30, 2011."

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S-T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1520, Washington DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. We will post electronic format copies on the Commission's Web site; the address for the Filer Manual is http://www.sec.gov/info/edgar.shtml. You may also obtain copies from Thomson Financial, the paper document contractor for the Commission, at (800) 638-8241.

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA)[6]. It follows that the requirements of the Regulatory Flexibility Act[7] do not apply.

The effective date for the updated Filer Manual and the rule amendments is [Insert date of publication in the Federal Register]. In accordance with the APA[8], we find that there is good

---

[6] 5 U.S.C. 553(b).

[7] 5 U.S.C. 601- 612.

[8] 5 U.S.C. 553(d)(3).

cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 9.14 is scheduled to become available on December 15, 2008. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the system upgrade.

Statutory Basis

We are adopting the amendments to Regulation S-T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[9] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,[10] Section 319 of the Trust Indenture Act of 1939,[11] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[12]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENT

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

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

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

---

[9] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[10] 15 U.S.C. 78c, 78l, 78m, 78n, 78o, 78w, and 78ll.

[11] 15 U.S.C. 77sss.

[12] 15 U.S.C. 80a-8, 80a-29, 80a-30, and 80a-37.

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

*****

2. Section 232.301 is revised to read as follows:

§232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: "General Information," Version 5 (September 2008). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 10 (December 2008). Additional provisions applicable to Form N-SAR filers are set forth in the EDGAR Filer Manual, Volume III: "N-SAR Supplement," Version 1 (September 2005). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1520, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Electronic copies are available on the

Commission's Web site. The address for the Filer Manual is http://www.sec.gov/info/edgar.shtml. You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

By the Commission.

Elizabeth M. Murphy
Secretary

April 8, 2009

Chairman Schapiro not participating
Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59740 / April 9, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13437

In the Matter of **WOODBURY FINANCIAL 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 Woodbury Financial Services, Inc. ("Respondent" or "Woodbury").

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 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:

Respondent

1. Woodbury Financial Services, Inc., under various names, has been registered as a broker-dealer with the Commission and a Financial Industry Regulatory Authority member since 1968. Woodbury is headquartered in Woodbury, Minnesota. Woodbury has approximately 1,800 registered representatives nationwide and more than 200 home office employees. In 2006, Woodbury realized revenues of over $225,000,000.

Background

2. Woodbury allowed and, on certain occasions, assisted newly-recruited registered representatives in providing customer nonpublic personal information to Woodbury prior to the recruited representative leaving their current broker-dealer.

3. The nonpublic personal information forwarded to Woodbury by its recruits included such items as Social Security numbers, account numbers, account registrations, and dates of birth. Beginning in March of 2007, Woodbury stopped asking recruits to provide customers' Social Security numbers and dates of birth.

4. Woodbury allowed recruits to provide some of their customers' nonpublic personal information before becoming associated with Woodbury so that Woodbury could, on the recruits' behalf, pre-populate account transfer and new account forms with certain customer information. The documents that Woodbury pre-populated could include: Automated Customer Account Transfer forms, Woodbury new account information forms, and change of broker-dealer letters. Woodbury sent the printed documents to the recruits, who, upon their official start date with Woodbury, would immediately send the customers notification of change letters with the pre-populated forms for the customers' completion, review and signature. If customers wished to proceed with the transfer of their accounts to Woodbury, the customers would complete and sign the forms and then return the customer-approved documents for processing.

5. Woodbury did not determine whether the recruits, or the current broker-dealers with which they were associated, had obtained the customers' consent to provide Woodbury with certain customers' nonpublic personal information.

6. In general, the privacy notices of the broker-dealers from which Woodbury recruited registered representatives did not specifically disclose that departing registered representatives might provide customer nonpublic personal information to an unaffiliated third party.

7. In certain situations described above, in which the recruits or their current broker-dealer did not first obtain their customers' consent to disclose the information, and the

current broker-dealer did not provide notice of, and an opportunity to opt out of, the disclosure of their nonpublic personal information to Woodbury, there were underlying violations of Rule 10 of Regulation S-P and such violations were caused by Woodbury's conduct described above.

8. Woodbury's privacy policies and procedures did not prohibit registered representatives who left Woodbury from providing their new broker-dealers certain customer nonpublic personal information about customers who had not consented to the disclosure of the information.

9. As a result of the conduct described above, Woodbury willfully violated Regulation S-P Rule 10 by allowing registered representatives to take nonpublic customer information to nonaffiliated broker-dealers when leaving Woodbury.

10. As a result of the conduct described above, Woodbury willfully violated Regulation S-P Rules 4 and 6 by not informing its customers that it would allow a departing registered representative to take nonpublic customer information when leaving Woodbury for a nonaffiliated broker-dealer.

Woodbury's Remedial Efforts

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

Undertakings

Respondent undertakes to:

1. Revise its practices, policies, and procedures with respect to accepting customer nonpublic personal information from recruits who have not yet associated with Woodbury to comply with Regulation S-P as presently written or as it may be amended in the future.

2. Revise its practices, policies, procedures and/or Privacy Policy with respect to allowing departing Woodbury registered representatives to take customer nonpublic personal information with them to their new broker-dealer to comply with Regulation S-P as presently written or as it may be amended in the future.

IV.

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

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

A. Respondent Woodbury shall cease and desist from committing or causing any violations and any future violations of Rules 4, 6 and 10 of Regulation S-P;

B. Respondent Woodbury be, and hereby is, censured; and

C. It is further ordered that Respondent shall, within 10 business days of the entry of this Order, pay a civil money penalty in the amount of $65,000 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 Woodbury 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 Kenneth D. Israel, Regional Director, Securities and Exchange Commission, 15 West South Temple Street, Suite 1800, Salt Lake City, Utah 84101.

D. Respondent shall comply with the undertakings enumerated in Section III above.

By the Commission.

Elizabeth M. Murphy
Secretary

Chairman Schapiro not participating
Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9023 / April 9, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59739 / April 9, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13436

In the Matter of **MARK TUMINELLO,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND 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 Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Mark Tuminello ("Respondent" or "Tuminello").

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 and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of

1933, and Sections 15(b) 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

This proceeding arises out of materially misleading statements and omissions in offering documents in connection with a private securities offering backed by a portfolio of regional aircraft manufactured by Bombardier, Inc. ("Bombardier"). RASPRO Trust 2005 ("RASPRO"), a special purpose entity created by Bombardier, sponsored the $1.67 billion offering and Wachovia Capital Markets, LLC. ("Wachovia") served as the underwriter. On September 23, 2005 the offering closed. Within the first three months after closing, Bombardier discovered that RASPRO would have to draw on a liquidity reserve to make the first payment on one of the three tranches of securities involved in the offering, the B Notes, and that a guarantor would have to step in and purchase the B Notes in the fifth year of the 18 year transaction.

Respondent Tuminello, a managing director, headed the Commercial Aviation Team of Wachovia's Structured Asset Finance Group. Respondent and the two other members of the Commercial Aviation Team were aware of the potential shortfalls as early as July, 2005, but did not tell anyone else at Wachovia. Instead, the Team manipulated certain payment assumptions used in running the transaction cash flow models. Although the cash flow models themselves were not part of the offering memorandum the false and misleading payment assumptions used in, and false outputs from, the cash flow models were included in the offering memorandum. It was not until after the RASPRO transaction closed that others involved in the transaction, both at Wachovia and elsewhere, became fully aware of the B Notes' imminent liquidity issue.

Respondent

Respondent Tuminello, age 53, currently resides in Massapequa, New York. During the relevant time period, Tuminello was a Managing Director at Wachovia on the Commercial Aviation Team in the Structured Asset Finance Group. Tuminello supervised the Team's two other members – a vice president and a junior associate, who were responsible for preparing the cash flow models and the payment assumptions for the RASPRO offering. At the time, Tuminello held Series 7 and Series 63 licenses. On December 22, 2005, Tuminello was placed on administrative leave by Wachovia. On July 31, 2006, Tuminello resigned from Wachovia. Until

[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.

recently, Tuminello was a registered representative and held a Managing Director position with a New York securities firm.

Other Relevant Entities

RASPRO is a Delaware special purpose trust organized on September 14, 2005 by Bombardier for the purpose of purchasing, leasing and owning a portfolio of 70 aircraft manufactured by Bombardier. RASPRO is located in Wilmington, Delaware and is governed by six trustees. On September 23, 2005, RASPRO issued a $1.67 billion exempted asset-backed bond offering to "Qualified Institutional Investors" pursuant to Rule 144A and Regulation D of the Securities Act, the proceeds of which were used to purchase 70 regional aircraft from Bombardier. The offering involved three tranches of securities: (1) $905 million in senior G Notes; (2) $275 million in leverage lease equity; and (3) $485 million in junior B Notes.

Wachovia, during the relevant time period, was an indirect wholly-owned subsidiary of Wachovia Corporation. On January 1, 2009, Wachovia Corporation became part of Wells Fargo & Co. Wachovia is a registered broker-dealer incorporated in Delaware and an affiliate of Wachovia Bank NA. Wachovia's principal place of business is in Charlotte, NC. Wachovia was the lead underwriter and sole lead manager of the RASPRO offering.

Bombardier is a Canadian manufacturer of aircraft and rail transportation equipment and a foreign private issuer under Section 12(g) of the Exchange Act. Its primary offices are located in Montreal, Québec, Canada, but it has U.S. offices in Vermont and Kansas.

Background

The RASPRO Offering

Bombardier created RASPRO, a special purpose entity, to finance the manufacture and sale of 70 regional aircraft. Bombardier sold the 70 aircraft to RASPRO, which leased the 70 aircraft to four airline companies. To finance the purchase of the 70 aircraft from Bombardier, RASPRO issued $1.67 billion in securities and leveraged lease equity in a private offering.

The Asset Side of the Transaction: Once Bombardier transferred the 70 new passenger airplanes to RASPRO, those aircraft were RASPRO's assets.[2] RASPRO leased the 70 aircraft to four different airline companies in return for regular lease payments. In addition to these regular lease payments, airline companies also made a one-time additional payment, payable at the same time the first regular payment was due. When RASPRO received the airline companies' payments, it placed them into a collections account. The incoming payments remained in this account for 15 days, except that the one-time additional payment stayed in the collections account longer – for a total of 105 days. While held in the collections account, the lease-payment funds earned interest.

[2] RASPRO kept ownership of some of the planes and sold-and-leased-back others.

The Liability Side of the Transaction: After the incoming lease payments accrued interest in the collections account, RASPRO then used these funds to pay various fees. After paying these fees, RASPRO used the incoming funds to satisfy its other liabilities, in descending order of priority, including interest payments due to the classes of note holders. The transaction included a $41.4 million liquidity reserve that could be used in the event RASPRO did not have sufficient cash at any given time to pay the noteholders.

The $1.67 billion private placement involved three tranches. The first, and most senior, tranche consisted of $905 million in G Notes, which were purchased by 19 investment banks and other sophisticated institutional investors. The second tranche consisted of $275 million leveraged lease equity and was purchased by Wachovia Bank, N.A. The third, and most junior, tranche was $485 million in B Notes. A New York commercial and investment bank purchased the B Notes. The B Notes were guaranteed by Investissement Quebec (IQ), and Financial Security Assurance Inc. (FSA).[3] If the incoming cash flows and liquidity reserve were insufficient to fund interest payments for the B Note holders, then IQ would make timely interest payments of up to $48.5 million. If the $48.5 million in interest payments were exhausted, IQ would be required to purchase the B Notes in their entirety.[4]

The G Notes and B Notes paid investors a monthly coupon rate (that is, the interest rate on the note) of LIBOR plus a fixed percentage.[5] In order to protect against fluctuations in LIBOR rates and give RASPRO and the note holders certainty about the monthly interest payment amounts, RASPRO entered into two separate interest rate swap agreements with Wachovia – one for the G Notes and one for the B Notes. In each case, RASPRO swapped the floating LIBOR interest rate income stream for a fixed rate income stream on the G Notes for the life of the transaction and on the B Notes for the first six years of the transaction. As a result of the swap agreements, RASPRO agreed to make fixed monthly payments to the G Note holders for the life of the transaction and the B Note holder for the first six years.

Knowledge of the Early Draw

Wachovia was the sole structuring, underwriting and placement agent for the RASPRO offering. Tuminello and the other members of the Commercial Aviation Team, were responsible for preparing the cash flow models used in structuring the transaction. Although the models themselves were not part of the offering memorandum, the outputs (or results) from the models

---

[3] The B Notes were rated A1 as to timely payment of interest and principal and shadow rated B- or B3 as to timely payment of interest and principal.

[4] IQ had a counter-guarantee from Bombardier. If IQ were required to purchase the B Notes, it could seek reimbursement from Bombardier for 10% of the total outstanding guarantees between IQ and Bombardier, which would cover most or the entire amount owed on the B Notes. If IQ sought reimbursement under the counter-guarantee, Bombardier would likely be required to consolidate RASPRO onto its balance sheet, which would significantly increase Bombardier's debt and make it difficult for Bombardier to finance the cost of manufacturing aircraft. Bombardier hired a consultant to perform an analysis under Financial Accounting Standards Board Interpretation No. 46 ("FIN 46") to determine whether it needed to consolidate RASPRO on its balance sheet.

[5] "LIBOR," or the London InterBank Offered Rate, is the average interest rate charged when banks in the London interbank network lend to each other. LIBOR rates are used internationally as a benchmark for pricing, among other things, debt instruments and securities.

and the payment assumptions used in the models were included in the offering memorandum (in a section titled "Payment Assumptions"). The Commercial Aviation Team was responsible for preparing that section of the offering memorandum.

The Commercial Aviation Team modeled "base case" and "stress scenarios" for the offering memorandum. The "base case" cash flow model assumed that all of the airlines made their lease payments throughout the life of the transaction with no defaults. The "stress scenarios" assumed that certain airlines defaulted on their lease payments at certain times or that there were percentage reductions in the gross lease revenues received in the transaction.

Tuminello, and the other Team members, knew as early as July 2005 that there could be an early draw on the B Note guarantee in the transaction even in the base case. In July 2005, the junior associate in the Team informed Tuminello that the transaction models were showing an early draw on the B Note guarantee. According to the junior associate, Tuminello instructed him that the models could not show such a draw in the base case and told him to consult with the vice president. Tuminello and the junior associate spoke separately to the vice president. The vice president suggested making changes to the payment assumptions in the offering memorandum on the liability side of the transaction because it was too complicated to make changes on the asset side of the transaction and there was time pressure on the transaction.

As a result, the Commercial Aviation Team made several changes to the cash flow model. Taken together these changes had the overall effect of understating liabilities, overstating cash flows, and masking the early draw.

Changes to the Payment Assumptions and Transaction Model

The Commercial Aviation Team changed the payment assumptions and the cash flow model in the following ways: First, the Team did not model the interest rate swap agreements. Accordingly, the payment assumptions in the offering memorandum, which were used to model the transaction, did not reflect the interest rate swap agreements that modified the coupon payments to the G and B Note holders. Instead the assumptions and models assumed a fixed three-month LIBOR rate of 3.66% as the coupon rate for both notes over the life of the transaction. The effect of not modeling the swap agreements and instead using a constant 3.66% LIBOR rate was to understate the liability on the B Notes and overstate expected cash flows. The failure to model the swap agreements had the greatest impact on overstating expected cash flows. It accounted for almost 80% of the aggregate amount of the cash flow overstatement from all four changes, and overstated cash flows by over $3.5 million during the first quarter of the transaction.

Second, the Team used an inflated reinvestment rate for amounts held in the collections account. Cash flows came into the transaction in the form of airline lease payments that were deposited into a collections account. Before payments were made from the collections account to the bondholders, the proceeds in the collections account earned interest for the short reinvestment period during which the cash was in the account. The model used a 5% reinvestment rate for this period when the industry standard, and the standard used in the rating

agencies' models, for short-term investments at the time, was closer to 3%. The inflated 5% reinvestment rate had the second greatest impact in overstating expected cash flows, overstating cash flows in the first quarter by $742,000. This accounted for approximately 15.5% of the aggregate overstated cash flows in the first quarter.

Third, the Team modeled an overly long reinvestment period. The transaction was structured such that the regular incoming airline lease payments accrued interest in the collections account for a 15-day reinvestment period, except for a one-time additional up-front payment that accrued interest in the collections account for 105 days. The payment assumptions in the offering memorandum stated that a 15-day reinvestment period was modeled. However, the model reflected a 105-day reinvestment period for all incoming lease payments instead of a 15-day reinvestment period. The 105-day reinvestment period had the third greatest impact on overstating expected cash flows. Because the first reinvestment period in the transaction was modeled correctly, the false assumption did not impact cash flows until the second quarter. Nevertheless, this false assumption overstated expected cash flows in the second quarter by $606,000, which was approximately 13% of the total first period cash flow overstatement and approximately 12% of the aggregate cash flow overstatement for the second quarter.[6] Taken together, these first three alterations overstated expected cash flows by $78 million during the first four years of the transaction (when the B Note guarantor would have been required to purchase the B Notes).

Fourth, the Team failed to model the acceleration provision. The cash flow models also reflected incorrectly the assumption that no Class B Note acceleration event would occur. Therefore, once the $48.5 million in IQ interest payments were exhausted, the model did not show IQ stepping in to replace the original B Note investor by purchasing the B Notes in their entirety, as the transaction was structured. Instead, the model assumed a continuation of the interest shortfalls. This assumption was added at the end of August, well after the team learned that there would be a draw on the B Note guarantee.

The Early Draw Is Discovered by Bombardier after Closing

On September 23, 2005, the transaction closed and RASPRO issued the bond offering. Nineteen institutional investors purchased the G Notes. Wachovia Bank NA purchased the equity interest with the purpose of selling it to the public. A New York commercial and investment bank purchased the entire B Note tranche.

A few weeks after closing, Bombardier's consulting firm noticed a possible early draw on the IQ interest payments and principal. After further analysis, Bombardier learned that the transaction as structured would result in a draw on IQ's interest payments in month 13 and a draw on the IQ principal in month 63, requiring IQ to purchase the B Notes in their entirety approximately five years after the transaction closed.

---

[6] The errors in conjunction with each other compound the monetary effect on the cash flows. That is, each of the percentages reflects the effect of the particular false assumption being discussed on the overall cash flows without taking into account the effects of all the false assumptions on each other. So the percentages are correct despite the fact that they exceed 100%.

In the Fall of 2005, Bombardier complained to Wachovia about the early draws that it had discovered. By January 2006, Wachovia had retained outside counsel to conduct an internal investigation. In June 2006, Wachovia agreed to restructure the transaction using corrected payment assumptions and cash flow models. As a result of the restructuring, Wachovia paid an $87 million cash infusion into the transaction to prevent a premature draw on IQ's interest and note payments.[7] Wachovia also paid a $7 million insurance premium and $28.6 million in structuring and placement fees, as part of the restructuring.

Respondent's Conduct

Despite learning in July 2005 of the early draw on the B Note guarantee in the base case, Tuminello did not report this fact to anyone outside of the Commercial Aviation Team that he led. Instead he gave the directive that the models could not show an early draw in the base case. Tuminello was aware of the changes that the Team subsequently made on the liability side of the transaction and that those changes were being made to conceal the fact that an early draw on the B Note guarantee would occur. Specifically, he knew that:

(a) payment assumptions and cash flow model outputs in the offering memorandum and the cash flow model inaccurately reflected a lower interest rate for the G and B Note coupons;

(b) the payment assumptions and cash flow model outputs in the offering memorandum and the cash flow model inaccurately reflected a higher reinvestment rate;

(c) that the payment assumptions and cash flow model outputs in the offering memorandum and the cash flow model inaccurately reflected that no Class B Note acceleration event would occur.

Although he knew them to be faulty, Respondent decided to incorporate these changes into the cash flow models and into the cash flow model outputs that were used in the offering memorandum in order to mask the early draw. Respondent thereafter made no effort to correct the model or disclose these changes or the early draw to anyone outside of the Commercial Aviation team that he supervised.

Legal Discussion

Section 17(a) of the Securities Act, which proscribes fraudulent conduct in the offer or sale of securities, and Section 10(b) of the Exchange Act and Rule 10b-5, which proscribe fraudulent conduct in connection with the purchase or sale of securities, prohibit essentially the same type of sales practices. *See United States v. Naftalin*, 441 U.S. 768, 773 n.4 (1979). Among other things, those provisions make it unlawful to make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under

[7] Bombardier also made a cash infusion of $23 million in exchange for the rights to share in Wachovia's interest in the leverage lease equity.

which they were made, not misleading, in the offer, purchase or sale of securities. Whether a fact is material depends upon the significance a reasonable investor would place on the withheld or misrepresented information in making an investment decision. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988).

By virtue of their unique position in the securities industry, underwriters are subject to liability under the antifraud provisions of the federal securities laws for materially false or misleading statements in an offering. *In the Matter of Donaldson, Lufkin & Jenrette Securities Corp.*, Securities Act Release No. 6959, Exchange Act Release No. 31,207 1992 WL 280784, at *7 (September 22, 1992). In a release proposing the adoption of a rule requiring that municipal securities underwriters review and distribute issuer disclosure documents to investors, the Commission reviewed the responsibilities of underwriters and explained that:

> An underwriter, whether of municipal or other securities, occupies a vital position in an offering. The underwriter stands between the issuer and the public purchasers, assisting the issuer in pricing and, at times, in structuring the financing and preparing disclosure documents. Most importantly, its role is to place the offered securities with public investors. By participating in an offering, an underwriter makes an implied recommendation about the securities. Because the underwriter holds itself out as a securities professional, and especially in light of its position vis-à-vis the issuer, this recommendation itself implies that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings.

Municipal Securities Disclosure, Exchange Act Release No. 26,100, 53 Fed. Reg. 37,778, 1988 WL 999989, at *20 (Sept. 28, 1988).

Faulty modeling assumptions can serve as a basis for underwriter liability under the antifraud provisions of the securities laws. *See In the Matter of Michael Lissack*, Exchange Act Release No. 39,687, 1998 WL 67399, at *2-4 (February 20, 1998) (Managing Director of broker-dealer that acted as a underwriter in a county bond offering intended to deceive when he intentionally used faulty and inaccurate modeling assumptions to present financing structure in an artificially favorable light.).

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

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, and Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent Tuminello cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Tuminello be, and hereby is barred from association with any broker or dealer, with the right to reapply for association after two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

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

D. Respondent shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $25,000 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 Tuminello 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 Cheryl J. Scarboro, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5631.

By the Commission.

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 28689 / April 7, 2009

In the Matter of

E*TRADE CAPITAL MARKETS LLC
440 S. LaSalle Street, Suite 3030
Chicago, IL 60605

E*TRADE FINANCIAL CORPORATION
135 E. 57th Street, 17th Floor
New York, NY 10022

E*TRADE ASSET MANAGEMENT, INC.
4500 Bohannon Drive
Menlo Park, CA 94025

E*TRADE SECURITIES LLC
135 E. 57th Street, 31st Floor
New York, NY 10022

KOBREN INSIGHT MANAGEMENT, INC.
20 William Street, Suite 200
Wellesley Hills, MA 02481

(812-13639)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

E*TRADE Capital Markets LLC ("ETCM"), E*TRADE Financial Corporation, E*TRADE Asset Management, Inc., E*TRADE Securities LLC and Kobren Insight Management, Inc. (collectively, "Applicants") filed an application on March 4, 2009, which was amended on March 12, 2009, requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting Applicants and any other company of which ETCM is or hereafter becomes an affiliated person within the meaning of section 2(a)(3) of the Act (together with Applicants, "Covered Persons") from section 9(a) of the Act

with respect to an injunction entered by the United States District Court for the Southern District of New York on March 11, 2009.

On March 12, 2009, the Commission simultaneously issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act from March 11, 2009 until the Commission takes final action on the application for a permanent order (Investment Company Act Release No. 28645). The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the prohibitions of section 9(a) as applied to the Applicants would be unduly and disproportionately severe and the conduct of the Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application filed by ETCM et al. (File No. 812-13639), that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, entered by the United States District Court for the Southern District of New York on March 11, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 242

[Release No. 34-59748; File No. S7-08-09]

RIN 3235-AK35

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing amendments to Regulation SHO under the Securities Exchange Act of 1934 ("Exchange Act"). We are proposing two approaches to restrictions on short selling – one is a price test that would apply on a market wide and permanent basis ("short sale price test" or "short sale price test restriction") and one that would apply only to a particular security during severe market declines in that security ("circuit breaker"). With respect to the first approach, we propose two alternative short sale price tests: one based on the national best bid and the second based on the last sale price. With respect to the second approach, we propose two basic alternatives: one alternative is a circuit breaker rule that would temporarily prohibit short selling in a particular security when there is a severe decline in the price of that security (a "halt"), which could operate in place of, or in addition to, a short sale price test rule; and the second alternative is a circuit breaker rule that would trigger a short sale price test rule; we propose that such a short sale price test either be based on the national best bid for any security for which there has been a severe price decline or be based on the last sale price for any security for which there has been a severe price decline.

Due to the extreme market conditions that we are currently facing and the resulting deterioration in investor confidence, we believe it is appropriate at this time to re-evaluate and

seek comment on some form of short sale price test restriction, either in the form of a short sale price test such as the proposed modified uptick rule or proposed uptick rule, or a circuit breaker rule.

For each of the proposed short sale price test restrictions and proposed circuit breaker rules, we are also proposing to amend Regulation SHO to require that a broker-dealer mark certain sell orders "short exempt." If the Commission adopts a short sale price test proposal or a circuit breaker proposal, and adopts a "short exempt" marking requirement, we are proposing that the implementation period for these amendments would be three months from the effective date of the amendments.

DATES: Comments should be received on or before [insert date 60 days after publication in the Federal Register].

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-08-09 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 Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-08-09. 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/final.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: James Brigagliano, Deputy Director; Jo Anne Swindler, Acting Associate Director; Josephine Tao, Assistant Director; Victoria Crane, Branch Chief; Joan Collopy, Special Counsel; Christina Adams, Special Counsel; or Matthew Sparkes, Staff Attorney, Division of Trading and Markets, at (202) 551-5720, at the Commission, 100 F Street, NE, Washington, DC 20549-6628.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed amendments to Rules 200(g) and 201 of Regulation SHO [17 CFR 242.200(g) and 17 CFR 242.201] under the Exchange Act. The Commission is soliciting comments on all aspects of the proposed amendments.

I. Executive Summary

In July 2007, the Commission eliminated all short sale price test restrictions. At that time, short sale price test restrictions included Rule 10a-1 under the Exchange Act, also known as the "uptick rule" or "tick test" ("former Rule 10a-1"), that applied to exchange-listed

securities, and the National Association of Securities Dealers, Inc.'s ("NASD")[1] bid test, that applied to certain Nasdaq securities. The Commission's removal of short sale price test restrictions followed a careful, deliberative rulemaking process, carried out in multiple stages from 1999 through 2006, and was open to the public at every stage.[2]

Prior to taking that action, the Commission took a number of steps, including seeking extensive public comment and staff study to consider removing short sale price test restrictions. For example, beginning in 1999, the Commission published a concept release in which it sought comment regarding short sale price test regulation, including on whether to eliminate such regulation.[3] In 2004, the Commission initiated a year-long pilot to study the removal of short sale price tests for approximately one-third of the largest stocks.[4] Short sale data was made publicly available during this pilot to allow the public and Commission staff to study the effects of eliminating short sale price test restrictions. The findings of third party researchers were presented and discussed in a public Roundtable in September 2006.[5] In addition, the results of the Commission staff study of the pilot data were made publicly available in draft form in September 2006 and in final form in February 2007.[6]

---

1 NASD is now known as the Financial Industry Regulatory Authority, Inc. ("FINRA").

2 In 1999, the Commission published a concept release in which it sought comment regarding short sale price test regulation, including on whether to eliminate such regulation. See Securities Exchange Act Release No. 42037 (Oct. 20, 1999), 64 FR 57996 (Oct. 28, 1999).

3 See Securities Exchange Act Release No. 42037 (Oct. 20, 1999), 64 FR 57996 (Oct. 28, 1999).

4 See Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (Aug. 6, 2004) ("Pilot Release").

5 See http://www.sec.gov/about/economic/shopilottrans091506.pdf.

6 See http://www.sec.gov/about/economic/shopilot091506/draft_reg_sho_pilot_report.pdf and http://www.sec.gov/news/studies/2007/regshopilot020607.pdf. See also discussion of findings of staff study, supra notes 25 to 41 and accompanying text.

As discussed in detail below,[7] concurrent with the development of the subprime mortgage crisis and credit crisis in 2007, market volatility, including steep price declines, particularly in the stocks of certain financial services issuers, has increased markedly in the U.S. and in every major stock market around the world (including markets that continued to operate under short sale price test restrictions). As market conditions have continued to worsen, investor confidence has eroded, and the Commission has received requests from many commenters to consider imposing restrictions with respect to short selling, in part in the belief that such action would help restore investor confidence.

Due to the extreme market conditions that we are currently facing and the resulting deterioration in investor confidence, we believe it is appropriate at this time to re-examine and seek comment on whether to restore restrictions with respect to short selling. Thus, we are proposing two approaches to restrictions on short selling. One approach would apply a price test on a market wide and permanent basis. With respect to this approach, we propose two alternative price tests. The first alternative price test, in many ways similar to NASD's former bid test, would be based on the national best bid (the "proposed modified uptick rule"). The second alternative price test, similar to former Rule 10a-1, would be based on the last sale price (the "proposed uptick rule").[8]

The other approach would apply only to a particular security during a severe market decline in that security (collectively, the "proposed circuit breaker rules"). With respect to this

---

[7] See infra Section II(C).

[8] In 2003, the Commission proposed a short sale price test based on the national best bid ("uniform bid test"). See Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972 (Nov. 6, 2003) ("2003 Regulation SHO Proposing Release"). The Commission determined not to proceed with the uniform bid test, but instead established a pilot program pursuant to which it could evaluate the overall effectiveness of short sale price test restrictions on short sales. See Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48009 (Aug. 6, 2004) ("2004 Regulation SHO Adopting Release"). See also infra Section II(B) (discussing the pilot program).

second approach, we are proposing two basic alternatives. First, we propose a circuit breaker rule that, when triggered by a severe price decline in a particular security, would temporarily prohibit any person from selling short that security, subject to certain exceptions ("proposed circuit breaker halt rule"). The proposed circuit breaker halt rule could operate in place of, or in addition to, a short sale price test restriction. Second, we propose a circuit breaker rule that, when triggered by a severe price decline in a particular security, would trigger a temporary short sale price test for that security. In connection with this approach, we are proposing two price tests. One is the modified uptick rule – that is, we propose a circuit breaker rule that would, when triggered by a severe decline in a particular security, temporarily impose the proposed modified uptick rule for that security ("proposed circuit breaker modified uptick rule"). The other is the uptick rule – that is, we propose a circuit breaker rule that would, when triggered by a severe market decline in a particular security, temporarily impose the proposed uptick rule for that security ("proposed circuit breaker uptick rule"). A circuit breaker that triggers a short sale price test rule such as the proposed modified uptick rule or the proposed uptick rule would operate in place of a short sale price test rule (collectively, the "circuit breaker price test rules").

As discussed in detail below, we preliminarily believe that of the short sale price test proposals, a price test based on the national best bid would have advantages over a test based on the last sale price in today's markets. Among other reasons, we believe that bids generally are a more accurate reflection of current prices for a security than last sale prices due to delays that can occur in the reporting of last sale price information and the manner in which last sale price information is published to the markets. For example, sale transactions may be reported manually up to 90 seconds after they occur. Even sale transactions that are reported automatically can be reported out-of-sequence if trades are occurring in multiple trading venues.

This may make the proposed uptick rule more difficult to implement. In addition, last sale price information is published to the markets in reporting sequence rather than in transaction sequence. Thus, we preliminarily believe that if we were to adopt a short sale price test restriction, whether as a full-time rule or as part of a circuit breaker rule, that it would be more appropriate for such short sale price test restrictions to be based on the national best bid rather than on the last sale price.

A short sale price test similar to former Rule 10a-1 that is based on the last sale price, a short sale price test based on a national best bid, and a circuit breaker rule resulting in a short sale halt, should generally be familiar to investors and market participants. Former Rule 10a-1 was in place for almost 70 years. NASD adopted its bid test in 1994 and that rule was in place for over a decade. Various circuit breaker rules have been in place throughout the markets for many years.[9] A circuit breaker rule resulting in a short sale price test for particular stocks that have suffered a severe price decline would be an amalgamation of these familiar rules.

To offer straight-forward alternatives, this release proposes a modified uptick rule based on the national best bid that would apply to trading centers[10] and applies a policies and procedures approach that would require that trading centers have policies and procedures reasonably designed to prevent the execution or display of short sales at impermissible prices. As an alternative short sale price test, this release proposes an uptick rule based on the last sale price that, similar to former Rule 10a-1, applies a straight prohibition approach that would prohibit any person from effecting short sales at impermissible prices. However, either

---

[9] See, e.g., infra note 239 and accompanying text.

[10] A "trading center" means a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. See infra note 111 and supporting text.

alternative could ultimately be implemented through a policies and procedures approach or through a prohibition approach or some combination thereof.[11]

We are also proposing circuit breaker rules.[12] As noted above, these are the proposed circuit breaker halt rule, the proposed circuit breaker modified uptick rule, and the proposed circuit breaker uptick rule. In addition, we are proposing that a broker-dealer be required to mark a sell order "short exempt" if the seller is relying on an exemption under the proposed short sale price test rules or proposed circuit breaker rules.

II. Background on Short Sale Restrictions

Short selling involves a sale of a security that the seller does not own or a sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.[13] In order to deliver the security to the purchaser, the short seller will borrow the security, typically from a broker-dealer or an institutional investor. Typically, the short seller later closes out the position by purchasing equivalent securities on the open market and returning the security to the lender. In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of an economic long position in the same security or in a related security.[14]

A. Short Selling and its Market Impact

---

[11] For instance, the approaches could be combined so that persons are prohibited from selling short on a downbid and trading centers are also required to have reasonable policies and procedures to prevent the execution or display of a short sale on a downbid.

[12] See Section III.C below discussing the proposed circuit breaker rules.

[13] See 17 CFR 242.200(a).

[14] See, e.g., Securities Exchange Act Release No. 54891 (Dec. 7, 2006), 71 FR 75068, 75069 (Dec. 13, 2006) ("2006 Price Test Elimination Proposing Release"); 2003 Regulation SHO Proposing Release, 68 FR at 62974.

The Commission has long held the view that short selling provides the market with important benefits, including market liquidity and pricing efficiency.[15] Market liquidity is often provided through short selling by market professionals, such as market makers (including specialists) and block positioners, who offset temporary imbalances in the buying and selling interest for securities. Short sales effected in the market add to the selling interest of stock available to purchasers and reduce the risk that the price paid by investors is artificially high because of a temporary imbalance between buying and selling interest. Short sellers covering their sales also may add to the buying interest of stock available to sellers.[16]

Short selling also can contribute to the pricing efficiency of the equities markets.[17] When a short seller speculates or hedges against a downward movement in a security, his transaction is a mirror image of the person who purchases the security in anticipation that the security's price will rise or to hedge against such an increase. Both the purchaser and the short seller hope to profit, or hedge against loss, by buying the security at one price and selling at a higher price. The strategies primarily differ in the sequence of transactions. Market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. Such short sellers add to stock pricing efficiency because their transactions inform the market of their evaluation of future stock price performance. This evaluation is reflected in the resulting market price of the security.[18]

---

[15] See id. See also Securities Exchange Act Release No. 29278 (June 7, 1991), 56 FR 27280 (June 13, 1991); 2004 Regulation SHO Adopting Release, 69 FR 48008, n. 6; Boehmer, Ekkehart and Wu, Julie, Short Selling and the Informational Efficiency of Prices (Jan. 8, 2009).

[16] See, e.g., 2006 Price Test Elimination Proposing Release, 71 FR at 75069; 2003 Regulation SHO Proposing Release, 68 FR at 62974.

[17] See id.

[18] See id. Arbitrageurs also contribute to pricing efficiency by utilizing short sales to profit from price disparities between a stock and a derivative security, such as a convertible security or an option on that stock. For

We recognize that, to the extent that the proposed short sale price test restrictions would result in increased costs to short selling in equity securities, it may lessen some of the benefits of legitimate short selling. Such a reduction may lead to a decrease in market efficiency and price discovery, less protection against upward stock price manipulations, a less efficient allocation of capital, an increase in trading costs, and a decrease in liquidity. Thus, we believe there may be potential costs associated with the proposed short sale price tests in terms of potential impact of such price tests on quote depths, spread widths, and market liquidity. We also believe costs may be incurred in terms of execution and pricing inefficiencies. For example, requiring all short sale orders to be executed or displayed above the best bid, or last sale price, in a declining market may slow the speed of executions and impose additional costs on market participants, including buyers. Also, by not allowing short sellers to sell at the bid, or last sale price, the proposed short sale price tests may impede trading and distort market pricing.

Although short selling serves useful market purposes, it also may be used to illegally manipulate stock prices.[19] One example is the "bear raid" where an equity security is sold short in an effort to drive down the price of the security by creating an imbalance of sell-side interest.[20] This unrestricted short selling could exacerbate a declining market in a security by increasing pressure from the sell-side, eliminating bids, and causing a further reduction in the price of a

---

example, an arbitrageur may purchase a convertible security and sell the underlying stock short to profit from a current price differential between two economically similar positions. See id.

[19] See, e.g., U.S. v. Russo, 74 F.3d 1383, 1392 (2d Cir. 1996) (short sales were sufficiently connected to the manipulation scheme as to constitute a violation of Exchange Act Section 10(b) and Rule 10b-5); S.E.C. v. Gardiner, 48 S.E.C. Docket 811, No. 91 Civ. 2091 (S.D.N.Y. March 27, 1991) (alleged manipulation by sales representative by directing or inducing customers to sell stock short in order to depress its price).

[20] Many people blamed "bear raids" for the 1929 stock market crash and the market's prolonged inability to recover from the crash. See 8 Louis Loss and Joel Seligman, Securities Regulation, section 8-B-3 (3d ed. 2006).

security by creating an appearance that the security price is falling for fundamental reasons, when the decline, or the speed of the decline, is being driven by other factors.[21]

B. History of Short Sale Price Test Restrictions in the U.S.

Section 10(a) of the Exchange Act[22] gives the Commission plenary authority to regulate short sales of securities registered on a national securities exchange, as necessary or appropriate in the public interest or for the protection of investors.[23] After conducting an inquiry into the effects of concentrated short selling during the market break of 1937,[24] the Commission adopted former Rule 10a-1 (also known as the "tick test" or "uptick rule") in 1938 to restrict short selling in a declining market.[25]

The core provisions of former Rule 10a-1 remained virtually unchanged for almost 70 years. Over the years, however, in response to changes in the securities markets, including changes in trading strategies and systems used in the marketplace, the Commission added exceptions to former Rule 10a-1 and granted numerous written requests for relief from the rule's restrictions. These market changes included decimalization, the increased use of matching systems that execute trades at independently derived prices during random times within specific

---

21 See 2006 Price Test Elimination Proposing Release, 71 FR at 75069; 2003 Regulation SHO Proposing Release, 68 FR at 62074.

22 15 U.S.C. 78j(a).

23 See also 2006 Price Test Elimination Proposing Release, 71 FR at 75068; 2003 Regulation SHO Proposing Release, 68 FR at 62973.

24 The study covered two weekly periods, that of September 7-13, 1937, and that of October 18-23, 1937. See Securities Exchange Act Release No. 1548 (Jan. 24, 1938), 3 FR 213 (Jan. 26, 1938) ("Former Rule 10a-1 Adopting Release").

25 See id. Former Rule 10a-1 provided that, subject to certain exceptions, a listed security could be sold short (i) at a price above the price at which the immediately preceding sale was effected (plus tick), or (ii) at the last sale price if it was higher than the last different price (zero plus tick).

time intervals,[26] and the spread of fully automated markets. In addition, market developments over the years led to the application of different price tests to securities trading in different markets.[27]

In July 2004, the Commission adopted Rule 202T of Regulation SHO,[28] which established procedures for the Commission to temporarily suspend short sale price tests for a prescribed set of securities so that the Commission could study the effectiveness of these tests.[29] Pursuant to the process established in Rule 202T, the Commission issued an order creating a one year pilot ("Pilot") temporarily suspending the tick test of former Rule 10a-1(a) and any price test of any exchange or national securities association for short sales of certain securities.[30] The

---

[26] See, e.g., Letter from Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, SEC, to Andre E. Owens, Schiff Hardin & Waite, dated April 23, 2003 (granting exemptive relief from former Rule 10a-1 for trades executed through an alternative trading system that matches buying and selling interest among institutional investors and broker-dealers at various set times during the day).

[27] See, e.g., Securities Exchange Act Release No. 55245 (Feb. 5, 2007), 72 FR 6635 (Feb. 12, 2007). Former Rule 10a-1 applied only to short sale transactions in exchange-listed securities. In 1994, the Commission granted temporary approval to NASD to apply its own short sale rule, known as the "bid test," on a pilot basis that was renewed annually until the Commission repealed short sale price tests. NASD's bid test prohibited short sales in Nasdaq Global Market securities (then known as Nasdaq National Market securities) at or below the current (inside) bid when the current best (inside) bid was below the previous best (inside) bid in a security. As a result, until the Commission eliminated former Rule 10a-1, and prohibited any self-regulatory organization ("SRO") from having a short sale price test in July 2007, Nasdaq Global Market securities traded on Nasdaq or the OTC market and reported to a NASD facility were subject to a bid test. Other listed securities traded on an exchange, or otherwise, were subject to former Rule 10a-1. Nasdaq securities traded on exchanges other than Nasdaq were not subject to any price test. In addition, many thinly-traded securities, such as Nasdaq Capital Market securities, and securities quoted on the over-the-counter ("OTC") Bulletin Board and Pink Sheets, were not subject to any price test wherever traded. According to the Commission's Office of Economic Analysis ("OEA"), in 2005, prior to the start of the Pilot, NASD Rule 3350 applied to approximately 2,800 securities, while former Rule 10a-1 applied to approximately 4,000 securities.

[28] 17 CFR 242.202T.

[29] See 17 CFR 242.202T; see also 2004 Regulation SHO Adopting Release, 69 FR at 48012-48013.

[30] See Pilot Release, 69 FR 48032 (commencing the Pilot on January 3, 2005 and terminating the Pilot on December 31, 2005). On November 29, 2004, the Commission issued an order resetting the Pilot to commence on May 2, 2005 and end on April 28, 2006 to give market participants additional time to make systems changes necessary to comply with the Pilot. See Securities Exchange Act Release No. 50747 (Nov. 29, 2004), 69 FR 70480 (Dec. 6, 2004). On April 20, 2006, the Commission issued an order extending the termination date of the Pilot to August 6, 2007. See Securities Exchange Act Release No. 53684 (April 20, 2006), 71 FR 24765 (April 26, 2006).

Pilot was designed to assist the Commission in assessing whether changes to current short sale price test regulation were appropriate at that time in light of then-current market practices and the purposes underlying short sale price test regulation.[31]

OEA gathered the data made public during the Pilot, analyzed the data and provided the Commission with a summary report on the Pilot ("OEA Staff's Summary Pilot Report").[32] The OEA Staff's Summary Pilot Report, which was made public, examined several aspects of market quality including the overall effect of price tests on short selling, liquidity, volatility and price efficiency.[33] The Pilot was also designed to allow the Commission and members of the public to examine whether the effects of short sale price tests were similar across stocks.[34]

As set forth in the OEA Staff's Summary Pilot Report, OEA found little empirical justification at that time for maintaining short sale price test restrictions, especially for actively traded securities. Amongst its results, OEA found that short sale price tests did not have a

---

31 See Pilot Release, 69 FR at 48032. In the 2004 Regulation SHO Adopting Release we noted that "the purpose of the [P]ilot is to assist the Commission in considering alternatives, such as: (1) Eliminating a Commission-mandated price test for an appropriate group of securities, which may be all securities; (2) adopting a uniform bid test, and any exceptions, with the possibility of extending a uniform bid test to securities for which there is currently no price test; or (3) leaving in place the current price tests." 2004 Regulation SHO Adopting Release, 69 FR at 48010.

32 See supra note 6.

33 OEA selected the securities to be included in the Pilot by sorting the 2004 Russell 3000, first by listing market and then by average daily dollar volume from June 2003 through May 2004, and then within each listing market, selecting every third company starting with the second. Because the selection process relied on average daily dollar volume, companies that had their Initial Public Offering ("IPO") in May or June 2004, just prior to the Russell reconstitution, were not included. The securities in the control group came from the remainder of the 2004 Russell 3000 not included in the Pilot (excluding the IPOs in May or June 2004 and any securities added to the Russell 3000 after June 2004). See OEA Staff's Summary Pilot Report at 22 (discussing the selection of securities included in the Pilot and the control group).

34 In the 2004 Regulation SHO Adopting Release, the Commission stated its expectation that data on trading during the Pilot would be made available to the public to encourage independent researchers to study the Pilot. See 2004 Regulation SHO Adopting Release, 69 FR at 48009, n.9. Accordingly, nine SROs began publicly releasing transactional short selling data on January 3, 2005. The nine SROs at that time were the Amex, ARCA, BSE, CHX, NASD, Nasdaq, National Stock Exchange, NYSE and Phlx. The SROs agreed to collect and make publicly available trading data on each executed short sale involving equity securities reported by the SRO to a securities information processor. The SROs published the information on a monthly basis on their Internet Web sites.

significant impact on daily volatility. However, OEA also found some evidence that short sale price tests dampened intraday volatility for smaller stocks.[35]

OEA also found that the Pilot data provided limited evidence that price test restrictions distort a security's price.[36] In addition, OEA found that price test restrictions resulted in an increase in quote depths.[37] Realized liquidity levels, however, were unaffected by the removal of short sale price test restrictions.[38] The Pilot data also provided evidence that short sale price test restrictions reduce the volume of executed short sales to total volume and, therefore, act as a constraint on short selling.[39] OEA did not find, however, a significant difference in short interest positions between those securities subject to a short sale price test versus those securities that were not subject to such a test during the Pilot.[40]

In addition, the Commission encouraged outside researchers to examine the Pilot data. In response to this request, the Commission received four completed studies (the "Academic Studies") from outside researchers that specifically examined the Pilot data.[41] The Commission

---

35 See OEA Staff's Summary Pilot Report, at 55 n. 61-63 and supporting text.

36 On the day the Pilot went into effect, listed Pilot securities underperformed listed control group securities by approximately 24 basis points. The Pilot and control group securities, however, had similar returns over the first six months of the Pilot. See OEA Staff's Summary Pilot Report at 8.

37 See OEA Staff's Summary Pilot Report, at 55 n.61-63 and supporting text.

38 This conclusion is based on the result that changes in effective spreads were not economically significant (less than a basis point) and that the changes in the bid and ask depth appear not to affect the transaction costs paid by investors. Arguably, the changes in bid and ask depth appeared to affect the intraday volatility. However, OEA concluded that overall, the Pilot data did not suggest a deleterious impact on market quality or liquidity. See OEA Staff's Summary Pilot Report at 42, 56.

39 See OEA Staff's Summary Pilot Report at 35.

40 See id.

41 See Karl B. Diether, Kuan Hui Lee and Ingrid M. Werner, 2009, It's SHO Time! Short-Sale Price-Tests and Market Quality, Journal of Finance 64:37-73; Gordon J. Alexander and Mark A. Peterson, 2008, The Effect of Price Tests on Trader Behavior and Market Quality: An Analysis of Reg. SHO, Journal of Financial Markets 11:84-111; J. Julie Wu, Uptick Rule, short selling and price efficiency, August 14, 2006; Lynn Bai, 2008, The

also held a public roundtable (the "Regulation SHO Roundtable") that focused on the empirical evidence learned from the Pilot data (the OEA Staff's Summary Pilot Report, Academic Studies, and Regulation SHO Roundtable are referred to collectively herein as, the "Pilot Results").[42] The Pilot Results contained a variety of observations, which the Commission considered in determining whether or not to propose removal of then-current short sale price test restrictions and subsequently whether or not to eliminate such restrictions. Generally, the Pilot Results supported removal of short sale price test restrictions at that time.[43] In addition to the Pilot Results, thirteen other analyses by SEC staff and various third party researchers were conducted between 1963 and 2004 addressing price test restrictions.[44] Among these were several studies that evaluated short sale price tests during times of severe market decline, including the market break of May 28, 1962, the market decline in September and October 1976, the market break of October 19, 1987, and the Nasdaq market decline of 2000-2001. The results of these studies were mixed, but generally they found that former Rule 10a-1 did not prevent short sales in extreme down markets and did limit short selling in up markets and provided additional support for the removal of short sale price restrictions.

In December 2006, the Commission proposed to eliminate former Rule 10a-1 by removing restrictions on the execution prices of short sales, as well as prohibiting any SRO from having a price test.[45] The Commission received 27 comment letters in response to its proposal to

---

Uptick Rule of Short Sale Regulation – Can it Alleviate Downward Price Pressure from Negative Earnings Shocks? Rutgers Business Law Journal 5:1-63 ("Bai").

42 See supra note 5.

43 See 2006 Price Test Elimination Proposing Release, 71 FR at 75072-75075 (discussing the Pilot Results).

44 See OEA Staff's Summary Pilot Report at 14, 17-22 (discussing the thirteen studies).

45 See 2006 Price Test Elimination Proposing Release, 71 FR 75068.

eliminate former Rule 10a-1 and prohibit any SRO from having a short sale price test. The comments in response to the proposed amendments varied. Most commenters (including individual traders, academics, broker-dealers, SROs and trade associations) advocated removing all price test restrictions.[46] Generally, these commenters believed that price test restrictions were no longer necessary due to increased market transparency and the existence of real-time regulatory surveillance that could monitor for and detect any potential short sale manipulation.[47]

Two commenters (both individual investors) opposed the proposed amendments noting the need for price tests to prevent "bear raids."[48] One commenter, although generally in support of removing all price test restrictions, stated the belief that at some level unrestricted short selling should be collared.[49] This commenter supported having a 10% circuit breaker to prevent panic in the event there is a major market collapse.[50] The NYSE also noted its concern about unrestricted short selling during periods of unusually rapid and large market declines. The NYSE stated that

---

46 See, e.g., letter from Howard Teitelman, CSO, Trillium Trading (Feb. 6, 2007) ("Teitelman Letter"); letter from S. Kevin An, Deputy General Counsel, E*TRADE (Feb. 9, 2007) ("E*TRADE Letter"); letter from Carl Giannone (Feb. 11, 2007) ("Giannone Letter"); letter from David Schwarz (Feb. 12, 2007) ("Schwarz Letter"); letter from John G. Gaine, President, MFA (Feb. 12, 2007) ("MFA Letter"); letter from Lisa M. Utasi, Chairman of the Board and John C. Giesea, President and CEO, STA (Feb. 12, 2007) ("STA Letter"); letter from Gerard S. Citera, Executive Director, U.S. Equities, UBS (Feb. 14, 2007) ("UBS Letter"); letter from Mary Yeager, Assistant Secretary, NYSE (Feb. 14, 2007) ("NYSE Letter"); letter from James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University (Feb. 14, 2007) ("Angel Letter"); letter from Ira D. Hammerman, SIFMA Managing Director and General Counsel (Feb. 16, 2007) ("SIFMA Letter"); see also Securities Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348, 36350-36351 (July 3, 2007) ("2007 Price Test Adopting Release") (discussing the comment letters).

47 See, e.g., Giannone Letter; E*TRADE Letter; STA Letter; UBS Letter; see also Securities Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348, 36350-36351 (July 3, 2007) (discussing the comment letters).

48 See, e.g., letter from Jim Ferguson (Dec. 19, 2006); letters from David Patch (Jan. 1, 2007; Jan. 12, 2007) ("Patch Letters").

49 See Giannone Letter.

50 See id.

the effects of an unusually rapid and large market decline could not be measured or analyzed during the Pilot because such decline did not occur during the period studied.[51]

Effective July 3, 2007, the Commission eliminated former Rule 10a-1 and added Rule 201 of Regulation SHO prohibiting any SRO from having a short sale price test.[52] The Commission stated that it determined to eliminate all short sale price test restrictions after reviewing the comments received in response to its proposal to eliminate all short sale price test restrictions, the Pilot Results, and taking into account the market developments that had occurred in the securities industry since the Commission adopted former Rule 10a-1 in 1938.[53] In addition, the Commission stated that it believed that the amendments would bring increased uniformity to short sale regulation, level the playing field for market participants, and remove an opportunity for regulatory arbitrage.[54]

C. Changes in Market Conditions since Elimination of Rule 10a-1

Recently, market volatility has increased markedly in the U.S., as well as in every major stock market around the world. Although we are not aware of specific empirical evidence that the elimination of short sale price tests has contributed to the increased volatility in U.S. markets, many members of the public currently associate the removal of former Rule 10a-1 with the recent volatility, including steep declines in some securities' prices, and the loss of investor confidence in our markets.

In addition, we have received numerous requests for reinstatement of short sale price test restrictions from a variety of individuals, including investors, issuers, academics, trade

---

51 See NYSE Letter.

52 See 2007 Price Test Adopting Release, 72 FR 36348.

53 See id at 36352.

54 See id.

associations, and members of Congress.[55] Most of these commenters have asked that we reinstate short sale price test restrictions because they believe that such a measure would help restore investor confidence.[56]

Some of these commenters have stated that a lack of price test restrictions makes them question whether they should invest in the stock market.[57] Other commenters have stated that they believe a short sale price test would aid small investors.[58] In addition, some commenters

---

55 See, e.g., letter to Mary Schapiro, Chairman, from Rep. Barney Frank and other Members of the House Financial Services Committee, dated March 11, 2009; letter to Mary Schapiro, Chairman, Commission, from Professor Constantine Katsoris ("Katsoris letter"), Fordham University School of Law, dated March 4, 2009; letter from Albert C. Roelse, dated Feb. 20, 2009; letter from Robert A. Lee, dated Feb. 10, 2009; letter from Giulio Liotine, dated Jan. 22, 2009 ("Liotine Letter"); letter from Edward L. Yingling, American Bankers Association, dated Dec. 16, 2008 ("American Bankers Assn. 2008 Letter"); letter from Peter Brown, dated Dec. 12, 2008 ("Brown Letter"); letter to Christopher Cox, Chairman, Commission, from Peter T. King, Member of Congress, dated Oct. 7, 2008; letter to Christopher Cox, Chairman, Commission, from Bill Sali, Member of Congress, dated Oct. 1, 2008; letter to Christopher Cox, Chairman, Commission, from T.J. Rodgers, President and CEO, Cypress Semiconductor Corp., dated October 1, 2008; letter to Christopher Cox, Chairman, Commission, from Carl H. Tiedmann, General Partner, Tiedmann Investment Group, dated Sept. 22, 2008; letter to Christopher Cox, Chairman, Commission, from Hillary Rodham Clinton, Senator, dated Sept. 17, 2008 ("Clinton Letter"). The Commission's Office of Investor Education and Advocacy estimates that it has received over 4,000 requests (including duplicate requests) from individuals regarding reinstating a short sale price test.

56 See, e.g., letter from Chris Baratta, dated March 9, 2009 ("Baratta Letter"); letter from Paul Kent, dated March 7, 2009; letter from Troy Williams, dated March 6, 2009; letter from Briggs Diuguid, dated March 5, 2009 ("Diuguid Letter"); letter from Bob Young, dated March 5, 2009; letter from Kevin Girard, dated March 4, 2009; letter from Mike Rogers, dated March 3, 2009; letter from George Flagg, dated March 3, 2009; letter from Arleen Golden, dated March 2, 2009; letter from Doug Cameron, dated March 2, 2009; letter from Dr. Bill Daniel, dated Feb. 26, 2009; letter from Glenn Webster, dated Feb. 26, 2009; letter from Robert Lounsbury, dated Feb. 25, 2009; letter from Karl Findorff, dated Feb. 19, 2009; letter from Robert Levine, dated Feb. 17, 2009; letter from Robert Lee, dated Feb. 10, 2009; American Bankers Assn. 2008 letter; letter from David Campbell and Natalie Win, dated Nov. 25, 2008; letter from Josh Dodson, dated Nov. 21, 2008; letter from J. Geddes Parsons, dated Nov. 21, 2008; letter from Charles Rudisill, dated Nov. 21, 2008; letter from Mike Ryan, dated Nov. 21, 2008; letter from Jeff Brower, dated Nov. 20, 2008; letter from Mike Abraham, dated Nov. 20, 2008; letter from Marvin Dingott, dated Nov. 20, 2008; letter from W. Romain Spell, dated Nov. 19, 2008; letter from Phil Mason, dated Nov. 19, 2008; letter from David Sheridan, dated Nov. 18, 2008; letter from Lynn Miller, dated Nov. 13, 2008; letter from Patrick McQuaid, dated Oct. 29, 2008; letter from Scotland Settle, dated Oct. 27, 2008; letter from Jenna Spurrier, dated Oct. 24, 2008; letter from Joe Garrett, dated Oct. 15, 2008; letter from Peter Eckle, dated Oct. 11, 2008; letter from Maureen Christensen, dated Oct. 9, 2008; letter from Richard Vulpi, dated Sept. 24, 2008; see also Katsoris Letter (stating that elimination of former Rule 10a-1 "...hardly generates confidence on the part of a true investor who is entrusting his or her life's savings...to the current market").

57 See, e.g., letter from Tim Zanni, dated Feb. 19, 2009; letter from Jeff Boyd, dated Feb. 10, 2009.

58 See, e.g., Baratta Letter (noting that while price test restrictions could not reasonably be expected to prevent market downturns, they would, in his opinion, "give the little investor a chance" in the current conditions). See also Young Letter (suggesting that reinstatement of the uptick rule "will not be a quick or total fix, but it will

have asserted that restricting the prices at which securities may be sold short would help address recent steep declines in securities' prices. For example, the American Bankers Association (the "ABA") noted that its members, "both large and small, are telling [the ABA] that short sellers are taking advantage of the uptick rule's absence and that their stock prices are experiencing excessive downward price pressure . . . ."[59] This commenter further noted that "its members strongly believe that reinstatement of the uptick rule in some format would help limit these downward stock spirals and restore investor confidence."[60]

In commenting on the recent market volatility and the absence of a short sale price test, one member of Congress recently stated that "[o]ne of the simplest but most important and effective initiatives that the SEC could undertake immediately to combat market volatility is the reinstatement of a . . . 'uptick rule'."[61] A former U.S. Senator urged the Commission to ". . . give close consideration to the many calls for the immediate restoration of the uptick rule whose repeal has been linked to the recent market volatility and proliferation of abusive short sale transactions."[62] SRO representatives and others have also commented on the need for a short sale

---

help"); letter to Mary Schapiro, Chairman, Commission, from Paul D. Mendelsohn, President of Windham Financial Services, Inc., dated March 6, 2009 (stating that he believes former Rule 10a-1 "protected" the markets and that "suspension of the uptick rule has opened a security hole into our financial system").

59 See American Bankers Assn. 2009 Letter.

60 See id. See also letter to Christopher Cox, Chairman, Commission, from Paul Tudor Jones II, Tudor Investment Corporation, dated Oct. 10, 2008 (stating that he believes that one way to "immediately stem the decline" in the stock market would be to reinstate the uptick rule); letter to Mary Schapiro, Chairman, Commission, from James F. Kane, Jr., dated Feb. 6, 2009 (stating that he believes that reinstating "the Up-tick Rule will go a long way in preventing speculators from ganging up on a particular stock and forcing it down"); Diuguid Letter (stating that while short sellers "make efficient markets," he is nonetheless concerned that short selling may be a tool of manipulators when short sales are "piled on" a particular company).

61 See letter to Mary Schapiro, Chairman, Commission, from Gary L. Ackerman, Member of Congress, dated Jan. 27, 2009.

62 See Clinton Letter.

price test.[63] Researchers have also indicated that they believe that they have collected data that establishes a possible association between the current market downturn and the elimination of former Rule 10a-1.[64] In addition, we note that recently there are reports of significant short selling in connection with credit default swaps, particularly in the securities of significant financial institutions.[65] One commenter has suggested that the interaction between and amplifying effects of credit default swaps and short selling may be a reason to reinstate a short sale price test.[66]

Questions and comments have been raised about the role that short selling, and in particular potentially abusive short selling, may have in connection with the price fluctuations and disruption in our markets. As such, recently we took a number of short sale-related actions aimed at addressing these concerns. For example, due to our concerns that false rumors spread

---

63 See, e.g., Edgar Ortega, Short-Sale Rule Undermined as Bernanke Backs Review, Bloomberg News Service, March 4, 2009 (noting comments by Duncan Niederauer, CEO, The NYSE/Euronext Group, Inc., that imposing a measure such as former Rule 10a-1 "would go a long way to adding confidence" in our markets); Ben Stein, How to Deal with a 3 A.M. Fear, The New York Times, March 8, 2009; Charles R. Schwab, Restore the Uptick Rule, Restore Confidence, Wall Street Journal Online, December 9, 2008. The Federal Reserve Chairman also recently noted that, while the "traditional literature on this doesn't seem to find much effect of the uptick rule," short sale price test restrictions are "worth looking at" and that the rule (i.e., former Rule 10a-1) "might have had some benefit." Monetary Policy and the State of the Economy: Hearing Before the House Financial Services Comm., 111th Cong., 1st Sess. (Lexis Federal News Service at 33) (Feb. 25, 2009). See also letter from Duncan Niederauer, CEO, The NYSE/Euronext Group, Inc., Robert Greifeld, CEO, The NASDAQ OMX Group, Inc., Joe Ratterman, CEO, BATS Exchange, Inc., Joseph Rizzello, CEO, National Stock Exchange, dated March 24, 2009 ("National Exchanges Letter") (stating that the United States national securities exchanges welcome the announcement that the Commission will consider a proposal to adopt a rule to combat abusive short selling and suggesting that any such rule proposal include a circuit breaker in the form discussed therein).

64 See D. Harmon and Y. Bar-Yam, 2008, Technical Report on the SEC Uptick Repeal Pilot, New England Complex Systems Institute; see also Robert C. Pozen and Dr. Yaneer Bar-Yam, There's a Better Way to Prevent Bear Raids, The Wall Street Journal, Opinion, November 18, 2008 (stating that the "uptick rule" is an effective way to prevent "bear raids"). But cf. John C. Bogle, Jr. and Howard Flinker, Uptick Rule Won't Prevent More Raids by the Bear, The Wall Street Journal, Opinion Section, (November 26, 2008).

65 See George Soros, The Game Changer, available at http://www.ft.com/cms/s/0/49b1654a-ed60-11dd-bd60-0000779fd2ac.html.

66 See id. (concluding that Lehman, AIG and other financial institutions were destroyed by "bear raids" in which the shorting of stocks and buying of CDS amplified and reinforced each other).

by short sellers regarding financial institutions of significance in the U.S. may have fueled market volatility in the securities of some of these institutions, on July 15, 2008, we issued an emergency order ("July Emergency Order")[67] pursuant to Section 12(k)(2) of the Exchange Act[68] which imposed borrowing and delivery requirements on short sales of the equity securities of certain financial institutions. We noted in the July Emergency Order that false rumors can lead to a loss of confidence in our markets. Such loss of confidence can lead to panic selling, which may be further exacerbated by "naked" short selling. As a result, the prices of securities may artificially and unnecessarily decline well below the price level that would have resulted from the normal price discovery process.[69] If significant financial institutions are involved, this chain of events can threaten disruption of our markets.[70]

Due to our concerns regarding the impact of short selling on the prices of financial institution securities, on September 18, 2008, we issued another emergency order prohibiting short selling in the publicly traded securities of certain financial institutions.[71] Our concerns, however, have not been limited to financial institutions given the importance of confidence in our markets and recent rapid and steep declines in the prices of securities generally.[72] Such rapid and steep price declines can give rise to questions about the underlying financial condition of an

---

67 See Securities Exchange Act Release No. 58166 (July 15, 2008), 73 FR 42379 (July 21, 2008).

68 15 U.S.C. 78l(k).

69 See July Emergency Order, 73 FR 42379.

70 See id.

71 See Securities Exchange Act Release No. 58592 (Sept. 18, 2008), 73 FR 55169 (Sept. 24, 2008).

72 See, e.g., July Emergency Order, 73 FR 42379; Securities Exchange Act Release No. 58592 (Sept. 18, 2008), 73 FR 55169 (Sept. 24, 2008) ("Short Sale Ban Emergency Order"); Securities Exchange Act Release No. 58572 (Sept. 17, 2008), 73 FR 54875 (Sept. 23, 2008) ("September Emergency Order").

institution, which in turn can erode confidence even without an underlying fundamental basis.[73] This erosion of confidence can impair the liquidity and ultimate viability of an institution, with potentially broad market consequences.[74]

These concerns resulted in our issuance on September 17, 2008 of an emergency order under Section 12(k)(2) of the Exchange Act, in part targeting short selling in all equity securities.[75] Pursuant to the September Emergency Order we imposed enhanced delivery requirements on sales of all equity securities under Rule 204T of Regulation SHO.[76]

The enhanced close-out requirements of Rule 204T of Regulation SHO in the September Emergency Order, which, among other things, require participants of a registered clearing agency to close-out fails to deliver resulting from short sales of any equity security by purchasing or borrowing the security by no later than the beginning of trading on the day after the fail to deliver occurs, appear to be having a positive effect toward achieving our goal of reducing fails to deliver.[77] As we stated in the October 2008 release adopting Rule 204T as an interim final temporary rule, we are concerned about the potentially negative market impact of large and persistent fails to deliver.[78] Thus, our adoption of Rule 204T followed a series of other

---

[73] See Short Sale Ban Emergency Order, 73 FR 55169; September Emergency Order, 73 FR 54875.

[74] See id.

[75] See September Emergency Order, 73 FR 54875.

[76] See id. We subsequently issued an interim final temporary rule imposing the delivery requirements of Rule 204T of Regulation SHO until July 31, 2009. See Securities Exchange Act Release No. 58773 (Oct. 14, 2008), 73 FR 61706 (Oct. 17, 2008) ("Interim Final Temporary Rule 204T"). We and Commission staff are currently reviewing the comment letters received in response to that rule. In addition, we issued an emergency order, and subsequent interim final temporary rule, to require disclosure of short sales and short positions in certain securities. The temporary rule expires on August 1, 2009. We and Commission staff are currently reviewing comment letters received in response to the temporary rule. See Securities Exchange Act Release No 58591 (Sept. 18, 2008). See also Securities Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008).

[77] See September Emergency Order, 73 FR 54875.

[78] See Interim Final Temporary Rule 204T, 73 FR at 61708.

steps aimed at reducing such fails to deliver and addressing potentially abusive short selling. Such steps included eliminating the "grandfather" and options market maker exceptions to Regulation SHO's close-out requirement,[79] and proposing and subsequently adopting a "naked" short selling anti-fraud rule, Rule 10b-21.[80] Although we recognize that fails to deliver can occur for legitimate reasons, we are concerned about the impact of large and persistent fails to deliver on market confidence. Preliminary results from OEA indicate that our actions to further reduce fails to deliver and, thereby, address potentially abusive short selling are having their intended effect. For example, preliminary results from OEA indicate that fails to deliver in all equity securities have declined significantly since the adoption of Rule 204T.[81]

Questions persist, however, about the rapid and steep declines in the prices of securities, and we recognize the concern over the continuing erosion of investor confidence in our markets. Thus, we have continued to examine whether there are other actions that the Commission might consider, including re-evaluating whether a short sale price test ought to be reintroduced or a circuit breaker rule should be imposed, in light of the extreme market declines and volatility, as well as the loss of investor confidence we continue to experience.

---

[79] See Securities Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR 45544 (Aug. 14, 2007) (eliminating the "grandfather" exception to Regulation SHO's close-out requirement); September Emergency Order, 73 FR 54875 (eliminating the options market maker exception to Regulation SHO's close-out requirement). Following the issuance of the September Emergency Order, we adopted amendments making permanent the elimination of the options market maker exception. See Securities Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008).

[80] See Securities Exchange Act Release No. 58774 (Oct. 14, 2008), 73 FR 61666 (Oct. 17, 2008); Securities Exchange Act Release No. 57511 (March 17, 2008), 73 FR 15376 (March 21, 2008).

[81] See Memorandum from OEA Re: Impact of Recent SHO Rule Changes on Fails to Deliver, November 26, 2008 at http://www.sec.gov/comments/s7-30-08/s73008-37.pdf; Memorandum from OEA Re: Impact of Recent SHO Rule Changes on Fails to Deliver, March 20, 2009 at http://www.sec.gov/comments/s7-30-08/s73008-107.pdf (stating, among other things, that the average daily number of aggregate fails to deliver for all securities decreased from 1.1 billion to 582 million for a total decline of 47.2% when comparing a pre-Rule to post-Rule period).

We also note that when we eliminated all short sale price test restrictions in July 2007, we acknowledged that circumstances may develop that would warrant relief from the prohibition in Rule 201 of Regulation SHO for a short sale price test, including a short sale price test of an SRO, to apply to short sales in any security.[82] Thus, in determining whether or not to propose a short sale price test rule or circuit breaker rule, we have considered the recent turmoil in the financial sector and steep declines and extreme volatility in securities prices. The turbulence in the financial markets has been underscored over the past 18 months by events such as the March 2008 sale of Bear Stearns Corporation, and the crisis surrounding the collapse of Lehman Brothers in September 2008.

In addition, between July 2007 and March 2009, the Dow Jones Industrial Average ("DJIA") lost roughly 50% of its value, while the Standard and Poor's 500 Index fell approximately 54%.[83] The publicly traded securities of significant financial institutions have experienced large reductions in value in 2008 and early 2009.[84] For example, one significant financial institution's stock price declined from approximately $49 per share in the beginning of July 2007, to approximately $1 per share in March 2009. Similarly, in July 2007, another significant financial institution's stock price declined from approximately $49 per share to approximately $3 per share in March 2009. In addition, in 2008, a number of major banks became the subjects of federal seizure.[85] A total of 25 banks failed in 2008, resulting in a $33.5

---

[82] See 2007 Price Test Adopting Release, 72 FR 36348.

[83] On July 3, 2007, the DJIA closed at 13,577, and on March 3, 2009, the DJIA closed at 6,726. On July 3, 2007, the S&P 500 Index closed at 1524.87, and on March 3, 2009, the S&P 500 Index closed at 700.82.

[84] We note that we have no empirical evidence that such falling prices are the result of short selling activity and the lack of short sale price test restrictions.

[85] See, e.g., Office of Thrift Supervision, Receivership Of A Federal Saving Association, dated Sept. 25, 2008 at http://files.ots.treas.gov/680024.pdf; Office of Thrift Supervision, Pass-Through Receivership Of A Federal Savings Association Into A De Novo Federal Savings Association That Is Placed Into Conservatorship With the

billion expenditure of the fund used by the Federal Deposit Insurance Corporation ("FDIC") to protect individual depositors' savings.[86] Put simply, market conditions have changed dramatically in recent months.[87]

In addition, as noted above, in response to the proposed amendments to eliminate former Rule 10a-1, one commenter expressed its concern about unrestricted short selling during periods of unusually rapid and large market declines.[88] This concern has been echoed in recent comment letters to the Commission.[89] We note, however, that in the 2007 Price Test Adopting Release, we noted that because of the Commission's stated objective when it adopted Rule 10a-1 and our concerns about the potential use of short sales to manipulate stock prices, OEA examined the Pilot data for any indication that there is an association between extreme price movements and price test restrictions. OEA, however, did not find any such association.[90]

Due to the extreme market conditions with which we are currently faced and the resulting deterioration in investor confidence, we believe it is appropriate at this time to propose amending Regulation SHO to add a short sale price test or a circuit breaker rule. In issuing this proposing release, we seek empirical data regarding the costs and benefits of reinstating short sale price test

---

FDIC, dated July 11, 2008 at http://files.ots.treas.gov/680018.pdf.

86 See Alison Vekshin, Bair Says Insurance Fund Could Be Insolvent This Year, http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=alsJZqIFuN3k, March 4, 2009.

87 We note, however, that stock markets have incurred significant declines in value under former short sale price test restrictions, most notably the 1987 Market Crash and the 2000 Tech Bubble Burst.

88 See NYSE letter.

89 See, e.g., Brown Letter (noting that "the investigation performed before the uptick rule was rescinded was insufficient, particularly [because] it covered a period of relative market stability and studied the side effects of the rule rather than the primary effect of the rule which would only be seen in a sharply down market such as we have just suffered"); Liotine Letter (stating that "[t]he research done prior to the [amendment] of rule 10-A was far too short" and that the study should have lasted longer to "ensure at least one bear market was involved in the study").

90 See 2007 Price Test Adopting Release, 72 FR at 36351.

restrictions or imposing circuit breaker rules, including the potential impact on legitimate short selling. We note that although we have received numerous letters requesting reinstatement of short sale price test restrictions, such requests have not included empirical data, but rather focus on what such commenters believe might be the impact on the markets of reinstating such restrictions. In addition, such requests do not discuss the potential impact of short sale price test restrictions on the benefits of legitimate short selling.

As discussed in this release, we remain mindful that there are benefits of short selling. For example, legitimate short selling can play an important and constructive functional role in the markets, providing liquidity and price efficiency. Short sellers also play an important role in correcting upward stock price manipulation.[91] Because short sale price test restrictions may lessen some of these benefits, it is important that any short sale price test regulation be designed to limit any potentially unnecessary impact on legitimate short selling.

We also recognize that some market participants may be advocating for a short sale price test because such participants may believe that it would put them at a competitive advantage over other participants who may be less able to implement or adjust their trading strategies to account for a short sale price test or may otherwise benefit at the expense of investors. Other market participants may favor a short sale price test due to concerns about the imposition of a greater restriction on short selling.

We believe that all arguments, both for and against a short sale price test rule and a possible circuit breaker rule, should be considered and addressed in light of current market conditions and recent experience. Thus, we believe it is important at this time to propose and obtain informed public comment regarding restricting the prices at which securities can be sold

---

[91] See OEA Staff's Summary Pilot Report, at 9.

short before determining whether or not to impose any such restrictions, and what any such restrictions should be, as well as the proposed circuit breaker rules.

As discussed in detail below, we are proposing two alternative price tests. The first test would be the proposed modified uptick rule that would be based on the national best bid. The second test would be the proposed uptick rule that would be a modified version of the tick test under former Rule 10a-1. We are also proposing amendments to Rule 200(g) of Regulation SHO that would require that a broker-dealer mark certain sell orders "short exempt."

In considering whether to reinstitute short sale price test restrictions, it is important that the Commission take into account any extant empirical data and analyses that would shed light on the potential impact of such restrictions on capital markets. In that connection, we note that OEA has analyzed the impact that a short sale price test might have had during a thirteen day period in September of 2008[92] as well as whether and the extent to which short selling drove prices downward during a volatile period in early September 2008.[93] The first of these studies noted that, although its data were limited to historical trade and quote data from a period when no price test was in place and the shape of order book and trading sequences might have differed had a price test been in place, a price test would likely have been most restrictive during periods of low volatility, with greatest impact on short selling in lower priced and more active stocks.[94] The second study found that long sellers were primarily responsible for price declines during this period. It also found that, on average, short sale volume as a fraction of total volume was highest during periods of positive returns, noting, however, that it was also possible that there were

---

92 See Office of Economic Analysis, Analysis of a short sale price test using intraday quote and trade data, Dec. 17, 2008.

93 See Office of Economic Analysis, Analysis of Short Selling Activity during the First Weeks of September, 2008, Dec. 16, 2008.

94 See OEA analysis (Dec. 17, 2008), supra note 92.

instances in which short selling activity peaked during periods of extreme negative returns.[95] The Commission looks forward to receiving additional analysis of relevant data and factors.

Similarly, it is important that the Commission take into account any extant empirical data and analyses that would shed light on the potential impact of such restrictions on capital markets, and it looks forward to receiving analysis of relevant data.

III. Discussion of Proposed Short Sale Restrictions

We discuss below our price test approach, the alternatives contained therein and our circuit breaker approach. As noted above, we preliminarily believe that a price test based on the national best bid would have advantages over a test based on the last sale price in today's markets. In particular, we believe that bids generally are a more accurate reflection of current prices for a security than last sale prices due to delays that can occur in the reporting of last sale price information and because last sale price information is published to the markets in reporting rather than trade sequence.

In adopting a final rule, we could take several different approaches, or a combination of approaches. For example, we could consider a straight prohibition approach prohibiting all persons from effecting short sales under a price test that references either the national best bid or the last sale price; a policies and procedures approach imposing obligations on market participants to adopt policies and procedures to guard against impermissible short selling; or a combination of a straight prohibition and a policies and procedures approach.

We discuss below the proposed modified uptick rule which would require trading centers to have policies and procedures reasonably designed to prevent the execution or display of short sales at impermissible prices. As an alternative, in Section II.B, below, we discuss the proposed uptick rule that is based on the last sale price and that, similar to former Rule 10a-1, would apply

[95] See OEA analysis (Dec. 16, 2008), supra note 93.

a straight prohibition approach that would prohibit any person from effecting short sales at impermissible prices. However, either alternative could ultimately be implemented through a policies and procedures or through a straight prohibition approach or some combination thereof.

We also discuss below our circuit breaker approach, which includes two basic alternatives – a halt and a price test. The proposed circuit breaker price test rule would temporarily result in either the proposed modified uptick rule or the proposed uptick rule applying to a specific security if there was a severe decline in the price of that security. As with the proposed short sale price test rules, the proposed circuit breaker price test rules could also be in the form of either a straight prohibition or a policies and procedures approach. The proposed circuit breaker halt rule, which would temporarily halt short selling in a specific security if there is a severe price decline in that security, could operate either in addition to, or in place of, a proposed short sale price test rule.

A. Proposed Modified Uptick Rule

1. Operation of the Proposed Modified Uptick Rule

We are proposing to amend Rule 201 of Regulation SHO to add a short sale price test that would use the national best bid as a reference point for short sale orders. Specifically, the proposed modified uptick rule would provide that "[a] trading center shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order in a covered security at a down-bid price."[96] The proposed modified uptick rule defines a "down-bid price" as "a price that is less than the current national best bid or,

[96] See Proposed Rule 201(b)(1).

if the last differently priced national best bid was greater than the current national best bid, a price that is less than or equal to the current national best bid."[97]

Thus, under the proposed modified uptick rule, a trading center would be required to have policies and procedures reasonably designed to prevent it from executing or displaying any short sale order, absent an exception, at a price that is below the national best bid. If the current national best bid is below the last differently priced national best bid, a trading center would be required to have policies and procedures reasonably designed to prevent it from executing or displaying the order unless the order is priced above the current national best bid. Such a rule might help prevent short sellers from driving the market down. In addition, the proposed modified uptick rule might help prevent short sales from being used as a tool to accelerate a declining market.

The following example demonstrates the operation of the proposed modified uptick rule. If the current national best bid in a security is $47.00, and the immediately preceding national best bid was $46.99 (i.e., the current bid is above the previous bid), a trading center could immediately execute a short sale order at $47.00 or above. Similarly, a trading center could display a short sale order priced at $47.00 or above.[98] If the current national best bid in a security is $47.00, and the immediately preceding bid was $47.01 (i.e., the current bid is below the previous bid), a trading center could execute or display a short sale order at a price above $47.00.[99] If the current national best bid in a security is $47.00, and the immediately preceding national best bid was $47.00, but that bid was above the prior national best bid (i.e., the last

---

97 Proposed Rule 201(a)(2).

98 A trading center could display a short sale order priced at $47.00 provided such order would comply with the locking or crossing requirements of any Commission or SRO rule. See, e.g., 17 CFR 242.610(d).

99 Any such execution or display would also need to be in compliance with applicable rules regarding minimum pricing increments. See 17 CFR 242.612.

differently priced national best bid), a trading center could execute a short sale order at $47.00 or above. Similarly, a trading center could display a short sale order priced at $47.00 or above.[100] If the current national best bid is $47.00, and the immediately preceding national best bid was $47.00, but that was below the prior national best bid (i.e., the last differently priced national best bid), a trading center could execute or display a short sale at a price above $47.00.[101]

The proposed modified uptick rule would apply to any "covered security," which is defined as an "NMS stock" under Rule 600(b)(47) of Regulation NMS.[102] Rule 600(b)(47) of Regulation NMS defines an "NMS stock" as "any NMS security other than an option."[103] Rule 600(b)(46) of Regulation NMS defines an "NMS security" as "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options."[104] Thus, the proposed modified uptick rule would apply to any security or class of securities, except options, for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan.[105] As a result, the proposed modified uptick rule generally would cover all securities, except options, listed on a national securities exchange whether traded on an exchange or in the over-the-counter ("OTC") market. It would not include non-NMS stocks quoted on the OTC Bulletin Board or elsewhere

---

[100] A trading center could display a short sale order priced at $47.00 provided such order would comply with the locking or crossing requirements of any Commission or SRO rule. See, e.g., 17 CFR 242.610(d).

[101] Any such execution or display would also need to be in compliance with applicable rules regarding minimum pricing increments. See 17 CFR 242.612.

[102] See proposed Rule 201(a)(1).

[103] 17 CFR 242.600(b)(47).

[104] 17 CFR 242.600(b)(46).

[105] See proposed Rule 201(a)(1) (providing that a "covered security" shall mean all "NMS stock" as defined in §242.600(b)(47) of Regulation NMS).

in the OTC market. We are not proposing to apply the proposed modified uptick rule to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market because a national best bid and offer currently is not required to be collected, consolidated, and disseminated for such securities. In addition, former Rule 10a-1 did not apply to non-exchange listed securities quoted on the OTC Bulletin Board or elsewhere in the OTC market. We recognize, however, that issuers of securities quoted in the OTC market may believe that they are particularly vulnerable to abusive short selling. Thus, we seek specific comment regarding whether the proposed modified uptick rule or some other form of price test, or any other restrictions on short sales, should apply to these types of securities.

The scope of securities covered by the proposed modified uptick rule would be similar to the scope of securities covered by former Rule 10a-1. Former Rule 10a-1(a) applied to securities registered on, or admitted to unlisted trading privileges on, a national securities exchange, if trades of the security were reported pursuant to an effective transaction reporting plan and information regarding such trades was made available in accordance with such plan on a real-time basis to vendors of market transaction information. All securities that would have been subject to former Rule 10a-1 would also be subject to the proposed modified uptick rule. In addition, certain securities, i.e., securities traded on Nasdaq prior to its regulation as an exchange, that were not subject to former Rule 10a-1, would be subject to the proposed modified uptick rule.[106]

---

[106] When Nasdaq became a national securities exchange in 2006, absent an exemption from former Rule 10a-1, all Nasdaq securities would have been subject to former Rule 10a-1. The Commission provided Nasdaq with an exemption from the application of the provisions of former Rule 10a-1 to securities traded on Nasdaq because the Pilot was already in progress, and the Commission believed it was necessary and appropriate to maintain the status quo for short sale price tests during the Pilot, and to ensure that market participants would not be burdened with costs associated with implementing a price test that might be temporary. See letter to Marc Menchel, Executive Vice President and General Counsel, NASD, Inc., June 26, 2006.

Market information for NMS stocks, including quotes, is disseminated pursuant to three different national market system plans.[107] The national securities exchanges and FINRA participate in these joint-industry plans ("Plans").[108] The Plans establish three separate networks to disseminate market information for NMS stocks.[109] These networks are designed to ensure that, among other things, consolidated bids from the various trading centers that trade NMS stocks are continually collected and disseminated on a real-time basis, in a single stream of information. Thus, all trading centers would have access to the consolidated bids for all the securities that would be subject to the proposed modified uptick rule.[110] As discussed in further detail below, however, we note that the national best bid can change rapidly and repeatedly and potentially there might be latencies in obtaining data regarding the national best bid.

The proposed modified uptick rule would apply to any trading center that executes or displays a short sale order in a covered security. It would define a "trading center" as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as

---

[107] The three joint-industry plans are (1) the Consolidated Tape Association Plan ("CTA Plan"), which disseminates transaction information for securities primarily listed on an exchange other than Nasdaq, (2) the Consolidated Quotation Plan ("CQ Plan"), which disseminates consolidated quotation information for securities primarily listed on an exchange other than Nasdaq, and (3) the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for securities primarily listed on Nasdaq.

[108] Rule 603(b) of Regulation NMS provides that every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, for NMS stocks. See 17 CFR 242.603(b).

[109] These networks can be categorized as follows: (1) Network A — securities primarily listed on the NYSE; (2) Network B — securities listed on exchanges other than the NYSE and Nasdaq; and (3) Network C — securities primarily listed on Nasdaq.

[110] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37503 (June 29, 2005) ("Regulation NMS Adopting Release").

agent."[111] The proposed definition encompasses all entities that may execute short sale orders. Thus, the proposed modified uptick rule would apply to any entity that executes short sale orders.

Under the proposed modified uptick rule, a trading center would be required to have written policies and procedures reasonably designed to prevent the execution or display of short sale orders on a down-bid price. Thus, upon receipt of a short sale order, a trading center's policies and procedures would have to require that the trading center be able to determine whether or not the short sale order could be executed or displayed in accordance with the provisions of proposed Rule 201(b)(1). If the order is marketable at a permissible price, the trading center would be able to present the order for immediate execution or, if not immediately marketable, hold for execution later at its specified price.

The proposed modified uptick rule would permit a trading center to display an order provided it is permissibly priced at the time the trading center displays the order. If an order is impermissibly priced, the trading center could, in accordance with policies and procedures reasonably designed to prevent the execution or display of a short sale order at a down-bid price, re-price the order at the lowest permissible price and hold it for later execution at its new price or better.[112] As quoted prices change, the proposed rule would allow a trading center to repeatedly re-price and display an order at the lowest permissible price down to the order's original limit order price (or, if a market order, until the order is filled).

---

[111] See 17 CFR 242.600(b)(78); see also proposed Rule 201(a)(7) (providing that the term "trading center" shall have the same meaning as in §242.600(b)(78) of Regulation NMS).

[112] For example, if a trading center receives a short sale order priced at $47.00 when the current national best bid in the security is $47.00, but the immediately preceding national best bid was $47.01 (i.e., the current bid is below the previous bid), the trading center could re-price the order at the permissible offer price of $47.01, and display the order for execution at this new limit price.

In addition, paragraph (b)(1)(i) of the proposed rule would require a trading center's policies and procedures to be reasonably designed to permit a trading center to execute a displayed short sale order at a down-bid price provided that, at the time the order was displayed by the trading center it was permissibly priced, i.e., not on a down-bid price.[113] This exception for properly displayed short sale orders would help avoid a conflict between the proposed modified uptick rule and the "Quote Rule" under Rule 602 of Regulation NMS. The Quote Rule requires that, subject to certain exceptions, the broker-dealer responsible for communicating a quotation shall be obligated to execute any order to buy or sell presented to him, other than an odd lot order, at a price at least as favorable to such buyer or seller as the responsible broker-dealer's published bid or published offer in any amount up to his published quotation size.[114] Thus, pursuant to this exception, a trading center would be able to comply with the "firm quote" requirement of Rule 602 of Regulation NMS by executing a presented order to buy against its displayed offer to sell as long as the displayed offer to sell was permissibly priced under the proposed rule at the time it was first displayed, even if the execution of the transaction would be on a down-bid price at the time of execution.

Because a trading center could re-price and display a previously impermissibly priced short sale order the proposed modified uptick rule potentially allows for the more efficient functioning of the markets than the proposed uptick rule because trading centers would not have to reject or cancel impermissibly priced orders unless instructed to do so by the trading center's customer submitting the short sale order. We recognize that some trading centers might not want

---

[113] See proposed Rule 201(b)(1)(i).

[114] See 17 CFR 242.602(b)(2). We note that to the extent that a short sale order is undisplayed, the proposed modified uptick rule would prevent the trading center from executing the order unless at the time of execution, the execution price complies with the proposed modified uptick rule at the time of execution of the order.

to re-price an impermissibly priced short sale order. Thus, re-pricing would not be a requirement under the proposed modified uptick rule.

In addition, the proposed modified uptick rule would provide trading centers and their customers with flexibility in determining how to handle orders that are not immediately executable or displayable by the trading center because the order is impermissibly priced. For example, trading centers could offer their customers various order types regarding the handling of impermissibly priced orders such that a trading center either could reject an impermissibly priced order or re-price the order at the lowest permissible price until the order is filled.

The proposed modified uptick rule would focus on a trading center's written policies and procedures as the mechanism through which to prevent the execution or display of short sale orders on a down-bid price. Under this approach, trading centers would be required to have policies and procedures reasonably designed to prevent the execution or display of short sale orders at impermissible prices and to surveil the effectiveness of the policies and procedures. Thus, short sale orders executed or displayed at impermissible prices would require the trading center that executed or displayed the short sales to take prompt action to remedy any deficiencies.

We also note that the policies and procedures requirements of the proposed modified uptick rule are similar to those set forth under Regulation NMS.[115] In accordance with Regulation NMS, trading centers must have in place written policies and procedures in connection with that Regulation's order protection rule.[116] Thus, trading centers are already familiar with establishing, maintaining, and enforcing trading-related policies and procedures,

---

[115] See Regulation NMS Adopting Release, 70 FR 37496; see also 17 CFR 242.611.

[116] See id.

including programming their trading systems in accordance with such policies and procedures. This familiarity should reduce the implementation costs of the proposed modified uptick rule on trading centers.

Similar to the requirements under Regulation NMS in connection with the order protection rule,[117] at a minimum, a trading center's policies and procedures would need to enable a trading center to monitor, on a real-time basis, the national best bid, and whether the current national best bid is an up- or down-bid from the last differently priced national best bid, so as to determine the price at which the trading center may execute or display a short sale order. In addition, a trading center would need to have policies and procedures reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price.[118] A trading center's policies and procedures would not, however, have to include mechanisms to determine on which provision a broker-dealer is relying in marking an order "short exempt" in accordance with paragraph (c) or (d) of the proposed modified uptick rule.[119]

A trading center would also need to take such steps as would be necessary to enable it to enforce its policies and procedures effectively. For example, trading centers could establish policies and procedures that could include regular exception reports to evaluate their trading practices. If a trading center's policies and procedures include exception reports, any such reports would need to be examined by the trading center to affirm that a trading center's policies and procedures have been followed by its personnel and properly coded into its automated systems and, if not, promptly identify the reasons and take remedial action.

---

[117] See id.

[118] See Section V below discussing short sale orders marked "short exempt."

[119] See proposed Rules 201(c) and 201(d).

To help ensure compliance with the proposed modified uptick rule, trading centers could also have policies and procedures that would enable a trading center to have a record identifying the current national best bid at the time of execution or display of a short sale order, as well as the last differently priced national best bid. Such "snapshots" of the market would aid SROs in evaluating a trading center's written policies and procedures and compliance with the proposed modified uptick rule. In addition, such snapshots would aid trading centers in verifying that a short sale order was priced in accordance with the provisions of proposed Rule 201(b)(1) if bid "flickering," i.e., rapid and repeated changes in the current national best bid during the period between identification of the current national best bid and the execution or display of the short sale order, creates confusion regarding whether or not the short sale order was executed or displayed at a permissible price. Snapshots of the market at the time of execution or display of an order would also aid trading centers in dealing with time lags in receiving data regarding the national best bid from different data sources. A trading center's policies and procedures would be required to address latencies in obtaining data regarding the national best bid. In addition, to the extent such latencies occur, a trading center's policies and procedures would need to implement reasonable steps to monitor such latencies on a continuing basis and take appropriate steps to address a problem should one develop.

Trading centers would be required to conduct surveillance under the proposed modified uptick rule. Proposed Rule 201(b)(2) provides that a trading center must regularly surveil to ascertain the effectiveness of the policies and procedures required under the proposed modified uptick rule and must take prompt action to remedy deficiencies in such policies and procedures.[120] This provision would reinforce the ongoing maintenance and enforcement

[120] See proposed Rule 201(b)(2).

requirements of proposed Rule 201(b)(1) by explicitly assigning an affirmative responsibility to trading centers to surveil to ascertain the effectiveness of their policies and procedures.[121] Thus, under the proposed modified uptick rule, trading centers would not be able to merely establish policies and procedures that may be reasonable when created and assume that such policies and procedures would continue to satisfy the requirements of proposed Rule 201(b). Rather, trading centers would be required to regularly assess the continuing effectiveness of their procedures and take prompt action when needed to remedy deficiencies. In particular, trading centers would need to engage in regular and periodic surveillance to determine whether executions or displays of short sale orders on impermissible bids are occurring without an applicable exception and whether the trading center has failed to implement and maintain policies and procedures that would have reasonably prevented such impermissible executions or displays of short sale orders.

The proposed modified uptick rule would differ from the tick test of former Rule 10a-1, and the alternative proposed uptick rule discussed below. Similar to former Rule 10a-1, the alternative proposed uptick rule would be based on the last sale price, rather than the national best bid, and it would not include an explicit policies and procedures requirement. The proposed uptick rule would prevent the execution of short sale orders below the last sale price, unless an exception applies. The proposed modified uptick rule would prevent the execution or display of short sale orders below the current national best bid, unless, among other things, the order is marked "short exempt." Because the proposed modified uptick rule would use the national best bid as its reference point, short selling could occur below the last sale price.

The two proposed alternative short sale price tests would operate similarly, however, in that they would be designed to achieve a similar purpose. In addition, to help limit the impact of

---

[121] We note that Rule 611(a)(2) of Regulation NMS contains a similar provision for trading centers. See 17 CFR 242.611(a)(2).

the proposed alternative short sale price tests on legitimate short selling, both rules would permit short selling at an increment above the national best bid, or the last sale price, as applicable, in a declining market. As commenters have noted, the higher the increment the more restrictive such an increment could be on short selling and could even be tantamount to a ban on short selling.[122]

In addition, the proposed modified uptick rule, similar to the proposed uptick rule, would not result in the type of disparate short sale regulation that existed under former Rule 10a-1.[123] The proposed modified uptick rule would apply a uniform rule to trades in the same securities that can occur in multiple, dispersed, and diverse markets. One of the reasons for the elimination of former Rule 10a-1 and the prohibition on any SRO from having a short sale price test in July 2007 was because the application of short sale price tests had become disjointed with different price tests applying to the same securities trading in different markets. Under the proposed modified uptick rule, all covered securities, wherever traded, would be subject to one short sale price test, the proposed modified uptick rule. To further this goal of having a uniform short sale price test, subsection (e) of proposed Rule 201 would provide that no SRO shall have any rule that is not in conformity with, or conflicts with proposed Rule 201.[124] In addition, just as market participants would be familiar with the proposed uptick rule because it is a modified version of former Rule 10a-1 that was in existence for almost 70 years, market participants would also be

---

[122] See supra note 94; see also letter from Dan Mathisson, Managing Director, Credit Suisse Securities USA, LLC, dated March 30, 2009 ("letter from Credit Suisse") (stating that "requiring an uptick of more than one cent would be tantamount to a total ban for any stock that trades actively").

[123] See proposed Rule 201(e).

[124] See proposed Rule 201(e).

familiar with using the current national best bid as a reference point because NASD's bid test, which was in existence from 1994 to mid-2007, was based on the current national best bid.[125]

We preliminarily believe that a short sale price test based on the national best bid would be more suitable to today's markets than a short sale price test based on the last sale price. Although we recognize that a quotation proposes a transaction, whereas the last trade price reflects an actual trade, we note that pursuant to Commission and SRO rules, quotations for all covered securities must be firm.[126] By requiring that quotations are firm, the Commission intended to ensure that quotations provide reliable information to the marketplace so that broker-dealers are able to make best execution decisions for their customers' orders and customers are able to make informed investment decisions.[127] Moreover, quotation information has significant value to the marketplace because it reflects the various factors affecting the market, including current levels of buying and selling interest.[128] Both retail and institutional investors rely on quotation information to understand the market forces at work at a given time and to assist in the formulation of investment strategies.[129]

Further, we believe that bids generally are a more accurate reflection of current prices for a security because changes in the national best bid are sequenced across trading centers. In contrast, transactions may be reported within a 90 second window, which can easily result in out-of-sequence reports. Even transactions that are executed and reported automatically may be out

---

[125] See supra note 27 (discussing NASD Rule 3350). Similar to the proposed modified uptick rule, NASD's bid test referenced the national best bid and was designed to help prevent short selling at or below the current national best bid in a declining market. NASD's bid test, however, took a straight prohibition approach, rather than a policies and procedures approach, and, by its terms, applied only to Nasdaq Global Market securities.

[126] See e.g., 17 CFR 242.602.

[127] See Securities Exchange Act Release No. 43085 (July 28, 2000), 65 FR 47918 (Aug. 4, 2000).

[128] See id.

[129] See id.

of sequence if they occur in different trading centers. For example, trade reporting for covered securities can involve multiple trading centers reporting trades in the same stock from different locations using different means of reporting. In addition, trades are published in reporting sequence, not trade sequence.[130] Thus, for those covered securities for which a significant amount of trading occurs manually, or in multiple trading centers, a price test based on the national best bid may be a fairer and more effective means of regulating short selling than a test based on the last sale price because the manner in which trades are reported may create up-ticks and down-ticks that may not accurately reflect actual price movements in the security for the purpose of a test based on the last sale price.

The proposed modified uptick rule would be designed to restrict short selling at successively lower prices and, thereby, might help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool to drive the markets down and from being used to accelerate a decline in the market by exhausting all remaining bids at one price level. By seeking to advance these goals, the proposed modified uptick rule might restore investor confidence in our securities markets.

In addition, the proposed modified uptick rule would be designed to preserve instant execution and liquidity by allowing relatively unrestricted short selling in an advancing market. As discussed above, one of the benefits of legitimate short selling is that it provides market liquidity by, for example, adding to the selling interest of stock available to purchasers, and, when sellers are covering their short sales, adding to the buying interest of stock available to sellers.

In addition, we believe the proposed modified uptick rule would accommodate trading systems and strategies used in the marketplace today, such as the automated trade matching

---

[130] See FINRA Rule 6380A.

systems that offer price improvement based on the national best bid and offer. These passive pricing systems often effect trades at an independently-derived price, such as at the mid-point of the bid-offer spread. Such pricing would often not satisfy the tick test of former Rule 10a-1 because matches could potentially occur at a price below the last reported sale price. Thus, we provided a limited exception from former Rule 10a-1 for these trading systems.[131] The proposed modified uptick rule would accommodate matching systems that execute trades at an independently derived price because such systems are designed so that matches occur above the current national best bid.[132] Thus, even in a declining market where a trading center could execute or display an order only if it is priced above the current national best bid at the time of execution or display, such matching system executions would comply with the proposed modified uptick rule.

If we were to adopt the proposed modified uptick rule, we are proposing that there would be a three month implementation period such that trading centers would have to comply with the proposed modified uptick rule three months following the effective date of the proposed modified uptick rule. We believe that a proposed three month implementation period would provide trading centers with sufficient time in which to modify their systems and procedures in order to comply with the requirements of the proposed modified uptick rule. Because the proposed modified uptick rule would require the implementation of policies and procedures similar to those required for trading centers under Regulation NMS, we believe that a three

---

[131] See, e.g., supra note 26.

[132] See id.; see e.g., letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Alan J. Reed, Jr., First Vice President and Director of Compliance, Instinet Group, LLC. (June 15, 2006) (granting Instinet modified exemptive relief from Rule 10a-1 for certain transactions executed through Instinet's Intraday Crossing System); POSIT letter.

month implementation period would be reasonable. The addition of an implementation period should alleviate any potential disruptive effects of the proposal.

We realize, however, that a shorter or longer implementation period may be manageable or preferable. In the Solicitation of Comment below, we seek specific comment as to what length of implementation period would be necessary or appropriate, and why, such that trading centers would be able to meet the proposed short sale price test restrictions, if adopted.

2. "Short Exempt" Provision of Proposed Modified Uptick Rule

Paragraph (b)(1)(ii) of the proposed modified uptick rule provides that a trading center's policies and procedures must be reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price.[133] Thus, a trading center's policies and procedures must be reasonably designed to recognize when an order is marked "short exempt" so that the trading center's policies and procedures would not prevent the execution or display of such orders on a down-bid price.[134]

As discussed in more detail below, proposed Rule 200(g)(2) of Regulation SHO provides that a sale order shall be marked "short exempt" only if the provisions of paragraph (c) or (d) of proposed Rule 201 are met.[135] Paragraphs (c) and (d) of the proposed modified uptick rule set forth when a broker-dealer may mark a short sale order "short exempt." The provisions contained in paragraphs (c) and (d) of the proposed modified uptick rule are designed to promote

---

[133] See proposed Rule 201(b)(1)(ii).

[134] See proposed Rule 201(b)(1)(ii).

[135] See Section V below discussing proposed Rule 200(g)(2).

the workability of the proposed modified uptick rule, while at the same time furthering the Commission's stated goals.

In addition, we note that the provisions contained in paragraph (d) of proposed Rule 201 would parallel exceptions to former Rule 10a-1 and exemptive relief granted pursuant to that rule. These exceptions and exemptions from former Rule 10a-1, as applicable, had been in place under former Rule 10a-1 for several years. We are not aware of any reason that the rationales underlying these exceptions and exemptions from former Rule 10a-1 would not still hold true today. Moreover, due to the limited scope of these exceptions and exemptions to former Rule 10a-1, we do not believe that including provisions that would parallel these exceptions and exemptions to former Rule 10a-1 would undermine the Commission's stated goals for proposing short sale price test restrictions.

Thus, the provisions in proposed Rule 201(d) parallel exceptions to and exemptive relief granted under former Rule 10a-1, as applicable.[136] As set forth in more detail below, however, we seek comment regarding each of these provisions, including whether or not these provisions would be appropriate or necessary under the proposed modified uptick rule.

a. Broker-Dealer Provision

Proposed Rule 201(c) provides that a broker-dealer may mark a short sale order of a covered security "short exempt" if a broker-dealer that submits a short sale order to a trading center identifies that the short sale order is not on a down-bid price at the time of submission of the order to the trading center.[137] The proposed rule would require any broker-dealer relying on

---

[136] We note that NASD Rule 3350 contained exceptions to that rule similar to exceptions to former Rule 10a-1. In addition, we note NASD Rule 3350 included an exception related to bona fide market making activity. See infra note 190 and accompanying text (discussing our decision not to propose that a broker-dealer may mark an order "short exempt" in connection with bona fide market making activity). See also supra note 125.

[137] See proposed Rule 201(c)(1).

this provision to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent the incorrect identification of orders as being priced in accordance with the requirements of proposed Rule 201(c)(1).[138]

We are proposing this provision to provide broker-dealers with the option to manage their order flow, rather than having to always rely on their trading centers to manage their order flow on their behalf. In addition, we note that this provision would not undermine the Commission's goals for short sale regulation because any broker-dealer marking an order "short exempt" in accordance with this provision would have to address whether its short sale order was not on a down-bid price at the time of submission of the order to a trading center.

As discussed in more detail below, we are proposing amendments to Rule 200(g) of Regulation SHO to require, in part, that a sale order shall be marked "short exempt" only if the provisions of paragraph (c) of proposed Rule 201 of the proposed modified uptick rule are met.[139]

To mark an order "short exempt" pursuant to paragraph (c) of the proposed modified uptick rule, the broker-dealer must have mechanisms in place to enable the broker-dealer to identify the short sale order as priced in accordance with the provisions of proposed Rule 201(c)(1). In accordance with proposed Rule 201(c)(1), these mechanisms must include written policies and procedures reasonably designed to prevent the incorrect identification of orders as being permissibly priced in accordance with the provisions of proposed Rule 201(c)(1).[140] Thus, although a broker-dealer relying on this provision in marking an order "short exempt" would not

---

[138] See proposed Rule 201(c)(1).

[139] See proposed Rule 200(g)(2).

[140] See proposed Rule 201(c)(1).

need to identify the order as permissibly priced to the trading center, it would need to have written policies and procedures in place reasonably designed to enable it to identify that an order was permissibly priced at the time of submission of the order to a trading center.[141]

At a minimum, a broker-dealer's policies and procedures would need to be reasonably designed to enable a broker-dealer to monitor, on a real-time basis, the national best bid, and whether the current national best bid is an up- or down-bid from the last differently priced national best bid, so as to determine the price at which the broker-dealer may submit a short sale order to a trading center in compliance with the provisions of proposed Rule 201(c)(1).

A broker-dealer would also need to take such steps as would be necessary to enable it to enforce its policies and procedures effectively.[142] For example, broker-dealers could establish policies and procedures that could include regular exception reports to evaluate their trading practices. If a broker-dealer's policies and procedures include exception reports, any such reports would need to be examined to affirm that a broker-dealer's policies and procedures have been followed by its personnel and properly coded into its automated systems and, if not, promptly identify the reasons and take remedial action.

To ensure compliance with proposed Rule 201(c)(1), a broker-dealer could also have policies and procedures that would enable it to have a record identifying the current national best bid at the time of submission of a short sale order, as well as the last differently priced national best bid. Such "snapshots" of the market would also aid SROs in evaluating a broker-dealer's written policies and procedures and compliance with proposed Rule 201(c). In addition, such snapshots would aid broker-dealers in verifying that a short sale order was priced in accordance

---

[141] Such policies and procedures would be similar to those required for trading centers complying with paragraph (b) of the proposed modified uptick rule.

[142] See proposed Rule 201(c)(1).

with the provisions of proposed Rule 201(c)(1) if bid flickering during the period between identification of the current national best bid and the submission of the short sale order to a trading center creates confusion regarding whether or not the short sale order was submitted at a permissible price. Snapshots of the market at the time of submission of an order would also aid broker-dealers in dealing with time lags in receiving data regarding the national best bid from different data sources. A broker-dealer's policies and procedures would be required to address any such latencies in obtaining data regarding the national best bid. In addition, to the extent such latencies occur, a broker-dealer's policies and procedures would need to implement reasonable steps to monitor such latencies on a continuing basis and take appropriate steps to address a problem should one develop.

Surveillance would be a required part of a broker-dealer's satisfaction of its legal obligations. Proposed Rule 201(c)(1) provides that a broker-dealer must regularly surveil to ascertain the effectiveness of the policies and procedures required under proposed Rule 201(c)(2) and must take prompt action to remedy deficiencies in such policies and procedures.[143] This provision would reinforce the ongoing maintenance and enforcement requirements of proposed Rule 201(c)(2) by explicitly assigning an affirmative responsibility to broker-dealers to surveil to ascertain the effectiveness of their policies and procedures.[144] Thus, under proposed Rule 201(c)(1) and (c)(2), broker-dealers would not be able to merely establish policies and procedures that may be reasonable when created and assume that such policies and procedures would continue to satisfy the requirements of the proposed rule. Rather, broker-dealers would be required to regularly assess the continuing effectiveness of their procedures and take prompt

---

[143] See proposed Rule 201(c)(2).

[144] We note that Rule 611(a)(2) of Regulation NMS contains a similar surveillance provision. See 17 CFR 242.611(a)(2).

action when needed to remedy deficiencies. In particular, each broker-dealer would need to engage in regular and periodic surveillance to determine whether it is submitting short sale orders marked "short exempt" without complying with the requirements of proposed Rule 201(c)(1) and whether the broker-dealer has failed to implement and maintain policies and procedures that would have reasonably prevented such impermissible submissions.

b. Seller's Delay in Delivery

The proposed modified uptick rule provides that a broker-dealer may mark an order "short exempt" if the broker-dealer has a reasonable basis to believe that the seller owns the security being sold and that the seller intends to deliver the security as soon as all restrictions on delivery have been removed.[145] Specifically, proposed Rule 201(d)(1) provides that a broker-dealer may mark a short sale order of a covered security "short exempt" if the broker-dealer has a reasonable basis to believe the short sale order of a covered security is by a person that is deemed to own the covered security pursuant to Rule 200 of Regulation SHO,[146] provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.[147]

Rule 200(g)(1) of Regulation SHO provides that a sale can be marked "long" only if the seller is deemed to own the security being sold and either (i) the security is in the broker-dealer's physical possession or control, or (ii) it is reasonably expected that the security will be in the

---

[145] Subsection (e)(1) of former Rule 10a-1 contained an exception relating to a seller's delay in the delivery of securities. The provision in proposed Rule 201(d)(1) parallels the exception contained in former Rule 10a-1(e)(1).

[146] 17 CFR 242.200.

[147] See proposed Rule 201(d)(1). This proposed provision is also consistent with Rule 203(b)(2)(ii) of Regulation SHO that provides an exception from the "locate" requirement of Rule 203(b)(1) of Regulation SHO for "[a]ny sale of a security that a person is deemed to own pursuant to §242.200, provided that the broker or dealer has been reasonably informed that the person intends to deliver such security as soon as all restrictions on delivery have been removed. . . ." 17 CFR 242.203(b)(2)(ii).

broker-dealer's physical possession or control by settlement of the transaction.[148] Thus, even where a seller owns a security, if delivery will be delayed, such as in the sale of formerly restricted securities pursuant to Rule 144 of the Securities Act of 1933, or where a convertible security, option, or warrant has been tendered for conversion or exchange, but the underlying security is not reasonably expected to be received by settlement date, such sales must be marked "short." As a result, proposed Rule 201(d)(1) would be necessary to allow for sales of securities that although owned, are subject to the provisions of Regulation SHO governing short sales due solely to the seller being unable to deliver the security to its broker-dealer prior to settlement based on circumstances outside the seller's control.

c. Odd Lot Transactions

Proposed Rule 201(d)(2) would provide that a broker-dealer may mark a short sale order "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is by a market maker to off-set a customer odd-lot[149] order or liquidate an odd-lot position which changes such broker-dealer's position by no more than a unit of trading.[150]

Under former Rule 10a-1, an exception for certain odd-lot transactions was created in an effort to reduce the burden and inconvenience that short sale restrictions would place on odd-lot transactions. In 1938, the Commission found that odd-lot transactions played a very minor role

---

[148] See 17 CFR 242.200(g)(1).

[149] Proposed Rule 201(a)(5) provides that the term "odd lot" shall have the same meaning as in 17 CFR 242.600(b)(49). Rule 600(b)(49) defines an "odd lot" as "an order for the purchase or sale of an NMS stock in an amount less than a round lot." 17 CFR 242.600(b)(49).

[150] See proposed Rule 201(d)(2). SRO rules define a "unit of trading" or "normal unit of trading," and generally means 100 shares, i.e., a round lot. For example, FINRA Rule 6320A(7) defines a "normal unit of trading" to mean "100 shares of a security unless, with respect to a particular security, FINRA determines that a normal unit of trading shall constitute other than 100 shares." NYSE Rule 55 states that "[t]he unit of trading in stocks shall be 100 shares, except that in the case of certain stocks designated by the Exchange the unit of trading shall be such lesser number of shares as may be determined by the Exchange, with respect to each stock so designated. . . .."

in potential manipulation by short selling. Initially, sales of odd-lots were not subject to the restrictions of Rule 10a-1.[151] However, the Commission became concerned over the volume of odd-lot transactions, which possibly indicated that the exception was being used to circumvent the rule. As a result, the exception was changed to include the two odd lot exceptions described below.[152]

Former Rule 10a-1(e)(3) contained a limited exception for odd-lot dealers registered in the security and third market makers. The exception allowed short sales by odd-lot dealers registered in the security and by third market makers of covered securities to fill customer odd lot orders. Former Rule 10a-1(e)(4) provided an exception under the rule for any sale to liquidate an odd-lot position by a single round lot sell order that changed the broker-dealer's position by no more than a unit of trading.

We believe that a provision that would allow a broker-dealer to mark a short sale order "short exempt" if it has a reasonable basis to believe that the short sale order is by a market maker to off-set a customer odd-lot order or liquidate an odd-lot position which changes such broker-dealer's position by no more than a unit of trading would continue to be of utility under the proposed modified uptick rule because it would not be in conflict with the goals of the proposed rule.

Thus, the provision in proposed Rule 201(d)(2) parallels the exceptions in subsections (e)(3) and (e)(4) of former Rule 10a-1. In addition, however, we propose extending the provision to cover all market makers acting in the capacity of an odd-lot dealer. When former

---

[151] The Commission initially adopted three exceptions for odd-lot transactions. While the first one, excepting all odd-lot transactions, seemed to make other odd-lot exceptions unnecessary, the 1938 adopting release included all three exceptions without discussion. See supra note 24, Former Rule 10a-1 Adopting Release 3 FR 213.

[152] See Securities Exchange Act Release No. 11030 (Sept. 27, 1974), 39 FR 35570 (Oct. 2, 1974).

Rule 10a-1 was adopted, odd-lot dealers dealt exclusively with odd-lot transactions, and were so registered. Today, market makers registered in a security typically also act as odd-lot dealers of the security. Thus, we propose to broaden the provision in proposed Rule 201(d)(2) to all broker-dealers acting as "market makers" in odd lots.[153]

We believe that this provision would be appropriate. Because odd-lot transactions by market makers to facilitate customer orders are not of a size that could facilitate a downward movement in the market, we do not believe that proposed Rule 201(d)(2) would adversely affect the goals of short sale regulation that the proposed modified uptick rule seeks to advance. Thus, we believe that a broker-dealer should be able to mark such orders "short exempt" so that those acting in the capacity of a "market maker," with the commensurate negative and positive obligations, would be able to off-set a customer odd-lot order and liquidate an odd-lot position without a trading center's policies and procedures preventing the execution or display of such orders at a down-bid price.

d. Domestic Arbitrage

Proposed Rule 201(d)(3) would provide that a broker-dealer may mark "short exempt" short sale orders associated with certain bona fide domestic arbitrage transactions. Subsection (e)(7) of former Rule 10a-1 contained an exception related to domestic arbitrage.[154] That exception applied to bona fide arbitrage undertaken to profit from a current difference in price between a convertible security and the underlying common stock.[155] The term "bona fide arbitrage" describes an activity undertaken by market professionals in which essentially

---

[153] Section 3(a)(38) of the Exchange Act defines a "market maker," and includes specialists. See 15 U.S.C. 78c(a)(38).

[154] See Securities Exchange Act Release No. 1645 (Apr. 8, 1938).

[155] See Securities Exchange Act Release No. 42037 (Oct. 20, 1999), 64 FR 57996 (Oct. 28, 1999) ("1999 Concept Release").

contemporaneous purchases and sales are effected in order to lock in a gross profit or spread resulting from a current differential in pricing of two related securities.[156] For example, a person may sell short securities to profit from a current price differential based upon a convertible security that entitles him to acquire an equivalent number of securities of the securities sold short. We continue to believe that bona fide arbitrage activities are beneficial to the markets because they tend to reduce pricing disparities between related securities.[157] Thus, bona fide arbitrage transactions promote market efficiency.

Proposed Rule 201(d)(3) would parallel the exception in former Rule 10a-1(e)(7). Specifically, proposed Rule 201(d)(3) would provide that a broker-dealer may mark a short sale order of a covered security "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is "for a good faith account by a person who owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold, provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from the difference between the price of the security sold and the security owned and that such right of acquisition was originally attached

---

[156] 1999 Concept Release, 64 FR at n.54 and accompanying text (discussing the domestic arbitrage exception under former Rule 10a-1). See also Section 220.6(b) of Regulation T which states that the term "bona fide arbitrage" means: "(1) A purchase or sale of a security in one market together with an offsetting sale or purchase of the same security in a different market at as nearly the same time as practicable for the purpose of taking advantage of a difference in prices in the two markets; or (2) A purchase of a security which is, without restriction other than the payment of money, exchangeable or convertible within 90 calendar days of the purchase into a second security together with an offsetting sale of the second security at or about the same time, for the purpose of taking advantage of a concurrent disparity in the prices of the two securities." 12 CFR 220.6(b). See also Securities Exchange Act Release No. 15533 (Jan. 29, 1979), 44 FR 6084 (Jan. 31, 1979) (interpretation concerning the application of Section 11(a)(1) to bona fide arbitrage).

[157] See Securities Exchange Act Release No. 15533 (Jan. 29, 1979), 44 FR 6084 (Jan. 31, 1979) (interpretation concerning the application of Section 11(a)(1) to bona fide arbitrage).

to or represented by another security or was issued to all the holders of any such securities of the issuer."[158]

The domestic arbitrage exception in former Rule 10a-1 was intended to be consistent with the arbitrage provision of Regulation T.[159] Thus, consistent with that provision, former Rule 10a-1(e)(7) referred to a "special arbitrage account" and not a "good faith account."[160] The Federal Reserve Board amended Regulation T in 1998 to eliminate the "special arbitrage account" and allow the functions formerly effected in that account to be effected in a "good faith account." Thus, proposed Rule 201(d)(3) also refers to a "good faith account." We note, however, that we request specific comment regarding whether or not the use of a "good faith account" or any other separate account continues to be appropriate or necessary for purposes of this proposed Rule 201(d)(3).

Because allowing domestic arbitrage at a down-bid price would potentially promote market efficiency, the proposed modified uptick rule would include a limited provision to allow broker-dealers to mark short sale orders "short exempt" provided the broker-dealer has a reasonable basis to believe that the conditions in proposed Rule 201(d)(3) have been met. Thus, the proposed rule is designed to permit the execution or display on a down-bid price of such orders in connection with bona fide arbitrage transactions involving convertible, exchangeable, and other rights to acquire the securities sold short, where such rights of acquisition were

---

158 Proposed Rule 201(d)(3).

159 See 12 CFR 220.6.

160 Section 220.3(b) of Regulation T, titled "Separation of accounts," generally provides that requirements for an account may not be met by considering items in any other account. Further, Regulation T identifies three types of customer accounts - cash accounts, margin accounts and good faith accounts – in which customer transactions may be booked. A broker-dealer can extend credit to customers through a margin account or a good faith account. Generally, positions held in a good faith account are subject to good faith margin, whereas positions held in a margin account are subject to the margin requirements otherwise set forth in Regulation T and SRO margin requirements.

originally attached to, or represented by, another security, or were issued to all the holders of any such class of securities of the issuer.

e. International Arbitrage

Proposed Rule 201(d)(4) would provide that a broker-dealer may mark "short exempt" short sale orders associated with certain international arbitrage transactions. Former Rule 10a-1(e)(8) included an international arbitrage exception that was adopted in 1939.[161] In adopting the exception, the Commission stated that it was necessary to facilitate "transactions which are of a true arbitrage nature, namely, transactions in which a position is taken on one exchange which is to be immediately covered on a foreign market."[162] We believe likewise that such transactions would have utility under the proposed modified uptick rule. As discussed above in connection with domestic arbitrage, bona fide arbitrage transactions promote market efficiency because they equalize prices at an instant in time in different markets or between relatively equivalent securities. Thus, we do not believe that permitting broker-dealers to mark these orders "short exempt" would undermine the goals of short sale price test regulation.

Proposed Rule 201(d)(4) would parallel the exception contained in former Rule 10a-1(e)(8). Specifically, proposed Rule 201(d)(4) would provide that a broker-dealer may mark a short sale order of a covered security "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is "for a good faith account submitted to profit from a current price difference between a security on a foreign securities market and a security on a securities market subject to the jurisdiction of the United States, provided that the short seller has an offer

---

[161] See Securities Exchange Act Release No. 2039 (Mar. 10, 1939), 4 FR 1209 (Mar. 14, 1939).

[162] See id.

to buy on a foreign market that allows the seller to immediately cover the short sale at the time it was made."[163]

In proposed Rule 201(d)(4), we have simplified the language of former Rule 10a-1(e)(8) to make it more understandable.[164] In addition, we have changed the reference in former Rule 10a-1(e)(8) from a "special international arbitrage account" to a "good faith account." As discussed above in connection with the domestic arbitrage provision of proposed Rule 201(d)(3), this revision is necessary to make the proposed provision consistent with the arbitrage provision in Regulation T. We note, however, that we request specific comment regarding whether or not the use of a "good faith account" or any other separate account continues to be appropriate or necessary for purposes of proposed Rule 201(d)(4).

In addition, we have incorporated language from the exception in former Rule 10a-1(e)(12) that provided that, for purposes of the international arbitrage exception, a depository receipt for a security shall be deemed to be the same security represented by the receipt. This language was originally included in the Commission's 1939 release adopting the international arbitrage exception, but was incorporated separately in former Rule 10a-1(e)(12).[165] We likewise believe this language is appropriate and should be incorporated into proposed Rule 201(d)(4). We seek comment, however, regarding whether for purposes of the international

---

[163] Proposed Rule 201(d)(4).

[164] Former Rule 10a-1(e)(8) provided that the short sale price test restrictions of that rule shall not apply to: "Any sale of a security registered on, or admitted to unlisted trading privileges on, a national securities exchange effected for a special international arbitrage account for the bona fide purpose of profiting [sic] from a current difference between the price of such security on a securities market not within or subject to the jurisdiction of the United States and on a securities market subject to the jurisdiction of the United States; provided the seller at the time of such sale knows or, by virtue of information currently received, has reasonable grounds to believe that an offer enabling him to cover such sale is then available to him such foreign securities market and intends to accept such offer immediately."

[165] See supra note 161.

arbitrage provision, a depository receipt for a security should be deemed to be the same security represented by the receipt.

As with the exception in former Rule 10a-1(e)(8), proposed Rule 201(d)(4) would apply only to bona fide arbitrage transactions. Thus, this provision would only be applicable if at the time of the short sale there is a corresponding offer in a foreign securities market, so that the immediate covering purchase would have the effect of neutralizing the short sale. We believe proposed Rule 201(d)(4) would be necessary to facilitate arbitrage transactions in which a position is taken in a security in the U.S. market, and which is to be immediately covered in a foreign market.[166]

f. Over-Allotments and Lay-Off Sales

Proposed Rule 201(d)(5) would provide that a broker-dealer may mark "short exempt" short sale orders by underwriters or syndicate members participating in a distribution in connection with an over-allotment, and any short sale orders with respect to lay-off sales by such persons in connection with a distribution of securities through a rights or standby underwriting commitment.

Former Rule 10a-1(e)(10) contained an exception for over-allotment and lay-off sales.[167] Although the exception was not adopted until 1974, the Commission's approval of the concept of excepting over-allotments and lay-off sales from short sale rules is long-standing.[168] In addition, we note that recently we excepted these sales from the July Emergency Order, which among

---

[166] We note that the requirement that the transaction be "immediately" covered on a foreign market requires the foreign market to be open for trading at the time of the transaction. See 2003 Regulation SHO Proposing Release, 68 FR at 62986.

[167] See Securities Exchange Act Release No. 11030 (Sept. 7, 1974), 39 FR 35570 (Oct. 2, 1974).

[168] See, e.g., Securities Exchange Act Release No. 3454 (July 6, 1946), in which the Commission approved the NYSE's special offering plan, which permitted short sales in the form of over-allotments to facilitate market stabilization.

other things required that short sellers borrow or arrange to borrow securities prior to effecting a short sale, stating that it was not necessary for the Order to cover such sales because such activity is covered by Regulation M under the Exchange Act,[169] an anti-manipulation rule.[170] In accordance with the long-standing Commission position regarding these sales, we are including through proposed Rule 201(d)(5) a provision for short sale orders in connection with over-allotment and lay-off sales that would parallel the exception in former Rule 10a-1(e)(10).

g. Riskless Principal Transactions

Proposed Rule 201(d)(6) would provide that a broker-dealer may mark "short exempt" short sale orders where broker-dealers are facilitating customer buy orders or sell orders where the customer is net long, and the broker-dealer is net short but is effecting the sale as riskless principal.[171]

In 2005, the Commission granted exemptive relief under former Rule 10a-1 for any broker-dealer that facilitates a customer buy or long sell order on a riskless principal basis.[172] In granting the relief, the Commission noted representations made in the letter requesting relief that in the situation where the amount of securities that the broker-dealer purchases for the customer may not be sufficient to give the broker-dealer an overall net "long" position, former Rule 10a-1 would constrain the ability of the broker-dealer to fill the customer buy order. Further, the Commission noted representations in the letter requesting relief that because such short sales

---

169 17 CFR 242.100 et seq.

170 See Securities Exchange Act Release No. 58190 (July 18, 2008), 73 FR 42837 (July 23, 2008) (amending the July Emergency Order to include exceptions for certain short sales).

171 See proposed Rule 201(d)(6).

172 See letter from James A. Brigagliano to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated July 18, 2005 ("Riskless Principal Letter").

would be effected only in response to a customer buy order, this should vitiate any concerns about such sales having a depressing impact on the security's price.[173]

In addition, the Commission noted representations made in the letter requesting relief that where a broker-dealer is facilitating a customer long sale order in a riskless principal transaction, because the ultimate seller is long the shares being sold, these transactions present none of the potential abuses that former Rule 10a-1 was designed to address.[174] The Commission also noted representations that the application of former Rule 10a-1 to riskless principal transactions involving a customer long sale can inhibit the broker-dealer's ability to provide timely (or any) execution to such customer long sale. Specifically, if the broker-dealer has a net short position, the broker-dealer will be restricted from executing its own principal trade to complete the first leg of the riskless principal transaction.[175] Thus, compliance with former Rule 10a-1 would adversely affect a broker-dealer's ability to provide best execution to a customer order.[176]

Consistent with the relief granted in the Riskless Principal Letter, we believe that including a provision to permit a broker-dealer to mark "short exempt" short sale orders in connection with riskless principal transactions would be appropriate and would not undermine our goals in proposing short sale price test regulation. In particular, we note that such a provision would facilitate a broker-dealer's ability to provide best execution to customer orders.

---

[173] See id.

[174] See id.

[175] See id.

[176] See id.

Accordingly, taken together proposed Rules 201(a)(6) and (d)(6) would parallel the conditions for relief in the Riskless Principal Letter.[177]

Specifically, proposed Rule 201(a)(6) would define the term "riskless principal" to mean "a transaction in which a broker or dealer, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell."[178] Proposed Rule 201(d)(6) would provide that a broker-dealer may mark a short sale order "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is to effect the execution of a customer purchase or the execution of a customer "long" sale on a riskless principal basis and provided the sell order is given the same per-share price at which the broker-dealer bought shares to satisfy the facilitated order, exclusive of any explicitly disclosed markup or markdown, commission equivalent or other fee.[179] In addition, proposed Rule 201(d)(6) would require the broker-dealer, if it marks an order "short exempt" under this provision, to have policies and procedures in place to assure that, at a minimum: the customer order was received prior to the offsetting transaction; the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and that it has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily

---

[177] These conditions are also consistent with the definition of "riskless principal transactions" under Rule 10b-18 of the Exchange Act. See 17 CFR 240.10b-18(a)(12).

[178] In addition to being consistent with the conditions in the Riskless Principal Letter and Rule 10b-18 of the Exchange Act, this definition is consistent with the definition of "riskless principal" in FINRA Rule 6642.

[179] This requirement is also consistent with FINRA's trade reporting rules which require a riskless principal transaction in which both legs are executed at the same price to be reported once, in the same manner as an agency transaction, exclusive of any markup, markdown, commission equivalent, or other fee. See FINRA Rule 6380A(d)(3)(B).

reconstruct, in a time-sequenced manner, all orders on which the broker-dealer relies pursuant to this provision.[180]

We believe that proposed Rule 201(d)(6) would provide broker-dealers with additional flexibility to facilitate customer orders and provide best execution. In addition, we believe that the conditions set forth in proposed Rule 201(d)(6) would provide a mechanism for the surveillance of the provision's use by linking it to specific incoming orders and executions, and by requiring broker-dealers to establish procedures for handling such transactions. These requirements would help ensure that broker-dealers are complying with proposed Rule 201(d)(6).

h. Transactions on a Volume-Weighted Average Price Basis

Proposed Rule 201(d)(7) would provide that a broker-dealer may mark "short exempt" certain sale orders executed on a volume-weighted average price ("VWAP") basis. Under former Rule 10a-1, the Commission granted limited relief from that rule in connection with short sales executed on a VWAP basis.[181] The relief was limited to VWAP transactions that are arranged or "matched" before the market opens at 9:30 a.m., but are not assigned a price until after the close of trading when the VWAP value is calculated. The Commission granted the exemptions based, in part, on the fact that these VWAP short sale transactions appeared to pose little risk of facilitating the type of market effects that former Rule 10a-1 was designed to

---

[180] See proposed Rule 201(d)(6).

[181] See e.g. letter from Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, SEC, to Edith Hallahan, Counsel, Phlx, dated March 24, 1999; letter from Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, SEC, to Soo J. Yim, Wilmer, Cutler & Pickering, dated December 7, 2000; letter from James Brigagliano, Assistant Director, Division of Market Regulation, SEC, to Andre E. Owens, Schiff Hardin & Waite, dated March 30, 2001; letter from James Brigagliano, Assistant Director, Division of Market Regulation, SEC, to Sam Scott Miller, Esq., Orrick, Herrington & Sutcliffe LLP, dated May 12, 2001; letter from James Brigagliano, Assistant Director, Division of Market Regulation, SEC, to William W. Uchimoto, Esq., Vie Institutional Services, dated February 12, 2003.

prevent.[182] In particular, the Commission noted that the pre-opening VWAP short sale transactions do not participate in or affect the determination of the VWAP for a particular security.[183] Moreover, the Commission stated that all trades used to calculate the day's VWAP would continue to be subject to former Rule 10a-1.[184]

Consistent with the relief granted under former Rule 10a-1, we propose providing that a broker-dealer may mark "short exempt" certain short sale orders executed at the VWAP. Proposed Rule 201(d)(7) would differ from the relief granted under former Rule 10a-1, however, in that it would not be limited to VWAP transactions that are arranged or "matched" before the market opens at 9:30 a.m., or that are not assigned a price until after the close of trading when the VWAP value is calculated. We believe this restriction would not be necessary because VWAP short sale transactions appear to pose little risk of facilitating the type of market effects that a short sale price test restriction would be designed to prevent. In addition, in accordance with proposed Rule 201(d)(7), no short sale orders used to calculate the VWAP may be marked "short exempt."[185] This would help limit any potential for manipulation.

Thus, pursuant to proposed Rule 201(d)(7), a broker-dealer may mark a short sale order of a covered security "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is for the sale of a covered security at the VWAP that meets the following conditions:[186] (1) the VWAP for the covered security is calculated by: calculating the values for every regular way trade reported in the consolidated system for the security during the regular

---

[182] See id.

[183] See id.

[184] See id.

[185] See proposed Rule 201(b)(7).

[186] See proposed Rule 201(d)(7).

trading session, by multiplying each such price by the total number of shares traded at that price; compiling an aggregate sum of all values; and dividing the aggregate sum by the total number of reported shares for that day in the security; (2) the transactions are reported using a special VWAP trade modifier; (3) no short sales used to calculate the VWAP are marked "short exempt"; (4) the VWAP matched security qualifies as an "actively-traded security" (as defined under Rules 101(c)(1) and 102(d)(1) of Regulation M), or where the subject listed security is not an "actively-traded security," the proposed short sale transaction will be permitted only if it is conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than 5% of the value of the basket traded; (5) the transaction is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security; and (6) a broker or dealer will act as principal on the contra-side to fill customer short sale orders only if the broker-dealer's position in the subject security, as committed by the broker-dealer during the pre-opening period of a trading day and aggregated across all of its customers who propose to sell short the same security on a VWAP basis, does not exceed 10% of the covered security's relevant average daily trading volume, as defined in Regulation M.[187]

Except as discussed above, the conditions set forth in proposed Rule 201(d)(7) parallel the conditions contained in the exemptive relief from former Rule 10a-1 granted for VWAP short sale transactions. We believe that these conditions worked well in restricting the exemptive relief to situations that generally would not raise the harms that short sale price tests are designed to prevent. We believe they would be similarly effective in serving that function today and, therefore, should be incorporated into proposed Rule 201(d)(7).

---

[187] 17 CFR 242.100(b).

i. Decision Not to Propose that a Broker-Dealer May Mark an Order "Short Exempt" in Connection with Bona Fide Market Making Activity

Former Rule 10a-1(e)(5) provided a limited exception from the restrictions of that rule for "[a]ny sale . . . by a registered specialist or registered exchange market maker for its own account on any exchange with which it is registered for such security, or by a third market maker for its own account over-the-counter, (i) Effected at a price equal to or above the last sale, regular way, reported for such security pursuant to an effective transaction reporting plan . . . . Provided, however, That any exchange, by rule, may prohibit its registered specialist and registered exchange market makers from availing themselves of the exemption afforded by this paragraph (e)(5) if that exchange determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors." Unless prohibited by exchange rule, this exception was intended to permit registered specialists or market makers to protect customer orders against transactions in other markets in the consolidated system by allowing them to sell short at a price equal to the last trade price reported to the consolidated system, even if that sale was on a minus or zero-minus tick.[188] Although former Rule 10a-1 included this exception for market makers, exchanges adopted rules that prohibited their registered specialists and market makers from availing themselves of this exception.[189] In addition, former Rule 10a-1

---

[188] See Securities Exchange Act Release No. 11030 (Sept. 27, 1974), 39 FR 35570 (Oct. 2, 1974). Former Rule 10a-1(a)(1)(i) referenced the last sale price reported to an effective transaction reporting plan, but former Rule 10a-1(a)(2) also permitted an exchange to make an election to use the last sale price reported in that exchange market. Certain exchanges, such as the NYSE, implemented short sale price test rules consistent with former Rule 10a-1(a)(2). See, e.g., former NYSE Rule 440B.

[189] See id.

did not contain a general exception for short selling in connection with bona fide market making activities.[190]

Consistent with former Rule 10a-1, the proposed modified uptick rule would not permit a broker-dealer to mark a short sale order "short exempt" if the broker-dealer is engaging in bona fide market making activity. By requiring trading centers to have policies and procedures reasonably designed to prevent the execution or display of a short sale order at a down-bid price, the proposed modified uptick rule might help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool to drive down a market and from being used to accelerate a declining market by exhausting all remaining bids at one price level, and causing successively lower prices to be established by long sellers. By seeking to advance these goals, the proposed modified uptick rule might help restore investor confidence.

As set forth above, paragraphs (c) and (d) of proposed Rule 201 would permit a broker-dealer to mark a short sale order "short exempt" under certain circumstances.[191] Further, if an order is marked "short exempt," proposed Rule 201(b)(1)(ii) provides that a trading center's policies and procedures must be reasonably designed to permit the execution or display of such order without regard to whether the order is at a down-bid price.[192] We have proposed these provisions to facilitate the proposed modified uptick rule's workability, while at the same time, not undermine our goals in proposing short sale price test restrictions.

---

[190] We note, however, that NASD's bid test contained an exception for short sales executed by qualified market makers in connection with bona fide market making. When, however, the Commission approved NASD's bid test and the market maker exception to the bid test it noted concerns that the market maker exception could create opportunities for abusive short selling. See 1994 NASD Bid Test Approval, 59 FR 34885. See also supra notes 125 and 136 (discussing NASD Rule 3350).

[191] See proposed Rule 201(c) and 201(d).

[192] See proposed Rule 201(b)(1)(ii).

We believe that permitting broker-dealers to mark "short exempt" short sale orders in connection with bona fide market making activity may undermine the goals of our proposed short sale price test restrictions at this time. In particular, we believe that for the proposed modified uptick rule to have the effect of helping to prevent declines in securities prices and restore investor confidence, provisions relating to when a broker-dealer may mark an order "short exempt" should be limited in scope.

In addition, we note that the proposed provision that would allow broker-dealers to mark short sale orders as "short exempt" in connection with riskless principal transactions would provide broker-dealers with flexibility to facilitate customer orders. A trading center's policies and procedures would also be designed to permit the execution or display of short sale orders at the offer. Additionally, in an advancing market, in accordance with proposed Rule 201(b)(1), a trading center's policies and procedures would be reasonably designed to permit the execution or display of short sale orders at the current national best bid and, therefore, in an advancing market, market makers could provide liquidity to the markets and meet purchasing demand.[193] For all these reasons, we do not believe it would be appropriate to provide that a broker-dealer may mark an order "short exempt" where the short sale order is in connection with bona fide market making activity.

We seek comment, however, on the importance of a market maker provision in the context of a market maker's role in providing liquidity, including the extent to which market makers would need to sell short at or below the current national best bid in their market making capacity. We also seek comment on the extent to which the proposed riskless principal

---

[193] See also McCormick, D. Timothy and Zeigler, Bram, 1997, The Nasdaq short sale rule: Analysis of market quality effects and the market maker exemption. Working paper, NASD Economic Research, p. 28 (finding that market makers' short sales at the bid or below on down-bids amounted to only 1.17% of their trading).

provision, as well as any other proposed provisions, would address concerns regarding the need for a more general market maker provision. In addition, we seek comment regarding what conditions should apply if a general market maker provision were added to when a broker-dealer may mark an order "short exempt" under the proposed modified uptick rule. We also seek comment on whether a general market maker exception should be limited to registered market makers.

3. Proposed Modified Uptick Rule and After-Hours Trading

Regular trading hours in the U.S. are from 9:30 a.m. to 4:00 p.m. Eastern Time ("ET").[194] A high volume of trading occurs, however, outside of these regular trading hours. Accordingly, the Commission interpreted former Rule 10a-1 to apply to all trades in covered securities, whenever they occurred.[195] By its terms, former Rule 10a-1 used as a reference point the last sale price reported to the consolidated tape. Thus, after the consolidated tape ceased to operate, the rule prevented any person from effecting a short sale in a listed security at a price lower than the last sale reported to the consolidated tape.[196] Although former Rule 10a-1 applied in the after-hours market, we do not believe that the proposed modified uptick rule should apply to covered securities during periods that the national best bid is not collected, calculated and disseminated.

---

[194] See, e.g., Rule 600(64) of Regulation NMS, defining the term "regular trading hours."

[195] See 2003 Regulation SHO Proposing Release, 68 FR at 62997 (stating that the Commission interprets former Rule 10a-1 to apply to all trades in listed securities whenever they occur).

[196] We note, however, that NASD did not extend its short sale price test rule to the after-hours market. See NASD Head Trader Alert #2000-55.

As discussed above, market information for quotes in NMS stocks is disseminated pursuant to two different national market system plans, the CQ Plan, and Nasdaq UTP Plan.[197] Quotation information is made available pursuant to the CQ Plan between 9:00 a.m. and 6:30 p.m. ET, while one or more participants is open for trading. In addition, quotation information is made available pursuant to the CQ Plan during any other period in which any one or more participants wish to furnish quotation information to the Plan.[198] Quotation information is made available by the Nasdaq UTP Plan between 9:30 a.m. and 4:00 p.m. ET. The Nasdaq UTP Plan also collects, processes, and disseminates quotation information between 4:00 a.m. and 9:30 a.m.(ET), and after 4:00 p.m. when any participant is open for trading, until 8:00 p.m. ET.[199]

During the time periods in which these Plans do not operate, real-time quote information is not collected, calculated and disseminated. We do not believe that it would further the goals of short sale price test regulation to apply the proposed modified uptick rule when the national best bid is not being collected, calculated and disseminated on a real-time basis. Thus, the proposed modified uptick rule would only apply at times when quotation information and, therefore, the national best bid, is collected, processed, and disseminated pursuant to a national market system plan. Thus, proposed Rule 201(f) limits application of the proposed modified uptick rule to times when "a national best bid for [an] NMS stock is calculated and disseminated

---

197 See supra note 107. See also 17 CFR 242.603(b). Rule 603 of Regulation NMS requires that every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks.

198 See http://www.nyxdata.com/cta.

199 See http://www.utpdata.com/docs/UTP_PlanAmendment.pdf.

on a current and continuing basis by a plan processor pursuant to an effective national market system plan."[200] However, we seek comment on these issues.

B. Proposed Uptick Rule

1. Operation of the Proposed Uptick Rule

As an alternative to proposing a short sale price test based on the national best bid, we are proposing a modified version of former Rule 10a-1 to provide the public with an opportunity to comment on the utility of such a price test, especially in light of the recent changes in market conditions.[201] The proposed uptick rule would use the last sale price as the reference point for short sale orders.

Specifically, the proposed uptick rule would provide that "[n]o person shall, for his own account or for the account of any other person, effect a short sale of any covered security, if trades in such security are reported pursuant to an effective transaction reporting plan[202] and information as to such trades is made available in accordance with such plan on a real-time basis to vendors of market transaction information: (i) Below the price at which the last sale thereof, regular way, was reported pursuant to an effective transaction reporting plan; or (ii) At such price unless such price is above the next preceding different price at which a sale of such security, regular way, was reported pursuant to an effective transaction reporting plan."[203] Thus, under the proposed uptick rule, no short sale order may be effected below the last sale price. Short sale

---

200 See proposed Rule 201(e).

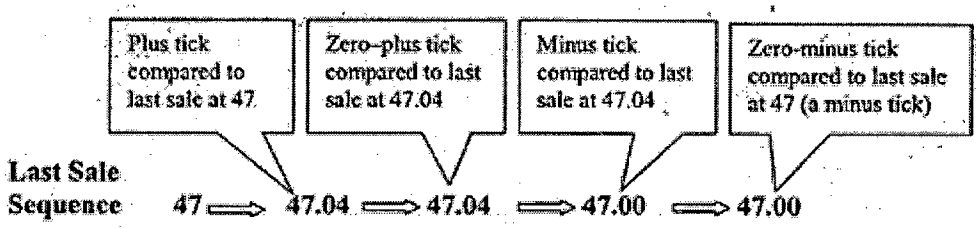
201 See supra Section II, discussing the history of short sale price test regulation in the United States and changes in market conditions and resulting erosion of investor confidence.

202 Proposed Rule 201(a)(3) provides that the term "transaction reporting plan" shall have the same meaning as in §242.600(22) of Regulation NMS.

203 Proposed Rule 201(b).

orders may be effected at the last sale price only if the last sale price is above the last different price. Otherwise, all short sale orders must be effected above the last sale price.

The following transactions illustrate the operation of the proposed uptick rule:



The first execution at 47.04 is a plus tick since it is higher than the previous last trade price of 47.00. The next transaction at 47.04 is a zero-plus tick since there is no change in trade price but the last change was a plus tick. Short sales could be executed at 47.04 or above in both of these cases. The final two transactions at 47.00 are minus and zero-minus transactions, respectively. Short sales in these two circumstances would have to be effected at a price above 47.00 in order to comply with proposed uptick rule.

Similar to the proposed modified uptick rule, the proposed uptick rule would apply to any "covered security," which is defined as an "NMS stock" under Rule 600(a)(47) of Regulation NMS. Rule 600(a)(47) of Regulation NMS defines an "NMS stock" as "any NMS security other than an option."[204] Rule 600(a)(46) of Regulation NMS defines an "NMS security" as "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options."[205] As a result, the proposed uptick rule would effectively cover all securities, other than options, listed on a national securities exchange

---

[204] 17 CFR 242.600(a)(47).

[205] 17 CFR 242.600(a)(46).

whether traded on an exchange or in the OTC market. It would not include non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market.

We are not proposing to apply the proposed uptick rule to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market because these securities were not subject to former Rule 10a-1. We recognize, however, that issuers of non-NMS stocks, which often are less actively traded securities than NMS stocks, may believe that they are particularly vulnerable to abusive short selling. Thus, we seek specific comment regarding whether the proposed uptick rule or some other form of price test should apply to these types of securities.

As discussed above in connection with the proposed modified uptick rule, the scope of securities covered by the proposed uptick rule would be similar to the scope of securities covered by former Rule 10a-1. Former Rule 10a-1(a) applied to securities registered on, or admitted to unlisted trading privileges on, a national securities exchange, if trades of the security were reported pursuant to an effective transaction reporting plan and information regarding such trades was made available in accordance with such plan on a real-time basis to vendors of market transaction information. All securities that would have been subject to former Rule 10a-1 would also be subject to the proposed uptick rule. In addition, certain securities, such as securities traded on Nasdaq, that were not subject to former Rule 10a-1, would be subject to the proposed uptick rule.[206]

---

[206] See supra note 106. We note that former Rule 10a-1(b) applied the restrictions of former Rule 10a-1 to short sales on a national securities exchange in securities for which trades were not reported pursuant to an "effective transaction reporting plan," as defined in Rule 600 of Regulation NMS, and for which information as to such trades was not made available in accordance with such plan on a real-time basis to vendors of market transaction information. Former Rule 10a-1(b) provided, in part: "No person shall, for his own account or for the account of any other person, effect on a national securities exchange a short sale of any security not covered by paragraph (a) of this rule, 1. below the price at which the last sale thereof, regular way, was effected on such exchange, or 2. at such price unless such price is above the next preceding different price at which a sale of such security, regular way, was effected on such exchange." A similar provision would not be applicable to the proposed uptick rule because the proposed uptick rule applies to all NMS stocks, which, by definition, include

As discussed in more detail above, the Commission eliminated former Rule 10a-1 and prohibited any SRO from having a price test in an effort in part to modernize and simplify short sale regulation in light of current trading systems and strategies used in the marketplace. In supporting its elimination of former Rule 10a-1, the Commission noted that the increased demand for exemptions from the Rule, and the disjointed application of short sale price tests had limited the reach of short sale price test restrictions, created confusion and compliance difficulties as well as an un-level playing field among market participants. In addition, the Commission noted that decimal increments had resulted in a rule that was no longer suited to the wide variety of trading strategies and systems used in the marketplace. The Commission also discussed that following its study of the effects of removing short sale price tests, OEA had found little empirical justification for maintaining former Rule 10a-1 and that, on balance, elimination of short sale price test restrictions for pilot stocks had not had a deleterious effect on market quality based on the examination of transactions during the period covered by the Pilot.[207]

Similar to the proposed modified uptick rule, the proposed uptick rule is designed to allow relatively unrestricted short selling in an advancing market. In addition, it is designed to restrict short selling at successively lower prices and, thereby, might help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers. In addition, the proposed uptick rule, similar to the proposed modified uptick rule, would not result

---

only those stocks for which trades are collected, processed, and made available pursuant to an effective transaction reporting plan. See 17 CFR 242.600(b)(47) and (b)(46).

[207] See 2006 Price Test Elimination Proposing Release, 71 FR at 75073.

in the type of disparate short sale regulation that existed under former Rule 10a-1 because proposed Rule 201(d) would include a requirement that no SRO shall have any rule that is not in conformity with, or conflicts with, the short sale price test requirements of the proposed uptick rule. Another potential advantage to the proposed uptick rule is that market participants would be familiar with the test because it would be based on former Rule 10a-1 which was in existence for almost 70 years, and was only recently eliminated.

At the same time, some of the reasons cited by the Commission for eliminating former Rule 10a-1, which are unique to the proposed uptick rule as a price test based on the last sale price, remain today. For example, as discussed in more detail below, as a short sale price test that is based on the last sale price, the proposed uptick rule includes a number of exceptions necessary to accommodate the various trading strategies and systems used in today's marketplace. For example, the proposed uptick rule includes an exception for automated trading systems that utilize passive pricing and trading systems that offer price improvement based on the national best bid. The proposed uptick rule also includes an exception to allow market makers or specialists publishing two-sided quotes to sell short at the offer to facilitate customer market or marketable limit buy orders regardless of the last sale price.

In addition, as noted above in connection with our discussion of the proposed modified uptick rule, we believe the spread of more fully automated markets may make a test based on the last sale price less effective at regulating short selling than a test based on the national best bid due to delays in reporting of last sale price information and because last sale price information is published in reporting sequence and not trade sequence. Such trade reporting may create up-ticks and down-ticks that may not accurately reflect price movements in the security for purposes of the proposed uptick rule. Because last trade prices can be reported out of sequence, for

various reasons, we believe bids may be a more accurate reflection of current prices for a security.

Although former Rule 10a-1 was only recently eliminated, we recognize that due to the extensive systems changes that have occurred in the last couple of years in response to Regulation NMS, programming systems for the proposed uptick rule may be burdensome. For example, we note that at the same time that we proposed and subsequently adopted amendments to eliminate former Rule 10a-1, market participants were programming their systems to comply with Regulation NMS. It is our understanding that some market participants may not have included in their programming coding that would have allowed for the application of short sale price test restrictions at that time.[208]

Although the proposed uptick rule does not take a policies and procedures approach, it is likely that market participants would use a policies and procedures approach as part of their efforts to comply with the proposed prohibition. As such, for either proposed approach (prohibition or policies and procedures), market participants could consider whether to build off the policies and procedures they already have in place under Regulation NMS. As discussed above in connection with the proposed modified uptick rule, trading centers have been required to develop policies and procedures in accordance with Regulation NMS that would be similar to

---

[208] In connection with the elimination of former Rule 10a-1 and all short sale price test restrictions, we noted that commenters to the proposed amendments to eliminate all short sale price test restrictions discussed potential reprogramming costs that market participants may incur if the proposed amendments were not effective prior to the date for which all automated trading centers were required to have fully operational Regulation NMS-compliant trading systems, i.e., July 9, 2007 (the "Regulation NMS Compliance Date"). For example, we noted that the Securities Industry Financial Markets Assn. ("SIFMA") urged the Commission to take steps to eliminate price test restrictions prior to the Regulation NMS Compliance Date to alleviate the need for firms to, in the course of instituting programming changes to meet the new requirements of Regulation NMS, program systems to comply with price test restrictions, only to be required to reverse such programming costs shortly thereafter. After considering these comments, we made the elimination of short sale price test restrictions immediately effective to provide market participants with sufficient notice and time prior to the Regulation NMS Compliance Date to reprogram their systems without regard to the then-current short sale price test restrictions. See 2007 Price Test Adopting Release, 72 FR at 36356, 36359.

the types of policies and procedures that would be required under the proposed modified uptick rule.

The proposed uptick rule may be more burdensome to apply than the proposed modified uptick rule, however, because the prohibition approach of the proposed uptick rule would not allow any short sale at an impermissible price, even if in error or inadvertent, unless an exception applies. If the Commission were to decide to provide an exception for inadvertent errors, that could reduce the differences between the two proposed approaches. In addition, the proposed uptick rule could follow a policies and procedures approach similar to the approach discussed in connection with the proposed modified uptick rule. Such a policies and procedures approach would require that market participants continuously surveil for compliance and take prompt remedial steps to limit the execution or display of short sales at impermissible prices.

As discussed above, we are proposing a short sale price test based on the last sale price, and, in particular, we are proposing a modernized version of former Rule 10a-1 to provide the public with the opportunity to comment on this test in light of changes that have occurred in market conditions and investor confidence since the elimination of former Rule 10a-1 in mid-2007. Because we want to provide the public with the opportunity to comment on a short sale price test similar to former Rule 10a-1, we are not proposing a policies and procedures type of approach in connection with the proposed uptick rule because this would be a substantial change from how former Rule 10a-1 was applied. We note, however, that some commenters may believe that a policies and procedures approach similar to the approach discussed under the proposed modified uptick rule that references the last sale price, rather than the national best bid, might be preferable to either the proposed modified uptick rule or the proposed uptick rule. Thus, we seek specific comment regarding such an approach.

If we were to adopt the proposed uptick rule, we are proposing that there would be a three month implementation period such that market participants would have to comply with the proposed uptick rule three months following the effective date of the proposed uptick rule. We believe that a proposed implementation period of three months after the effective date would provide market participants with sufficient time in which to modify their systems and procedures in order to comply with the requirements of the proposed uptick rule. Among other things, we believe this period would be a reasonable period because market participants would be familiar with the changes to their trading systems necessary to implement the proposed uptick rule as the proposed uptick rule would be similar to former Rule 10a-1. The addition of an implementation period should help alleviate potential disruptive effects of the proposal.

We realize, however, that a shorter or longer implementation period may be manageable or preferable. Thus, we seek specific comment as to what length of implementation period would be necessary or appropriate, and why, such that market participants would be able to meet the proposed short sale price test restrictions, if adopted.

2. Exceptions to Proposed Uptick Rule

Paragraph (c) of Rule 201 of the proposed uptick rule sets forth exceptions to the proposed rule to promote its workability. Rule 201(c) of the proposed uptick rule would include exceptions that parallel provision set forth in proposed Rule 201(d) of the proposed modified uptick rule pursuant to which a broker-dealer may mark an order "short exempt" for purposes of that proposed rule. Thus, proposed Rule 201(c) of the proposed uptick rule would also include exceptions for: (i) a seller's delay in delivery as set forth in Section III.A.2.b above; (ii) odd lots, as set forth in Section III.A.2.c. above; (iii) domestic arbitrage, as set forth in Section III.A.2.d. above; (iv) international arbitrage, as set forth in Section III.A.2.e. above; (v) over-allotments

and lay-off sales, as set forth in Section III.A.2.f. above; (vi) transactions on a VWAP basis, as set forth in Section III. A.2.h above; and (vii) riskless principal transactions as set forth in Section III.A.2.g. above. We believe that the rationale for these provisions under the proposed modified uptick rule would be equally applicable to the proposed uptick rule. Thus, we do not repeat the discussions of these provisions in connection with our discussion regarding the proposed uptick rule.

The following discussion sets forth the rationale regarding exceptions that would be unique to the proposed uptick rule. The exceptions contained in paragraph (c) of proposed Rule 201 are based upon exceptions contained in former Rule 10a-1 and exemptive relief granted pursuant to that rule. These exceptions and exemptions, as applicable, had been in place under former Rule 10a-1 for several years. We are not aware of any reason that the rationales underlying these exceptions and exemptions would not still hold true today. Moreover, due to the limited scope of the proposed exceptions and exemptions, we do not believe that they would undermine the Commission's stated goals for proposing short sale price test restrictions.

Thus, the exceptions in proposed Rule 201(c) parallel exceptions to and exemptive relief granted under former Rule 10a-1. As set forth in more detail below, however, we seek comment regarding each of these exceptions, including whether or not these exceptions would be appropriate or necessary under the proposed modified uptick rule particularly in light of trading systems and strategies used in today's marketplace.

a. Error in Marking a Short Sale

Proposed Rule 201(c)(2) would provide an exception from the proposed uptick rule where a broker-dealer effects a sale order marked "long" by another broker-dealer, but the order was mis-marked such that it should have been marked as a "short" sale order. Specifically,

proposed Rule 201(c)(2) provides that the proposed uptick rule shall not apply to "[a]ny sale by a broker or dealer of a covered security for an account in which it has no interest, pursuant to an order marked long."[209]

The broker-dealer that marks the order "long" must comply with the order marking requirements of Rule 200(g) of Regulation SHO.[210] Subsection (e)(2) of former Rule 10a-1 contained an exception for mis-marked short sales. The exception was included in former Rule 10a-1 when the rule was adopted in 1938 and was provided to "avoid implicating in any violation of the rules a member whose participation in the violation [was] unwitting and unintentional."[211] The exception in proposed Rule 201(c)(2) would avoid implicating the broker-dealer effecting the sale where the broker-dealer's participation in the violation was neither knowing nor reckless.[212]

b. Electronic Trading Systems

Proposed Rule 201(c)(8) would provide an exception from the proposed uptick rule for sales of securities in certain electronic trading systems that match and execute trades at various times and at independently-derived prices, such as at the mid-point of the NBBO. The Commission granted limited exemptive relief in connection with these systems under former Rule 10a-1 because matches

---

209 Proposed Rule 201(c)(2).

210 See 17 CFR 242.200(g).

211 See Former Rule 10a-1 Adopting Release, 3 FR 213.

212 Knowledge may be inferred where a broker-dealer has previously accepted orders marked "long" from the same counterparty that required borrowed shares for delivery or that resulted in a "fail to deliver." See 2004 Regulation SHO Adopting Release, 69 FR at 48019, n.111 (stating that "[i]t may be unreasonable for a broker-dealer to treat a sale as long where orders marked 'long' from the same customer repeatedly require borrowed shares for delivery or result in 'fails to deliver.' A broker-dealer also may not treat a sale as long if the broker-dealer knows or has reason to know that the customer borrowed shares being sold.").

could potentially occur at a price below the last sale price.[213] Similarly, under the proposed uptick rule, matches could potentially occur at a price below the last sale price and, therefore, violate the provisions of proposed Rule 201(b) prohibiting short sales on a minus or zero-minus tick, absent an exception.

This exception provides that the proposed uptick rule shall not apply to any sale of a covered security in an electronic trading system that matches buying and selling interest at various times throughout the day if: (1) matches occur at an externally derived price within the existing market and above the current national best bid; (2) sellers and purchasers are not assured of receiving a matching order; (3) sellers and purchasers do not know when a match will occur; (4) persons relying on the exception are not represented in the primary market offer or otherwise influence the primary market bid or offer at the time of the transaction; (5) transactions in the electronic trading system are not made for the purpose of creating actual, or apparent, active trading in, or depressing or otherwise manipulating the price of, any security; (6) the covered security qualifies as an "actively-traded security" (as defined in Rules 101(c)(1) and 102(d)(1) of Regulation M), or where the subject listed security is not an "actively-traded security," the proposed short sale transaction will be permitted only if it is conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than 5% of the value of the basket traded; and (7) during the period of time in which the electronic trading system may match buying and selling interest, there is no solicitation of customer orders, or any communication with customers that the match has not yet occurred.[214]

---

[213] See, e.g., supra note 26.

[214] See proposed Rule 201(c)(8).

The conditions set forth in the exception in proposed Rule 201(c)(8) parallel the conditions provided in the exemptive relief granted under former Rule 10a-1. Consistent with the relief granted under former Rule 10a-1 and the rationales provided in granting such relief, we believe it is appropriate to propose an exception to the proposed uptick rule for short sales submitted to these electronic trading systems because such rationales still hold true today. In particular, we note that due to the passive nature of pricing and the lack of price discovery, trades executed through these systems generally would not involve the types of abuses that the proposed uptick rule would be designed to prevent.

c. Trade-Throughs

Proposed Rules 201(c)(10) and (11) would provide exceptions from the requirements of the proposed uptick rule that would help address any potential conflict between the proposed uptick rule and the Quote Rule under the Exchange Act.[215] These exceptions parallel the exceptions contained in former Rule 10a-1(e)(5)(ii) and (e)(11), respectively.

Former Rule 10a-1(e)(5)(ii) was added to former Rule 10a-1 to address a potential conflict between the operation of former Rule 10a-1 and the "firm quote requirement" of the Quote Rule[216] in situations where execution of an offer quotation by a broker-dealer would be rendered unlawful because of a trade-through,[217] even though the offer had been at a price

---

[215] See 17 CFR 242.602.

[216] At the time the Commission adopted former Rule 10a-1(e)(5)(ii), the Quote Rule was included in Rule 11Ac1-1 under the Exchange Act. The Quote Rule is now in Rule 602 of Regulation NMS. See 17 CFR 242.602.

[217] A "trade-through" generally means the purchase or sale of a security at a price that is lower than a protected bid or higher than a protected offer. See 17 CFR 242.600(a)(77) (defining the term "trade-through" for purposes of Regulation NMS).

permitted under former Rule 10a-1 at the time that the broker-dealer had communicated it to its exchange or association for inclusion in the consolidated quotation system.[218]

To resolve this potential conflict, the Commission adopted the exception in subsection (e)(5)(ii) of former Rule 10a-1 to permit market makers to execute transactions at their offer following a trade-through, and (e)(11) to permit non-market makers to effect a short sale at a price equal to the price associated with their most recently communicated offer up to the size of that offer[219] provided the offer was at a price, when communicated, that was permissible under former Rule 10a-1. The (e)(11) exception was added in response to several comments that, in addition to orders for their own account, specialists and other floor members also often represent as part of their displayed quotation orders of other market participants (e.g., public agency orders or proprietary orders of non-market makers) that also might be ineligible for execution under former Rule 10a-1 following a trade-through in another market.[220]

---

[218] The following example from the release adopting the exception illustrates the potential conflict: A market maker who currently has a short position in XYZ stock communicates an offer which, if executed against at that time, would be in compliance with Rule 10a-1, e.g., at a price of 20 1/8 when the last trade price reported in the consolidated system is also 20 1/8. There is a "trade through" of the market maker's offer on another trading venue that causes an up-tick to be reported in the consolidated system at 20 ¼. Finally, a buy order is sent to the market maker after the trade through at 20 ¼ has been reported. In order to ensure compliance with 10a-1, the market maker must refuse to execute the order at his offer of 20 1/8 because doing so would result in a short sale being effected on an impermissible minus tick, however, in refusing to effect the trade, he would arguably violate the "firm quote requirement" of the Quote Rule. In addition, when a market maker "backs away" from an order, he may, in effect be revealing that he had a short position in the security, thus making it more difficult to liquidate that position at favorable prices. See Securities Exchange Act Release No. 17314 (Nov. 20, 1980), 45 FR 79018 (Nov. 28, 1980).

[219] The Commission explained in the release that the scope of the exception in former Rule 10a-1(e)(11) was limited to the size of the broker-dealer's displayed offer because the need for the exception only arises to the extent that the broker-dealer's obligations under the Quote Rule may conflict with former Rule 10a-1. Because the firm quote requirement of the Quote Rule only applies to a broker-dealer's displayed offer, it was deemed appropriate to limit the exception to the size of the displayed offer. See supra note 218 at n.20.

[220] This concern was illustrated in the release adopting the amendments with the following example: A specialist who is short XYZ stock quotes an offer for 1,000 shares at 20 1/8 at a time when the last sale reported in the consolidated system was such that the offer, if executed at that time, would be in compliance with Rule 10a-1. This offer for 1,000 shares consists of 300 shares offered by the specialist, a 400-share limit order in the specialist's book, and an offer from the crowd at the specialist's post for 300 shares, all at 20 1/8. A trade through of this offer occurs on another exchange and an up-tick is reported in the consolidated system at 20 ¼. A buy order for 1,000 shares at 20 1/8 is then sent to the exchange – after the trade through at 20 ¼ is reported.

We believe that the rationale for adopting the exceptions in former Rule 10a-1(e)(5)(ii) and (e)(11) and proposed in subsections (c)(10) and (c)(11) of the proposed uptick rule, namely resolving a conflict between a short sale price test based on the last sale price and the Quote Rule would exist under the proposed uptick rule. Thus, the proposed exceptions would parallel the exceptions in former Rule 10a-1(e)(5)(ii) and (e)(11).[221]

Specifically, proposed Rule 201(c)(10) would provide that the restrictions of the proposed uptick rule shall not apply to: "[a]ny sale of a covered security (except a sale to a stabilizing bid complying with §242.104 of Regulation M) by a registered specialist or registered exchange market maker for its own account on any exchange with which it is registered for such security, or by a third market maker for its own account over-the-counter, (i) Effected at a price equal to the most recent offer communicated for the security by such registered specialist, registered exchange market maker or third market maker to an exchange or a national securities association ("association") pursuant to §242.602 of this chapter, if such offer, when communicated, was equal to or above the last sale, regular way, reported for such security pursuant to an effective transaction reporting plan. Provided, however, (ii) That any self-regulatory organization, by rule, may prohibit its registered specialist and registered exchange market makers from availing themselves of the exemption afforded by this paragraph (c)(10) if that self-regulatory organization determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors."[222]

Without (e)(11), filling the complete order for 1,000 shares would not be permissible, since (e)(5)(ii), by its terms, applied only to a sale by a market maker for its own account. See supra note 218 at n.18.

[221] See proposed Rule 201(c)(10) and (c)(11).

[222] See Proposed Rule 201(c)(10).

We believe that the rationale for adopting former Rule 10a-1(e)(5)(ii) still holds true today and, therefore, we have incorporated the language of that exception into proposed Rule 201(c)(10). Consistent with former Rule 10a-1(e)(5)(ii), the proposed exception would include language that would permit SROs to prohibit registered specialists and registered exchange market makers from availing themselves of this exception. We note that under former Rule 10a-1, SROs such as the NYSE prohibited registered specialists and registered exchange market makers from availing themselves of this exception.[223] We believe it would be appropriate to continue to provide this option to SROs.

Proposed Rule 201(c)(11) would provide that the restrictions of the proposed uptick rule shall not apply to: "[a]ny sale of a covered security (except a sale to a stabilizing bid complying with §242.104 of this chapter) by any broker or dealer, for his own account or for the account of any other person, effected at a price equal to the most recent offer communicated by such broker or dealer to an exchange or association pursuant to §242.602 of this chapter in an amount less than or equal to the quotation size associated with such offer, if such offer, when communicated, was: (i) Above the price at which the last sale, regular way, for such security was reported pursuant to an effective transaction reporting plan; or (ii) At such last sale price, if such last sale price is above the next preceding different price at which a sale of such security, regular way, was reported pursuant to an effective transaction reporting plan." We believe that the rationale for adopting former Rule 10a-1(e)(11) still holds true today and, therefore, we have incorporated the language of that exception into proposed Rule 201(c)(10).

d. Facilitation of Customer Buy Orders

Proposed Rule 201(c)(12) would provide for an exception from the proposed uptick rule for short sales by registered market makers or specialists publishing two-sided quotes to sell

[223] See former NYSE Rule 440B.

short at the offer to facilitate customer market and marketable buy limit orders regardless of the last sale price.[224] We believe that this exception would be necessary because some third market makers in exchange-listed securities offer trade execution for eligible customer orders at a price equal to or better than the national best offer. Under the proposed uptick rule, if the national best offer were below the previous last reported sale in a security and the third market maker or specialist has a short position, sales at the national best offer would violate the proposed uptick rule. The proposed exception would provide limited relief in a decimals environment to registered market makers and specialists so that they could provide liquidity in response to customer buy limit orders. Because this relief is limited to short selling only at the national best offer and only in response to customer buy limit orders we believe that it would not undermine the goals of short sale price test regulation, including helping to prevent short selling from being used as a tool to drive the market down.

3. Proposed Uptick Rule and After-Hours Trading

As discussed above in connection with the proposed modified uptick rule, the Commission interpreted former Rule 10a-1 to apply to all trades in covered securities, whenever they occurred. By its terms, former Rule 10a-1 used as a reference point the last sale price reported to the consolidated tape. Thus, after the consolidated tape ceased to operate, the rule prevented any person from effecting a short sale in a listed security at a price lower than the last sale reported to the consolidated tape.[225] Although former Rule 10a-1 applied in the after-hours market, similar to the proposed modified uptick rule, we do not believe that the proposed uptick

---

[224] See proposed Rule 201(c)(12). This exception parallels exemptive relief provided by the Commission under former Rule 10a-1.

[225] We note, however, that NASD did not extend its short sale price test rule to the after-hours market. See NASD Head Trader Alert #2000-55.

rule should apply to covered securities while last sale price information is not collected, processed, and disseminated.[226]

As discussed above, last sale price information for NMS stocks is disseminated pursuant to a national market system plan, the CTA Plan.[227] The CTA Plan disseminates last sale price information during the hours in which any of its participants that regularly reports to the Plan is open for trading. In addition, the Plan disseminates last sale price information at other times during which any of its exchange participants is open for trading.[228] During times in which the CTA Plan does not collect, process, and disseminate last sale price information, real-time last sale price information is not available. For the same reasons discussed in connection with the proposed modified uptick rule, we do not believe that it would further the goals of short sale price test regulation to apply the proposed uptick rule when last sale price information is not being collected and disseminated on a real-time basis. Thus, proposed Rule 201(e) limits application of the proposed uptick rule to times when "a last sale price for [an] NMS stock is collected and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan."[229]

C. The Proposed Circuit Breaker Rules

We also are proposing for comment, as an alternative to the proposed price test restrictions, circuit breaker rules. The proposed circuit breaker halt rule would, when triggered by a specified

---

[226] See supra Section III.A.2. (discussing our belief that the proposed modified uptick rule should not apply when the national best bid is not collected, processed, and disseminated on a real-time basis).

[227] See 17 CFR 242.603(b). Rule 603 of Regulation NMS requires that every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks.

[228] See http://www.nyxdata.com/cta.

[229] See proposed Rule 201(e).

decline in the price of a particular security, temporarily prohibit any person from selling short a particular NMS stock during severe market declines in that security, subject to certain exceptions. The proposed circuit breaker modified uptick rule would, when triggered by a specified decline in the price of a particular security, temporarily impose the proposed modified uptick rule for that security. The proposed circuit breaker uptick rule would, when triggered by a specified decline in the price of a particular security, temporarily impose the proposed uptick rule for that security.

As discussed above, questions persist about the reasons for the rapid speed of steep declines in the prices of securities. A short selling circuit breaker rule would be designed to target only those securities that experience rapid severe intraday declines and, therefore, might help to prevent short selling from being used to drive the price of a security down or to accelerate the decline in the price of those securities.

In line with the Commission's position that market impediments should be minimized, a short selling circuit breaker when applied might benefit the market as a narrowly tailored response to extraordinary circumstances.[230] Unlike the market wide circuit breakers that halt all trading, a short selling circuit breaker would apply only to those individual securities that are facing a severe intraday decline in share price. A short selling circuit breaker could be structured in a number of ways. We set forth below three forms of circuit breakers.

1. Background on Circuit Breakers

To protect investors and the markets, the Commission has approved proposals to restrict or halt trading if key market indexes fall by specified amounts. For example, the Commission approved such proposals from various exchanges ("SRO Circuit Breakers") in response to the October 1987 market break. These measures were designed to permit brief, coordinated cross-

---

[230] See Securities Exchange Act Release No. 39846 (Apr. 9, 1998), 63 FR 18477 (Apr. 15, 1998) (order approving proposals by Amex, BSE, CHX, NASD, NYSE, and Phlx) ("1998 Release").

market halts to provide opportunities during a severe market decline to re-establish equilibrium between buying and selling interests in an orderly fashion, and help to ensure that market participants have a reasonable opportunity to become aware of, and respond to, significant price movements.[231]

Currently, all stock exchanges and FINRA have rules or policies to implement coordinated circuit breaker halts.[232] The options markets also have rules applying circuit breakers.[233] The futures exchanges that trade index futures contracts have adopted circuit breaker halt procedures in conjunction with their price limit rules for index products.[234] Finally, security futures products are required to have cross-market circuit breaker regulatory halt procedures in place.[235] In addition, the Commission has authority under Section 12(k)(1) of the Exchange Act to suspend trading in the securities of individual issuers.[236] Moreover, SROs have rules or policies in place to coordinate individual security trading halts corresponding to significant news events.[237] Information on the

---

[231] See Securities Exchange Act Release No. 26198 (Oct. 19, 1988), 53 FR 41637 (Oct. 24, 1988) (approving rules of the Amex, CBOE, NASD, NYSE).

[232] See 1998 Release supra note 230. See also NYSE Rule 80B. The circuit breaker procedures call for cross-market trading halts when the Dow Jones Industrial Average (DJIA) declines by 10 percent, 20 percent, and 30 percent from the previous day's closing value. See e.g., BATS Exchange Rule 11.18.

[233] See Amex Rule 950 (applying Amex Rule 117, Trading Halts Due to Extraordinary Market Volatility, to options transactions); CBOE Rule 6.3B; ISE Rule 703; NYSE Arca Options Rule 7.5; and Phlx Rule 133.

[234] See, e.g., CME Rule 35102.I. The CME will implement a trading halt on S&P 500 Index futures contracts if a NYSE Rule 80B trading halt is imposed in the primary securities market. Trading of S&P 500 Index futures contracts will resume upon lifting of the NYSE Rule 80B trading halt.

[235] See Securities Exchange Act Release No. 45956 (May 17, 2002), 67 FR 36740 (May 24, 2002).

[236] See 15 U.S.C. 781(k)(1).

[237] See, e.g., FINRA Rule 6120.

securities subject to SRO regulatory trading halts is disseminated to market participants through the Common Messaging System ("CMS") and other electronic media.[238]

The current SRO Circuit Breakers impose percentage based triggers that result in trading halts of varying lengths, dependent on the DJIA's rate of decline.[239] Unlike the original SRO Circuit Breakers, which used set point values to determine when a trading halt should be imposed, the current SRO Circuit Breakers are governed by percentage based declines tied to specific point values that are calculated at the beginning of each calendar quarter using the average daily DJIA closing for the previous month.[240]

Under the current SRO Circuit Breakers, a 10% decline prior to 2 p.m. will result in a one hour trading halt. Should the 10% decline occur after 2 p.m. but prior to 2:30 p.m., exchanges must halt trading for 30 minutes. If the 10% threshold is crossed after 2:30 p.m., trading will not be halted. A 20% decline in the DJIA will result in a two-hour trading halt, if the decline occurs prior to 1 p.m. and a one-hour trading halt if the threshold is reached between 1 p.m., and 2 p.m. If the DJIA declines by 20% after 2 p.m., under the current circuit breaker rules, trading will halt for the remainder of the day. Should the market decline by 30% at any point, trading will halt for the

---

238 For example, in addition to disseminating news of trading halts through the CMS, Nasdaq publishes a daily list of securities subject to trading halts indicating the name of the issuer, the time the halt was initiated, and where applicable, the times at which quoting and trading may resume.

239 See 1998 Release 63 FR 18477 supra note 230 and accompanying text (The SRO Circuit Breakers, as adopted in 1988, called for a one-hour trading halt if the DJIA declined by 250 points from the previous day's close, and a two-hour halt in the event of a 400 point decline.). See Securities Exchange Act Release No. 26198 (Oct. 19, 1988), 53 FR 41637 (Oct.24, 1988) (approving rules of the Amex, CBOE, NASD, NYSE). The original circuit breaker parameters were amended in 1996 to limit the duration of trading halts, and again in 1997 after it was determined that the 250 and 400 point thresholds were too low given the substantial increase in the value of the DJIA in the years following implementation of 1988 policies. The 1997 amendments increased the SRO Circuit Breakers' "trigger values" to 350 and 500 points respectively for the one-hour and two-hour trading halt scenarios. See Securities Exchange Act Release No. 38221 (Jan. 31, 1997) 62 FR 5871 (Feb. 7, 1997). The Commission approved the various Exchanges' circuit breaker revisions on a one year pilot basis. The SRO Circuit Breakers were revised again in 1998 to put into place circuit breakers triggered by certain percentage declines. See Securities Exchange Act Release No. 39846 (Apr. 9, 1998) 63 FR 18477 (Apr. 15, 1998).

240 See id.

remainder of the day.[241] The coordinated cross-market trading halts provided by the SRO Circuit Breakers operate only during significant market declines and are intended to substitute orderly, pre-planned halts for the ad hoc and destabilizing halts which can occur when market liquidity is exhausted.[242]

The SRO Circuit Breakers focus on market indexes rather than on the market for an individual security. The SRO Circuit Breakers apply a market-wide trading halt, rather than a halt in an individual security, or a short selling halt. The proposed circuit breaker rules, in contrast, would temporarily restrict only short selling (and only) in an individual NMS security that suffers a severe price decline.

We believe that either a short sale price test restriction or a circuit breaker rule may be appropriate to address the recent change in market conditions and erosion of investor confidence. As discussed above, investors have become increasingly concerned about sudden and excessive declines in prices that appear to be unrelated to issuer fundamentals.[243] Circuit breakers that are triggered by severe declines in the price of individual securities may be a targeted response to address these concerns.

2. Proposed Circuit Breaker Halt Rule

We are proposing a short selling circuit breaker that, when triggered by a severe price decline in a particular security, would prohibit any person from selling short that security, wherever it is traded, while the circuit breaker is in effect, subject to certain exceptions.

---

241 See 1998 Release, 63 FR 18477 supra note 230.

242 See Circuit Breaker Report by the Staff of the President's Working Group on Financial Markets (Aug. 18, 1998) (Circuit Breaker Report), n. 33.

243 See supra Section II.C. (discussing investor confidence)

While the Commission does not favor market closings as a general matter, the proposed circuit breaker halt rule would not be as broad as a market-wide trading halt. Furthermore, the Commission has recognized that circumstances may infrequently call for a trading pause that allows participants to reassess conditions.[244] We believe that a pause in short selling resulting from a significant decline in the price of an individual equity security might provide a similar measure of stability.

We seek comment on whether it would be appropriate for the Commission to impose a circuit breaker that when triggered would halt all short selling in an individual equity security, wherever it is traded, for the remainder of the trading day if the price of the security has declined by at least 10% from the prior day's closing price for that security, as measured by the closing price of the security on the consolidated system. Like the proposed modified uptick rule and the proposed uptick rule, we propose that it would apply to all NMS stocks as that term is defined under Rule 600(a)(47) of Regulation NMS.[245] We seek comment regarding the scope of a potential circuit breaker's application and to which securities it might most appropriately apply.

We preliminarily believe that a 10% decline in a security's price as measured from the prior day's closing price, as reported in the consolidated system, would be an appropriate level at which to trigger a circuit breaker that results in a short selling halt. As discussed above, such a percentage decline would be consistent with the current SRO Circuit Breakers.[246] The 10% threshold for a circuit breaker that, when triggered, results in a short selling halt in an individual security would reflect the format of current SRO Circuit Breakers and use a trigger based on a fluctuating value, the

---

[244] See 1998 Release, 63 FR 18477 supra note 230.

[245] See proposed Rule 201(a)(1).

[246] See 1998 Release, 63 FR 18477 supra note 230 and accompanying text.

share price, to strike a balance between the need to halt short selling in moments of severe decline in a security's price and the market participant's expectation that its short selling strategy will be available in an efficient and open marketplace. We note that a group of national securities exchanges recommended a 10% decline threshold in connection with a short selling circuit breaker combined with a short sale price test restriction.[247] Another commenter supported a 10% minimum threshold, but also recommended a "rolling" circuit breaker that when triggered would impose short selling halts of varying lengths, depending on the level of decline in the price of an individual equity security.[248] We recognize that a lesser or greater percentage decline or some other measure of decline may be appropriate, and seek comment on that question.

As described in more detail below, the price decline would be based on the security's price during the trading day as reported in the consolidated system as compared to the prior day's closing price as reported in the consolidated system. The prior day's closing price would be the last price reported during regular trading hours[249] the prior day.

The proposed circuit breaker halt rule would, once triggered by a 10% decline in the price of a security from the prior day's closing price on any trading day, impose a short selling halt in the individual security at times when the last sale price is calculated and disseminated in the consolidated system. We based the time period on the calculation and dissemination of last sale price because the circuit breaker is triggered by a percentage decline in the security's intra-day last sale price relative to the prior day's last sale price at the end of regular trading hours on the prior day.

---

[247] See National Exchanges letter, supra note 63.

[248] See letter from Credit Suisse, supra note 122.

[249] "Regular trading hours" has the same meaning as in Rule 600(b)(64) of Regulation NMS. Rule 600(b)(64) provides that "Regular trading hours means the time between 9:30 a.m. and 4:00 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to §242.605(a)(2)."

In addition, to avoid market disruption that may occur if a circuit breaker is triggered late in the trading day, the proposed circuit breaker rules would not be triggered if the specified market decline threshold is reached in an NMS security within thirty minutes of the end of regular trading hours. Former NYSE Rules 80A(a) and 80A(b) provided that a circuit breaker would not trigger program trading restrictions after 3:25 p.m., or approximately thirty-five minutes before the close. We seek comment as to whether thirty minutes is an appropriate balance to ensure that the goals of the proposed rule would be met while also reducing the potential for market disruption toward the close of regular trading hours.

We believe that a short selling halt that persists at times when the last sale price is calculated and disseminated following a 10% decline in a security's price might be appropriate. We are concerned that a short selling halt for a lesser time might not provide sufficient time to re-establish equilibrium between buying and selling interest in the individual security in an orderly fashion. We also believe that a short selling halt for this length of time might be necessary to help ensure that market participants have a reasonable opportunity to become aware of, and respond to, a significant decline in a security's price. We seek comment below, however, regarding whether a longer or shorter short selling halt would be appropriate, or whether it would be appropriate to impose a short selling halt on a rolling basis as suggested by an industry commenter.[250]

We are also seeking comment on the potential costs and benefits of a short selling circuit breaker that when triggered results in a temporary halt on short selling. The Commission has previously noted that circuit breakers may benefit the market by allowing participants an opportunity to reevaluate circumstances and respond to volatility.[251] Unlike the proposed modified uptick rule and the proposed uptick rule, this proposed circuit breaker halt rule would halt all short

---

[250] See letter from Credit Suisse supra note 122.

[251] See 1998 Release, 63 FR 18477.

selling for an individual security for the specified period of time. In discussing a short selling circuit breaker, one commenter noted that such a measure could address the issue of "bear raids" while limiting the market impact that may arise from other forms of short sale price test restrictions.[252] The Commission has long held the view that coordinated circuit breakers might restore investor confidence during times of substantial uncertainty.[253] We believe the proposed circuit breaker halt rule might produce similar benefits.

We recognize, however, that there are potential costs associated with implementation of a short selling circuit breaker that when triggered results in a temporary short selling halt. As discussed below, we anticipate that market participants charged with implementation of such a short selling circuit breaker would have to invest human and financial resources to update systems as necessary for compliance. Furthermore, as discussed above, short selling is an important tool in price discovery and the provision of liquidity to the market, and we recognize that imposition of a short selling circuit breaker that when triggered imposes short selling halts could restrict otherwise legitimate short selling activity during periods of extreme volatility.

We also understand there are concerns about a potential "magnet effect" that could arise as an unintended consequence of a circuit breaker that halts short selling and results in short sellers driving down the price of an equity security in a rush to execute short sales before the circuit breaker is triggered. One commenter noted that a short sale circuit breaker could exacerbate downward pressure on stocks as their value reached the threshold level.[254] Another commenter, however, in discussing the issue of a "magnet effect" cited empirical studies that question whether a

---

[252] See Brown Letter supra note 55.

[253] See 1998 Release, 63 FR 18477 supra note 230.

[254] See letter to Mary Schapiro, Chairman, from Direct Edge, dated March 30, 2009.

circuit breaker would result in artificial pressure on the price of individual securities.[255] We are also concerned about another type of "magnet effect" in which short selling demand is built up until the circuit breaker is lifted.

Similar to the short sale price test restrictions, the proposed circuit breaker halt rule would apply to NMS securities other than options. However, we seek comment below on whether such a rule should also apply to non-NMS securities.

The proposed circuit breaker halt rule would include exceptions substantially identical to exceptions that were included in the Short Sale Ban Emergency Order,[256] as amended by the Commission on September 21, 2008 ("September 21, 2008 Amended Order") (collectively, the "Short Sale Ban").[257] We believe the proposed circuit breaker halt rule should include exceptions that mirror certain of the exceptions in the Short Sale Ban because the proposed rule shares the same goal of prohibiting short selling that might exacerbate a price decline during a period of sudden and excessive price declines, while being designed to maintain functions that, for example, would be necessary to help provide adequate liquidity. Short sales effected under these exceptions would be marked "short exempt."

The proposed circuit breaker halt rule could operate in place of, or in addition to, a short sale price test restriction. For instance, in addition to the imposition of a permanent, market-wide price test restriction, a circuit breaker halt rule could also prohibit any person from selling short any security that suffers a severe price decline.

a. Market Makers and Options Market Makers Engaged in Bona Fide Market Making Activities

---

[255] See letter from Credit Suisse supra note 122.

[256] See Short Sale Ban Emergency Order, 73 FR 55169-02 (Sept. 24, 2008).

[257] See September 21, 2008 Amendment, 73 FR 55556-01 (Sept. 25, 2008).

The Short Sale Ban excepted registered market makers, block positioners, or other market makers obligated to quote in the over-the-counter market, if they were selling short a publicly traded security covered by the Short Sale Ban as part of bona fide market making in such security.[258] The purpose of the exception was to permit market makers to continue to provide liquidity to the markets, facilitate orders including customer buy orders, and otherwise comply with their obligations as market makers.

The term "market maker" includes any specialist permitted to act as a dealer, any dealer acting in the capacity of a block positioner, and any dealer who, with respect to a security, holds itself out (by entering quotations in an inter-dealer quotation system or otherwise) as being willing to buy and sell such security for its own account on a regular or continuous basis.[259] As the Commission has stated previously, a market maker engaged in bona-fide market making is a "broker-dealer that deals on a regular basis with other broker-dealers, actively buying and selling the subject security as well as regularly and continuously placing quotations in a quotation medium on both the bid and ask side of the market."[260] We recently provided guidance on bona fide market making for purposes of Regulation SHO Rule 203(b), and believe that such guidance would also be appropriate with regard to a market maker exception for the proposed circuit breaker halt rule.[261] We believe it is appropriate to include a market maker exception for this proposed alternative because a halt in short selling in a security would, during the period of the halt, have far greater effects on liquidity and legitimate price discovery activity than the

---

[258] See id.

[259] See 2004 Regulation SHO Adopting Release, 69 FR at 48015, n. 66 (citing to Section 3(a)(38) of the Exchange Act).

[260] See Exchange Act Release No. 32632 (July 14, 1993), 58 FR 39072, 39074 (July 21, 1993).

[261] See Exchange Act Release No. 58775 (Oct. 14, 2008); 73 FR 61690 (Oct. 17, 2008).

proposed modified uptick rule or proposed uptick rule, which, as discussed above, are each based on a trading unit increment.

b. Bona Fide Market Making in Derivatives

The Short Sale Ban also included an exception for any person that is a market maker that effects a short sale as part of bona fide market making and hedging activity related directly to bona fide market making in derivatives on the publicly traded securities of any security covered by the Short Sale Ban.[262] Under the Short Sale Ban, this exception applied to all market makers, including over-the-counter market makers, and to bona fide market making and hedging activity related directly to bona fide market making in exchange traded funds and exchange traded notes of which securities included in the Short Sale Ban were a component. We stated that the purpose of the exception was to permit market makers to continue to provide liquidity to the markets.[263] Similarly, we believe such an exception would be appropriate for the proposed circuit breaker halt rule.

During the period that the Short Sale Ban was effective, to help ensure that the exception would not result in increased short exposure in securities covered by the Short Sale Ban, we limited the exception so that if a customer or counterparty position in a derivative security based on the security was established after the effectiveness of the September 21 Amended Order, a market maker could not effect the short sale if the market maker knew that the customer's or counterparty's transaction would result in the customer or counterparty establishing or increasing an economic net short position (i.e., through actual positions, derivatives, or otherwise) in the issued share capital of a firm covered by the Short Sale Ban. This provision was included to address potential circumvention of the Short Sale Ban during the several weeks that it was in

---

[262] See Short Sale Ban Emergency Order, 73 FR 55169-02.

[263] See id.

effect.[264] However, we do not believe such a provision is necessary for the proposed circuit breaker halt rule because the rule as proposed only contemplates a one-day (or less than one day depending on when during the day the circuit breaker is triggered) prohibition on short selling of any NMS security that becomes subject to the circuit breaker.

c. Options and Futures Contract Expiration.

The Short Sale Ban included an exception to allow short sales that occurred as a result of automatic exercise or assignment of an equity option held prior to effectiveness of the Short Sale Ban due to expiration of the option.[265] It also allowed short sales that occurred as a result of the expiration of futures contracts held prior to effectiveness of the Short Sale Ban.[266]

We propose including a similar exception for the proposed circuit breaker halt rule for short sales that occur as a result of automatic exercise or assignment of an equity option held before a circuit breaker on a particular security is triggered and a short selling halt is imposed in that security due to expiration of the option. We are also proposing an exception to the proposed circuit breaker halt rule to allow short sales that occur as a result of the expiration of futures contracts held before a circuit breaker is triggered in a particular security.

Persons that purchased or sold options prior to the effectiveness of a circuit breaker halt entered into such transactions with the expectation that they would be able to fulfill their contractual obligations and receive the benefits of their bargain in return. Generally, options contracts are purchased or sold prior to the day in which a circuit breaker might be triggered. Therefore, providing an exception to the proposed circuit breaker halt rule to allow such persons

---

[264] See September 21, 2008 Amendment, 73 FR 55556-01.

[265] See Short Sale Ban Emergency Order, 73 FR 55169-02.

[266] See id.

to continue to rely on their pre-existing transactions until completion does not raise the concerns that the proposed circuit breaker halt rule is intended to address. As with the Short Sale Ban, we propose to limit this exception to automatic exercises and assignments to prevent it from being abused by more discretionary options exercises.

d. Exception for Assignment to Call Writers Upon Exercise of an Option

To allow for creation of long call options, the Short Sale Ban included an exception to permit short sales that occur as a result of assignment to call writers upon exercise.[267] When options are exercised, call writers may be required to sell short in order to satisfy their obligations. Because call writers do not have discretion, and because the short sales are effected in order to fill buying demand, we believe that including this exception in the proposed circuit breaker halt rule would benefit the markets while not opening the door to the abuses that the proposed rule is intended to address.

e. Owned Securities

The Short Sale Ban provided that sales of Rule 144 securities were excepted from its requirements because Rule 144 securities are owned securities and do not raise the concerns that the Short Sale Ban was designed to address.[268] We believe a similar exception for securities that a seller is deemed to own under Rule 200(b) should be included in the proposal.

Rule 200(g)(1) of Regulation SHO provides that a sale can be marked "long" only if the seller is deemed to own the security being sold and either (i) the security is in the broker-dealer's physical possession or control, or (ii) it is reasonably expected that the security will be in the

---

[267] See September 21, 2008 Amendment, 73 FR 55556-01.

[268] See id.

broker-dealer's physical possession or control by settlement of the transaction.[269] Thus, even where a seller owns a security, if delivery will be delayed, such as in the sale of formerly restricted securities pursuant to Rule 144 of the Securities Act of 1933, or where a convertible security, option, or warrant has been tendered for conversion or exchange, but the underlying security is not reasonably expected to be received by settlement date, such sales must be marked "short."[270] As a result, during a halt triggered by a circuit breaker, sellers would be permitted to sell securities that although owned, are subject to the provisions of Regulation SHO governing short sales due solely to the seller being unable to deliver the security to its broker-dealer prior to settlement based on circumstances outside the seller's control.

Although the Short Sale Ban only excepted Rule 144 securities, we believe that other securities considered "deemed to own" for purposes of Rule 200(b) should also be excepted from the proposed circuit breaker halt rule because these are owned securities that do not raise the same concerns that the proposed rule is designed to address.

3. Proposed Circuit Breaker Price Test Rules

We are also proposing a short selling circuit breaker that, when triggered by a severe decline in the price of a particular security, would impose short sale price restrictions for that security wherever it is traded for the remainder of the trading day. Such a circuit breaker would be imposed in place of a permanent, market-wide short sale price test restriction.

Similar to the reasons stated in the discussion above regarding the proposed circuit breaker halt rule, a circuit breaker price test rule would be triggered by a 10% intraday decline in the price of an individual equity security from the prior day's closing price as reported in the consolidated system. We preliminarily believe that a 10% decline in a security's price as measured from the

---

[269] See 17 CFR 242.200(g)(1).

[270] See id.

prior day's closing price, as reported in the consolidated system, would be an appropriate level at which to trigger a circuit breaker that results in a short sale price test restriction. As discussed above, such a percentage decline would be consistent with the current SRO Circuit Breakers.[271] We recognize that a lesser or greater percentage decline or some other measure of decline may be appropriate.

We also seek comment regarding the form of the short sale price test restrictions that could be imposed when the proposed circuit breaker is triggered. Such a circuit breaker when triggered could impose a short sale price test restriction in the form of the proposed modified uptick rule based on the national best bid, or in the form of the proposed uptick rule based on the last sale price of the individual security. This would include the same proposed short sale price test and provisions that would be used in the proposed modified uptick and proposed uptick rules, permitting certain sales to occur notwithstanding the price limitations otherwise applicable under the two proposed rules.[272] We believe these provisions would be justified for the same reasons described regarding the proposed modified uptick rule and the proposed uptick rule, respectively.[273]

As described in more detail below, the price decline would be based on the security's price during the trading day as reported in the consolidated system as compared to the prior day's closing price as reported in the consolidated system. The prior day's closing price would be the last price reported during regular trading hours[274] the prior day.

---

271 See 1998 Release, 63 FR 18477 supra note 230 and accompanying text.

272 See Section III.A. and III.B. (discussing the operation of the proposed modified uptick rule and the proposed uptick rule respectively)

273 See Sections III.A.2. and III.B.2. (discussing the short exempt provisions of the proposed modified uptick rule and proposed uptick rule, respectively).

274 "Regular trading hours" has the same meaning as in Rule 600(b)(64) of Regulation NMS. Rule 600(b)(64) provides that "Regular trading hours means the time between 9:30 a.m. and 4:00 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to § 242.605(a)(2)."

The proposed circuit breaker modified uptick rule would, once triggered by a 10% decline in the price of a security from the prior day's closing price, impose the modified uptick rule in the individual security at times when the national best bid is calculated and disseminated in the consolidated system, for the remainder of the trading day. We based the time period on the calculation and dissemination of the national best bid in the consolidated system because the proposed modified uptick rule is based on the national best bid as calculated and disseminated in the consolidated system.

Similarly, the proposed circuit breaker uptick rule would, once triggered by a 10% decline in the price of a security from the prior day's closing price on any trading day, impose the uptick rule in the individual security at times when the last sale price is calculated and disseminated in the consolidated system. We based the time period on the calculation and dissemination of the last sale price because the proposed uptick rule is based on the last sale price as calculated and disseminated in the consolidated system.

To avoid market disruption that may occur if a circuit breaker is triggered late in the trading day, the proposed circuit breaker rules would not be triggered if the specified market decline threshold is reached in an NMS security within thirty minutes of the end of regular trading hours. Former NYSE Rules 80A(a) and 80A(b) provided that a circuit breaker would not trigger program trading restrictions after 3:25 p.m., or approximately thirty-five minutes before the close of regular trading hours. As with the proposed circuit breaker halt rule, we seek comment as to whether thirty minutes is an appropriate balance to ensure that the goals of the proposed rule would be met while also reducing the potential for market disruption toward the close of regular trading hours.

We believe that the temporary imposition of the proposed modified uptick rule, after a circuit breaker is triggered, that operates at times when the national best bid is disseminated

following a 10% decline in a security's price might be appropriate. Similarly, we believe that the temporary imposition of the proposed uptick rule, after a circuit breaker is triggered, that operates at times when the last sale price is calculated and disseminated following a 10% decline in a security's price might be appropriate. We seek comment below, however, regarding whether longer or shorter time periods would be appropriate.

We are seeking comment on the potential benefits and costs of the proposed circuit breaker price test rule. We believe that such a rule might be a narrowly tailored means to help restore investor confidence and stabilize the market for individual securities. Such a rule might also help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers. Further, we note that allowing short selling to continue with price test restrictions once the circuit breaker is triggered might have a lesser impact on legitimate short selling and normal market activity including price discovery and the provision of liquidity than a circuit breaker that triggers a short selling halt. We also believe that a circuit breaker rule that triggers a price test restriction, because it is based on a trading increment of a penny as opposed to a short sale halt, may also alleviate some concerns over the possibility of artificial downward pressure that might arise from a "magnet effect" prior to reaching the trigger threshold.

We recognize that a short selling circuit breaker that, when triggered, imposes short sale price test restrictions for the remainder of the trading day, would result in costs on market participants responsible for implementing and assuring compliance with the requirements of such restrictions. There might be significant operational costs associated with reprogramming systems to comply with short sale price test restrictions, and we anticipate that these costs might be greater than

those required to comply with a short selling circuit breaker that, when triggered, imposes halts on short selling in individual securities. There might also be requirements for additional staff and costs associated with personnel hiring and training related to maintaining and ensuring compliance with any short sale price test restrictions.[275]

Further, we recognize that short sale price test restrictions imposed as a result of a circuit breaker might result in many of the same costs discussed in detail in Section IX pertaining to the implementation of market-wide short sale price test restrictions.[276] Those costs might include a reduction of the benefit of legitimate short selling and a subsequent reduction in the quantity of short selling, which we have noted might lead to a decrease in market quality and price discovery, less protection against upward stock price manipulations, a less efficient allocation of capital, an increase in trading costs, and a decrease in liquidity.[277] We are seeking comment on the extent of these and other costs associated with a circuit breaker that when triggered imposes short sale price test restrictions.

The proposed circuit breaker price test rule would result in either the proposed modified uptick rule or the proposed uptick rule, for the remainder of the trading day, as each proposed rule is described above. For instance, a circuit breaker resulting in the proposed modified uptick rule would require that trading centers establish, maintain, and enforce policies and procedures reasonably designed to prevent short selling on a downbid in a security where the circuit breaker has been triggered by a severe decline in the price of that NMS security. Broker-dealers could mark certain short sale orders "short-exempt" under the conditions set forth above. A circuit breaker that

---

[275] See, e.g., Credit Suisse letter, supra note 122.

[276] See Section IX (discussing costs and benefits of the proposed modified uptick rule and the proposed uptick rule).

[277] See Section IX.B.

resulted in the proposed uptick rule would, when triggered by a decline in the price of a particular security, prohibit any person from selling short that security on a downtick. This would be a more limited approach than a short sale price test rule that is in place at all times and thus might result in fewer of the potential disadvantages that would result from a short sale price test that was in place at all times.

Under the proposed circuit breaker price test rule, a price test would not be in place on a permanent and market-wide basis for all securities. Under the proposed circuit breaker that results in the proposed modified uptick rule, trading centers would need to establish and maintain reasonable policies and procedures in advance so that they are able to comply with the proposed circuit breaker rule whenever triggered. It would not be reasonable for a trading center to wait until the circuit breaker is triggered to begin establishing policies and procedures to prevent the execution or display of the particular security on a downbid. Thus, a circuit breaker that triggers the proposed modified uptick rule would result in some immediate upfront costs to trading centers.

In the Solicitation of Comments, we seek comment on whether the short sale price test restrictions should remain in place for a longer or shorter period of time, whether a 10% decline would be an appropriate trigger for the circuit breaker proposals, or if for example, a 5% or 20% threshold might be more appropriate, and what additional costs may be associated with a proposed circuit breaker price test rule.

IV. Request for Comment

In addition to the specific requests for comment found throughout this proposing release, we seek comment generally from all members of the public on all aspects of the proposed amendments to Rules 200(g) and 201 of Regulation SHO. We request that commenters provide empirical data to support their views and arguments related to these proposals. In addition to the

questions set forth above, commenters are welcome to offer their views on any other matter raised by the proposed amendments to Regulation SHO. Specifically, are there any other possible restrictions on short selling that the Commission should consider, particularly ones that might be helpful in a severe market decline?

Questions Regarding Proposed Shot Sale Price Tests Generally

1. Should short sales be subject to a short sale price test restriction, or should we continue to rely on current short sale regulations and anti-fraud and anti-manipulation provisions of the securities laws to address potentially abusive short selling?
2. We note that our decision to propose a short sale price test was based, in part, on the recent changes in market conditions and investor confidence.[278] To what extent, if any, would a short sale price test, such as the proposed modified uptick rule or the proposed uptick rule, be necessary or appropriate in light of recent changes in market conditions? Please explain and provide empirical data in support of any arguments and/or analyses. How would the proposed modified uptick rule or the proposed uptick rule affect market conditions today? Please explain and provide empirical data in support of any arguments and/or analyses.
3. How effective would the proposed modified uptick rule or the proposed uptick rule be in allowing relatively unrestricted short selling in an advancing market? Please explain and provide empirical data in support of any arguments and/or analyses. How effective would the proposed modified uptick rule or proposed uptick rule be at helping to prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market

[278] See Section II.C.

by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers? Please explain and provide empirical data in support of any arguments and/or analyses. Could the proposed modified uptick rule or proposed uptick rule be modified to better meet these goals? If so, how? Please explain and provide empirical data in support of any arguments and/or analyses.

4. We also note our concern regarding investor confidence based on the numerous requests for reinstatement of short sale price test restrictions.[279] Would reinstating a short sale price test restriction such as the proposed modified uptick rule or proposed uptick rule help restore investor confidence? If so, why? If not, why not? Please explain and provide empirical data or other specific information in support of any arguments and/or analyses.

5. In addition to investor confidence and market volatility, we have stated that we are concerned about potentially abusive short selling. Would the proposed modified uptick rule or proposed uptick rule help address potentially abusive short selling? If so, how? If not, why not? Please explain and provide empirical data in support of any arguments and/or analyses.

6. We note that short selling provides the market with important benefits, including market liquidity and pricing efficiency.[280] What effect, if any, would the proposed modified uptick rule or proposed uptick rule have on market liquidity? Please explain and provide empirical data in support of any arguments and/or analyses. What effect, if any, would

---

[279] See id.

[280] See Section II.A.

the proposed modified uptick rule or proposed uptick rule have on pricing efficiency? Please provide empirical data in support of any arguments and/or analyses.

7. We also note that short selling may be used to illegally manipulate stock prices.[281] What impact, if any, would the proposed modified uptick rule or proposed uptick rule have on "bear raids"? Please explain and provide empirical data in support of any arguments and/or analyses. To what extent, if any, does unrestricted short selling exacerbate a declining market? Please explain and provide empirical data in support of any arguments and/or analyses.

8. Is there a need for short sale price test restrictions? If there is a need for a short sale price test, would the proposed modified uptick rule be the best test? If so, why? If not, why not? Would the proposed uptick rule be the best test? If so, why? If not, why not? What are the costs and benefits of the proposed modified uptick rule versus the proposed uptick rule? What would be the general costs and benefits of short sales being subject to the proposed modified uptick rule? What would be the general costs and benefits of short sales being subject to the proposed uptick rule? Should we consider other forms of short sale price tests? If so, what forms? What would be the costs and benefits of any alternative forms of short sale price tests? Please explain and provide empirical data in support of any arguments and/or analyses.

9. Would the proposed modified uptick rule or proposed uptick rule be an appropriate short sale price test in the current decimals environment? Would the proposed modified uptick rule or proposed uptick rule be more suitable in a decimals environment with multiple trading centers? Please explain and provide empirical data in support of any arguments and/or analyses.

---

[281] See id.

10. Should the proposed modified uptick rule or proposed uptick rule be limited to specific sectors or industries, such as financials, due to the unique harms or susceptibility to harms to those industries or sectors from the potential adverse effect of short selling in a declining market? If so, please describe the types of industries or sectors that should be covered and the unique harms or susceptibility to harm to which they are subject. Please also describe the mechanisms or criteria that should be used to determine which entities fall within these industries or sectors.

11. One of the reasons for the elimination of former Rule 10a-1 and the prohibition on any SRO from having a short sale price test in July 2007 was because the application of short sale price tests had become disjointed with different price tests applying to the same securities trading in different markets. Under both proposed rules, all covered securities, wherever traded, would be subject to one short sale price test. What are the advantages or disadvantages of having a uniform short sale price test in the covered securities across all markets? Please explain.

12. How would trading systems and strategies used in today's marketplace be impacted by the proposed modified uptick rule or proposed uptick rule? How might market participants alter their trading systems and strategies in response to either proposed rule, if adopted? To further the goal of having a uniform short sale price test, both the proposed modified uptick rule and proposed uptick rule would provide that no SRO shall have any rule that is not in conformity with, or conflicts with either proposed rule. Is this prohibition necessary or appropriate? Would there ever be a need for an SRO to institute its own short sale price test? If so, why?

13. One of the reasons for the elimination of former Rule 10a-1 was that the disjointed application of the rule resulted in an un-level playing field among market participants. Could implementation of a short sale price test through a policies and procedures approach applicable to a "trading center" lead to disproportionate burden among market participants? In what way? Would a straight prohibition implementation approach be preferable in this regard? To what extent could the proposed exceptions to either alternative rule contribute to a disproportionate burden on certain market participants? What effect might there be on relative competitive advantages of different market participants if the short sale price test were based on an increment larger than a penny?

14. What impact, if any, would the trading requirements of Regulation NMS have on implementing the proposed modified uptick rule or proposed uptick rule?

15. To what extent does the ability to obtain a short position through the use of derivative products such as options, futures, contracts for difference, warrants, credit default swaps or other swaps (so-called "synthetic short sales") or other instruments (such as inverse leveraged exchange traded funds) undermine the goals of short sale price test restrictions, such as the proposed modified uptick rule and the proposed uptick rule? Will synthetic short sales increase if the Commission adopts either alternative short sale price test? What effects might such an increase have on market liquidity and pricing efficiency? Please explain.

16. Before determining whether to adopt a short sale price test restriction on a permanent basis, should we adopt a rule that would apply, on a pilot basis, the operation of a short sale price test restriction for specified securities? Such an approach would allow us to study the effects on, among other things, market volatility, price efficiency, and liquidity

during the recent changes in market conditions. What would be other benefits of taking this approach? What would be the costs of taking this approach? Would the costs associated with programming systems to apply a short sale price test restriction on specified securities outweigh any benefits of having a pilot? If we were to take this approach, how long would it take to program systems to apply a short sale price test restriction to specified securities? Similar to the Pilot conducted immediately prior to the elimination of former Rule 10a-1, the securities that could be subject to the pilot could be comprised of a subset of the Russell 3000 index, or such other securities as necessary or appropriate in the public interest and consistent with the protection of investors after giving due consideration to the security's liquidity, volatility, market depth and trading market. Would it be appropriate for such a pilot to be comprised of a subset of the Russell 3000 index? How should the securities that would comprise a pilot be selected? Please explain the reasons for any suggested selection method. Such a pilot could remain in effect for one or two years. Would a one or two year pilot be an appropriate period of time? If so, why? If not, why not? Please provide specific reasons to support any views in favor of establishing another time period. Please provide any additional details regarding how a pilot could be structured in terms of the securities to be selected, the time-frame of the pilot, and the types of restrictions that could be placed on short selling of such securities.

17. In connection with the Pilot conducted immediately prior to our elimination of former Rule 10a-1, SROs publicly released transactional short selling data so that data would be available to the public to encourage independent researchers to study the Pilot. If we were to adopt a rule that would apply, on a pilot basis, a short sale price test restriction on

specified securities, we would expect to make information obtained during any such pilot publicly available. In addition, we would expect SROs to again make data available to the public during any such pilot. Would there be any costs associated with making short selling data available to the public during the period of a pilot? What would be the benefits of making such data available to the public?

18. Commenters have stated that the Pilot conducted prior to the elimination of former Rule 10a-1 was insufficient, in part, because it only covered a period of relative market stability[282] and that the Pilot should have lasted longer to "ensure at least one bear market was involved in the study."[283] Did the Pilot cover a sufficient period of time?

19. The proposed implementation period for both of the proposed rules would be three months from the effective date of the proposed rule, if adopted. Would a three month implementation period be appropriate for the proposed modified uptick rule? Would a three month implementation period be appropriate for the proposed uptick rule? Should there be a shorter or longer implementation period for either proposed rule? Please explain.

Questions Regarding Proposed Modified Uptick Rule

1. The proposed modified uptick rule would define the term "down-bid price" to mean a price that is less than the current national best bid or, if the last differently priced national best bid was greater than the current national best bid, a price that is less than or equal to the current national best bid. Should this definition be altered? If the last differently priced national best bid was greater than the current national best bid, should short selling

---

[282] See Brown Letter supra note 55.

[283] See id.

be restricted to a cent above the current national best bid, or a higher or lower increment? If so, why? If a specific increment is suggested, please describe what impact such increment would have on short selling. What increment, if any, would be tantamount to a ban on short selling? Please provide empirical data in support of any arguments and/or analyses.

2. The proposed modified uptick rule would allow short selling at the current national best bid in an advancing market. Should the proposed modified uptick rule instead require a trading center to have policies and procedures reasonably designed to permit short selling only at a price above the current national best bid such that short selling would occur only at a higher price than the current national best bid, and only on a passive basis? Would such an approach be more effective at preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to drive down the market or from being used to accelerate a declining market than the approach set forth in the proposed modified uptick rule or proposed uptick rule? If so, how? If not, why not? What effect would an approach that allows short selling only at a price above the current national best bid have on the benefits of short selling, such as providing price efficiency and liquidity? Would this approach be easier to program into trading and surveillance systems than the approach in the proposed modified uptick rule or proposed uptick rule? If so, why? If not, why not? Should an approach that allows short selling only at a price above the current national best bid be combined with a policies and procedures approach similar to that discussed under the proposed modified uptick rule or a prohibition approach similar to that discussed under the proposed uptick rule? What would be the advantages and disadvantages, including costs and benefits of each of these approaches

as combined with a short sale price test that permits short selling only at a price above the current national best bid?

3. The proposed modified uptick rule would apply to a "covered security" which is defined to mean an NMS stock as that term is defined in Regulation NMS. Is it appropriate for the proposed modified uptick rule to apply only to NMS stocks? Should the definition of a "covered security" instead be a security that is registered on, or admitted to unlisted trading privileges on, a national securities exchange? If so, why? If not, why not? Should the definition of "covered security" be expanded to include all NMS securities, including options? If so, why? If not, why not?
4. Should the proposed modified uptick rule be extended to Non-NMS stocks, such as stocks quoted on the OTC Bulletin Board and Pink Sheets? How would a national best bid be determined for sales of such securities?
5. The proposed modified uptick rule has as its reference point for a permissible short sale the current national best bid in relation to the last differently priced national best bid. To what extent would the sequence of bids play a role in determining when short sales can be executed or displayed by trading centers, or submitted by broker-dealers relying on the exception to the proposed modified uptick rule in proposed Rule 201(c)? Are there any regulatory or operational reasons to allow markets to use their own bid information in regulating short sales under the proposed modified uptick rule? Would allowing markets to use their own bid information affect the operation or effectiveness of the proposed modified uptick rule? If so, how? If trading centers and broker-dealers marking orders "short exempt" pursuant to proposed Rule 201(c) take snapshots of the market at the time of execution, display, or submission of the short sale order, as applicable, would such

snapshots address any concerns regarding the sequence of bids? If not, what other policies and procedures could trading centers and broker-dealers put in place to address these concerns?

6. The proposed modified uptick rule would require trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display by the trading center of impermissibly priced short sale orders. Are the proposed modified uptick rule's requirements for what trading centers' policies and procedures would be required to include appropriate? Please explain. Pursuant to proposed Rule 201(b)(1)(ii) a trading center's policies and procedures must be reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price. Thus, a trading center's policies and procedures must be able to recognize an order marked "short exempt." Is the inclusion of this requirement in a trading center's policies and procedures appropriate? Please explain.

7. Proposed Rule 201(b)(2) would require that trading centers regularly surveil to ascertain the effectiveness of the policies and procedures required by proposed Rule 201(b)(1) and promptly take action to remedy deficiencies in such policies and procedures. Would all trading centers readily be able to monitor on a real-time basis the national best bid and the last differently priced national best bid? Are there other ways to surveil that would not be on a real-time basis that would be equally or more effective? Please explain. What systems and surveillance changes by trading centers would be necessary to meet the requirements of the proposed modified uptick rule? Should additional requirements be placed on trading centers that execute or display short sale orders in covered

securities? If so, what should such requirements be? Is a policies and procedures approach preferable to a prohibition (as was the case under former Rule 10a-1) on any person executing a short sale on a down-bid price? What would be the costs and benefits of a policies and procedures approach as compared to such a prohibition? Should the Commission consider instead a prohibition with regard to some or all of the entities regulated by the Commission, rather than one on "any person," as was the case under former Rule 10a-1? What about an approach that imposed a policies and procedures requirement on some or all of the entities regulated by the Commission and a prohibition on "any person"? What would be the costs and benefits of an approach that used both a prohibition and a policies and procedures requirement on some or all of the entities regulated by the Commission? What would be the costs and benefits of each of these approaches?

8. Under the proposed modified uptick rule, a trading center or broker-dealer, as applicable, would need to take such steps as would be necessary to enable it to enforce its policies and procedures effectively. For example, trading centers and broker-dealers, as applicable, could establish policies and procedures that could include regular exception reports to evaluate their trading practices. Should the proposed modified uptick rule require trading centers and broker-dealers subject to the policies and procedures requirements of the rule to have exception reports? Please explain. What would be the costs and benefits of such a requirement? Would such costs and benefits differ depending on the size of the trading center or broker-dealer?

9. Under the proposed modified uptick rule, if an order is impermissibly priced, the trading center could re-price the order at the lowest permissible price and hold it for later

execution at its new price or better. As quoted prices change, the proposed modified uptick rule would allow a trading center to repeatedly re-price and display an order at the lowest permissible price down to the order's original limit order price (or, if a market order, until the order is filled). In effect, what would be the consequences of the proposed modified uptick rule? What would be the impact of the proposed modified uptick rule on speed of executions, transaction costs, and order flow? In addition, if a trading center were not to re-price an order, what would be the impact on speed of executions, transaction costs, and order flow?

10. Proposed Rule 201(b)(1)(i) provides that a trading center's policies and procedures must be reasonably designed to permit the execution of a displayed short sale order of a covered security if, at the time of display of the short sale order, the order was not at a down-bid price. Is it appropriate that the proposed modified uptick rule would not preclude execution of a short sale order that was not priced in accordance with proposed Rule 201(b)(1) provided that the short sale order complied with the requirements of proposed Rule 201(b)(1) at the time it was displayed? If so, why? If not, why not? Please explain.

11. Proposed Rule 201(c) provides that a broker-dealer may mark an order "short exempt" provided the broker-dealer complies with the requirements of that paragraph of the proposed rule. Would it be appropriate to permit a broker-dealer to mark a short sale order "short exempt" if it complies with the requirements of paragraph (c) of the proposed rule? Should this provision apply to entities other than, or in addition to, broker-dealers? Would the determination of the down-bid price for certain orders at the time of submission and others at the time of execution or display cause unnecessary

confusion in the market? What systems and surveillance changes by broker-dealers would be necessary to meet the requirements of this provision?

12. The proposed modified uptick rule would not apply at times the national best bid is not collected, processed, and disseminated. Is this appropriate? Would this result in a substantial portion of short selling moving to times when the national best bid is not collected, processed, and disseminated? Would this undermine the effectiveness of the proposed modified uptick rule at helping to prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool to drive down markets or to accelerate a price decline? Should the proposed modified uptick rule apply even at times the national best bid is not collected, processed, and disseminated? If so, why? If not, why not? If it were to apply during trading sessions when the national best bid is not collected, processed, and disseminated, how should it apply (e.g., using the national best bid at the end of the trading session)? What would be the costs and benefits of applying the proposed modified uptick rule at times the national best bid is not collected, processed, and disseminated, including the impact on liquidity and price efficiency? What would be the costs and benefits of applying the proposed modified uptick rule at times the national best bid is collected, processed, and disseminated, including the impact on liquidity and price efficiency?

13. The proposed modified uptick rule includes a number of provisions that would permit a broker-dealer to mark a short sale order "short exempt." Pursuant to proposed Rule 201(b)(1)(ii) a trading center's policies and procedures must be reasonably designed to permit the execution or display of a short sale order marked "short exempt" without regard to whether the order is at a down-bid price. In addition to the provisions under

paragraphs (c) and (d) of the proposed modified uptick rule regarding when a broker-dealer may mark an order "short exempt," are there other provisions that the proposed modified uptick rule should include? Should the proposed modified uptick rule permit a broker-dealer to make a short sale order "short exempt" in connection with short selling activity and electronic trading systems that match and execute customer orders at random times within specific time intervals, and at independently derived prices? If so, please explain. If such a provision would be appropriate or necessary, what conditions should apply? Should such a provision include conditions similar to the conditions set forth in Rule 201(c)(8) of the proposed uptick rule? Should the proposed modified uptick rule permit a broker-dealer to mark a short sale order "short exempt" in connection with locked or crossed markets? If so, please explain how a conflict could arise in connection with the proposed modified uptick rule and locked or crossed markets and what should be the conditions of any such provision. Should the proposed modified uptick rule permit a broker-dealer to make a short sale order "short exempt" when the broker-dealer is fulfilling specific obligations? If so, please explain.

14. Would any of the provisions under paragraph (c) or (d) under the proposed modified uptick rule be susceptible to abuse? If so, how? Are there conditions that would address this concern?

15. Proposed Rule 201(d)(1) would permit a broker-dealer to mark a short sale order of a covered security "short exempt" if the seller owns the security sold and intends to deliver the security as soon as all restrictions on delivery have been removed. Would this provision be necessary or appropriate? Should any conditions or limitations apply? If so, why? If not, why not?

16. Proposed Rule 201(d)(2) would permit a broker-dealer to mark a short sale order of a covered security "short exempt" in connection with certain odd lot transactions. Is this provision necessary or appropriate? Should proposed Rule 201(d)(2) apply to all market makers in odd-lots or should it be more limited? If so, why and how?

17. Proposed Rule 201(d)(3) would permit a broker-dealer to mark a short sale order of a covered security "short exempt" in connection with certain bona fide domestic arbitrage transactions. Would this provision be necessary or appropriate? Should the provision be narrowed or broadened? If so, state specifically why, and how it should be restructured in relation to the purposes of the proposed modified uptick rule. Proposed Rule 201(d)(3) parallels the exception in former Rule 10a-1(e)(7) which, consistent with Regulation T at the time, referred to a "special arbitrage account." Because Regulation T no longer refers to a "special arbitrage account" but instead refers to a "good faith account", proposed Rule 201(d)(3) would also refer to a "good faith account." Should proposed Rule 201(d)(3) refer to a "special arbitrage account" or a "good faith account"? Please explain. Is a separate account, whether a "special arbitrage account" or "good faith account," necessary or appropriate for this provision? If so, why? If not, why not?

18. Proposed Rule 201(d)(4) would permit a broker-dealer to mark a short sale order of a covered security "short exempt" in connection with certain international arbitrage transactions. Would this provision be necessary or appropriate? Should the provision be narrowed or broadened? If so, state specifically why, and how it should be restructured in relation to the purposes of the proposed modified uptick rule. Proposed Rule 201(d)(4) parallels the exception in former Rule 10a-1(e)(8) which, consistent with Regulation T at the time, referred to a "special international arbitrage account." Because Regulation T no

longer refers to a "special international arbitrage account" but instead refers to a "good faith account," proposed Rule 201(d)(4) would also refer to a "good faith account." Should proposed Rule 201(d)(4) refer to a "special international arbitrage account" or a "good faith account"? Please explain. Is a separate account, whether a "special arbitrage account" or "good faith account," necessary or appropriate for this provision? If so, why? If not, why not? Should proposed Rule 201(d)(4) be combined with proposed Rule 201(d)(3)? If so, why? If not, why not? Should depository receipts of a security be deemed the same security as the security represented by such depository receipt? Why or why not?

19. Proposed Rule 201(d)(5) would permit a broker-dealer to mark a short sale order of a covered security "short exempt" in connection with sales by underwriters or syndicate members participating in a distribution in connection with over-allotments, and lay-off sales by such persons in connection with a distribution of securities. Would this provision be necessary or appropriate for both and/or either over-allotments and lay-off sales? Under what circumstances would an underwriter or syndicate member price an offering below the national best bid? What market impact, if any, would there be if the provision were extended to short sales below the national best bid?

20. Proposed Rule 201(d)(6) would permit a broker-dealer to mark a short sale order of a covered security "short exempt" where a broker-dealer is facilitating customer buy or long sale orders on a riskless principal basis. Would this provision be appropriate or necessary? Are the conditions set forth in proposed Rule 201(d)(6) appropriate? Should the conditions be narrowed or broadened in any way? Please explain.

21. Proposed Rule 201(d)(7) would permit a broker-dealer to mark a short sale order of a covered security "short exempt" in connection with certain VWAP transactions. Would this provision be necessary or appropriate? Should the proposed provision be modified in any way? If so, please explain. Are all of the proposed conditions appropriate, or should any be eliminated or modified? Should any other conditions be added? In place of a provision limited to VWAP transactions, would it be more appropriate to permit a broker-dealer to mark a short sale order of a covered security "short exempt" in connection with "any short sale at a price that is not based, directly or indirectly, on the quoted price of the covered security at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made"?[284] If this provision would be more appropriate, please explain why. What types of benchmark orders would such a provision capture? If we were to use this alternative language, how should we determine the "material terms" of the short sale? Should there be any conditions on the use of this alternative proposed provision?

22. Should the proposed modified uptick rule include a "short exempt" marking provision specific to the daily opening of trading at each trading center, particularly given that there are multiple trading centers with non-synchronous opening auctions? Please explain. Should there be a "short exempt" marking provision specific to the opening of trading after a trading halt? Please explain. Should there be a "short exempt" marking provision specific to short selling at the closing of trading at each trading center? Please explain.

23. Should the proposed modified uptick rule include a "short exempt" marking provision for transactions in exchange traded funds and similar products? If so, what should be the

[284] See also 17 CFR 242.611(7).

qualifications and/or conditions related to such provision? We note the Commission previously exempted ETFs from Rule 10a-1, subject to various conditions.[285]

24. Should the proposed modified uptick rule include a "short exempt" marking provision for short sale orders that are not pursuant to a "regular way" contract?

25. The proposed modified uptick rule does not contain a "short exempt" marking provision in connection with market makers engaged in bona fide market making activity. Should there be such a provision to facilitate market making activity by broker-dealers? If so, why? What consequences would there be, if any, to the markets if broker-dealers are not permitted to mark such orders "short exempt"? Please describe. If the proposed modified uptick rule were to permit broker-dealers to mark short sale orders pursuant to bona fide market making activity as "short exempt" what qualifications and/or conditions should apply?

26. When the Commission repealed short sale price tests in 2007, it also provided that no SRO could have or adopt its own short sale price test. One reason for removing short sale price tests was the existence of different types of prices tests (e.g., the tick test of Rule 10a-1 and the NASD bid test). Should the proposed modified uptick rule be an SRO rule?

27. Under a straight prohibition, any person is liable for an impermissible short sale, even if the sale is the product of an error. Should we include an exception for inadvertent errors, if the person can demonstrate that the error was inadvertent? When would an inadvertent error occur? How could a person demonstrate that the non-compliant short sale was an inadvertent error?

[285] See, e.g., 2003 Proposing Release at 62988.

28. The short sales that qualify for the "broker-dealer" provision in proposed Rule 201(c) are still subject to the provisions of the proposed modified uptick rule and would be required to be marked as "short exempt." Should these short sales be marked as "short exempt" or is another mark more appropriate? What effect, if any, would marking these short sales as "short exempt" have on compliance or surveillance relative to another mark? What would be the costs associated with implementing a mark especially for these short sales?

Questions Regarding Proposed Uptick Rule

1. Should the proposed uptick rule have a policies and procedures approach for some or all of the entities regulated by the Commission similar to the approach under the proposed modified uptick rule? If so, why? If not, why not? Or, should the Commission also adopt a prohibition on "any person" for the proposed uptick rule, in addition to a policies and procedures requirement on some or all of the entities regulated by the Commission? What would be the costs and benefits of a policies and procedures requirement, as compared to the proposed prohibition? What would be the costs and benefits of an approach that used both a prohibition and a policies and procedures requirement on some or all of the entities regulated by the Commission?
2. The proposed uptick rule would apply to a "covered security" which is defined as an NMS security, other than an option, in which trades in such securities are reported pursuant to an effective transaction reporting plan and for which information as to such trades is made available in accordance with such plan on a real-time basis to vendors of market transaction information. Should the definition of a "covered security" be changed to apply to a security registered on, or admitted to unlisted trading privileges on, a national securities exchange, if trades in such securities are reported pursuant to an

effective transaction reporting plan and information as to such trades is made available in accordance with such plan on a real-time basis to vendors of market transaction information? If so, why? Would such a definition result in securities other than NMS stocks being subject to the proposed uptick rule? If so, please describe those types of securities and the costs and benefits of applying the proposed uptick rule to such securities. Should the definition of "covered security" be expanded to include all NMS securities, including options? If so, why? If not, why not?

3. The proposed uptick rule would apply to NMS stocks quoted in the OTC market, but not to non-NMS stocks quoted in the OTC market. What form of price test, if any, should apply to non-NMS stocks quoted in the OTC market, and why? If a price test should apply to non-NMS stocks, to what types of non-NMS stocks should it apply? Please explain. How should such a price test be implemented? In addition, we seek comment regarding whether the market is structured in a manner that would make regulation of non-NMS stocks practical.

4. Could any operational concerns regarding implementation of the proposed uptick rule be remedied by market participants taking snapshots of the market at the time of effecting a short sale? Such snapshots could provide a record of the last sale price and the direction of the market for a particular security at the time of effecting the short sale. Would any additional exceptions be necessary to address time lags in the receipt of last sale price information from data feeds? If so, please explain, including providing any suggested language for such an exception.

5. The proposed uptick rule would not apply to short sales in covered securities while last sale price information is not collected, calculated and disseminated on a real-time basis.

Would this result in a substantial portion of short selling moving to times when last price information is not collected, calculated, and disseminated on a real-time basis? Would this undermine the effectiveness of the proposed modified uptick rule at helping to prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool to drive down markets or to accelerate a price decline? Would it be appropriate to apply the proposed uptick rule while last sale price information is not collected, calculated and disseminated on a real-time basis? Please explain. What would be the costs and benefits of applying the proposed uptick rule during after-hours trading sessions, including the impact on liquidity and price efficiency? Please explain. What would be the costs and benefits of not applying the proposed uptick rule during after-hours trading sessions, including the impact on liquidity and price efficiency? Please explain.

6. Former Rule 10a-1 included a provision that permitted markets to use the last sale prices on their own markets as the reference point for measuring the permissibility of short sales. Specifically, former Rule 10a-1(a)(2) provided: " . . . any exchange, by rule, may require that no person shall, for his own account or the account of any other person, effect a short sale of any such security on that exchange (i) below the price at which the last sale thereof, regular way, was effected on such exchange, or (ii) at such price unless such price is above the next preceding different price at which a sale of such securities, regular way, was effected on such exchange, if that exchange determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors; and, if an exchange adopts such a rule, no person shall, for his own account or for the account of any other person, effect a short sale of any such security on such

exchange otherwise than in accordance with such rule . . . ." This provision was added to former Rule 10a-1 in response to certain SROs asserting that the last trade price on the consolidated system should not be the reference point for the tick test of former Rule 10a-1 because last trade price data was not available in a timely manner and because the principal exchanges did not have adequate information retrieval systems on their floors to ensure adherence with former Rule 10a-1.[286] Should the proposed uptick rule include a similar provision? With the spread of fully automated markets and the advances in the dissemination of market information, is such a provision necessary or desirable in today's markets? Please explain the costs and benefits of permitting each market to use the last sale price in its market as the reference point under the proposed uptick rule.

7. Former Rule 10a-1(a)(3) included a provision that allowed for an adjustment to the sale price of a security after the security went ex-dividend, ex-right, or ex any other distribution when determining the price at which a short sale may be effected. Specifically, former Rule 10a-1(a)(3) provided: "In determining the price at which a short sale may be effected after a security goes ex-dividend, ex-right, or ex-any other distribution, all sale prices prior to the "ex" date may be reduced by the value of such distribution." Would this provision be necessary under the proposed uptick rule? Please explain.

8. Former Rule 10a-1(e)(6) contained an "equalizing exception" that applied to securities registered on, or admitted to unlisted trading privileges on, a national securities exchange, for which trades in such securities were not reported to an effective transaction reporting

---

[286] See Securities Exchange Act Release No. 11276 (Mar. 5, 1975), 54 FR 12522 (Mar. 19, 1975) (release proposing subparagraph (a)(2) in response to stated operational and other difficulties associated with complying with Rule 10a-1); see also Securities Exchange Act Release No. 11468 (June 12, 1975), 40 FR 25442 (June 16, 1975) (adoption of proposed changes adding subparagraph (a)(2)).

plan and for which information as to such trades was not made available in accordance with such plan on a real-time basis to vendors of market transaction information. For such securities, it allowed short sales to be effected on a national securities exchange (provided the exchange approved the sale), if such sale was necessary to equal the price of the security on that exchange with the price of the security on the principal exchange for the security. The Commission stated that this exception was afforded to persons on regional exchanges to enhance the liquidity on those exchanges with respect to orders naturally flowing to those exchanges.[287] The Commission also noted, however, that the exception may have resulted in providing an incentive to divert orders from the principal exchange market to avoid the impact of former Rule 10a-1, because it allowed short sales to be effected on regional exchanges at prices below the last sale price on the principal exchange.[288] We have determined not to include this exception in the proposed uptick rule because we believe it would not make sense in light of the proposed reference point (the last sale reference point in the consolidated system). The exception in former Rule 10a-1(e)(6) was originally adopted in 1938 when the permissibility of short sales under former Rule 10a-1 was determined for each particular exchange by comparing the price of the proposed short sale to the immediately preceding price of the security to be sold short on that exchange. The exception was modified, but retained, following amendments to former Rule 10a-1 to reference the last trade price reported to the consolidated system or in a particular exchange market. The proposed uptick rule uses as the reference price the last sale price reported pursuant to an effective transaction

---

287 See Securities Exchange Act Release No. 11468 (June 12, 1975), 40 FR 25442 (June 16, 1975) (adopting amendments to Rule 10a-1 and discussing the operation of Rule 10a-1(e)(6) as in effect prior to and after amendment).

288 See id.

reporting plan only. Thus, we believe a similar exception to the exception contained in former Rule 10a-1(e)(6) would not be necessary. Are there any reasons to include in the proposed uptick rule a similar exception to that contained in former Rule 10a-1(e)(6)? Please explain.

9. As discussed in detail above under Section III.B.2.c. we have incorporated into proposed Rule 201(c)(10) and (c)(11), proposed exceptions to address any potential conflict between the proposed uptick rule and the Quote Rule arising from a trade-through. These exceptions are substantially in the form in which they were included in subsections (e)(5)(ii) and (e)(11) of former Rule 10a-1. Are these exceptions appropriate or necessary? Should these exceptions be revised in any way? If so, please provide suggested language. Proposed Rule 201(c)(10) would allow an SRO, by rule, to prohibit its registered specialists and registered exchange market makers from availing themselves of the exemption afforded by paragraph (c)(10) if that SRO determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors. Is this provision appropriate or necessary? Would any SRO avail itself of this provision? If not, why not? If so, why and how?

10. Former Rule 10a-1 contained an exception in paragraph (e)(5)(i) that permitted market makers to effect short sales at the same price as the last sale price even if the last sale price was on a zero-minus tick. Specifically, former Rule 10a-1(e)(5)(i) provided an exception for: "Any sale of a security . . . (except a sale to a stabilizing bid complying within Rule 104 of Regulation M) by a registered specialist or registered exchange market maker for its own account on any exchange with which it is registered for such security, or by a third market maker for its own account over-the-counter, i. Effected at a

price equal to or above the last sale, regular way, reported for such security pursuant to an effective transaction reporting plan . . . . Provided, however, That any exchange, by rule, may prohibit its registered specialist and registered exchange market makers from availing themselves of the exemption afforded by this paragraph (e)(5) if that exchange determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors." Unless prohibited by exchange rule, this exception was intended to permit registered specialists or market makers to protect customer orders against transactions in other markets in the consolidated system by allowing them to sell short at a price equal to the last trade price reported to the consolidated system, even if that sale was on a minus or zero-minus tick.[289] Although former Rule 10a-1 included this exception for market makers, exchanges adopted rules that prohibited their registered specialists and market makers from availing themselves of this exception.[290] Thus, we have determined not to include a similar exception in the proposed uptick rule.[291] Would a similar exception under the proposed uptick rule for registered market makers be appropriate or necessary? If the proposed uptick rule were to include a similar exception, should the exception be substantially in the form in which it was included in former Rule 10a-1(e)(5)(i)? If so, why? If not, why not? Please explain any recommended changes.

11. The proposed uptick rule would include a number of exceptions. In addition to the exceptions contained in the proposed uptick rule, are there other exceptions that should

---

289 See supra note 188. Former Rule 10a-1(a)(1)(i) referenced the last sale price reported to an effective transaction reporting plan, but former Rule 10a-1(a)(2) also permitted an exchange to make an election to use the last sale price reported in that exchange market. Certain exchanges, such as the NYSE, implemented short sale price test rules consistent with former Rule 10a-1(a)(2). See, e.g., former NYSE Rule 440B.

290 See former NYSE Rule 440B.

291 See supra Section III.A.2.i. (discussing our decision not to propose that a broker dealer may mark an order "short exempt" in connection with bona fide market making activity).

be included? For example, should the Commission provide an exception from the proposed uptick rule for transactions in exchange traded funds? If so, what should be the qualifications and/or conditions for relief? If not, please explain why not. In addition, we note that under former Rule 10a-1 the Commission granted conditional relief to allow requesting exchanges[292] and broker-dealers[293] to execute short sales in after-hours crossing sessions at a price equal to the closing price of the security.[294] Absent relief, such short sales could have violated former Rule 10a-1 in that the matching price (the closing price) of a security could have been on a minus or zero-minus tick with respect to the last sale in the consolidated transaction reporting system. In granting this conditional relief, the Commission noted that short sale transactions executed at the closing price generally do not represent the type of abusive practices that former Rule 10a-1 was designed to prevent. In particular, the Commission stated that short sale orders entered in the after-hours crossing sessions cannot influence the matching price, but rather are priced by unrelated order flow and transactions occurring during the primary trading session, which are subject to former Rule 10a-1. Should we codify the exemptive relief granted under former Rule 10a-1 as an exception from the proposed uptick rule? Under

---

[292] See, e.g., letter re: Off-Hours Trading by the Amex, [1991] Fed. Sec. L. Rep. (CCH) ¶ 79,802 (Aug. 5, 1991); letter re: Operation of Off-Hours Trading by the NYSE, [1991] Fed. Sec. L. Rep. (CCH) ¶ 79,736 (June 13, 1991).

[293] See, e.g., letter re: Burlington Capital Markets (July 1, 2003); letter re: Bear, Stearns & Co., Inc. (Jan. 19, 1996); Letter re: AZX, Inc. (Nov. 15, 1995); letter re: Instinet Corporation Crossing Network, [1992] Fed. Sec. L. Rep. (CCH) ¶ 76,290 (July 1, 1992); letter re: Portfolio System for Institutional Trading, [1991-1992] Fed. Sec. L. Rep. (CCH) ¶ 76,097 (Dec. 31, 1991).

[294] The relief was generally subject to the conditions that: (1) short sales of a security in the after-hours matching session shall not be effected at prices lower than the closing price of the security on its primary exchange; (2) persons relying on these exemptions shall not directly or indirectly effect any transactions designed to affect the closing price on the primary exchange for any security traded in the after-hours matching session; and (3) transactions effected in the after-hours matching session shall not be made for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security.

current market conditions, do closing price transactions create potentially manipulative incentives for broker-dealers, such that they should not be granted an exception?

12. Proposed Rule 201(c)(1) would provide an exception to allow short sales to be submitted without regard to the proposed uptick rule if the seller owns the security sold and the seller intends to deliver the security as soon as all restrictions on delivery have been removed. Would this exception be necessary or appropriate? Should any conditions or limitations apply to the exception? If so, why? If not, why not?

13. Proposed Rule 201(c)(2) would provide an exception for any sale by a broker-dealer of a covered security for an account in which it has no interest pursuant to an order marked "long." Would this exception be appropriate or necessary? Should any conditions or limitations apply to the exception? If so, why? If not, why not?

14. Proposed Rule 201(c)(3) would provide a limited exception for odd lot transactions. Would this exception be appropriate or necessary? Should the proposed exception apply to all market makers in odd-lots or should the exception be more limited? Would this exception be susceptible to abuse? If so, how? Should all odd-lot transactions have an exception from the proposed uptick rule? Would providing an exception for all odd-lot transactions result in a risk of increased short sale manipulation, e.g., would traders break up trades into 99 share odd-lots in order to avoid the proposed uptick rule?

15. Proposed Rule 201(c)(4) would provide an exception from the proposed uptick rule for certain bona fide domestic arbitrage transactions. Should the exception be narrowed or broadened? If so, state specifically why, and how it should be restructured in relation to the purposes of the proposed uptick rule. Proposed Rule 201(c)(4) parallels the exception in former Rule 10a-1(e)(7) which, consistent with Regulation T at the time, referred to a

"special arbitrage account." Because Regulation T no longer refers to a "special arbitrage account" but instead refers to a "good faith account", proposed Rule 201(c)(4) would also refer to a "good faith account." Should proposed Rule 201(c)(4) refer to a "special arbitrage account" or a "good faith account"? Please explain.

16. Proposed Rule 201(c)(5) would provide an exception from the proposed uptick rule for certain international arbitrage transactions. Should the proposed exception be narrowed or broadened? If so, state specifically why, and how it should be restructured in relation to the purposes of the proposed uptick rule. Proposed Rule 201(c)(5) parallels the exception in former Rule 10a-1(e)(8) which, consistent with Regulation T at the time, referred to a "special international arbitrage account." Because Regulation T no longer refers to a "special international arbitrage account" but instead refers to a "good faith account", proposed Rule 201(c)(5) would also refer to a "good faith account." Should proposed Rule 201(c)(5) refer to a "special international arbitrage account" or a "good faith account"? Please explain. Should proposed Rule 201(c)(4) be combined with proposed Rule 201(c)(5)? If so, why? If not, why not? Should depository receipts of a security be deemed the same security as the security represented by such depository receipt? Why or why not?

17. Proposed Rule 201(c)(6) would provide an exception from the proposed uptick rule for sales by underwriters or syndicate members participating in a distribution in connection with over-allotments and lay-off sales by such persons in connection with a distribution of securities. Under what circumstances would an underwriter or syndicate member price an offering below the last sale? What market impact, if any, would there be if the exception were extended to short sales below the last sale?

18. Would the exception for VWAP transactions contained in proposed Rule 201(c)(7) be appropriate or necessary? Are all of the proposed conditions appropriate, or should any be eliminated or modified? Should any other conditions be added? Should the proposed exception be modified in any way? If so, please explain. Would the following exception be more appropriate for excepting transactions such as short sale orders on a VWAP basis: The provisions of the proposed uptick rule shall not apply to "any short sale at a price that was not based, directly or indirectly, on the quoted price of the covered security at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made"?[295] If this exception would be more appropriate, please explain why. What types of benchmark orders would such an exception capture? If we were to use this alternative language, how should we determine the "material terms" of the short sale? Should there be any conditions on the use of this alternative proposed exception?

19. Would the exception for transactions pursuant to certain electronic trading systems that match buying and selling interest in proposed Rule 201(c)(8) be appropriate? Should the proposed exception be modified in any way? If so, please explain.

20. Proposed Rule 201(c)(9) would provide an exception from the proposed uptick rule for broker-dealers facilitating customer buy or long sale orders on a riskless principal basis. Are the conditions set forth in proposed Rule 201(c)(9) in connection with the "riskless principal" exception appropriate? Should the conditions be narrowed or broadened in any way? Please explain.

21. Proposed Rule 201(c)(12) would provide for an exception from the proposed uptick rule for short sales by registered market makers or specialists publishing two-sided quotes to

[295] See also 17 CFR 242.611(a)(7).

sell short to facilitate customer market and marketable limit orders regardless of the last sale price. Would this proposed exception be appropriate? Should additional qualifications and/or conditions be placed on such a proposed exception? If so, please describe any such qualifications and/or conditions including the purpose of such qualifications and/or conditions. Is this proposed exception necessary in highly liquid securities where there is likely to be sufficient selling interest without the specialist's or market maker's quote? Should this proposed exception be limited in some way? Please explain.

22. Should there be an exception specific to the daily opening of trading at each trading center, particularly given that there are multiple trading centers with non-synchronous opening auctions? Please explain. Should there be an exception specific to the opening of trading after a trading halt? Please explain. Should there be an exception specific to short selling at the closing of trading at each trading center? Please explain.

23. Under the proposed uptick rule, short sales could not be executed at a price below the last sale price of a security. In addition, short sale orders could be executed at the last sale price only if it is higher than the last different price for the security. Is a one-cent trading increment appropriate for the proposed uptick rule? Why or why not? If a higher increment is suggested, please describe what impact such increment would have on short selling. What increment, if any, would be tantamount to a ban on short selling? Please provide empirical data in support of any arguments and/or analyses.

24. When the Commission repealed short sale price tests in 2007, it also provided that no SRO could have or adopt its own short sale price test. One reason for removing short

sale price tests was the existence of different types of prices tests (e.g., the tick test of Rule 10a-1 and the NASD bid test). Should the proposed uptick rule be an SRO rule?

Questions Regarding Circuit Breakers Generally

1. The Commission believes that the erosion of investor confidence and questions concerning the volatility in the securities markets necessitate review of various alternatives with respect to short selling restrictions. Would a short selling circuit breaker be more appropriate than a market-wide short sale price test restriction in current market conditions? If so, why? If not, why not? Would a short selling circuit breaker provide more potential benefit to the market than a market-wide short sale price test restriction? Please explain. For example, would a short selling circuit breaker be a more appropriate means for the Commission to achieve the objective of helping to prevent short selling from being used as a tool to drive down the market? Please explain. Would a short selling circuit breaker rule help to address the Commission's concerns regarding investor confidence? If so, why and how? If not, why not?
2. Would implementation of a circuit breaker be less or more costly than the implementation of a market-wide short sale price test restriction? The proposed circuit breaker rules would, when triggered, impose short selling restrictions for the trading day on which the circuit breaker is triggered. Should the circuit breaker rules instead impose short sale price tests for multiple days? How many days? Would there be any additional costs associated with a circuit breaker that persisted for multiple trading days? Would a circuit breaker that when triggered imposed a temporary halt on short selling be more or less costly than one that resulted in a short sale price test

restriction? Please explain. Would a short selling circuit breaker be generally easier to implement in a Regulation NMS environment than a market-wide short sale price test restriction such as the proposed modified uptick rule, or the proposed uptick rule.

3. To which securities should a short selling circuit breaker apply? Should a short selling circuit breaker apply to all NMS stocks? If so, why? If not, why not and to which securities should a short selling circuit breaker apply? Should a short selling circuit breaker also apply to securities traded over-the-counter?
4. The Commission is seeking comment on the potential impacts of a short selling circuit breaker on market function and efficiency. What would be the impact of a short selling circuit breaker when triggered on the liquidity of individual securities? What would be the impact of a short selling circuit breaker on capital formation? What would be the impact of a short selling circuit breaker on price discovery? Would different circuit breaker alternatives have different impacts on liquidity, capital formation and price discovery? Would a multiple day circuit breaker pose any unique costs? Please explain.
5. Would circuit breakers pose any unique issues related to the daily opening of trading, the opening of trading after a trading halt, or the closing of trading? Please explain.
6. Should a short selling circuit breaker be limited in its application to specific industry sectors that are historically susceptible to extreme volatility or disproportionately high levels of short selling? If so, why? If not, why not? If a circuit breaker should be limited to apply only to certain sectors, what sectors should be included? Please explain. For example, should a circuit breaker apply only to the financial sector? If

so, how should the financial sector be defined for purposes of determining which issuers' securities are subject to the circuit breaker thresholds? Please explain.

7. Currently, the market wide circuit breaker rules are SRO rules. Should a short selling circuit breaker be a SRO rule or a Commission rule? Who should be responsible for implementing a short selling circuit breaker? Should trading centers be responsible for implementing a short selling circuit breaker when triggered? Should any person effecting a short sale be responsible for implementing a short selling circuit breaker? Should market participants be responsible for programming their own systems to prevent submission of a short sale order in violation of the circuit breaker? Please explain.

8. Who should be responsible for monitoring the price declines of individual securities that may trigger the short selling circuit breaker (e.g., broker-dealers, SROs)? Please explain. How should information about the triggering of a circuit breaker in an individual security be disseminated to the market? Who should be responsible for disseminating that information? For example, the CMS is the primary means of dissemination for the current SRO Circuit Breakers and regulatory halts. Should the CMS be the primary means by which participants are made aware that a short selling circuit breaker has been triggered with respect to an individual security? Please explain. Should the exchanges be responsible for publishing daily lists of the individual securities subject to the restrictions of a short selling circuit breaker? What cost would be associated with dissemination of circuit breaker notifications and what entities would bear expense in upgrading systems to ensure compliance with a short selling circuit breaker? Please explain.

9. What would be the advantages and disadvantages of a short selling circuit breaker combined with a short selling halt versus those of a short selling circuit breaker combined with short sale price test restrictions? Please explain.

10. What would be the advantages and disadvantages of short selling circuit breakers in general? Please explain.

11. To what extent would market participants' ability to create short positions through the use of derivatives or other instruments undermine the effectiveness of a short selling circuit breaker? If this would occur, would it be more or less significant in the context of a short selling circuit breaker as compared to a short sale price test restriction? What effects would any increase in "synthetic short sales" after a circuit breaker is reached during a rapid market decline have on market volatility, liquidity, and price efficiency? Would a short selling circuit breaker create an unlinking of equity markets from derivatives market prices?

12. Would a short selling circuit breaker result in exacerbated downward pressure as the trigger was approached, creating a "magnet effect"? Would any such "magnet effect" differ between a circuit breaker that when triggered imposed a short selling halt, and a circuit breaker that when triggered imposed a short sale price test restriction? Please explain and provide empirical data and analysis where appropriate to support the explanation.

13. Before determining whether to adopt a short selling circuit breaker on a permanent basis, should we adopt a rule that would apply, on a pilot basis, the operation of a short selling circuit breaker on individual securities? If so, what variation of a short selling circuit breaker should be applied on a pilot basis? Should the pilot circuit

breaker when triggered result in short selling halts in individual securities, or rather should such a pilot circuit breaker impose short sale price test restrictions on individual securities? Please explain. Such an approach would allow us to study the effects on, among other things, market volatility, price efficiency, and liquidity during the recent changes in market conditions. What would be other benefits of taking this approach? What would be the costs of taking this approach? Would the costs associated with programming systems to apply a short selling circuit breaker on specified individual securities outweigh any benefits of having a pilot? If we were to take this approach, how long would it take to program systems to apply a short selling circuit breaker in specified individual securities? Would it take longer or be more difficult to implement a short selling circuit breaker that when triggered imposed short selling halts? Would it take longer or be more difficult to implement a short selling circuit breaker that when triggered imposed short sale price test restrictions? Please explain. Similar to the Pilot conducted immediately prior to the elimination of former Rule 10a-1, the securities that could be subject to the pilot could be comprised of a subset of the Russell 3000 index, or such other securities as necessary or appropriate in the public interest and consistent with the protection of investors after giving due consideration to the security's liquidity, volatility, market depth and trading market. Would it be appropriate for such a pilot to be comprised of a subset of the Russell 3000 index? How should the securities that would comprise a pilot be selected? Please explain the reasons for any suggested selection method. Such a pilot could remain in effect for one or two years. Would a one or two year pilot be an

appropriate period of time? If so, why? If not, why not? Please provide specific reasons to support any views in favor of establishing another time period.

14. In connection with the Pilot conducted immediately prior to our elimination of former Rule 10a-1, SROs publicly released transactional short selling data so that data would be available to the public to encourage independent researchers to study the Pilot. If we were to adopt a rule that would apply, on a pilot basis, a short selling circuit breaker on individual securities, we would expect to make information obtained during any such pilot publicly available. In addition, we would expect SROs to again make data available to the public during any such pilot. Would there be any costs associated with making short selling data available to the public during the period of a pilot? What would be the benefits of making such data available to the public?

15. The proposed circuit breaker rules would not be triggered if there is a severe decline in the price of any NMS security within 30 minutes of the end of regular trading hours on any trading day. As noted above, former NYSE Rule 80A provided that a circuit breaker would not trigger program trading restrictions after 3:25 p.m., or approximately 35 minutes before the close. Is 30 minutes an appropriate time to limit the proposed circuit breaker rules? Is 35 minutes more appropriate? At what point during the trading day would it be too disruptive to implement a circuit breaker rule? Is a 30 minute period sufficient to avoid major disruptions to the markets? Do thinly traded NMS securities raise additional concerns? If a circuit breaker would otherwise be triggered toward the end of the trading day, what alternative short sale restriction would be helpful in addressing a severe market decline in the price of a particular NMS security? Please provide any data if available.

16. Should a circuit breaker be based on an intra-day decline from that day's opening price? For instance, should the circuit breaker be triggered by a 10% decline from the opening price during regular trading hours?

17. As proposed, the proposed circuit breaker rules, once triggered, would impose a short selling halt or a short sale price test restriction in the individual security until the close of the consolidated system.[296] Should the short selling halt or short sale price test restriction conclude at the end of regular trading hours (which are from 9:30 a.m. until 4 p.m. EST)?[297] Should we consider extending the short selling halt or short sale price test, when triggered, for a longer period of time? Should the halt be extended until the opening of regular trading hours on the next trading day? Please explain.

Questions Regarding Proposed Circuit Breaker Halt Rule

1. If a short selling circuit breaker was to be imposed, should short selling in individual securities be halted entirely during a period of severe decline in the price of the security? If so, why? If not, why not? Please explain.

2. If short selling should be halted during periods of severe decline in the price of an individual security, how should the decline be measured? Should the decline be tied to a market index or the price of an individual security? Should illiquidity in the market for an individual security be a factor in measuring a decline in the price of a security for purposes of determining whether to halt short selling in a particular security? Please explain.

---

[296] See Sections III.A.3 and III.B.3. discussing the after-hours trading with regard to the proposed modified uptick rule and the proposed uptick rule, respectively.

[297] See supra note 274.

3. If short selling should be halted during periods of severe decline in the price of an individual security, on what price should the decline be based? Should the decline be based on the previous day's closing price? If the decline is measured by the prior day's closing price at the end of regular trading hours, should it be based on the closing price reported in the consolidated system, or some other widely-disseminated price? Please explain.

4. The proposed circuit breaker rules would impose a short sale halt on any security that declines in price 10% or more relative to the prior day's closing price for that security. We note that a low trigger level may result in more securities becoming subject to a halt or some securities becoming subject to a halt more frequently, resulting in potential increases in costs, decreases in liquidity, and decreases in market quality for the affected security. Also, the impact of a lower trigger level may be greater for thinly traded securities and higher volatility securities than for other securities. However, if a high level is established, more securities may face severe price declines for longer periods before a halt is imposed. This also may affect thinly traded securities more than other securities. Is 10% an appropriate trigger for a circuit breaker rule that results in short sale halt? If not, at what level should a halt take place? Should the trigger be different for thinly traded or higher volatility securities? Should the halt take place after a 10% decline, or a higher/lower level? Should the initial halt take place after a 5% decline, or a 15% decline, or a 20% decline, or some other decline? Please explain. Should the decline be measured as a percentage of the individual security's price or should another value be used? Please explain. For example, should the decline measurement for the circuit breaker threshold be based on the dollar amount of the decline, i.e., $5? If so,

how should the thresholds be determined in relation to the price level of the individual stock? Should the percentage decline be linked to the stock's price level such that stocks with lower prices must experience a greater percentage decline before the circuit breaker is triggered? If so, what thresholds are appropriate? Please explain. If the percentage decline is linked to price level, what additional operational burdens would be experienced if stock values were required to be continuously monitored due to frequent fluctuation? Please explain. What costs and benefits may accrue from having the decline based on a dollar amount rather than a value derived from a percentage of the share value? What potential problems or benefits may arise from pegging a short selling circuit breaker threshold to a decline in a stock's dollar amount? Please explain.

5. The proposed circuit breaker halt rule would impose a short selling halt for the trading day following the triggering of the circuit breaker. Is this an appropriate length of time? If so, why? If not, why not, and how long should the halt persist? Should the length of the halt vary depending on the time during the day that the circuit breaker is triggered?[298] We note that increasing the length of a halt to an additional days or multiple additional days may increase costs, reduce market quality, and reduce liquidity in that security. This may affect thinly traded securities and higher volatility securities more than other securities. However, decreasing the period of time to less than a trading day, such as limiting the halt to an hour or a few hours following the trigger, may reduce the effectiveness of the halt. Would it be more beneficial for a 10% intraday decline to trigger a periodic halt in short selling rather than a halt for the a trading day? Should it result in a multiple day halt in short selling? Please explain. How disruptive to normal

[298] See 1998 Release supra note 230 and accompanying text (discussing that SRO Circuit Breaker rules vary the length of the trading halt depending on the time of day the halt is triggered and the amount of the decline triggering the halt).

trading would a multiple day halt be compared to a halt for one trading day? If short selling is halted after the circuit breaker is triggered in the wake of a 10% intraday decline, and the value of the stock continues to decline throughout the day to the point where it is down 20% at closing, should short selling be allowed to resume the following trading day? If so, why? If not, why not? Please explain. Should a 20% or greater intraday decline result in a halt on short selling for multiple trading days? For example, would it be appropriate for a 20% intraday decline on the day the circuit breaker is triggered to result in a 3-day halt in short selling, a 5-day halt in short selling, or a 10-day halt in short selling? Specifically, what length of a short selling halt would be appropriate for the various levels of decline in excess of 10%? Should volatility of the individual security be considered? Please explain.

6. Should different stocks be subject to different levels of decline before the circuit breaker is triggered? For example, should a higher trigger level apply to more liquid stocks than to less liquid stocks? Should different trigger levels be based on market capitalization or volatility of individual securities? If so, what parameters should apply and what criteria should be used to determine those parameters? Please explain.
7. Would a circuit breaker that when triggered halts short selling in a particular security result in increased selling pressure by short sellers in anticipation of the halt for securities experiencing large price declines? Please explain and provide data and analysis to support the explanation. What provisions, if any, would facilitate an orderly re-entry of a security after a halt on short selling? Please explain.
8. What benefits would be associated with a short selling circuit breaker that when triggered imposes short selling halts? Could such a short selling halt help stabilize the

market for the individual security? If so, why? If not, why not? Could the short selling halt benefit investors by allowing the market to "cool off" with respect to that individual security? Please explain. Could a temporary short selling halt imposed by a circuit breaker result in an increase in investor confidence? Please explain.

9. What costs would be associated with implementing a short selling circuit breaker for individual securities that when triggered imposed a halt on short selling? Please explain. What would it cost to update systems in a manner necessary to ensure compliance with such a circuit breaker? Would the expenditure necessary to ensure compliance be primarily an "up-front" cost? Would the expenditure necessary to ensure compliance require long-term investment? Please explain. What technological challenges would be encountered in updating systems to ensure compliance with a short selling circuit breaker that applied to individual securities and when triggered imposed halts on short selling? Please explain. How long would it take to update systems in a manner that ensured compliance with such a short selling circuit breaker? Please explain.

10. Should a short selling circuit breaker that when triggered imposed a halt on short selling contain exceptions? If so, why? If not, why not? Please explain. Should the circuit breaker contain an exception for bona fide market making? If so, why? If not, why not? Should such an exception apply to: registered market makers, block positioners, other market makers obligated to quote in the over-the-counter market, in each case that are selling short the individual securities subject to the short selling halt? If so, why? If not, why not, and what entities should be excepted under a bona fide market making exception? Should the circuit breaker provide an exception that would allow short sales that occur as a result of automatic exercise or assignment of an equity option held prior

to the effectiveness of the short selling halt due to expiration of the option? If so, why? If not, why not? Please explain. Should the circuit breaker contain an exception for options market makers selling short as part of bona fide market making and hedging activities related directly to bona fide market making in derivatives on the individual security subject to the halt? If so, why? If not, why not? Please explain. The circuit breaker halt rule as proposed includes an exception for hedging activity by market makers engaged in bona fide market making, but it does not provide an exception for hedging of convertible securities or for convertible arbitrage activities by persons who are not market makers engaged in bona fide market making activities at the time of the short sale. Should we consider exceptions for convertible arbitrage and/or the hedging of convertible securities by persons who are not market makers engaged in bona fide market making? Would such exceptions reduce the effectiveness of the rule? How often would this exception be used? Please explain and provide empirical data to support explanations/analyses.

11. What other exceptions should be considered or included in such a circuit breaker? Please explain.

12. What would be an appropriate implementation period for the circuit breaker? Would a three month implementation period be appropriate for a circuit breaker that when triggered imposed short selling halts on individual securities? Is more or less time necessary? Please explain.

13. Should the exception for owned securities be limited to Rule 144 securities, similar to the Short Sale Ban, or expanded to include other securities that a seller is deemed to own but are not included under Rule 200(b) of Regulation SHO?

14. We are proposing to include an exception for marker makers, including over-the-counter market makers, that sell short as part of bona fide market making and hedging activity directly related to bona fide market making in derivative securities based on covered securities or exchange traded funds and exchange traded notes of which covered securities are a component. Similar to the Short Sale Ban, should we also provide that this exception would not apply to any market maker that knows that the customer's or counterparty's transaction would result in the customer or counterparty establishing or increasing an economic net short position (i.e., through actual positions, derivatives, or otherwise) in a covered security? Do the same concerns apply for a short sale halt that would only be in place for one trading day? What if the proposed circuit breaker halt rule prohibits short selling in a particular security for longer than one trading day when triggered? How long of a period would necessitate including such a provision?

15. Should the proposed circuit breaker halt rule be adopted in addition to a permanent, market-wide short sale price test restriction rule? Thus, while a short sale price test restriction rule would be in place as a permanent, market-wide rule, a circuit breaker would also trigger a short selling halt in any security that suffers a severe price decline.

16. Should the proposed circuit breaker halt rule apply to non-NMS securities? Would a 10% trigger level cause some non-NMS securities to be halted too frequently? Should we consider a different trigger for non-NMS securities?

17. As an alternative to a circuit breaker rule that prohibits short selling at any price after the trigger price is reached, should we consider instead a price limit rule that would prohibit short selling in a particular NMS security at a price lower than 10% below the prior day's close? Unlike a circuit breaker rule, a price limit rule would continue

to allow short selling at prices above the limit price after the limit has been reached. Would 10% be the appropriate limit? Should it be higher or lower? Please explain.

18. We propose including an exception for sales of securities that the seller is deemed to own pursuant to Rule 200(b) of Regulation SHO because these are sales of owned securities. Are broker-dealers able to identify short sales as sales of Rule 200(b) owned securities on an intra-day basis so that the exception would be useful when a circuit breaker is triggered?

Questions Regarding Circuit Breaker Price Test Rule

1. Should a short selling circuit breaker impose a short sale price test restriction on individual equity securities, rather than halt short selling for individual securities when triggered? For example, following a 10% decline in a security's price, as measured from the prior day's closing price, should a circuit breaker result in a temporary short sale price test restriction in the form of the proposed modified uptick rule or the proposed uptick rule? Please explain.
2. Should we consider a circuit breaker rule that, when triggered, would prohibit short selling in a particular NMS security on a downbid unless the short sale is effected at a price that is more than 10% greater than the prior day's closing price? Would 10% be an appropriate requirement? Should it be higher or lower? Should we have different percentages for different types of securities (e.g., based on volatility, market capitalization, volume traded)? Please explain.
3. The proposed circuit breaker rules would impose a short sale price test on any security that suffers a decline in price of 10% or more relative to the prior day's closing price for that security. We note that a low trigger level may result in more securities becoming

subject to a short sale price test or some securities becoming subject to a short sale price test more frequently, resulting in potential increases in costs, decreases in liquidity, and decreases in market quality for the affected security. Also, the impact of a lower trigger level may be greater for thinly traded securities or higher volatility securities than for other securities. However, if a high level is established, more securities may face severe price declines for longer periods before the short sale price test is imposed. This also may affect thinly traded securities more than other securities. Unlike a circuit breaker that results in a halt, however, a circuit breaker that results in a short sale price test would not prohibit short selling but would restrict short selling to a rising market. Also, the short sale price test would be limited to a trading unit increment, which may result in fewer costs and reduced loss of liquidity than a short sale halt. Is 10% an appropriate trigger for a circuit breaker rule that results in short sale price test? If not, at what percentage trigger level should short sale price test restrictions be imposed? Would a 10% trigger level be appropriate? Would a higher or lower trigger level be appropriate? Should the trigger be different for thinly traded or higher volatility stocks? Should we consider market capitalization in determining different trigger levels?

4. What short sale price test restrictions would be most appropriate in combination with a short selling circuit breaker? Should the circuit breaker when triggered result in a short sale price test based on the national best bid, similar to the proposed modified uptick rule? Please explain. Should the circuit breaker when triggered result in a short sale price test based on the last sale price, similar to the proposed uptick rule? Please explain. Should the circuit breaker when triggered result in a short sale price test that requires short sale orders to be initiated only at a price above the highest prevailing

national best bid by posting a quote for a short sale order above the national bid? If so, why? If not, why not? If the circuit breaker when triggered results in a short sale price test restriction based on the national best bid (the proposed modified uptick rule), should short selling be restricted to a specific increment above the current national best bid, such as one cent above the national best bid? Or should a higher or lower increment apply? Please explain. If a specific increment is suggested, what impact would such an increment have on short selling in the individual security? Please explain. What increment, if any, would be tantamount to a halt on short selling during the period in which the circuit breaker is in effect? Please explain and provide empirical data and analysis in support of any arguments and/or analyses.

5. The proposed circuit breaker halt rule would impose a short sale price test for the trading day following the triggering of the circuit breaker. Is this an appropriate length of time? If so, why? If not, why not, and how long should the short sale price test persist? We note that increasing the length of a halt to an additional days or multiple additional days may increase costs, reduce market quality, and reduce liquidity in that security. This may affect thinly traded securities or higher volatility securities more than other securities. However, decreasing the period of time to less than the trading day, such as limiting the short sale price test to an hour or a few hours following the trigger, may reduce the effectiveness of the short sale price test. Would it be more beneficial for a 10% intraday decline to trigger a short sale price test in short selling for a few hours rather than for the trading day? Should it result in a multiple day short sale price test? Please explain. How disruptive to normal trading would a multiple day short sale price test be compared to a halt for one trading day? If short selling is restricted by a price

test after the circuit breaker is triggered in the wake of a 10% intraday decline, and the value of the stock continues to decline throughout the day to the point where it is down 20% at closing, should short selling be allowed to resume the following trading day? If so, why? If not, why not? Please explain. Should a 20% or greater intraday decline result in a short sale price test for multiple trading days? For example, would it be appropriate for a 20% intraday decline on the day the circuit breaker is triggered to result in a 3-day price test restriction in short selling, a 5-day restriction on short selling, or a 10-day restriction on short selling? Specifically, what length of a restriction would be appropriate for the various levels of decline in excess of 10%? Should we consider a different period for higher volatility stocks? Should we consider market capitalization in determining different trigger levels? Please explain.

6. What benefits would be associated with a short selling circuit breaker that when triggered imposed short sale price test restrictions? Could the short sale price test restrictions help stabilize the market for the individual security? If so, why? If not, why not? Could the short sale price test restrictions benefit investors by allowing the market to "cool off" with respect to that individual security? Please explain. Could a circuit breaker that when triggered imposes short sale price test restrictions result in an increase in investor confidence? Please explain.
7. What are the benefits, if any, of a circuit breaker that when triggered imposes short sale price test restrictions, versus a permanent, market-wide short sale price test such as the modified uptick rule or the proposed uptick rule? Please explain and support explanations with data and analysis where appropriate.

8. What costs would be associated with implementing a short selling circuit breaker that when triggered imposed short sale price test restrictions? Please explain. What would be the degree of financial expenditure involved in updating systems in a manner necessary to ensure compliance with such a circuit breaker? Would the expenditure necessary to ensure compliance be primarily an "up-front" cost? Would the expenditure necessary to ensure compliance require long-term investment? Please explain. How would the costs of a circuit breaker that when triggered imposes short sale price test restrictions compare with the costs of a permanent short sale price test such as the proposed modified uptick rule or the proposed uptick rule? Please explain.
9. What technological challenges would be encountered in updating systems to ensure compliance with a short selling circuit breaker that when triggered imposed short sale price test restrictions on individual securities? Please explain. How long would it take to update systems in a manner that ensured compliance? Please explain. Would a short selling circuit breaker that when triggered imposed short sale price test restrictions impede the efficient functioning of the equity markets? If so, why? If not, why not? Please explain. Are there any other operational challenges that may arise from implementing a short selling circuit breaker that when triggered imposed short sale price test restrictions? Please explain. Would the operational challenges presented impede the effectiveness of such a short selling circuit breaker? Please explain.
10. Are there other short sale price test restrictions that should be considered in combination with a short selling circuit breaker? Please explain.
11. Should a circuit breaker that when triggered imposed short sale price test restrictions include exceptions? Please explain. If such a circuit breaker is based on the proposed

modified uptick rule, should it contain the same exceptions as those contemplated in the proposed modified uptick rule? If so, why? If not, why not? If other or different exceptions are warranted for such a circuit breaker, what should they be? Please explain. If a circuit breaker is based on the proposed uptick rule, should it contain the same exceptions as those contemplated in the proposed uptick rule? If so, why? If not, why not? If other or different exceptions are warranted for such a circuit breaker, what should they be? Please explain.

12. Should a circuit breaker that when triggered imposed short sale price test restrictions contain a general market maker exception? If so, why? If not, why not? If so, should the market maker exemption be limited to registered market makers, exchange-based market makers, or apply to over-the-counter market makers as well? Should upstairs customer facilitation be exempted from a short selling circuit breaker? Should parties involved in delta neutral hedging be excepted from a short selling circuit breaker? Should parties involved with index arbitrage be excepted from a short selling circuit breaker that when triggered imposed short sale price test restrictions? What other exceptions may be appropriate? Please explain.

13. What implementation period would be necessary for the circuit breaker? Would a three month implementation period be appropriate for a circuit breaker that when triggered imposed short sale price test restrictions on individual securities? Is more or less time necessary? Please explain.

14. One commenter suggested a circuit breaker that, when triggered, would prohibit any person from selling short except at an upbid.[299] Should a circuit breaker that triggers a

[299] See National Exchanges Letter, supra note 63.

bid-based price restriction for a particular security be expanded to prohibit short sales both on a downbid and at the bid? Thus, once triggered, short sales in the particular security could only be executed or displayed, or effected, at an upbid. We note that such a rule would be stricter than the proposed circuit breaker modified uptick rule, which would permit short sales at the bid unless the bid is on a downbid. As a result, this proposal may result in additional costs, reduce liquidity, and reduce market quality. However, this proposed rule may also establish a longer "break" before short selling resumes. Would it be appropriate to change the proposed circuit breaker modified uptick rule to require that, following the trigger of the circuit breaker, short sales could only be effected at an upbid? Please explain why this may be more appropriate.

15. Would it be more appropriate for the resulting price test to be based on a policies and procedures rule or a straight prohibition? For instance, a circuit breaker that triggers a policies and procedures rule would require trading centers to incur immediate upfront costs to establish policies and procedures that would be implemented and enforced once a circuit breaker is triggered for a particular security. Would a circuit breaker that triggers a straight prohibition incur fewer costs? Please explain.

V. Marking

Rule 200(g) of Regulation SHO provides that a broker-dealer must mark all sell orders of any security as "long" or "short."[300] As initially adopted, Regulation SHO included an additional marking requirement of "short exempt" applicable to short sale orders if the seller was "relying on an exception from the tick test of 17 CFR 240.10a-1, or any short sale price test of any

[300] See 17 CFR 242.200(g).

exchange or national securities association."[301] We adopted amendments to Rule 200(g) of Regulation SHO to remove the "short exempt" marking requirement in conjunction with our elimination of former Rule 10a-1.[302]

In conjunction with the proposed amendments to Rule 201 of Regulation SHO to add a short sale price test or a circuit breaker rule, we are proposing to amend Rule 200(g) of Regulation SHO to again impose a "short exempt" marking requirement. Specifically, proposed Rule 200(g) would provide that "[a] broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."[303]

In addition, proposed Rule 200(g)(2) of the proposed modified uptick rule would provide that a sale order shall be marked "short exempt" only if the provisions of paragraph (c) or (d) of proposed Rule 201 are met.[304] This "short exempt" marking requirement would provide a record that a broker-dealer is availing itself of the provisions of paragraph (c) or (d) of the proposed modified uptick rule.

Proposed Rule 200(g)(2) of the proposed uptick rule or the proposed circuit breaker rules would provide that a sale order shall be marked "short exempt" only if the seller is relying on an exception from the price test of §242.201.[305] This "short exempt" marking requirement would provide a record that short sellers are availing themselves of the various exceptions to the application of the restrictions of the proposed uptick rule.[306]

---

301 See 2004 Regulation SHO Adopting Release, 69 FR 48008.

302 See 2007 Price Test Adopting Release, 72 FR 36348.

303 See proposed Rule 200(g) of the proposed modified uptick rule and of the proposed uptick rule.

304 See proposed Rule 200(g)(2) of the proposed modified uptick rule.

305 See Proposed Rule 200(g)(2).

The records provided pursuant to the "short exempt" marking requirements of proposed Rule 200(g) of the proposed short sale price test rules and the proposed circuit breaker rules would aid surveillance by SROs and the Commission for compliance with the provisions of either of those short sale price test restrictions. In addition, if the Commission were to adopt a policies and procedures approach, such as is proposed in conjunction with the proposed modified uptick rule, the proposed "short exempt" marking requirement would provide an indication to a trading center regarding whether it must execute or display a short sale order with regard to whether the short sale order is at a down-bid price.

If we were to adopt the proposed "short exempt" marking requirement of proposed Rule 200(g) of the proposed short sale price test rules or the proposed circuit breaker rules, we are proposing an implementation period under which market participants would have to comply with this requirement three months following the effective date of the proposed marking requirement. We believe that this proposed implementation period would provide market participants with sufficient time in which to modify their systems and procedures in order to comply with the proposed marking requirements. We realize, however, that a shorter or longer implementation period may be manageable or preferable. Thus, we seek specific comment as to what length of implementation period would be necessary or appropriate, and why, such that market participants would be able to meet the proposed marking requirements, if adopted.

---

[306] The improper marking of a short sale order as "short exempt" by the broker-dealer would be a violation of proposed Rule 200(g)(2) and Exchange Act Section 10(a). In addition, the improper marking of a short sale order as "short exempt" could, in some circumstances, result in liability under the antifraud provisions of the federal securities laws; the liability of the broker-dealer that marked the order, and of the trading center that displayed or executed the order, would turn on whether those entities acted with the mental state required under the applicable antifraud provisions.

Request for Comment

We seek comment generally on all aspects of the proposed amendment to Rule 200(g) of Regulation SHO. In addition, we seek comment on the following:

1. What type of costs, if any, would be associated with requiring sell orders to be marked "short exempt" when relying on an exception under proposed Rule 201? What types of costs, if any, would be associated with not requiring sell orders to be marked "short exempt" when relying on an exception under proposed Rule 201?
2. Should the proposed rule require a broker-dealer marking a sell order "short exempt" to identify the specific provision on which the broker-dealer is relying in marking the order "short exempt"? If not, why not?
3. What would be a sufficient implementation period for making any systems changes necessary to allow sell orders to be marked "short exempt"?
4. Please describe any anticipated difficulties in complying with a "short exempt" marking requirement.
5. The "short exempt" marking has historically been used only for short sales that are excepted from a short sale price test. For instance, the "short exempt" marking was not available for short sales that were excepted from the Regulation SHO locate requirement of Rule 203(b). We are, however, proposing to require short sales that are excepted from the proposed circuit breaker halt rule, when triggered, to be marked "short exempt." Would a "short exempt" marking be needed for the proposed circuit break rules if circuit breakers operate in place of short sale price test restrictions?

VI. Overseas Transactions

In connection with former Rule 10a-1, the Commission consistently took the position that the rule applied to trades in securities subject to that rule where the trade was "agreed to" in the U.S., but booked overseas.[307] In addition, in the 2004 Regulation SHO Adopting Release we stated that any broker-dealer using the United States jurisdictional means to effect short sales in securities traded in the United States would be subject to Regulation SHO, regardless of whether the broker-dealer is registered with the Commission or relying on an exemption from registration.[308] For example, a U.S. money manager decides to sell a block of 500,000 shares in an NMS stock. The money manager negotiates a price with a U.S. broker-dealer, who sends the order ticket to its foreign trading desk for execution. In our view, this trade occurred in the United States as much as if the trade had been executed by the broker-dealer at a U.S. trading desk. Under either the proposed short sale price test rules or the proposed circuit breaker rules, if

---

[307] See Securities Exchange Act Release No. 27938 (Apr. 23, 1990), 55 FR 17949 (Apr. 30, 1990) (stating that the no-action position exempting certain index arbitrage sales from former Rule 10a-1 would not apply to an index arbitrage position that was established in an offshore transaction unless the holder acquired the securities from a seller that acted in compliance with former Rule 10a-1 or other comparable provision of foreign law). See also Securities Exchange Act Release No. 21958 (Apr. 18, 1985), 50 FR 16302 (Apr. 25, 1985) at n. 48 (stating that, "Rule 10a-1 does not contain any exemption for short sales effected in international markets."). The question of whether a particular transaction negotiated in the U.S. but nominally executed abroad by a foreign affiliate is a domestic trade for U.S. regulatory purposes was also addressed in the Commission's Order concerning Wunsch Auction Systems, Inc. (WASI). The Commission stated its belief that "trades negotiated in the U.S. on a U.S. exchange are domestic, not foreign trades. The fact that the trade may be time-stamped in London for purposes of avoiding an SRO rule does not in our view affect the obligation of WASI and BT Brokerage to maintain a complete record of such trades and report them as U.S. trades to U.S. regulatory and self-regulatory authorities and, where applicable, to U.S. reporting systems." See Securities Exchange Act Release No. 28899 (Feb. 20, 1991), 56 FR 8377 (Feb. 28, 1991). In what is commonly referred to as the "fax market," a U.S. broker-dealer acting as principal for its customer negotiates and agrees to the terms of a trade in the U.S., but transmits or faxes the terms overseas to be "printed" on the books of a foreign office. This practice of "booking" trades overseas was analyzed in depth in the Division of Market Regulation's Market 2000 Report. In the Report, the Division estimated that at that time approximately 7 million shares a day in NYSE stocks were faxed overseas, and many of these trades were nominally "executed" in the London over-the-counter market. See Division of Market Regulation, SEC, Market 2000: An Examination of Current Equity Market Developments (Jan. 1994), Study VII, p. 2.

[308] See 2004 Regulation SHO Adopting Release, 69 FR at 48104, n. 54.

the short sale is agreed to in the U.S., it must be effected in accordance with the requirements of those proposed rules, unless otherwise excepted.

Request for Comment

1. Would the proposed modified uptick rule, proposed uptick rule, or circuit breaker rules, if adopted, result in sellers transacting short sales in foreign markets where they would not be subject to a short sale price test rather than in U.S. markets? If so, please explain.
2. For short sales agreed to in the United States and executed overseas, would the time the short sale is agreed to in the U.S. be the appropriate time to be used to establish the price against which the proposed uptick rule, proposed modified uptick rule, or circuit breaker rule, would be determined?
3. Please identify any challenges or difficulties that could arise in applying the proposed modified uptick rule or proposed uptick rule to short sales agreed to in the United States and executed overseas?
4. Would the proposed modified uptick rule, proposed uptick rule, circuit breaker proposals, or any other restriction on short sales, be easier to implement and enforce for short sales agreed to in the United States but executed overseas? Please explain.
5. What would be the costs and benefits of applying the proposed modified uptick rule, proposed uptick rule, the alternative circuit breaker rules, or any other restriction on short sales to short sales agreed to in the United States and executed overseas?

VII. Exemptive Procedures

The proposed alternative short sale price test rules and the alternative circuit breaker rules would establish procedures for the Commission, upon written request or its own motion, to grant an exemption from the rules' provisions, either unconditionally or on specified terms and

conditions, if the Commission determines that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.[309] Pursuant to this provision, we would consider and act upon appropriate requests for relief from the proposed short sale price tests' provisions and the proposed short sale circuit breakers' provisions, if adopted, and would consider the particular facts and circumstances relevant to each such request and any appropriate conditions to be imposed as part of the exemption. We solicit comment regarding including a provision for exemptive procedures in the proposed short sale price test rules and the propose circuit break rules.

VIII. Paperwork Reduction Act

A. Background

Certain provisions of the proposed amendments to Regulation SHO would impose new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[310] We have submitted the collection of information to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has not yet assigned a control number to the new collection of information.

We are proposing amendments to Rules 201 and 200(g) of Regulation SHO under the Exchange Act. The proposed amendments to Rule 201 include two alternative price tests that would impose restrictions on the prices at which certain securities would be able to be sold

---

[309] See proposed Rule 201(e) of the proposed uptick rule; proposed Rule 201(f) of the proposed modified uptick rule; proposed Rule 201(g) of the proposed circuit breaker halt rule and proposed circuit breaker uptick rule; and proposed Rule 201(h) of the proposed circuit breaker modified uptick rule.

[310] 44 U.S.C. 3501 et seq.

short.[311] The first alternative short sale price test would be a proposed modified uptick rule. The second alternative short sale price test would be a proposed uptick rule. We are also proposing alternative circuit breaker rules that would establish limitations on short selling in a particular security during severe market declines in the price of that security.[312] The first alternative circuit breaker rule would be the proposed circuit breaker halt rule. The second alternative circuit breaker rule would be the proposed circuit breaker modified uptick rule. The third alternative circuit breaker rule would be the proposed circuit breaker uptick rule. In addition, we are proposing to amend Rule 200(g) of Regulation SHO to impose a "short exempt" marking requirement and to also require that a broker-dealer mark a sell order "short exempt" only if the provisions in proposed Rule 201(c) or (d) of the proposed modified uptick rule (or the proposed circuit breaker modified uptick rule) are met, or if a seller is relying on an exception in proposed Rule 201(c) of the proposed uptick rule (or the proposed circuit breaker uptick rule), or if a seller is relying on an exception in proposed Rule 201(c) of the proposed circuit breaker halt rule.[313]

B. Summary

As detailed below, several provisions under the proposed amendments to Regulation SHO would impose a new "collection of information" within the meaning of the PRA.

1. Policies and Procedures Requirement under Proposed Modified Uptick Rule

The proposed modified uptick rule would impose a new "collection of information" within the meaning of the PRA.[314] Under the proposed modified uptick rule, a trading center

---

311 See proposed Rule 201.

312 See proposed Rule 201.

313 See proposed Rules 200(g) and 200(g)(2).

314 The discussion of the PRA as it applies to the proposed modified uptick rule applies equally to the proposed circuit breaker modified uptick rule.

would be required to have written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a down-bid price.[315] In addition, a trading center would be required to have policies and procedures reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price.[316] Thus, upon acceptance of a short sale order, a trading center's policies and procedures would have to be reasonably designed to permit the trading center to be able to determine whether or not the short sale order is priced in accordance with the provisions of proposed Rule 201(b)(1) and to recognize when an order is marked "short exempt" such that the trading center's policies and procedures do not prevent the execution or display of such orders on a down-bid price.[317]

At a minimum, a trading center's policies and procedures would need to enable a trading center to monitor, on a real-time basis, the national best bid, and whether the current national best bid is an up- or down-bid from the last differently priced national best bid, so as to determine the price at which the trading center may execute or display a short sale order. As mentioned above, a trading center would need to have policies and procedures governing how to recognize and handle orders that a trading center receives as marked "short exempt" pursuant to proposed Rule 200(g)(2).[318] A trading center's policies and procedures also would be required to

---

[315] Proposed Rule 201(b)(1). A "down bid" is defined as "a price that is less than the current national best bid or, if the last differently priced national best bid was greater than the current national best bid, a price that is less than or equal to the current national best bid." Proposed Rule 201(a)(2).

[316] See proposed Rule 201(b)(1)(ii). See also Section V, above, regarding the proposed "short exempt" marking requirement.

[317] See proposed Rule 200(g)(2). The broker-dealer marking the order "short exempt" would have responsibility for being able to identify on which provision to the proposed modified uptick rule it was relying in marking the order "short exempt."

[318] Id.

address latencies in obtaining data regarding the national best bid. In addition, to the extent such latencies occur, a trading center would be required to implement reasonable steps in its policies and procedures to monitor such latencies on a continuing basis and take appropriate steps to address a problem should one develop.

A trading center would also need to take such steps as would be necessary to enable it to enforce its policies and procedures effectively. As part of its written policies and procedures, a trading center also would be required to regularly surveil to ascertain the effectiveness of its policies and procedures and take prompt remedial steps.[319] The nature and extent of the policies and procedures that a trading center would be required to establish to comply with these requirements would depend upon the type, size, and nature of the trading center.

2. Identification of Short Sale Orders and Policies and Procedures Requirement under the Proposed "Broker-Dealer" and "Riskless Principal" Provisions

The proposed modified uptick rule contains a "broker-dealer" provision that would require a new "collection of information" under the PRA. Proposed Rule 201(c)(1) provides that a broker dealer may mark a short sale order of a covered security "short exempt" if a broker-dealer that submits a short sale order to a trading center has identified that the short sale order is not on a down-bid price at the time of submission of the order to the trading center.[320] This provision would require a new "collection of information" in that a broker-dealer marking an order "short exempt" under proposed Rule 201(c)(1) must identify both a short sale order as priced in accordance with the requirements of proposed Rule 201(c)(1) and establish, maintain,

---

[319] This provision would reinforce the ongoing maintenance and enforcement requirements of proposed Rule 201(b)(1) by explicitly assigning an affirmative responsibility to trading centers to surveil to ascertain the effectiveness of their policies and procedures. See proposed Rule 201(b)(2). We note that Rule 611(a)(2) of Regulation NMS contains a similar provision for trading centers. See 17 CFR 242.611(a)(2).

[320] See proposed Rule 201(c)(1).

and enforce written policies and procedures reasonably designed to prevent the incorrect identification of orders as being price in accordance with the requirements of proposed Rule 201(c)(1).[321]

While the proposed uptick rule itself does not contain a "collection of information" requirement within the meaning of the PRA, the proposed uptick rule does contain a "riskless principal" exception that would require a new "collection of information" under the PRA.[322] The proposed modified uptick rule also contains a "riskless principal" provision that would require a new "collection of information" under the PRA. Specifically, proposed Rule 201(d)(6) of the proposed modified uptick rule and Rule 201(c)(9) of the proposed uptick rule would allow a broker-dealer to mark short sale orders of a covered security "short exempt" where a broker-dealer is facilitating customer buy orders or sell orders where the customer is net long, and the broker-dealer is net short but is effecting the sale as riskless principal, provided certain conditions are satisfied.[323]

Proposed Rules 201(d)(6) of the proposed modified uptick rule and 201(c)(9) of the proposed uptick rule would require a new "collection of information" in that each would require a broker-dealer marking an order "short exempt" under these provisions to have written policies and procedures in place to assure that, at a minimum, the customer order was received prior to

---

[321] See proposed Rule 201(c)(1). As part of its written policies and procedures, a broker-dealer also would be required to regularly surveil to ascertain the effectiveness of its policies and procedures and take prompt remedial steps. See proposed Rule 201(c)(2). This provision is intended to reinforce the ongoing maintenance and enforcement requirements of the provision contained in proposed Rule 201(c)(1) by explicitly assigning an affirmative responsibility to broker-dealers to surveil to ascertain the effectiveness of their policies and procedures. See id.

[322] The discussion of the PRA as it applies to the proposed uptick rule applies equally to the proposed circuit breaker uptick rule.

[323] See proposed Rule 201(d)(6). As a result, a trading center's policies and procedures would need to be reasonably designed to permit the execution or display of such orders without regard to whether the order is at a down-bid price. See proposed Rule 201(b)(1)(ii).

the offsetting transaction; the offsetting transaction is allocated to a riskless principal account within 60 seconds of execution; and that it has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which the broker-dealer relies pursuant to this provision.[324]

3. Proposed Marking Requirements

While the current marking requirements in Rule 200(g) of Regulation SHO, which require broker-dealers to mark all sell orders of any equity security as either "long" or "short,"[325] would remain in effect, proposed Rule 200(g) would add a new marking requirement of "short exempt."[326] In addition, the proposed amendments to Rule 200(g)(2) would require that a broker-dealer mark a sell order "short exempt" only if the provisions in paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule) are met, or if the seller is relying on an exception in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule), or if the seller is relying on an exception in paragraph (c) of the proposed circuit breaker halt rule.[327] The proposed "short exempt" marking requirements would impose a new "collection of information."

C. Proposed Use of Information

1. Policies and Procedures Requirement under Proposed Modified Uptick Rule

The information that would be collected under the proposed modified uptick rule's written policies and procedure requirement would help ensure that the trading center does not

---

[324] See proposed Rule 201(c)(9) of the proposed uptick rule and Rule 201(d)(6) of the proposed modified uptick rule.

[325] 17 CFR 242.200(g).

[326] See proposed Rule 200(g). See also Section V above discussing proposed Rule 200(g).

[327] See proposed Rule 200(g)(2).

execute or display any impermissibly priced short sale orders, unless an order is marked "short exempt" in accordance with the rule's requirements. This written policies and procedures requirement would also provide trading centers with flexibility in determining how to comply with the requirements of the proposed modified uptick rule. The information collected also would aid the Commission and SROs that regulate trading centers in monitoring compliance with the price test's requirements. It also would aid trading centers and broker-dealers in complying with the rule's requirements.

2. Identification of Short Sale Orders and Policies and Procedures Requirement under the Proposed "Broker-Dealer" and "Riskless Principal" Provisions

Proposed Rule 201(c)(1) of the proposed modified uptick rule would include a "broker-dealer" provision that would permit a broker-dealer to mark a short sale order in a covered security "short exempt" if the broker-dealer has identified the order as not being at a down-bid price at the time of submission of the order to the trading center. This provision would include a policies and procedures requirement that would be designed to help prevent incorrect identification of orders for purposes of the proposed modified uptick rule's broker-dealer provision.

Moreover, the information collection under the written policies and procedures requirement in the "riskless principal" exception in proposed Rule 201(c)(9) of the proposed uptick rule and the "riskless principal" provision in proposed Rule 201(d)(6) of the proposed modified uptick rule would help assure that broker-dealers comply with the requirements of these proposed provisions. The information collected would also enable the Commission and SROs to examine for compliance with the requirements of these proposed provisions.

3. Proposed Marking Requirements

Proposed Rule 200(g) would impose a "short exempt" marking requirement.[328] In addition, proposed Rule 200(g)(2) would require that a sale order be marked "short exempt" only if the provisions in paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule) are met,[329] or if the seller is relying on an exception in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule),[330] or if the seller is relying on an exception in paragraph (c) of the proposed circuit breaker halt rule.[331] The purpose of the information collected would be to enable the Commission and SROs to monitor whether a person entering a sell order covered by the proposed amendments to Rule 201 is acting in accordance with one of the provisions contained in paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule), or if the seller is relying on an exception in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule), or if the seller is relying on an exception in paragraph (c) of the proposed circuit breaker halt rule. In particular, the "short exempt" marking requirement would provide a record that would aid in surveillance for compliance with the provisions of proposed Rule 201. It also would provide an indication to a trading center regarding whether or not it must execute or

---

328 See proposed Rule 200(g).

329 See proposed Rule 200(g)(2) of the proposed modified uptick rule (and the proposed circuit breaker modified uptick rule). Paragraphs (c) and (d) of the proposed modified uptick rule (and the proposed circuit breaker modified uptick rule) set forth when a broker-dealer may mark a short sale order "short exempt." See proposed Rules 201(c) and (d).

330 See proposed Rule 200(g)(2) of the proposed uptick rule (and the proposed circuit breaker uptick rule). Paragraph (c) of the proposed uptick rule (and paragraph (c) of the proposed circuit breaker uptick rule) sets forth when a broker-dealer may mark a short sale order "short exempt" in accordance with the proposed uptick rule (or the proposed circuit breaker uptick rule). See proposed Rule 201(c).

331 See proposed Rule 200(g)(2) of the proposed circuit breaker halt rule. Paragraph (c) of the proposed circuit breaker halt rule sets forth when a broker-dealer may mark a short sale order "short exempt" in accordance with the proposed circuit breaker halt rule. See proposed Rule 201(c).

display a short sale order in accordance with the price test restrictions of the proposed modified uptick rule (or the proposed circuit breaker modified uptick rule). It also would help a trading center determine whether its policies and procedures were reasonable and whether its surveillance was effective.

D. Respondents

As discussed below, the Commission has considered each of the following respondents for the purposes of calculating the reporting burdens under the proposed amendments to Rules 200(g) and 201 of Regulation SHO. The Commission requests comment on the accuracy of these figures.

1. Policies and Procedures Requirement under Proposed Modified Uptick Rule

The proposed modified uptick rule would require each trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order at a down-bid price.[332] A "trading center" is defined as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker-dealer that executes orders internally by trading as principal or crossing orders as agent."[333] Because the proposed modified uptick rule would apply to any trading center that executes or displays a short sale order in a covered security, the proposed modified uptick rule would apply to 10 registered national securities exchanges that trade NMS stocks and one

---

[332] See proposed Rule 201(b)(1).

[333] See 17 CFR 242.600(b)(78).

national securities association (or "SRO trading centers"),[334] and approximately 372 broker-dealers (including ATSs) registered with the Commission (or "non-SRO trading centers").[335]

2. Identification of Short Sale Orders and Policies and Procedures Requirements under the Proposed "Broker-Dealer" and "Riskless Principal" Provisions

The collection of information that would be required in the proposed "broker-dealer" provision in proposed Rule 201(c)(1) of the proposed modified uptick rule, the "riskless principal" provision in proposed Rule 201(d)(6) of the proposed modified uptick rule, and the "riskless principal" exception in proposed Rule 201(c)(9) of the proposed uptick rule would apply to all the 5,561[336] registered brokers-dealers submitting short sale orders in reliance on these proposed provisions.

3. Proposed Marking Requirements

The collection of information that would be required pursuant to the proposed "short exempt" marking requirements would apply to all the 5,561[337] registered brokers-dealers submitting short sale orders marked "short exempt" in accordance with the provisions contained in paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the

---

[334] There are 10 national securities exchanges (BX, BATS, CBOE, CHX, ISE, NASDAQ, NSX, NYSE, NYSE Amex, and NYSE Arca) and one national securities association (FINRA) that operate an SRO trading facility for NMS stocks and thus would be subject to the Rule.

[335] This number includes the approximately 325 firms that were registered equity market makers or specialists at year-end 2007 (this number was derived from annual FOCUS reports and discussion with SRO staff), as well as the 47 ATSs that operate trading systems that trade NMS stocks. The Commission believes it is reasonable to estimate that in general, firms that are block positioners - i.e., firms that are in the business of executing orders internally - are the same firms that are registered market makers (for instance, they may be registered as a market maker in one or more Nasdaq stocks and carry on a block positioner business in exchange-listed stocks), especially given the amount of capital necessary to carry on such a business.

[336] This number is based on OEA's review of 2007 FOCUS Report filings reflecting registered broker-dealers, including introducing broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[337] See id.

proposed circuit breaker modified uptick rule), or in reliance on an exception contained in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule), or in reliance on an exception contained in paragraph (c) of the proposed circuit breaker halt rule.

E. Total Annual Reporting and Recordkeeping Burdens

1. Policies and Procedures Requirement under Proposed Modified Uptick Rule

The proposed modified uptick rule would require each trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a down-bid price.[338] In addition, a trading center would need to have policies and procedures reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price.[339] Thus, trading centers would be required to develop written policies and procedures reasonably designed to permit the trading center to be able to determine whether or not the short sale order is priced in accordance with the provisions of proposed Rule 201(b)(1) and to recognize when an order is marked "short exempt" such that the trading center's policies and procedures do not prevent the execution or display of such orders on a down-bid price in accordance with proposed Rule 201(b)(1)(ii).[340] A trading center's policies and procedures would not, however, have to include mechanisms to determine

---

[338] See proposed Rule 201(b)(1). This would include a trading center taking such steps as would be necessary to enable it to enforce its policies and procedures effectively, including the proposed requirement to regularly surveil to ascertain the effectiveness of its policies and procedures and taking prompt remedial steps. See proposed Rule 201(b)(2).

[339] See proposed Rule 201(b)(1)(ii). See also Sections III.A. and V, above, discussing short sale orders marked "short exempt."

[340] See proposed Rule 201(b)(1)(ii).

on which provision a broker-dealer is relying in marking an order "short exempt" in accordance with paragraph (c) or (d) of the proposed modified uptick rule.

Although the exact nature and extent of the policies and procedures that a trading center would be required to establish likely would vary depending upon the nature of the trading center (e.g., SRO vs. non-SRO, full service broker-dealer vs. market maker), we preliminarily estimate that it initially would take an SRO trading center approximately 220 hours[341] of legal, compliance, information technology and business operations personnel time,[342] and a non-SRO trading center approximately 160 hours of legal, compliance, information technology and business operations personnel time,[343] to develop the required policies and procedures.

In addition to this estimate (of 220 hours for SRO respondents and 160 hours for non-SRO respondents), we expect that SRO and non-SRO respondents may incur one-time external costs for outsourced legal services. While we recognize that the amount of legal outsourcing utilized to help establish written policies and procedures may vary widely from entity to entity, we preliminarily estimate that on average, each trading center would outsource 50 hours of legal

---

[341] For purposes of this Release, we are basing our estimates on the burden hour estimates provided in connection with the adoption of Regulation NMS because the policies and procedures developed in connection with that Regulation's order protection rule are in many ways similar to what a trading center would need to do to comply with the proposed modified uptick rule. See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005). We note, however, that these estimates may be on the high end because trading centers have already had to establish similar policies and procedures to comply with Regulation NMS.

[342] Based on experience and estimates provided in connection with Regulation NMS, we anticipate that of the 220 hours we preliminarily estimate would be spent to establish the required policies and procedures, 70 hours would be spent by legal personnel, 105 hours would be spent by compliance personnel, 20 hours would be spent by information technology personnel and 25 hours would be spent by business operations personnel of the SRO trading center.

[343] Based on experience and the estimates provided in connection with Regulation NMS, we anticipate that of the 160 hours we preliminarily estimate would be spent to establish policies and procedures, 37 hours would be spent by legal personnel, 77 hours would be spent by compliance personnel, 23 hours would be spent by information technology personnel and 23 hours would be spent by business operations personnel of the non-SRO trading center.

time in order to establish policies and procedures in accordance with the proposed amendments.[344]

We estimate that there would be an initial one-time burden of 220 (not including the outsourced 50 hours of legal time) burden hours per SRO trading center or 2,420 hours,[345] and 160 (not including the outsourced 50 hours of legal time) burden hours per non-SRO trading center[346] or 59,520 hours, for a total of 61,940 burden hours to establish the required written policies and procedures.[347] We estimate a cost of approximately $7,660,000 for both SRO and non-SRO trading centers resulting from outsourced legal work.[348]

Once a trading center has established the required written policies and procedures, we preliminarily estimate that it would take the average SRO and non-SRO trading center each approximately two hours per month of ongoing internal legal time and three hours of ongoing internal compliance time to ensure that its written policies and procedures are up-to-date and remain in compliance with the proposed amendments to Rule 201, or a total of 60 hours annually per respondent.[349] In addition, we preliminarily estimate that it would take the average SRO and

---

[344] As discussed above, we base our burden estimate of 50 hours of outsourced legal time on the burden estimate used for Regulation NMS because the policies and procedures developed in connection with that Regulation's order protection rule are in many ways similar to what a trading center would need to do to comply with the proposed modified uptick rule.

[345] The estimated 2,420 burden hours necessary for SRO trading centers to establish policies and procedures are calculated by multiplying 11 times 220 hours (11 x 220 hours = 2,420 hours).

[346] The estimated 59,520 burden hours necessary for non-SRO trading centers to establish policies and procedures are calculated by multiplying 372 times 160 hours (372 x 160 hours = 59,520 hours).

[347] Proposed Rule 201(b)(1). Proposed Rule 201(b)(1) requires that "A trading center shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order at a down-bid price."

[348] This figure was calculated as follows: (50 legal hours x $400 x 11 SRO trading centers) + (50 legal hours x $400 x 372 non-SRO trading centers) = $7,660,000. Based on industry sources, OEA estimates that the average hourly rate for outsourced legal services in the securities industry is $400.

[349] This figure was calculated as follows: (2 legal hours x 12 months) + (3 compliance hours x 12 months) = 60 hours annually per respondent. As discussed above, this burden estimate of 60 hours is based on experience and

non-SRO trading center each approximately 16 hours per month of ongoing compliance time, 8 hours per month of ongoing information technology time, and 4 hours per month of ongoing legal time associated with ongoing monitoring and surveillance for and enforcement of trading in compliance with the proposed modified uptick rule, or a total of 336 hours annually per respondent.[350]

As mentioned above, we realize that the exact nature and extent of the policies and procedures that a trading center would be required to establish likely would vary depending upon the type, size, and nature of the trading center. Thus, while we have based our burden estimates, in part, on the burden estimates provided in connection with the adoption of Regulation NMS, we note that these estimates may be on the high end because trading centers have already had to establish policies and procedures in connection with that Regulation's order protection rule, which could help form the basis for the policies and procedures for the proposed modified uptick rule. We realize, however, that these estimates may be on the low end for smaller trading centers with less familiarity with having had to establish policies and procedures in connection with Regulation NMS's order protection rule. Thus, we seek specific comment as to whether the proposed burden estimates are appropriate or whether such estimates should be increased or reduced, and for which entities. If they should be increased or decreased, please address by how much, in order to be able to comply with the proposed modified uptick rule's required policies and procedures, if adopted.

---

what was estimated for Regulation NMS to ensure that written policies and procedures were up-to-date and remained in compliance.

[350] This figure was calculated as follows: (16 compliance hours x 12 months) + (8 information technology hours x 12 months) + (4 legal hours x 12 months) = 336 hours annually per respondent. As discussed above, this preliminary burden estimate of 336 hours is based on experience and what was estimated for Regulation NMS regarding similarly required ongoing monitoring and surveillance for and enforcement of trading in compliance with that regulation's policies and procedures requirement.

2. Identification of Short Sale Orders and Policies and Procedures Requirements under the Proposed "Broker-Dealer" and "Riskless Principal" Provisions

To rely on the proposed modified uptick rule's Rule 201(c)(1) "broker-dealer" provision, a broker-dealer marking a short sale order in a covered security "short exempt" under proposed Rule 201(c)(1) must identify the order as not being a down-bid price at the time the order is submitted to the trading center and must establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent the incorrect identification of orders as not being submitted to the trading center at a down-bid price.[351] At a minimum, the broker-dealer's policies and procedures would need to be reasonably designed to enable a broker-dealer to monitor, on a real-time basis, the national best bid, and whether the current national best bid is an up- or down-bid from the last differently priced national best bid, so as to determine the price at which the broker-dealer may submit a short sale order to a trading center in compliance with the requirements of proposed Rule 201(c)(1). In addition, a broker-dealer would also need to take such steps as would be necessary to enable it to enforce its policies and procedures effectively.[352]

To rely on proposed Rule 201(d)(6)'s "riskless principal" provision under the proposed modified uptick rule or Rule 201(c)(9)'s "riskless principal" exception to the proposed uptick rule, a broker-dealer would be required to have written policies and procedures in place to assure that, at a minimum, the customer order was received prior to the offsetting transaction and that it has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which a broker-dealer relies pursuant to these provisions.

---

[351] See proposed Rule 201(c)(1).

[352] This would include the proposed requirement that broker-dealer regularly surveil to ascertain the effectiveness of its policies and procedures and taking prompt remedial steps. See proposed Rule 201(c)(2).

Although the exact nature and extent of the required policies and procedures that a broker-dealer would be required to establish under the "broker-dealer" or the "riskless principal" provisions likely would vary depending upon the nature of the broker-dealer (e.g., full service broker-dealer vs. market maker), we preliminarily estimate that it initially would take a broker-dealer approximately 160 hours[353] of legal, compliance, information technology and business operations personnel time,[354] to develop the required policies and procedures. In addition to this estimate of 160 hours, we expect that broker-dealers may incur one-time external costs for out-sourced legal services. While we recognize that the amount of legal outsourcing utilized to help establish written policies and procedures may vary widely from entity to entity, we preliminarily estimate that on average, each broker-dealer would outsource 50 hours[355] of legal time in order to establish policies and procedures in accordance with the "broker-dealer" provision in proposed Rule 201(c)(1) of the proposed modified uptick rule, the "riskless principal" exception in 201(c)(9) of the proposed uptick rule, and the "riskless principal" provision in 201(d)(6) of the proposed modified uptick rule.

---

353 We base this estimate of 160 hours on the estimated burden hours we preliminarily believe it would take a non-SRO trading center (which would include broker-dealers) to develop similarly required policies and procedures, since the policies and procedures required under the proposed broker-dealer provisions would be similar to those required for non-SRO trading centers in complying with paragraph (b) of the proposed modified uptick rule.

354 Based on experience and the estimates provided in connection with Regulation NMS, we anticipate that of the 160 hours we estimate would be spent to establish policies and procedures; 37 hours would be spent by legal personnel, 77 hours would be spent by compliance personnel, 23 hours would be spent by information technology personnel and 23 hours would be spent by business operations personnel of the broker-dealer.

355 As discussed above, we base our burden estimate of 50 hours of outsourced legal time on the burden estimate used for Regulation NMS because the policies and procedures developed in connection with that Regulation's order protection rule are in many ways similar to what a broker-dealer would need to do to comply with the policies and procedures required under the proposed broker-dealer provision of the proposed modified uptick rule.

We preliminarily estimate that there would be an initial one-time burden of 160 burden hours per broker-dealer or 889,760 hours[356] to establish policies and procedures that would be required to rely on the proposed modified uptick rule's "broker-dealer" provision in proposed Rule 201(c)(1), the "riskless principal" exception in Rule 201(c)(9) of the proposed uptick rule, or the "riskless principal" provision in 201(d)(6) of the proposed modified uptick rule. We preliminarily estimate a cost of approximately $111,220,000 for broker-dealers resulting from outsourced legal work.[357]

Once a broker-dealer has established written policies and procedures that would be required so that it could rely on proposed 201(c)(1) of the proposed modified uptick rule, 201(c)(9) of the proposed uptick rule, or 201(d)(6) of the proposed modified uptick rule, we preliminarily estimate that it would take the average broker-dealer approximately two hours per month of internal legal time and three hours of internal compliance time to ensure that its written policies and procedures are up-to-date and remain in compliance with proposed 201(c)(1) of the proposed modified uptick rule, 201(c)(9) of the proposed uptick rule, or 201(d)(6) of the proposed modified uptick rule, or a total of 60 hours annually per respondent.[358] In addition, we

---

[356] As discussed above, we base this estimate of 160 hours on the estimated burden hours we preliminarily believe it would take a non-SRO trading center (which would include broker-dealers) to develop similarly required policies and procedures since the policies and procedures required under the proposed broker-dealer provisions would be similar to those required for non-SRO trading centers in complying with paragraph (b) of the proposed modified uptick rule.

The estimated 889,760 burden hours necessary for a broker-dealer to establish policies and procedures are calculated by multiplying 5,561 times 160 hours (5,561 x 160 hours = 889,760 hours).

[357] This figure was calculated as follows: (50 legal hours x $400 x 5,561 broker-dealers) = $111,220,000. Based on industry sources, OEA estimates that the average hourly rate for outsourced legal services in the securities industry is $400.

[358] This figure was calculated as follows: (2 legal hours x 12 months) + (3 compliance hours x 12 months). As discussed above, this burden estimate of 60 hours is based on experience and what was estimated for a Regulation NMS respondent to ensure that its written policies and procedures were up-to-date and remained in compliance.

preliminarily estimate that it would take the average broker-dealer each approximately 16 hours per month of ongoing compliance time, 8 hours per month of ongoing information technology time, and 4 hours per month of ongoing legal time associated with ongoing monitoring and surveillance for and enforcement of trading in compliance with the proposed modified uptick rule, or a total of 336 hours annually per respondent.[359]

As mentioned above, we realize that the exact nature and extent of the policies and procedures that a broker-dealer would be required to establish likely would vary depending upon the type, size, and nature of the broker-dealer. Thus, while we have based our burden estimates on the burden estimates provided in connection with the adoption of Regulation NMS with respect to non-SRO trading centers (which includes broker-dealers), we note that these estimates may be on the high end for those broker-dealers that have already had to establish policies and procedures in connection with that Regulation's order protection rule, which could help form the basis for the policies and procedures for the proposed broker-dealer provision of the modified uptick rule, or the riskless principal provisions under the proposed modified uptick rule and the proposed uptick rule. We realize, however, that these estimates may be on the low end for some broker-dealers with less familiarity with having had to establish policies and procedures in connection with Regulation NMS's order protection rule. Thus, we seek specific comment as to whether the proposed burden estimates are appropriate or whether such estimates should be increased or reduced, and for which broker-dealers. If they should be increased or decreased, please address by how much, in order to be able to comply with the proposed provisions' required policies and procedures, if adopted.

---

[359] This figure was calculated as follows: (16 compliance hours x 12 months) + (8 information technology hours x 12 months) + (4 legal hours x 12 months) = 336 hours annually per respondent. As discussed above, this preliminary burden estimate of 336 hours is based on experience and what was estimated for Regulation NMS for similarly required ongoing monitoring and surveillance for and enforcement of trading in compliance with that regulation's policies and procedures requirement.

3. Proposed Marking Requirements

Proposed Rule 200(g) would impose a "short exempt" marking requirement.[360] In addition, proposed Rule 200(g)(2) would require a broker-dealer to mark all sell orders of a covered security "short exempt" only if the provisions contained in paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule) are met, or if the seller is relying on one of the exceptions contained in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule), or if the seller is relying on one of the exceptions contained in paragraph (c) of the proposed circuit breaker halt rule.[361] While not all broker-dealers likely would enter sell orders in securities covered by the proposed amendments to Rules 200(g) and 201 in a manner that would subject them to this collection of information, we estimate, for purposes of the PRA, that all of the approximately 5,561 registered broker-dealers would do so.[362] For purposes of the PRA, the Commission staff has estimated that a total of approximately 12.9 billion "short exempt" orders would be entered annually.[363]

---

[360] See proposed Rule 200(g).

[361] See proposed Rule 200(g)(2).

[362] We also note that, because the proposed circuit breaker halt rule, if adopted, would not be in place at all times or for all securities and because there would be fewer exceptions that would be available and they would apply only when the restrictions of the proposed circuit breaker halt rule are triggered, the frequency and, therefore, the estimate burden of marking "short exempt" would be expected to be lower under the proposed circuit breaker halt rule.

[363] There are approximately 45.4 billion short sale orders entered annually. OEA calculates that there were about 263 million short sale trades during August 2008 for Amex, FINRA, Nasdaq, NYSEArca, and NYSE market centers. We gross up 263 million by 14.4 which is the ratio of orders to trades. The ratio is derived from Rule 605 reports from the three largest market centers during August 2008. This yields 3.8 billion short sale orders during August 2008 or an annualized figure of 45.4 billion. OEA believes that August 2008 data is representative of a normal month of trading. We estimate that approximately 28.5% of short sale orders are short exempt using Nasdaq short sale data from January to April 2005. We multiply 45.4 billion times 0.285 to obtain our estimate of 12.9 billion short exempt orders.

This would be an average of approximately 2,319,727 annual responses by each respondent.[364] Each response of marking sell orders "short exempt" would take approximately .000139 hours (.5 seconds) to complete.[365] We base this estimate on the fact that, in accordance with the current marking requirements of Rule 200(g) of Regulation SHO, broker-dealers are already required to mark a sell order either "long" or short"; the fact that most broker-dealers already have the necessary mechanisms and procedures in place and are already familiar with processes and procedures to comply with the marking requirements of Rule 200(g) of Regulation SHO; and the fact that broker-dealers would be able to continue to use the same mechanisms, processes and procedures to comply with proposed Rules 200(g) and 200(g)(2).

Thus, the total approximate estimated annual hour burden per year would be 1,793,100 burden hours (12,900,000,000 orders marked "short exempt" @ 0.000139 hours/order marked "short exempt"). Our estimate for the paperwork compliance for the proposed amendments order marking requirement for each broker-dealer would be approximately 322 burden hours (2,319,727 responses @ 0.000139 hours/responses) or (a total of 1,793,100 burden hours / 5,561 respondents).

F. Collection of Information Is Mandatory

1. Proposed Policies and Procedures Requirements

The collection of information that would be required under the proposed modified uptick rule's (and proposed circuit breaker modified uptick rule's) policies and procedures requirement in proposed Rule 201(b)(1) would be mandatory for trading centers executing and displaying short sale orders in covered securities. The collection of information that would be required

---

[364] This figure was calculated as follows: 12.9 billion "short exempt" orders divided by 5,561 broker-dealers.

[365] This estimate is based on the same time estimate for marking sell orders "long" or "short" under current Rule 200(g) under Regulation SHO. See 2004 Regulation SHO Adopting Release, 69 FR at 48023; see also 2003 Regulation SHO Proposing Release, 68 FR at 63000 n. 232.

under the proposed modified uptick rule's (and proposed circuit breaker modified uptick rule's) policies and procedures requirements in connection with the proposed broker-dealer provision in proposed Rule 201(c)(1) and the "riskless principal" provision in proposed Rule 201(d)(6), and the collection of information that would be required under the proposed uptick rule's (and proposed circuit breaker uptick rule's) policies and procedure requirement in connection with the proposed "riskless principal" exception in proposed Rule 201(c)(9) would be mandatory for broker-dealers relying on these provisions.

2. Proposed Marking Requirements

The collection of information would be mandatory for all broker-dealers submitting sell orders marked "short exempt" in reliance on one of the proposed provisions contained in paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule), or in reliance on an exception in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule), or in reliance on an exception in paragraph (c) of the proposed circuit breaker halt rule.

G. Confidentiality

1. Proposed Policies and Procedures Requirements

We expect that the information collected pursuant to the proposed modified uptick rule's (and the proposed circuit breaker modified uptick rule's) required policies and procedures would be communicated to the members, subscribers, and employees (as applicable) of all trading centers. To the extent this information is made available to the Commission, it would not be kept confidential. The information collected pursuant to the proposed modified uptick rule's (or proposed circuit breaker modified uptick rule's) "broker-dealer" provision and the "riskless principal" provisions under the proposed short sale price tests (or under the proposed circuit

breaker price tests) would be retained and would be available to the Commission and SRO examiners upon request, but not subject to public availability.

2. Proposed Marking Requirements

The information collected pursuant to the "short exempt" marking requirements in proposed Rules 200(g) and 200(g)(2) would be submitted to trading centers and would be available to the Commission and SRO examiners upon request.

H. Record Retention Period

1. Proposed Policies and Procedures Requirements

Any records generated in connection with the proposed short sale price tests' requirements to establish written policies and procedures and the proposed circuit breaker rules would be required to be preserved in accordance with, and for the periods specified in, Exchange Act Rules 17a-1 for SRO trading centers and 17a-4(e)(7) for non-SRO trading centers.

2. Proposed Marking Requirements

The proposed amendments to Rule 200(g) and 200(g)(2) do not contain any new record retention requirements. All registered broker-dealers that would be subject to the proposed amendments are currently required to retain records in accordance with Rule 17a-4(e)(7) of the Exchange Act.[366]

I. Request for Comment

We invite comment on these estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to: (a) evaluate whether the collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the collection of information; (c) determine whether there are ways to enhance the quality, utility and clarity of the information

[366] 17 CFR 240.17a-4.

to be collected; and (d) 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.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. [**S7- -09**]. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File No. [**S7- -09**], and be submitted to the Securities and Exchange Commission, Records Management, 100 F Street, NE, Washington, DC 20549. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

IX. Cost-Benefit Analysis

We are sensitive to the costs and benefits of our rules. We request comment on the costs and benefits associated with the proposed amendments. In particular, we request comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the proposed amendments for registrants, issuers, investors, brokers or dealers, other securities industry professionals, regulators, and others. We also request comment as to the extent to which placing price restrictions on short selling could impact or lessen some of the benefits of legitimate short selling or could lead to a decrease in market

efficiency, price discovery, or liquidity. Commenters should provide analysis and data to support their views on the costs and benefits associated with the proposed amendments to Rules 200(g) and 201.

A. Benefits

As discussed above, we believe it is appropriate at this time to examine and seek comment on whether to restore short sale price test restrictions or adopt circuit breaker rules in light of the extreme market conditions that we are currently facing and the resulting deterioration in investor confidence.

The proposed amendments to Rule 201 include two alternative price tests that would place restrictions on the prices at which certain securities would be able to be sold short.[367] The first test would be the proposed modified uptick rule that would be based on the national best bid and would require trading centers to have policies and procedures reasonably designed to prevent the execution or display of short sales at impermissible prices. The second test would be the proposed uptick rule that would be based on the last sale price, similar to the tick test under former Rule 10a-1, and would prohibit any person from effecting short sales at impermissible prices.

We are also proposing circuit breaker rules that would establish limitations on short selling in a particular security during severe market declines in the price of that security.[368] The proposed circuit breaker halt rule, when triggered by a severe price decline in a particular security, would temporarily prohibit any person from selling short that security during the

---

[367] See proposed Rule 201.

[368] See proposed Rule 201.

effectiveness of the circuit breaker.[369] The proposed circuit breaker modified uptick rule, when triggered by a severe market decline in a particular security, would temporarily impose the proposed modified uptick rule, as described in detail above, for that security. The proposed circuit breaker uptick rule, when triggered by a severe market decline in a particular security, would temporarily impose the proposed uptick rule, as described in detail above, for that security.[370]

In addition, we are proposing amendments to Rule 200(g) of Regulation SHO to impose a "short exempt" marking requirement and to Rule 200(g)(2) of Regulation SHO to require broker-dealers to mark a sell order "short exempt" only if the provisions in paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule) are met, or if the seller is relying on an exception in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule), or if the seller is relying on an exception in paragraph (c) of the proposed circuit breaker halt rule.

1. Proposed Short Sale Price Tests

The two alternative short sale price tests proposed would be designed to allow relatively unrestricted short selling in an advancing market. In addition, the proposed short sale price tests would be designed to restrict short selling at successively lower prices and, thereby, help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be

---

[369] The proposed circuit breaker halt rule could be imposed in place of, or in addition to, a short sale price rule.

[370] A circuit breaker that triggers a short sale price test rule would be adopted in place of a short sale price test rule.

established by long sellers. Further, the two alternative short sale price tests would be designed to help restore investor confidence in the securities markets.[371]

In particular, by requiring trading centers to have policies and procedures reasonably designed to prevent the execution or display of short sale orders at a down-bid price, unless the order is marked "short exempt," and by requiring them to regularly surveil to ascertain the effectiveness of the policies and procedures and to take prompt remedial action to remedy deficiencies in such policies and procedures, the proposed modified uptick rule might help to prevent short selling, including potentially abusive or manipulative short selling, from driving the market down and from being used as a tool to accelerate a declining market. Similarly, for the proposed uptick rule, by prohibiting the execution of short sale orders below the last sale price, unless an exception applies, the alternative proposed uptick rule might also help to prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool to drive the market down and accelerate a declining market.

At the same time, the proposed short sale price tests might help to preserve instant execution and liquidity, by allowing relatively unrestricted short selling in an advancing market. As discussed above, one of the benefits of legitimate short selling is that it may provide market liquidity by, for example, adding to the selling interest of stock available to purchasers, and, when sellers are covering their short sales, adding to the buying interest of stock available to sellers.

In seeking to advance these goals, the proposed short sale price tests might help address the erosion of investor confidence in our markets. Bolstering investor confidence in the markets should help to encourage investors to be more willing to invest in the market, thus adding depth

---

[371] See, e.g., supra note 56 (citing comment letters suggesting that reinstatement of short price test restrictions in some format would help restore investor confidence in the market).

and liquidity to the markets. Moreover, as discussed above, prior research on the uptick rule indicates that price test restrictions might help improve market depth, especially at the offer, and could also dampen intraday volatility.[372] For example, as discussed above, OEA found that price test restrictions resulted in an increase in the quote depths.[373]

2. Proposed Circuit Breaker Halt Rule

The proposed circuit breaker halt rule, when triggered by a severe price decline in a particular security, would temporarily prohibit any person from selling short a particular NMS stock during a severe decline in the price of that security.[374] By targeting only those securities that experience severe intraday declines, the proposed circuit breaker halt rule would be designed to help prevent short selling, including potentially abusive or manipulative short selling, from being used to drive the price of a security down, or to accelerate the decline in the price of those securities when needed most. By applying only to those individual securities that are facing a severe intraday decline in share price, the proposed circuit breaker halt rule might benefit the market as a narrowly tailored response to extraordinary circumstances.[375] It also might benefit the market by allowing participants an opportunity to reevaluate circumstances and respond to volatility.[376]

We believe that the proposed circuit breaker halt rule also would be narrowly tailored to help restore investor confidence and stabilize the market for individual securities during times of substantial uncertainty.[377] By halting short selling for the remainder of the trading day following a

---

372 See supra note 35 (referencing OEA Staff's Summary Pilot Report, at 55 n. 61-63 and supporting text).

373 See supra note 37 (referencing OEA Staff's Summary Pilot Report, at 55 n. 61-63 and supporting text).

374 See proposed Rule 201.

375 See 1998 Release, 63 FR 18477 (April 15, 1998) supra note 230.

376 See id.

377 See id.

significant decline in a security's price, we believe the proposed circuit breaker halt rule might provide sufficient time to re-establish equilibrium between buying and selling interests in the individual security in an orderly fashion. It might also help to ensure that market participants have a reasonable opportunity to become aware of, and respond to, a significant decline in a security's price. By providing a pause in short selling resulting from a significant decline in the price of an individual equity security, we believe the proposed circuit breaker halt rule might provide a measure of stability to the markets. We believe that the proposed circuit breaker halt rule might help to restore investor confidence during times of substantial uncertainty.

Moreover, unlike the proposed short sale price test restrictions, the proposed circuit breaker halt rule would halt all short selling for an individual security only for a specified period of time. Thus, the proposed circuit breaker halt rule would also be narrowly tailored to help address the issue of "bear raids" while limiting the potential negative market quality impact that may arise from the proposed short sale price test restrictions.[378]

3. Proposed Circuit Breaker Price Test Rules

The alternative proposed circuit breaker price test rules, when triggered by a severe market decline in a particular security, would temporarily impose either the proposed circuit breaker modified uptick rule or the proposed circuit breaker uptick rule, as each rule is described above, for a particular NMS stock during a severe market decline in that security, and would remain in place for the remainder of the trading day.[379]

---

[378] See 1998 Release, 63 FR 18477.

[379] For instance, a circuit breaker resulting in the proposed modified uptick rule would require that trading centers implement and enforce policies and procedures reasonably designed to prevent short selling at a down-bid price in a particular security, when triggered by a decline in the price of that security. Broker-dealer could mark certain short sale orders "short-exempt" under the conditions set forth above. A circuit breaker resulting in the proposed uptick rule would, once triggered by a decline in the price of a particular security, prohibit any person from selling short on a downtick.

We believe that the proposed circuit breaker price test rules would be narrowly tailored to help restore investor confidence and stabilize the market for individual securities. The proposed circuit breaker price test rules might also help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers. Further, we also believe that allowing short selling to continue with price test restrictions once a circuit breaker is triggered might also have less impact on legitimate short selling and normal market activity including price discovery and the provision of liquidity than a circuit breaker that halts short selling. To that end, we believe that the proposed circuit breaker price test rules might also alleviate some concerns over the possibility of artificial downward pressure that might arise from a "magnet effect" prior to reaching the trigger threshold.[380]

4. Proposed Marking Requirements

In addition, the "short exempt" marking requirements under Rule 200(g)(2) would provide a record that a broker-dealer is availing itself of the provisions of paragraph (c) or (d) of the proposed modified uptick rule (or paragraphs (c) or (d) of the proposed circuit breaker modified uptick rule), or that short sellers are availing themselves of the various exceptions to the application of the restrictions of the proposed uptick rule (or the proposed circuit breaker uptick rule), or that short sellers are availing themselves of the various exceptions to the application of the proposed circuit breaker halt rule. Thus, the records created pursuant to the "short exempt" marking requirements of proposed Rule 200(g) of the proposed short sale price test rules or the proposed circuit breaker rules would aid surveillance by SROs and the

---

[380] See, e.g., letter from Credit Suisse (discussing "magnet effect").

Commission for compliance with the provisions of those short sale price tests or circuit breaker rules. In addition, if the Commission were to adopt a policies and procedures approach, such as is proposed in conjunction with the proposed modified uptick rule (or proposed circuit breaker modified uptick rule), the proposed "short exempt" marking requirement would provide an indication to a trading center regarding whether it must execute or display a short sale order with regard to whether the short sale order is at a down-bid price.

B. Costs

1. Proposed Short Sale Price Test Restrictions

We recognize that the proposed amendments, if adopted, would impose costs on market participants to implement and assure compliance with the proposed short sale price test requirements. These costs could, in sum, increase the costs of legitimate short selling. We believe, however, that such costs might be justified by the design of the proposed short sale price tests to restrict short selling at successively lower prices and, thereby, help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers. Further, by seeking to advance these goals, the proposed price test restrictions might help restore investor confidence in the securities markets.

We recognize that, to the extent that the proposed short sale price test restrictions could result in increased costs of short selling in NMS stocks, it might lessen some of the benefits of legitimate short selling and, thereby, could result in a reduction in short selling generally. Such a reduction might lead to a decrease in market efficiency and price discovery, less protection against upward stock price manipulations, a less efficient allocation of capital, an increase in

trading costs, and a decrease in liquidity. Restricting short selling may also reduce "long" activity where it is part of the same strategy, thus adversely affecting liquidity. Thus, we believe there might be potential costs associated with the proposed short sale price tests in terms of potential impact of such price tests on quote depths, spread widths, and market liquidity.

We also believe costs might be incurred in terms of execution and pricing inefficiencies. For example, allowing all short sales to be executed or displayed at or above the best bid (or last sale price) in an advancing market, and above the best bid (or last sale price) in a declining market might slow the speed of executions and impose additional costs on market participants, including buyers.[381]

In addition, we recognize that imposing short sale price restrictions when, currently, there is an absence of any short sale price test restrictions may result in costs in terms of modifications to systems and surveillance mechanisms, as well as changes to processes and procedures. We anticipate that these changes would likely result in immediate implementation costs for trading centers and SROs and other market participants associated with reprogramming trading and surveillance systems to now account for price test restrictions based on either last sale or best bid information, as discussed in more detail below. We also believe the proposed amendments may impose costs to trading centers and SROs and other market participants related to systems changes to computer hardware and software, reprogramming costs, and surveillance and compliance costs, as well as staff time and technology resources, associated with monitoring compliance with the proposed short sale price test restrictions, as discussed below.

---

[381] As discussed above, on the day the Pilot went into effect, listed Pilot securities underperformed listed control group securities by approximately 24 basis points. The Pilot and control group securities, however, had similar returns over the first six months of the Pilot. See supra note 36 (referencing OEA Staff's Summary Pilot Report at 8).

Moreover, imposing price test restrictions when there are currently no short sale price restrictions in place also could mean that staff (compliance personnel, associated persons, etc.) might need to be trained or re-trained regarding rules related to price test restrictions. Also, trading centers and SROs and other market participants could be required to hire additional staff (and train or re-train them) to comply with the proposed rules related to short sale price test restrictions. As such, we believe the proposed amendments, if adopted, might impose training and compliance costs for trading centers, SROs, and other market participants.

a. Proposed Modified Uptick Rule

The proposed modified uptick rule, in particular, would require each trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order at a down-bid price.[382] In addition, a trading center would be required to have policies and procedures reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price.[383] A trading center's policies and procedures would not, however, have to include mechanisms to determine on which provision a broker-dealer is relying in marking an order "short exempt" in accordance with paragraph (c) or (d) of the proposed modified uptick rule. In addition, trading centers also would be required to surveil the effectiveness of their written policies and procedures and take prompt action to remedy any deficiencies in their policies and procedures.

As detailed in the PRA section, VIII, above, although the exact nature and extent of the required policies and procedures that a trading center would be required to establish likely would

---

[382] See proposed Rule 201(b)(1).

[383] See proposed Rule 201(b)(1)(ii). See also Sections III.A.2. and V, above, discussing short sale orders marked "short exempt."

vary depending upon the nature of the trading center (e.g., SRO vs. non-SRO, full service broker-dealer vs. market maker), we preliminarily estimate a total one-time initial cost of $26,393,412 [384] for all trading centers subject to the proposed modified uptick rule to establish the written policies and procedures reasonably designed to help prevent the execution or display of short sale orders not priced in accordance with the provisions of proposed Rule 201(b)(1).

Once a trading center has established written policies and procedures reasonably designed to help prevent the execution or display of a short sale order at a down-bid price, we preliminarily estimate a total annual on going cost of $7,119,204 [385] for all trading centers subject to the proposed modified uptick rule to ensure that their written policies and procedures are up-to-date and remain in compliance with the proposed amendments to Rule 201. In addition, with regard to ongoing monitoring for and enforcement of trading in compliance with the proposed modified uptick rule, as detailed in the PRA section, VIII, above, we preliminary believe that, once the tools necessary to carry out on-going monitoring have been put in place, a

---

[384] This figure was calculated by adding $18,733,412 and $7,660,000 (for outsourced legal work). The $18,733,412 figure was calculated as follows: (70 legal hours x $305) + (105 compliance hours x $313) + (20 information technology hours x $292) + (25 business operation hours x $273) = $66,880 per SRO x 11 SROs = $735,680 total cost for SROs; (37 legal hours x $305) + (77 compliance hours x $313) + (23 information technology hours x $292) + (23 business operation hours x $273) = $48,381 per broker-dealer x 372 broker-dealers = $17,997,732 total cost for broker-dealers; $735,680 + $17,997,732 = $18,733,412. The $7,660,000 figure for outsourced legal work was calculated as follows: (50 legal hours x $400 x 11 SROs) + (50 legal hours x $400 x 372 broker-dealers) = $7,660,000.

Based on industry sources, OEA estimates that the average hourly rate for outsourced legal services in the securities industry is $400. For in-house legal services, we estimate that the average hourly rate for an attorney in the securities industry is approximately $305 per hour. The $305/hour figure for an attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. In addition, OEA estimates that the average hourly rate for an assistant compliance director, a senior computer programmer, a senior operations manager, in the securities industry is approximately $313, $292, and $273 per hour, respectively. These figures are from SIFMA's Management & Professional Earnings in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[385] This figure was calculated as follows: (2 legal hours x 12 months x $305) x (11 + 372) + (3 compliance hours x 12 months x $313) x (11 + 372) = $7,119,204.

trading center would be able to incorporate ongoing monitoring and enforcement within the scope of its existing surveillance and enforcement policies and procedures without a substantial additional burden. We recognize, however, that this ongoing compliance would not be cost-free, and that trading centers would incur some additional annual costs associated with ongoing compliance, including compliance costs of reviewing transactions. We preliminarily estimate that each trading center would incur an average annual ongoing compliance cost of $102,768, for a total annual cost of $39,360,144 for all trading centers.[386]

As detailed in the PRA section, VIII, above, we realize that the exact nature and extent of the policies and procedures that a trading center would be required to establish would likely vary depending upon the type, size, and nature of the trading center. Thus, while we have based our estimates on the burden estimates provided in connection with the adoption of Regulation NMS, we note that these estimates may be on the high end because trading centers have already had to establish policies and procedures in connection with that Regulation's order protection rule, which could help form the basis for the policies and procedures for the proposed modified uptick rule. We realize, however, that these estimates may be on the low end for some trading centers.

---

[386] We preliminarily estimate that each trading center would incur an average annual ongoing compliance cost of $102,768 for a total annual cost of $39,360,144 for all trading centers. This figure was calculated as follows: (16 compliance hours x $313) + (8 information technology hours x $292) + (4 legal hours x $305) x 12 months = $102,768 per trading center x 383 trading centers = $39,360,144. As discussed above, we base our burden hour estimates on the estimates used for Regulation NMS because it requires similar ongoing monitoring and surveillance for and enforcement of trading in compliance with that regulation's policies and procedures requirement.

For in-house legal services, we estimate that the average hourly rate for an attorney in the securities industry is approximately $305 per hour. The $305/hour figure for an attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. In addition, OEA estimates that the average hourly rate for an assistant compliance director, a senior computer programmer, a senior operations manager, in the securities industry is approximately $313, $292, $273 per hour, respectively. These figures are from SIFMA's Management & Professional Earnings in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

Thus, we seek specific comment as to whether these estimates are appropriate or whether such estimates should be increased or reduced and for which entities. If they should be increased or decreased, please address by how much, in order to be able to comply with the proposed modified uptick rule's required policies and procedures, if adopted.

As detailed in the PRA section, VIII, above, although the exact nature and extent of the required policies and procedures that a broker-dealer would be required to establish under the "broker-dealer" provision in proposed Rule 201(c)(1) of the proposed modified uptick rule, as well as under the "riskless principal" provision in proposed Rule 201(d)(6) of the proposed modified uptick rule and the "riskless principal" exception in proposed Rule 201(c)(9) of the proposed uptick rule, likely would vary depending upon the nature of the broker-dealer (e.g., full service broker-dealer vs. market maker), we preliminarily estimate a total one-time initial cost of $380,266,741 for all broker-dealers relying on the broker-dealer provision in proposed Rule 201(c)(1) of the proposed modified uptick rule; the "riskless principal" provisions in proposed Rules 201(d)(6) of the proposed modified uptick rule; or 201(c)(9) of the proposed uptick rule, to establish the written policies and procedures reasonably designed to prevent the incorrect identification of orders as being priced in accordance with the broker-dealer provision or, in the case of the "riskless principal" provisions, to assure that, at a minimum, the customer order was received prior to the offsetting transaction and to assure the broker-dealer has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which a broker-dealer relies pursuant to these provisions of the proposed price tests.[387]

---

[387] This figure was calculated by adding $269,046,741 and $111,220,000 (for outsourced legal work). The $269,046,741 figure was calculated as follows: (37 legal hours x $305) + (77 compliance hours x $313) + (23 information technology hours x $292) + (23 business operation hours x $273) = $48,381 per broker-dealer x

Once a broker-dealer has established written policies and procedures that would be required so that it could rely on the proposed modified uptick rule's "broker-dealer provision" in proposed Rule 201(c)(1); the "riskless principal" exception in proposed Rule 201(c)(9) of the proposed uptick rule; or the "riskless principal" provision in proposed Rule 201(d)(6) of the proposed uptick rule, we estimate a total annual on-going cost of $103,367,868 for all broker-dealers relying on any of these three provisions to ensure that its written policies and procedures are up-to-date and remain in compliance with the proposed amendments to Rule 201.[388] In addition, with regard to ongoing monitoring for and enforcement of trading in compliance with the proposed modified uptick rule's "broker-dealer" provision in proposed Rule 201(c)(1), as detailed in the PRA section, VIII, above, we preliminary believe that, once the tools necessary to carry out on-going monitoring would have been put in place, a broker-dealer would be able to incorporate ongoing monitoring and enforcement within the scope of its existing surveillance and enforcement policies and procedures without a substantial additional burden. We recognize, however, that this ongoing compliance would not be cost-free, and that broker-dealers would incur some additional annual costs associated with ongoing compliance, including compliance

---

5,561 broker-dealers = $ 269,046,741 total cost for broker-dealers. The $111,220,000 figure was calculated as follows: (50 legal hours x $400 x 5,561) = $111,220,000.

Based on industry sources, OEA estimates that the average hourly rate for outsourced legal services in the securities industry is $400. For in-house legal services, we estimate that the average hourly rate for an attorney in the securities industry is approximately $305 per hour.

The $305/hour figure for an attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. In addition, OEA estimates that the average hourly rate for an assistant compliance director, a senior computer programmer, a senior operations manager, in the securities industry is approximately $313, $292, $273 per hour, respectively. These figures are from SIFMA's Management & Professional Earnings in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[388] This figure was calculated as follows: (2 legal hours x 12 months x $305) x 5,561 + (3 compliance hours x 12 months x $313) x 5,561 = $103,367,868.

costs of reviewing transactions. We estimate that each broker-dealer would incur an average annual ongoing compliance cost of $102,768, for a total annual cost of $571,492,848 for all broker-dealers.[389]

As discussed above in connection with the PRA, we realize that the exact nature and extent of the policies and procedures that a broker-dealer would be required to establish likely would vary depending upon the type, size, and nature of the broker-dealer. Thus, while we have based our estimates on the burden estimates provided in connection with the adoption of Regulation NMS, we note that these estimates may be on the high end because broker-dealers have already had to establish policies and procedures in connection with that Regulation's order protection rule, which could help form the basis for the policies and procedures for the proposed modified uptick rule's "broker-dealer" provision's policies and procedures requirement in proposed Rule 201(c)(1). We realize, however, that these estimates may be on the low end for some broker-dealers that may have less familiarity with a policies and procedures approach. Thus, we seek specific comment as to whether these estimates are appropriate or whether such estimates should be increased or reduced. If they should be increased or decreased, please

---

[389] We estimate that each broker-dealer would incur an average annual ongoing compliance cost of $102,768 for a total annual cost of $571,492,848 for all broker-dealers. This figure was calculated as follows: (16 compliance hours x $313) + (8 information technology hours x $292) + (4 legal hours x $305) x 12 months = $102,768 per broker-dealer x 5,561 broker-dealers = $571,492,848. As discussed above, we base our estimate of burden hours on the estimates used for Regulation NMS because it requires similar ongoing monitoring and surveillance for and enforcement of trading in compliance with that regulation's policies and procedures requirement.

For in-house legal services, we estimate that the average hourly rate for an attorney in the securities industry is approximately $305 per hour. The $305/hour figure for an attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. In addition, OEA estimates that the average hourly rate for an assistant compliance director, a senior computer programmer, a senior operations manager, in the securities industry is approximately $313, $292, $273 per hour, respectively. These figures are from SIFMA's Management & Professional Earnings in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

address by how much, in order to be able to comply with the proposed modified uptick rule's required policies and procedures, if adopted.

In addition, we anticipate that each trading center would incur initial up-front costs associated with taking action necessary to implement the written policies and procedures it has developed, which would include surveillance and reprogramming costs for enforcing, monitoring, and updating their trading, execution management, and surveillance systems under the proposed modified uptick rule, systems changes to computer hardware and software, as well as staff time and technology resources.[390] However, we note that the policies and procedures that would be required to be implemented are similar to those that are required under Regulation NMS.[391] In accordance with Regulation NMS, trading centers must have in place written policies and procedures in connection with that Regulation's order protection rule, which could help form the basis for the policies and procedures for the proposed modified uptick rule.[392]

---

[390] For instance, to implement the proposed modified uptick rule would require that each ATS reprogram their trading engine, as would any broker-dealer who executes trades as an OTC market maker. Moreover, one commenter indicated that programming costs across sell-side firms could range from $200,000 to $2 million. See, e.g., 2007 Price Test Adopting Release, 72 FR at 36350 n. 113 (citing comment letter from SIFMA stating that cost estimates for firms to program for the changes that were necessary to meet the policies and procedures requirements of Regulation NMS varied, from as low as approximately $200,000 for some firms to as high as $2 million for others. See also supra note 46 (citing to 2007 SIFMA letter) and text accompanying note 208. Additionally, because they might require trading centers and other market participants a significant amount of time in which to reprogram and test their systems to comply with the proposed amendments, these systems and programming costs might be higher without a sufficient implementation period. For example, this same commenter indicated that it would take six to nine months to implement a new version of the bid test. See id.

See letter from Credit Suisse (discussing need for a longer implementation period, particularly for smaller broker-dealers, in terms of having to build systems to be able to track upticks or upbids in their smart order routers in accordance with any new rules and then preserve this history so that regulators can audit it). According to this commenter, "[b]uilding such systems would likely be as expensive and challenging as Reg NMS implementation was from 2005-2007, and would likely take more than a year to implement . . . It is also likely that the compliance costs would disproportionately burden smaller BDs, who would likely be forced to route their order flow through a handful of larger brokers, impeding competition and adding to systemic risk as flow is consolidated among fewer players"). Id.

We also recognize that the proposed amendments, if adopted, would require the commitment of resources associated with compliance oversight, market surveillance, and enforcement, with attendant opportunity costs.

[391] See Regulation NMS Adopting Release, 70 FR 37496. See also 17 CFR 242.611.

Thus, we believe trading centers may already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading systems in accordance with such policies and procedures.

We believe this familiarity may reduce the implementation costs of the proposed modified uptick rule on trading centers and may make the proposed modified uptick rule less burdensome to implement. Moreover, because trading centers have already developed or modified their surveillance mechanisms in order to comply with Regulation NMS's policies and procedures requirement, trading centers may already have retained and trained the necessary personnel to ensure compliance with that Regulation's policies and procedures requirements and, therefore, may already have in place most of the infrastructure and potential policies and procedures necessary to comply with the proposed modified uptick rule.[393]

Thus, while we believe there would be costs associated with systems modifications and training staff that would be affected by these systems modifications, because most trading centers would already have in place systems, written policies and procedures in order to comply with Regulation NMS's order protection rule, we believe trading centers would already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading and surveillance systems in accordance with such policies and procedures.

Moreover, the proposed modified uptick rule's written policies and procedures requirement are designed to provide trading centers with significant flexibility in determining

---

[392] See id.

[393] We also believe some trading centers may have retained personnel familiar with the former SRO bid tests, which may make the proposed modified uptick rule less burdensome to implement. See, e.g., supra note 125 and accompanying text.

how to comply with the requirements of the proposed modified uptick rule. For example, the proposed modified uptick rule is designed to provide trading centers and their customers with flexibility in determining how to handle orders that are not immediately executable or displayable by the trading center because the order is impermissibly priced. Thus, if an order were impermissibly priced, the trading center could, in accordance with policies and procedures reasonably designed to prevent the execution or display of a short sale at a down-bid price, re-price the order at the lowest permissible price and hold it for later execution at its new price or better.[394] As quoted prices change, the proposed modified uptick rule would allow a trading center to repeatedly re-price and display an order at the lowest permissible price down to the order's original limit order price (or, if a market order, until the order is filled). Because a trading center could re-price and display a previously impermissibly priced short sale order, the proposed modified uptick rule may allow for the more efficient functioning of the markets because trading centers would not have to reject or cancel impermissibly priced orders unless instructed to do so by the trading center's customer submitting the short sale order.

Moreover, while latencies in obtaining data regarding the national best bid from consolidated market data feeds, as discussed in detail above, could impact implementation costs associated with the proposed modified uptick rule, a trading center could have policies and procedures that could provide a snapshot of the market to identify the current national best bid at the time of execution or display of a short sale order. Such snapshots may cause a reduction in costs for trading centers by helping to verify whether a short sale order was executed or displayed at a permissible price.

---

[394] For example, if a trading center received a short sale order priced at $47.00 when the current national best bid in the security is $47.00, but the immediately preceding national best bid was $47.01 (i.e., the current bid is below the previous bid), the trading center could re-price the order at the permissible offer price of $47.01, and display the order for execution at this new limit price.

b. Proposed Uptick Rule

The alternative proposed uptick rule would be based on the last sale price, rather than the national best bid, as the reference point for short sale orders, similar to former Rule 10a-1. However, the proposed uptick rule would not include an explicit policies and procedures requirement. Instead, the proposed uptick rule would prohibit any person from effecting a short sale below the last sale price, unless an exception applies. Because the proposed uptick rule would be a modernized version of the former Rule 10a-1, it would also provide the public with an opportunity to comment on the utility of such a price test, especially in light of recent changes in market conditions.[395]

We recognize that due to the extensive systems changes that have occurred in the last couple of years in response to Regulation NMS, programming systems for the proposed uptick rule could be burdensome.[396] In particular, because the proposed uptick rule does not take a policies and procedures approach, market participants would not be able to rely to the same extent on the policies and procedures they already have in place under Regulation NMS. Instead, the proposed uptick rule would prohibit any person from effecting a short sale in contravention of the rule's limitations. However, because the proposed uptick rule would apply to any person effecting a short sale, rather than just to trading centers, the proposed uptick rule might impose costs on more market participants than the proposed modified uptick rule.

---

[395] See supra Section II discussing the history of short sale price test regulation in the United States and the changes in market conditions and resulting erosion of investor confidence.

[396] See, e.g., 2007 Price Test Adopting Release, 72 FR at 36350 n. 113 (citing to comment letter from SIFMA stating that cost estimates for firms to program for the changes that were necessary to meet the policies and procedures requirements of Regulation NMS varied, from as low as approximately $200,000 for some firms to as high as $2 million for others. See SIFMA Letter. Additionally, because they might require trading centers, SROs, and other market participants a significant amount of time in which to reprogram and test their systems to comply with a price test restriction, these systems and programming costs might be higher without a sufficient implementation period. For example, one commenter indicated that it would take six to nine months to implement a new version of the price test. See id. (discussing SIFMA comment letter) and see also supra note 208.

However, the proposed uptick rule, which is similar to the price test of former Rule 10a-1, would be familiar to many market participants because it would be based on a rule which was in existence for almost 70 years, and was only recently eliminated. We believe this familiarity may help to reduce the implementation costs of the proposed uptick rule on market participants and, therefore, should decrease the costs of implementation of the proposed uptick. For example, we believe some market participants may have retained personnel familiar with former Rule 10a-1,[397] and may also have in place some of the systems and surveillance mechanisms used in connection with former Rule 10a-1 that could be used to comply with the proposed uptick rule. We believe, however, that most market participants would incur costs associated with having to implement or modify their trading systems and surveillance mechanisms in order to comply with the proposed uptick rule, including a period of time in which to make such changes.[398] However, we believe familiarity with a price test that would be based on a modernized version of former Rule 10a-1 might more readily help address investor confidence in our markets.

c. Additional Mitigating Price Test Costs Features

While we recognize that either proposed price test alternatives would create costs for trading centers that execute or display short sale orders in covered securities, as well as other market participants that engage in short selling, we believe there are several additional mitigating costs features that might help to reduce costs associated with a proposed price test if adopted.

First, we believe that the fact that either proposed price test alternative, if adopted, would apply a uniform price test[399] might help to reduce compliance costs for market participants. For

---

[397] Likewise, we believe some market participants may have retained personnel familiar with former SRO bid tests. See, e.g., supra note 125 and accompanying text.

[398] See, e.g., supra note 346.

[399] As discussed above, unlike the former Rule 10a-1, the proposed short sale price test restrictions, if adopted, would apply a uniform rule to trades in the same securities that occur in multiple, dispersed, and diverse

example, by applying a uniform price test, the proposed short sale price test restrictions would be designed so as to not result in the type of disparate short sale regulation that existed under former Rule 10a-1, in which different price tests were applied in different markets, resulting in confusion, compliance difficulties, regulatory arbitrage, and an un-level playing field among market participants.[400] Moreover, subsection (e) of proposed Rule 201 of the proposed modified uptick rule and subsection (d) of proposed Rule 201 of the proposed uptick rule, if adopted, would include a requirement that no SRO may have any rule that is not in conformity with, or conflicts with, the proposed short sale price test requirements.[401] Thus, we believe a uniform rule might reduce compliance costs, and also could reduce regulatory arbitrage. Also, there might be a reduction in costs associated with systems and surveillance mechanisms that would have to be programmed to consider only a single test based on the national best bid (or on the last sale price if the proposed uptick rule is adopted) instead of different tests for different markets.

Second, the proposed three month implementation period would be designed to provide trading centers and market participants with a sufficient amount of time in which to modify their systems and procedures in order to comply with the requirements of a proposed short sale price test if adopted and, thus, might help reduce some of the costs and help to alleviate some of the potential disruptions that might be associated with implementing either proposed price test. We recognize, however, that a longer implementation period may be more manageable or preferable, particularly to smaller broker-dealers that might be disproportionately burdened by any

---

markets. Under the proposed short sale price test restrictions, all covered securities, wherever traded, would be subject to the same short sale price test.

[400] See supra note 27 (discussing the different tests under former Rule 10a-1).

[401] See proposed Rule 201(e) of the proposed modified uptick rule, and proposed Rule 201(d) of the proposed uptick rule.

implementation and compliance costs associated with the proposed short sale price test restrictions, as well as competitively disadvantaged in terms of reduced order flow as a result.[402] Thus, we seek comment as to what length of implementation period would be necessary or appropriate, and why, such that trading centers would be able to meet the proposed short sale price test restrictions, if adopted.

Third, as described below, we believe the "broker-dealer" provision in proposed Rule 201(c)(1) of the proposed modified uptick rule and the provisions contained in paragraph (d) of the proposed modified uptick rule, as well as the exceptions contained in paragraph (c) of the proposed uptick rule might also help to minimize any potential price distortions or costs associated with the proposed short sale price restrictions. These provisions also would be designed to help promote the workability of the proposed price tests, while at the same time furthering the Commission's stated goals of short sale price test regulation.

For example, as discussed above, proposed Rule 201(c)(1) of the proposed modified uptick rule would provide that a broker-dealer may mark a short sale order in a covered security "short exempt" and send it to a trading center if the broker-dealer has identified the order as not being at a down-bid price at the time of submission of the order to the trading center. This provision would provide broker-dealers with the option to manage their order flow, rather than having to always rely on their trading centers to manage their order flow on their behalf. In addition, we note that this provision would not undermine the Commission's goals for short sale regulation because any broker-dealer marking an order "short exempt" in accordance with this

---

[402] See supra note 390 and accompanying text (discussing letters from SIFMA and Credit Suisse, respectively, regarding cost estimates and the need for a longer implementation period, particularly for smaller broker-dealers).

provision would have to ensure that its short sale order was not on a down-bid price at the time of submission of the order to a trading center. We believe that this provision also might help to preserve instant execution and liquidity by allowing relatively unrestricted short selling in an advancing market.

Proposed Rule 201(d)(1) of the proposed modified uptick rule would provide an exception if the seller owns a security and would provide that a short sale order of a covered security may be marked "short exempt," thereby allowing it to be displayed or executed at a down-bid price, if the broker-dealer has a reasonable basis to believe that the seller owned the security being sold and that the seller intended to deliver the security as soon as all the restrictions on delivery have been removed. Similarly, proposed Rule 201(c)(1) of the proposed uptick rule would provide an exception for sales of owned securities. As a result, these provisions would allow for sales of securities that although owned, were subject to the provisions of Regulation SHO governing short sales due solely to the seller being unable to deliver the security to its broker-dealer prior to settlement due to circumstances outside the seller's control.

Proposed Rule 201(d)(2) of the proposed modified uptick rule would allow a broker-dealer to mark a short sale order "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is by a market maker to off-set a customer odd-lot order or to liquidate an odd-lot position by a single round lot sell order that changed such broker-dealer's position by no more than a unit of trading and, thereby, may be permitted to be executed or displayed at a down-bid price. Similarly, in proposed Rule 201(c)(3) of the proposed uptick rule we would provide an exception for sales related to odd-lot orders. These provisions would allow market makers to facilitate customer orders that are not of a size that could facilitate a downward price movement in the market.

Proposed Rule 201(d)(3) of the proposed modified uptick would permit qualifying short sale orders associated with certain bona fide domestic arbitrage transactions to be marked "short exempt," and thereby permit them to be executed or displayed at a down-bid price. This provision would allow broker-dealers to engage in transactions that tend to reduce pricing disparities between securities. Moreover, to facilitate arbitrage transactions in which a short position was taken in a security on the U.S. market, and which was to be immediately covered on a foreign market, Rule 201(d)(4) of the proposed modified uptick rule would permit short sale orders associated with certain international arbitrage transactions to be marked "short exempt," and thereby permit such orders to be executed or displayed at a down-bid price. Similarly, proposed Rules 201(c)(4) and 201(c)(5) of the proposed uptick rule would provide exceptions related to domestic and international arbitrage transactions.

In addition, proposed Rule 201(d)(5) of the proposed modified uptick rule is intended to facilitate distributions of securities by providing an exception for any sales of covered securities by underwriters or members of a syndicate or group participating in the distribution of a security in connection with an over-allotment of securities, and any lay-off sales by such persons in connection with a distribution of securities through a rights or standby underwriting commitment. By permitting short sales in connection with an over-allotment or lay-off sales at or below the national best bid to be marked "short exempt," and thereby permit them to be executed or displayed at a down-bid price, this provision would enable an underwriter to reduce its risk by pricing an offering at or below the current national best bid or last sale price, as applicable. Similarly, proposed Rule 201(c)(6) of the proposed uptick rule would provide an exception for sales in connection with over-allotments and lay-off sales.

As discussed above, proposed Rules 201(d)(6) of the proposed modified uptick rule would allow a broker-dealer to mark short sale orders of a covered security "short exempt," and thereby allow for their execution or display at a down-bid price where a broker-dealer is facilitating customer buy orders or sell orders where the customer is net long and the broker-dealer is net short but is effecting the sale as riskless principal, provided certain conditions are met. Similarly, proposed Rule 201(c)(9) of the proposed uptick rule would provide an exception for certain transactions on a riskless principal basis. These provisions would provide broker-dealers with additional flexibility to facilitate customer orders.

Proposed Rules 201(d)(7) of the proposed modified uptick rule would permit certain short sale orders executed on a VWAP basis to be marked "short exempt," and, as a result, to be executed or displayed at a down-bid price.[403] Similarly, proposed Rule 201(c)(7) of the proposed uptick rule would provide an exception for certain transactions on a VWAP basis. These provisions might help provide an additional source of liquidity for investors' VWAP orders and might help enable investors to achieve their objective of obtaining an execution at the VWAP.

In addition, the proposed uptick rule would include cost-mitigating provisions that would be unique to the proposed uptick rule, designed to allow its proper functioning in today's markets, while at the same time being designed to further the purposes of our proposing short sale price test restrictions at this time. For example, proposed Rule 201(c)(2) of the proposed uptick rule would provide an exception for errors in marking a short sale order, such as when a broker-dealer effected a sale marked "long" by another broker-dealer, but the sale was mis-marked such that it should have been marked as a "short" sale.[404] This exception might help

---

[403] See supra note 181 (citing to VWAP relief letters under former Rule 10a-1).

[404] See proposed Rule 201(d)(2).

promote liquidity by avoiding implicating the broker-dealer effecting the sale where the broker-dealer's participation in the violation was neither knowing nor reckless.[405]

Proposed Rule 201(c)(8) of the proposed uptick rule would provide an exception from the proposed uptick rule for any sale of a covered security in an electronic trading system that matches buying and selling interest at various times throughout the day as long as such sales meet certain criteria. This exception might help promote market efficiency and liquidity by accommodating the increased use of automated trading systems and alternative strategies used in today's marketplace. It might also help provide an additional source of liquidity for investors' passively priced orders and better enable investors to engage in alternative trading strategies to achieve their investment objectives.

Proposed Rules 201(c)(10) and (c)(11) of the proposed uptick rule might also help promote market efficiency and liquidity by providing exceptions to the requirements of the proposed uptick rule to help address conflicts between the proposed uptick rule and the Quote Rule under Rule 602 of Regulation NMS.[406]

Proposed Rule 201(c)(12) of the proposed uptick rule would provide an exception from the proposed uptick rule for any sale of a security at the offer by a registered market maker or specialist publishing two-sided quotes to sell short to facilitate customer market and marketable limit orders to buy regardless of the last sale price. This exception is intended to help provide relief in a decimals environment to registered market makers and specialists so that they could provide liquidity in response to customer buy orders.

---

[405] Id.

[406] See 17 CFR 242.602.

2. Proposed Circuit Breaker Halt Rule

We recognize that the proposed circuit breaker halt rule, if adopted, would impose costs on market participants to implement and assure compliance with the proposed circuit breaker halt rule's requirements. These costs could, in sum, increase the costs of legitimate short selling. For example, the proposed circuit breaker halt rule, when triggered, would impose a short selling halt that might restrict otherwise legitimate short selling activity during periods of extreme volatility. As such, we recognize that the proposed circuit breaker halt rule might result in a reduction of the benefits of legitimate short selling and, thereby, could result in a subsequent reduction in short selling generally. Such a reduction might lead to a decrease in market efficiency and price discovery, less protection against upward stock price manipulations, a less efficient allocation of capital, an increase in trading costs, and a decrease in liquidity.[407] Thus, we believe there might be potential costs associated with the proposed circuit breaker halt rule in terms of potential impact of such a halt on quote depths, spread widths, and market liquidity.

In addition, we recognize that imposing a circuit breaker halt rule when, currently, there is an absence of a short selling halt may result in costs in terms of modifications to systems and surveillance mechanisms, as well as changes to processes and procedures. We anticipate that these changes would likely result in immediate implementation costs for market participants associated with reprogramming trading and surveillance systems to now account for the requirements of the proposed circuit breaker halt, if adopted. We also believe the proposed circuit breaker halt rule may impose costs to market participants related to systems changes to computer hardware and software, reprogramming costs, and surveillance and compliance costs,

---

[407] See Section IX.B. (discussing costs of the proposed modified uptick rule and proposed uptick rule).

as well as staff time and technology resources, associated with monitoring compliance with the proposed circuit breaker halt rule.[408]

Moreover, imposing a circuit breaker halt rule when there are currently no short sale halts in place also could mean that staff (compliance personnel, associated persons, etc.) might need to be trained or re-trained regarding rules related to the circuit breaker requirements. Also, market participants could be required to hire additional staff (and train or re-train them) to comply with the proposed circuit breaker halt rule. As such, we believe the proposed circuit breaker halt rule, if adopted, might impose training and compliance costs for market participants.

While we recognize that market participants would incur initial up-front costs associated with having to update their systems, including systems changes to computer hardware and software, as well as staff time and technology resources to update their systems and surveillance mechanisms in order to ensure compliance with the requirements of the proposed circuit breaker halt rule,[409] we believe that many of the systems changes that would be required to be implemented are similar to what was already required for implementation under Regulation NMS.[410] Thus, we believe market participants may already have developed or programmed their trading and surveillance systems in accordance with the requirements of Regulation NMS which may help to reduce any implementation costs associated with the proposed circuit breaker halt rule and, therefore, may make the proposed circuit breaker halt rule less burdensome to implement.

---

408 See id.

409 See, e.g., 2007 Price Test Adopting Release, 72 FR at 36350 n. 113 (citing comment letter from SIFMA stating that cost estimates for firms to program for the changes that were necessary to meet the requirements of Regulation NMS varied, from as low as approximately $200,000 for some firms to as high as $2 million for others. See also letter from Credit Suisse.

410 See Regulation NMS Adopting Release, 70 FR 37496. See also 17 CFR 242.611.

Thus, while we believe there would be costs associated with systems modifications and training staff that would be affected by these systems modifications, because most market participants would already have in place systems in order to comply with Regulation NMS, market participants may already have in place most of the infrastructure and processes necessary to comply with the proposed circuit breaker halt rule. Moreover, because the proposed circuit breaker halt rule might require less substantial modifications to existing systems, the implementation and compliance costs may not be significant.[411] As discussed above, currently, all stock exchanges and FINRA have rules or policies to implement coordinated circuit breaker halts.[412] Moreover, SROs have rules or policies in place to coordinate individual security trading halts corresponding to significant news events.[413] Information on the securities subject to SRO regulatory trading halts is disseminated to market participants through the CMS and other electronic media.[414] We, however, seek comment as to whether the time and implementation costs associated with the proposed circuit breaker halt rule may be lower than other alternatives proposed.

We, however, recognize that there may be concerns about a potential "magnet effect" that could arise as an unintended consequence of the proposed circuit breaker halt rule that could halt short selling and result in short sellers driving down the price of an equity security in a rush to

---

411 See letter from Credit Suisse (stating that "[i]mplementation could be fast and costs would be modest" and that "listing exchanges already disseminate real-time status conditions as part of existing price feeds. By generalizing the existing "Regulatory Halt" flag to include a "Do Not Short" condition, both away trading venues and broker-dealers could react to the circuit breaker condition in real-time with very little coding and testing").

412 See Securities Exchange Act Release No. 39846 (Apr. 9, 1998), 63 FR 18477 (Apr. 15, 1998) (order approving proposals by Amex, BSE, CHX, NASD, NYSE, and Phlx) ("1998 Release"). See also NYSE Rule 80B. The circuit breaker procedures call for cross-market trading halts when the DJIA declines by 10 percent, 20 percent, and 30 percent from the previous day's closing value. See e.g., BATS Exchange Rule 11.18.

413 See, e.g., FINRA Rule 6120.

414 For example, in addition to disseminating news of trading halts through the CMS, Nasdaq publishes a daily list of securities subject to trading halts indicating the name of the issuer, the time the halt was initiated, and where applicable, the times at which quoting and trading may resume.

execute short sales before the circuit breaker would be triggered. As discussed above, one commenter noted that a short sale circuit breaker could exacerbate downward pressure on stocks as their value reached the threshold level.[415] Another commenter, however, in discussing the issue of a "magnet effect" cited empirical studies that question whether a circuit breaker would result in artificial pressure on the price of individual securities.[416]

In addition, we note that the proposed circuit breaker halt rule would include exceptions substantially identical to exceptions in the Short Sale Ban that would be designed to allow its proper functioning in today's markets and allow broker-dealer to provide liquidity to the market, while at the same time being designed to further the purposes of our proposing the alternative circuit breaker halt rule at this time.[417]

We believe the proposed circuit breaker halt rule should include exceptions that mirror certain of the exceptions in the Short Sale Ban because the proposed rule shares the same goal of prohibiting short selling that might exacerbate a price decline during a period of sudden and excessive price declines. For example, the proposed circuit breaker halt would include a bona fide market maker exception, which would allow market makers to effect a short sale as part of bona fide market making and hedging activity related directly to bona fide market making in derivatives on the publicly traded securities of a covered security. This proposed exception would permit market makers to continue to provide liquidity to the markets, facilitate orders, and

---

[415] See letter to Mary Schapiro, Chairman, from Direct Edge, dated March 30, 2009.

[416] See letter from Credit Suisse (discussing potential costs associated with short sale price test restrictions and circuit breaker rules).

[417] See Section III, above (discussing exceptions to proposed circuit breaker halt rule). See also Securities Exchange Act Release No. 58592 (Sept. 18, 2008), 73 FR 55169-02 (Sept. 24, 2008) (regarding exceptions to the Short Sale Ban).

otherwise comply with their obligations as market makers. This proposed exception would also apply to options market makers that sell short equity securities to hedge options positions.

The proposed exception for short sales that occur as a result of automatic exercise or assignment of an equity option held before a circuit breaker on a particular security is triggered and a short selling halt is imposed in that security due to expiration of the option would allow short sales that occur as a result of the expiration of options contracts held before a circuit breaker is triggered in a particular security. This would allow persons that purchased or sold options prior to the effectiveness of a circuit breaker halt entered into such transactions with the expectation that they would be able to fulfill their contractual obligations and receive the benefits of their bargain in return. Providing this proposed exception to the circuit breaker halt rule would not raise the concerns that a circuit breaker rule is intended to address.

To allow for creation of long call options, the proposed exception would permit short sales that occur as a result of assignment to call writers upon exercise. When options are exercised, call writers may be required to sell short in order to satisfy their obligations. Because call writers do not have discretion, and because the short sales are effected in order to fill buying demand, we believe that including this exception in the proposed circuit breaker halt rule would benefit the markets while not opening the door to the abuses that the proposed rule is intended to address.

The proposed exception for securities that a seller is deemed to own under Rule 200(b) (because Rule 144 securities are owned securities and do not raise the concerns that a short sale circuit breaker halt would be designed to address) would, during a halt triggered by a circuit breaker, allow sellers to sell securities that although owned, are subject to the provisions of

Regulation SHO governing short sales due solely to the seller being unable to deliver the security to its broker-dealer prior to settlement based on circumstances outside the seller's control.

We seek comment regarding any benefits or costs associated with the above described exceptions to the proposed circuit breaker halt rule.

3. Proposed Circuit Breaker Price Test Rules

We also recognize that the proposed circuit breaker price test restrictions would result in costs on market participants responsible for implementing and assuring compliance with such requirements. We anticipate that there might be significant operational costs associated with reprogramming systems to comply with the proposed circuit breaker price test rules. We also anticipate that these costs might be greater than those required to comply with the proposed circuit breaker halt rule described above, which would, when triggered, impose a halt on short selling in individual NMS stocks rather than impose specific price test restrictions.[418] In addition, we believe there might also be costs incurred for additional staff and costs associated with personnel hiring and training related to maintaining and ensuring compliance with the proposed circuit breaker price test rules.[419]

Further, we recognize that short sale price test restrictions that would be imposed as a result of the proposed circuit breaker price test rules being triggered might result in many of the same costs discussed in detail in Section IX.B.1 pertaining to the implementation of market-wide short sale price test restrictions.[420] Those costs might include a reduction of the benefit of legitimate short

---

[418] See also Sections IX.B.1. (discussing costs of the proposed modified uptick rule and proposed uptick rule).

[419] See, e.g., letter from Credit Suisse (discussing potential costs associated with short sale price restrictions and circuit breaker rules). See also Section IX.B. (discussing costs associated with proposed modified uptick rule and proposed uptick rule).

[420] See Section IX.B.1. (discussing costs and benefits of the proposed modified uptick rule and the proposed uptick rule). See also Section IX.B.1.a. (discussing burden hour estimates, for purposes of the PRA, in connection

selling and a subsequent reduction in the quantity of short selling, which we recognize might lead to a decrease in market efficiency and price discovery, less protection against upward stock price manipulations, a less efficient allocation of capital, an increase in trading costs, and a decrease in liquidity.[421]

Although under the proposed circuit breaker price test rules, a price test would not be in place full-time or for all securities, if the proposed circuit breaker modified uptick rule is adopted, trading centers would need to establish reasonable policies and procedures in advance to ensure compliance whenever a circuit breaker, and thus the proposed circuit breaker modified uptick rule, is triggered. We note that it would not be reasonable for a trading center to wait until the circuit breaker is triggered to begin establishing reasonable policies and procedures to prevent the execution or display of the particular NMS stock on a down-bid. Thus, we recognize that both of the proposed circuit breaker price tests would result in immediate upfront costs to trading centers.[422]

However, while we recognize that either proposed circuit breaker price test would create costs for trading centers that execute or display short sale orders in covered securities, as well as other market participants that engage in short selling, we note that the proposed circuit breaker price tests would include the same cost-mitigating provisions discussed in Section IX(B)(1)(c) pertaining to the market-wide short sale price test restrictions that might help to reduce costs associated with the proposed circuit breaker price tests, while at the same time being designed to further the purposes of our proposing the alternative circuit breaker price test restrictions at this

---

with the proposed policies and procedure requirements under the modified uptick rule, the riskless principal exception to the proposed uptick rule, and the proposed marking requirements).

421 See Section IX.B.1. (discussing costs of the proposed modified uptick rule and proposed uptick rule).

422 See id.

time.[423] For example, we believe that the fact that either proposed circuit breaker price test, if adopted, would apply a uniform price test[424] might help to reduce compliance costs for market participants associated with systems and surveillance mechanisms that would have to be programmed to consider only a single circuit breaker price test instead of different tests for different markets.

Second, the proposed three month implementation period would be designed to provide trading centers and market participants with a sufficient amount of time in which to modify their systems and procedures in order to comply with the requirements of either proposed circuit breaker price test, if adopted, and, thus, might help reduce some of the costs and help to alleviate some of the potential disruptions that might be associated with implementing either proposed circuit breaker price test. We recognize, however, that a longer implementation period may be more manageable or preferable, particularly to smaller broker-dealers that might be disproportionately burdened by any implementation and compliance costs associated with the proposed circuit breaker price test restrictions, as well as competitively disadvantaged in terms of reduced order flow as a result.[425] Thus, we seek comment as to what length of implementation period would be necessary or appropriate, and why, such that trading centers would be able to meet the proposed circuit breaker price test restrictions, if adopted.

---

423 See id.

424 As discussed above, unlike the former Rule 10a-1, the proposed short sale price test restrictions, if adopted, would apply a uniform rule to trades in the same securities that occur in multiple, dispersed, and diverse markets. Under the proposed short sale price test restrictions, all covered securities, wherever traded, would be subject to the same short sale price test.

425 See letter from Credit Suisse supra note 122 (discussing need for a much longer implementation period, particularly for smaller broker-dealers). According to this commenter, compliance costs associated with a bid or tick test would disproportionately burden smaller broker-dealers, who would likely be forced to route their flow through a handful of larger broker-dealers, impeding competition and adding to systemic risk as flow is consolidated among fewer players).

Third, as described below, we believe the "broker-dealer" provision in proposed Rule 201(c)(1) of the proposed circuit breaker modified uptick rule and the provisions contained in paragraph (d) of the proposed circuit breaker modified uptick rule, as well as the exceptions contained in paragraph (c) of the proposed circuit breaker uptick rule might also help to minimize any potential price distortions or costs associated with the proposed circuit breaker price restrictions. These provisions also would be designed to help promote the workability of the proposed circuit breaker price tests, while at the same time furthering the Commission's stated goals of short sale price test regulation.[426]

4. Proposed Marking Requirements

We do not anticipate that the "short exempt" marking requirements would impose significant costs on broker-dealers. For example, such broker-dealers might incur a one-time cost associated with implementation and reprogramming. In connection with the order marking requirements of Rule 200(g) of Regulation SHO, which had originally included the category of "short exempt," industry sources at that time estimated initial implementation costs for the former "short exempt" marking requirement to be approximately $100,000 to $125,000.[427]

In addition, we do not believe the proposed order marking requirements would impose significant ongoing monitoring and surveillance costs for broker-dealers. Broker-dealers already have established systems, processes, and procedures in place to comply with the current marking requirements of Rule 200(g) of Regulation SHO with respect to marking a sell order either "long" or "short" and, thus, would likely continue to use such systems, processes and procedures

---

[426] See Section IX.B.1.c. (discussing cost-mitigating features of proposed modified uptick rule and proposed uptick rule in detail).

[427] See 2004 Regulation SHO Adopting Release, 69 FR at 48023.

to comply with the proposed "short exempt" marking requirements in proposed Rules 200(g) and 200(g)(2).

We recognize that there would be an ongoing paperwork burden cost associated with adding the "short exempt" marking requirements. For example, as discussed in detail in Section VIII, above, for purposes of the PRA, we estimate that it would take each broker-dealer no more than approximately .000139 hours (.5 seconds) to mark a sell order "short exempt." In addition, we estimate that the total annual hour burden per year for each broker-dealer subject to the proposed "short exempt" marking requirements would be 322 hours.

If we were to adopt the proposed "short exempt" marking requirements of proposed Rules 200(g) of the proposed modified uptick rule (or the proposed circuit breaker modified uptick rule) or the proposed uptick rule (or the proposed circuit breaker uptick rule), or the proposed circuit breaker halt rule, we are proposing an implementation period under which market participants would have to comply with these requirements three months following the effective date of the proposed marking requirements. We believe that this proposed implementation period would provide market participants with sufficient time in which to modify their systems and procedures in order to comply with the proposed "short exempt" marking requirements. We realize, however, that a shorter or longer implementation period may be manageable or preferable. Thus, we seek specific comment as to what length of implementation period would be necessary or appropriate, and why, such that market participants would be able to meet the proposed marking requirements, if adopted.

C. Request for Comment

We are sensitive to the costs and benefits of the proposed amendments, and encourage commenters to discuss any additional costs or benefits beyond those discussed herein, as well as

any reduction in costs. Commenters should provide analysis and data to support their views of the costs and benefits associated with the proposed amendments.

Questions Regarding Proposed Short Sale Price Test Restrictions

1. The Commission believes that the erosion of investor confidence and questions concerning the volatility in the securities markets necessitate review of various alternatives with respect to short selling restrictions. Would the proposed market-wide short sale price test restrictions be more appropriate than the proposed circuit breaker rules in current market conditions? If so, why? If not, why not? Would the proposed market-wide short sale price test restrictions provide more potential benefit to the market than the proposed circuit breaker rules? Please explain. For example, would the proposed market-wide short sale price test restrictions be a more appropriate means for the Commission to achieve the objective helping to prevent short selling from being used as a tool to drive down the market? Please explain. Would the proposed market-wide short sale price test restrictions help to address the Commission's concerns regarding investor confidence? If so, why and how? If not, why not?
2. What would be the costs and benefits of the proposed modified uptick rule versus the proposed uptick rule? Is a policies and procedures approach preferable to a prohibition on executing a short sale on a down-bid price? Why or why not? What would be the costs and benefits of a policies and procedures approach as compared to such a prohibition? Should we consider other forms of short sale price tests? What would be the costs and benefits of any alternative forms of short sale price tests?

3. What would be the costs and benefits of short sales being subject to the proposed modified uptick rule? What would be the costs and benefits of short sales being subject to the proposed uptick rule? What would be the costs and benefits of having a uniform short sale price test in the covered securities across all markets? Please explain.
4. What, if any, additional benefits, beyond those discussed herein, would result from the proposed modified uptick rule? What, if any, additional benefits, beyond those discussed herein, would result from the proposed uptick rule? Should either proposed price test be modified in any way to increase the benefits of a short sale price test? If so, how?
5. What, if any, additional costs, beyond those discussed herein, would result from the proposed modified uptick rule? What, if any, additional costs, beyond those discussed herein, would result from the proposed uptick rule? What would be the types of costs, and what would be the amounts? Should the proposed short sale price tests be modified in any way to mitigate costs? If so, how?
6. How would trading systems and strategies used in today's marketplace be impacted by the proposed modified uptick rule? How might market participants alter their trading systems and strategies in response to the proposed modified uptick rule, if adopted?
7. Would the proposed modified uptick rule create any additional implementation or operational costs associated with systems (including computer hardware and software), surveillance, procedural, recordkeeping, or personnel modifications, beyond those discussed herein? Would the proposed uptick rule create any

additional implementation or operational costs associated with systems (including computer hardware and software), surveillance, procedural, recordkeeping, or personnel modifications, beyond those discussed herein?

8. Would smaller trading centers and other market participants be disproportionately impacted by any additional implementation or operational costs associated with systems (including computer hardware and software), surveillance, procedural, recordkeeping, or personnel modification as a result of the proposed short sale price test restrictions? If so, in what way. Please explain.
9. To comply with the proposed modified uptick rule, broker-dealers might be required to purchase new systems or implement changes to existing systems. Would changes to existing systems be significant? What would be the costs and benefits associated with acquiring new systems or making changes to existing systems? What, if any, changes would need to be made to existing record keeping systems? What would be the costs and benefits associated with any changes? How might smaller broker-dealers be impacted by having to purchase new systems or implement changes to existing systems in order to comply with the proposed modified uptick rule, if adopted?
10. To comply with the proposed uptick rule, broker-dealers might be required to purchase new systems or implement changes to existing systems. Would changes to existing systems be significant? What would be the costs and benefits associated with acquiring new systems or making changes to existing systems? What, if any, changes would need to be made to existing records? What would be the costs and benefits associated with any changes?

11. What would be the costs and benefits of requiring trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display by the trading center of impermissibly priced short sale orders? What would be the costs and benefits of requiring trading centers to have policies and procedures reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price?
12. What would be the costs and benefits of requiring that trading centers regularly surveil to ascertain the effectiveness of the policies and procedures required by proposed Rule 201(b)(1) and promptly take action to remedy deficiencies in such policies and procedures? What systems and surveillance changes by trading centers would be necessary to meet the requirements of the proposed modified uptick rule?
13. Would the proposed modified uptick rule's compliance and surveillance requirements disproportionately burden smaller broker-dealers? If so, in what way? Please explain.
14. How much, if any, would the proposed price test restrictions affect compliance costs (e.g., personnel or system changes) for each category of broker-dealers: small, medium, and large?
15. Would the proposed modified uptick rule affect different trading centers differently? If so, how? If not, why?
16. Would there be any increases in staffing and associated overhead costs for trading centers and broker-dealers? Would other resources need to be re-dedicated to comply with the proposed modified uptick rule or proposed uptick rule?

17. What, if any, impact on competition would the proposed price test restrictions have on smaller broker-dealers, e.g., due to systems modifications and implementation costs. Please explain.

18. We solicit comment on whether any costs associated with the proposed modified uptick rule and proposed uptick rule would be incurred on a one-time or ongoing basis, as well as cost estimates. In addition, we seek comment as to whether the exceptions to the proposed modified uptick rule or proposed uptick rule would decrease or increase any costs for any market participants. We seek comment about any other costs and cost reductions associated with the proposed amendments.

19. Would the proposed short sale price tests increase the costs of legitimate short selling and lessen some of the benefits of legitimate short selling, which, in turn, could result in a reduction of short selling? To what extent, if any, would the proposed short sale price tests impact legitimate short selling and market efficiency?

20. We seek comment regarding types of entities that would be affected, and the manner in which they would be affected, by the proposed amendments.

21. We seek specific comments on the costs associated with systems changes for trading centers and broker-dealers, including the type of systems changes necessary and quantification of costs associated with changing the systems, including both start-up costs and maintenance. We request comments on the types of jobs and staff that would be affected by systems modifications and training with respect to the proposed modified uptick rule or proposed uptick rule, the number of labor hours that would be required to accomplish these matters, and the compensation rates of these staff members.

22. Would reinstating a short sale price test restriction such as the proposed modified uptick rule or proposed uptick rule help restore investor confidence? If so, why? If not, why not? We note that short selling provides the market with important benefits, including market liquidity and pricing efficiency.[428] What effect, if any, would the proposed modified uptick rule have on market liquidity? What effect, if any, would the proposed modified uptick rule have on pricing efficiency? Please provide empirical data in support of any arguments and/or analyses.

23. Should short sales be subject to a short sale price test restriction, or should we continue to rely on current short sale regulations, as well as anti-fraud and anti-manipulation provisions of the securities laws to address issues raised by potentially abusive short selling? What would be the costs and benefits of subjecting short sales to a short sale price test restriction versus the current short sale regulations, as well as anti-fraud and anti-manipulation provisions of the securities laws?

24. We request comments on whether the pricing of securities affected by any short sale price test would be more or less efficient.

25. We request comments on whether the pricing of securities affected by the proposed modified uptick rule would be more or less efficient.

26. We request comments on whether the pricing of securities affected by the proposed uptick rule would be more or less efficient.

27. If a short sale price test restriction were introduced, the rule would require some commitment of resources associated with compliance oversight, market surveillance, and enforcement. What would be the associated opportunity costs? What level of

---

[428] See Section II.A.

additional resources would be needed for that oversight, surveillance, and enforcement?

Questions Regarding Proposed Circuit Breaker Halt Rule

1. The Commission believes that the erosion of investor confidence and questions concerning the volatility in the securities markets necessitate review of various alternatives with respect to short selling restrictions. Would the proposed circuit breaker halt rule be more appropriate than a market-wide short sale price test restriction in current market conditions? If so, why? If not, why not? Would the proposed circuit breaker halt rule provide more potential benefit to the market than a market-wide short sale price test restriction? Please explain. For example, would the proposed circuit breaker halt rule be a more appropriate means for the Commission to achieve the objective helping to prevent short selling from being used as a tool to drive down the market? Please explain. Would the proposed circuit breaker halt rule help to address the Commission's concerns regarding investor confidence? If so, why and how? If not, why not?
2. Would implementation of the proposed circuit breaker halt rule be less or more costly than the implementation of a market-wide short sale price test restriction? Would the proposed circuit breaker halt rule that, when triggered, would impose a temporary halt on short selling be more or less costly than one that resulted in a short sale price test restriction? Please explain. Would the proposed circuit breaker halt rule be generally easier to implement in a post-Regulation NMS environment than a market-wide short sale price test restriction such as the proposed modified uptick rule, or the proposed

uptick rule? Are there any additional costs associated with multiple day circuit breakers when compared to same day circuit breakers?

3. Should the proposed circuit breaker halt rule be adopted in addition to a permanent, market-wide short sale price test restriction rule? Thus, while a short sale price test restriction rule would be in place as a permanent, market-wide rule, a circuit breaker would also trigger a short selling halt in any security that suffers a severe price decline. Please describe the advantages and disadvantages of such an approach.
4. What would be the relative advantages and disadvantages of a short sale price test combined with a circuit breaker halt rule versus those of a short selling circuit breaker with short sale price test restrictions? Please explain.
5. The Commission is seeking comment on the potential impact of the proposed circuit breaker halt rule on market function and efficiency. What would be the impact of the proposed circuit breaker halt rule, when triggered, on the liquidity of individual securities? What would be the impact of the proposed circuit breaker halt rule on capital formation? What would be the impact of the proposed circuit breaker halt rule on price discovery? Would different circuit breaker alternatives have different impacts on liquidity, capital formation and price discovery? Would a multiple circuit breaker impose any unique costs? Please explain.
6. Should the percentage decline be linked to the stock's price level such that stocks with lower prices must experience a greater percentage decline before the circuit breaker is triggered? If so, what thresholds are appropriate? Please explain. If the percentage decline is linked to price level, what additional operational burdens would be experienced if stock values were required to be continuously monitored due to frequent

fluctuation? Please explain. What costs and benefits may accrue from having the decline based on a dollar amount rather than a value derived from a percentage of the share value? What potential problems or benefits may arise from pegging a short selling circuit breaker threshold to a decline in a stock's dollar amount? Please explain.

7. What other benefits, beyond those discussed herein, would be associated with the proposed circuit breaker halt rule? Would the proposed circuit breaker halt rule help stabilize the market for the individual security? If so, why? If not, why not? Would the proposed circuit breaker halt rule benefit investors by allowing the market to "cool off" with respect to that individual security? Please explain. Would the proposed circuit breaker halt rule result in an increase in investor confidence? Please explain.
8. What costs, beyond those discussed herein, would be incurred in terms of implementing the proposed circuit breaker halt rule? Please explain. What would it cost to update systems in a manner necessary to ensure compliance with the proposed circuit breaker halt rule? Would the expenditure necessary to ensure compliance be primarily an "up-front" cost? Would the expenditure necessary to ensure compliance require long-term investment? Please explain. What technological challenges would be encountered in updating systems to ensure compliance with the proposed circuit breaker halt rule? Please explain. How long would it take to update systems in a manner that ensured compliance with the proposed circuit breaker halt rule? Please explain.
9. What would be the costs and benefits associated with the proposed bona fide market making exception to the proposed circuit breaker halt rule? Please explain. What would be the costs and benefits associated with the proposed exception that would allow short sales that occur as a result of automatic exercise or assignment of an equity option held

prior to the effectiveness of the short selling halt due to expiration of the option? Please explain. What would be the costs and benefits associated with the proposed exception for options market makers selling short as part of bona fide market making and hedging activities related directly to bona fide market making in derivatives on the individual security subject to the halt? Please explain.

Questions Regarding Proposed Circuit Breaker Price Test Rules

1. What benefits, beyond those discussed herein, would be associated with the proposed circuit breaker price test rules? Would the proposed circuit breaker price test rules help stabilize the market for the individual security? If so, why? If not, why not? Would the proposed circuit breaker price test rules benefit investors by allowing the market to "cool off" with respect to that individual security? Please explain. Would the proposed circuit breaker price test rules result in an increase in investor confidence? Please explain.
2. What would be the benefits of the proposed circuit breaker price test rules versus a permanent, market-wide short sale price test such as the modified uptick rule or the proposed uptick rule? Please explain and support explanations with data and analysis where appropriate.
3. What costs would be associated with implementing the proposed circuit breaker modified uptick rule? Please explain. What costs would be associated with implementing the proposed circuit breaker uptick rule? What would be the degree of financial expenditure involved in updating systems in a manner necessary to ensure compliance with each proposed circuit breaker price test rule? Would the expenditure necessary to ensure compliance be primarily an "up-front" cost? Would the expenditure necessary to ensure compliance require long-term investment? Please explain. How

would the costs of each of the proposed circuit breaker price test rules compare with the costs of a permanent short sale price tests such as the proposed modified uptick rule or the proposed uptick rule? Please explain.

4. What technological challenges would be encountered in updating systems to ensure compliance with each of the proposed circuit breaker price test rules on individual securities? Please explain. How long would it take to update systems in a manner that ensured compliance? Please explain. Would either of the proposed circuit breaker price test rules impede the efficient functioning of the equity markets? If so, why? If not, why not? Please explain. Are there any other operational challenges that may arise from implementing either of the proposed circuit breaker price test rules? Please explain. Would the operational challenges presented impede the effectiveness of the proposed circuit breaker modified uptick rule? Please explain. Would the operational challenges presented impede the effectiveness of the proposed circuit breaker uptick rule? Please explain.
5. Are there other short sale price test restrictions, beyond those discussed herein, that should be considered in combination with proposed circuit breaker price test rules? Please explain.
6. What would be the benefits and costs associated with the proposed exceptions to the proposed circuit breaker modified uptick rule? Please explain. What would be the benefits and costs associated with the proposed exceptions to the proposed circuit breaker uptick rule? Please explain.
7. What would be benefits and costs associated with a circuit breaker rule that, when triggered, would prohibit short selling in a particular NMS security on a down-bid unless

the short sale is effected at a price that is more than 10% greater than the prior day's closing price? Please explain.

Questions Regarding Proposed Marking Requirements

1. What, if any, additional benefits or costs, beyond those discussed herein, would result from complying with the "short exempt" marking requirements under the proposed amendments to Rules 200(g) and 200(g)(2)? What would be the types of additional benefits, and what would be the amounts? What would be the types of additional costs, and what would be the amounts? Who would bear these costs? Should the proposed "short exempt" marking requirements be modified in any way to mitigate costs? If so, how?
2. Would there be any operational or compliance concerns associated with the proposed "short exempt" marking requirements?
3. What types of costs, if any, would be associated with requiring sell orders be marked "short exempt" only if the provisions of paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule) are met? What type of costs, if any, would be associated with requiring sell orders to be marked "short exempt" when relying on an exception to the proposed uptick rule (or the proposed circuit breaker uptick rule)? What type of costs, if any, would be associated with requiring sell orders to be marked "short exempt" when relying on an exception to the proposed circuit breaker halt rule?
4. What would be a sufficient implementation period for making any systems changes necessary to allow sell orders to be marked "short exempt"?

5. Please describe any anticipated difficulties in complying with a "short exempt" marking requirements.

6. The short sales that qualify for the "broker-dealer" provision in proposed Rule 201(c) are still subject to the provisions of the proposed modified uptick rule and would be required to be marked as "short exempt." Should these short sales be marked as "short exempt" or is another mark more appropriate? What effect, if any, would marking these short sales as "short exempt" have on compliance or surveillance relative to another mark? What would be the costs associated with implementing a mark especially for these short sales?

X. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.[429] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[430] 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.

We believe the proposed amendments might have minimal impact on the promotion of price efficiency and capital formation. The two alternative short sale price tests proposed are designed to allow relatively unrestricted short selling in an advancing market. In addition, the

---

[429] 15 U.S.C. 78c(f).

[430] 15 U.S.C. 78w(a)(2).

short sale price tests would restrict short selling at successively lower prices and, thereby, might help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers. Further, by seeking to advance these goals, the two alternative short sale price tests might help restore investor confidence in the securities markets.[431]

If the proposed short sale price test restrictions help address the erosion of investor confidence in our markets, the proposed amendments might help to facilitate and maintain stability in the markets and help ensure that they function efficiently. Bolstering investor confidence in the markets could help to encourage investors to be more willing to invest in the market, thus adding depth and liquidity to the markets and promoting the ability of listed companies to raise capital.

In particular, by proposing to require trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to help prevent the execution or display of a short sale order at a down-bid price, in the case of the proposed modified uptick rule, or prohibiting persons from effecting short sales below the last sale price, in the case of the proposed uptick rule, the proposed short sale price test restrictions might help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers. By doing so, the proposed amendments might help to facilitate and maintain stability to the markets and help ensure that they function efficiently.

---

[431] See supra Section II.C., above (discussing restoring investor confidence).

In addition, the proposed short sale price tests might help preserve instant execution and liquidity, by allowing relatively unrestricted short selling in an advancing market. As discussed above, one of the benefits of legitimate short selling is that it provides market liquidity by, for example, adding to the selling interest of stock available to purchasers, and, when sellers are covering their short sales, adding to the buying interest of stock available to sellers. Thus, the proposed short sale price tests are designed to help reduce the potential harm toward the useful market purposes served by short selling by allowing relatively unrestricted short selling in an advancing market.

Moreover, unlike the former short sale price tests (including former Rule 10a-1), the proposed short sale price test restrictions would apply a uniform rule to trades in the same securities that occur in multiple, dispersed, and diverse markets. Under the proposed short sale price test restrictions, all covered securities, wherever traded, would be subject to the same short sale price test. As such, the proposed short sale price test restrictions would not result in the type of disparate short sale regulation that existed under former Rule 10a-1 (in which different price tests were applied in different markets, potentially resulting in confusion, compliance difficulties, regulatory arbitrage, and an un-level playing field among market participants).[432] This might help to avoid undermining competition and efficiency in the market.

In addition, the proposed short sale price tests include a number of provisions that are designed to help promote market efficiency and liquidity, while at the same time helping to promote the goals of our proposing at this time short sale price test restrictions and alternative circuit breaker rules. Moreover, the proposed modified uptick rule (and proposed circuit breaker modified uptick rule) is designed to provide trading centers and their customers with flexibility

[432] See supra note 27 (discussing disparate short sale regulation under former Rule 10a-1).

in determining how to handle orders that are not immediately executable or displayable by the trading center because the order is impermissibly priced. For example, if an order is impermissibly priced, a trading center could re-price the order at the lowest permissible price, execute the order immediately if the order is marketable at its new price, or hold it for later execution at its new price or better.[433] As quoted prices change, the proposed rule would allow a trading center to repeatedly re-price and display an order at the lowest permissible price down to the order's original limit order price (or, if a market order, until the order is filled). Permitting a trading center to re-price an impermissibly priced short sale order might help to allow for the more efficient functioning of the markets because trading centers would not have to reject or cancel impermissibly priced orders unless instructed to do so by the trading center's customer submitting the short sale order.

In addition, the proposed circuit breaker rules would be designed to target only those securities that experience severe intraday declines and, therefore, might also help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market where needed most. By doing so, the proposed circuit breaker rules might help restore confidence in the securities markets[434] and, in turn, might help stabilize the market for individual securities during times of substantial uncertainty and help ensure that the markets function efficiently. Bolstering investor confidence in the markets might help to encourage investors to be more willing to invest in the

---

[433] For example, if a trading center received a short sale order priced at $47.00 when the current national best bid in the security was $47.00, but the immediately preceding national best bid was $47.01 (i.e., the current bid was below the previous bid), the trading center could re-price the order at the permissible offer price of $47.01, and display the order for execution at this new limit price.

[434] See supra Section II.C. above (discussing restoring investor confidence).

market during times of substantial uncertainty, thus adding depth and liquidity to the markets and promoting capital formation.

For example, by halting short selling for the remainder of the trading day following a significant decline in a security's price, we believe the proposed circuit breaker halt rule, in particular, would be designed to provide sufficient time to re-establish equilibrium between buying and selling interests in the individual security in an orderly fashion. It would also be designed to help ensure that market participants have a reasonable opportunity to become aware of, and respond to, a significant decline in a security's price. By providing a pause in short selling resulting from a significant decline in the price of an individual equity security, we believe the proposed circuit breaker halt rule might provide a measure of stability to the markets. However, by allowing short selling to continue with price test restrictions once a circuit breaker was triggered, the proposed circuit breaker price test rules might have less impact on legitimate short selling and normal market activity including price discovery and the provision of liquidity than a circuit breaker with halt on short selling.

By targeting only those securities that experience severe intraday declines, all three proposed circuit breaker rules would be narrowly tailored so that most stocks would not fall under any new short sale restrictions. As such, the proposed circuit breaker rules might help preserve instant execution and liquidity. As discussed above, one of the benefits of legitimate short selling is that it provides market liquidity by, for example, adding to the selling interest of stock available to purchasers, and, when sellers are covering their short sales, adding to the buying interest of stock available to sellers. Thus, the proposed circuit breaker rules are designed to help reduce the potential harm toward the useful market purposes served by short selling by targeting only those securities that experience severe intraday declines.

In addition, the proposed amendment to Rule 200(g)(2) of Regulation SHO to require broker-dealers to mark a sale order as "short exempt" if the provisions of paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule) are met, or if the seller is relying on an exception in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule) , or if the seller is relying on an exception in paragraph (c) of the proposed circuit breaker halt rule, could help to promote price efficiency by helping to preserve instant execution and liquidity of such orders.

In addition, we believe that the proposed amendments would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. We believe the proposed short sale price test restrictions and the proposed circuit breaker rules might help to avoid undermining competition by imposing a uniform price test on all similarly situated entities or individuals subject to the proposed amendments. We recognize, however, that the proposed three-month implementation period for the proposed short sale price test restrictions may not be sufficient for certain smaller broker-dealers and that any potential compliance costs associated with the short sale price test restrictions could likely disproportionately burden these smaller broker-dealers in terms of reduced order flow, thereby impeding competition.[435] However, we believe the proposed circuit breaker halt rule, in particular, might help to avoid undermining competition in that it may require less time and significantly less costs for implementation and compliance with its requirements.[436] In addition, the proposed "short exempt" marking requirements would apply to all NMS stocks wherever

---

[435] See letter from Credit Suisse (discussing need for a much longer implementation period, particularly for smaller broker-dealers, and how compliance costs of a bid or tick test would likely disproportionately burden smaller broker-dealer and impede competition by forcing these smaller broker-dealers to route their flow through a handful of larger broker-dealers).

[436] See id.

traded, thereby providing a uniform practice designed to ensure consistency within the equity markets. Moreover, the proposed amendments could help to address any possibility that abusive or manipulative short selling might be contributing to the disruption in the markets and, therefore, could help to address the erosion of investor confidence in the markets.

We request comment on whether the proposed amendments would likely promote efficiency, capital formation, and competition.

XI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"[437] we must advise the Office of Management and Budget as to whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

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

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed 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.

---

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

XII. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA"), in accordance with the provisions of the Regulatory Flexibility Act,[438] regarding the proposed amendments to Rules 200(g) and 201 of Regulation SHO under the Exchange Act.

A. Reasons for the Proposed Action

We are proposing to amend Regulation SHO to impose a short sale price test that would restrict the prices at which certain securities may be sold short. We are also proposing as alternatives to a full-time price short sale price test two alternative circuit breaker rules. As discussed above, we believe it is appropriate at this time to examine and seek comment on whether to restore short sale price tests in light of the extreme market conditions that we are currently facing and the resulting deterioration in investor confidence.

We are proposing two alternative short sale price tests. The first test would be the proposed modified uptick rule that would be based on the national best bid. The second test would be the proposed uptick rule that would be a modernized version of the tick test under former Rule 10a-1, and would be based on a last sale price. We are also proposing, as alternatives to a full-time short sale price test, circuit breaker rules that would establish limitations on short selling in a particular security during sever market declines in the price of that security. The proposed circuit breaker halt rule, when triggered by a severe price decline in a particular security, would temporarily prohibit any person from selling short that security during the effectiveness of the circuit breaker.[439] The proposed circuit breaker price test rules, when triggered by a severe market decline in a particular security, would temporarily establish

---

[438] 5 U.S.C. 603.

[439] The proposed circuit breaker halt rule could be imposed in place of, or in addition to, a permanent short sale price restriction rule.

either the proposed modified uptick rule or the proposed uptick rule, as each are described in detail above, for that security.[440]

In addition, we are proposing amendments to Rule 200(g) of Regulation SHO to impose a "short exempt" marking requirement and to Rule 200(g)(2) of Regulation SHO to require broker-dealers to mark a sell order "short exempt" only if the provisions in paragraph (c) or (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule) are met, or if a seller is relying on an exception in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule), or if a seller is relying on an exception in paragraph (c) of the proposed circuit breaker halt rule.

B. Objectives

The two alternative short sale price tests proposed are designed to allow relatively unrestricted short selling in an advancing market. In addition, the short sale price tests are designed to restrict short selling at successively lower prices and, thereby, might help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, causing successively lower prices to be established by long sellers. Further, by seeking to advance these goals, the two alternative short sale price tests would also be designed to help restore investor confidence in the securities markets.

Moreover, the proposed alternative circuit breaker rules would be designed to target only those securities that experience severe intraday declines and, therefore, might also help prevent

[440] A circuit breaker that triggers a short sale price test rule would be adopted in place of a short sale price test rule.

short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market when needed most.

C. Legal Basis

Pursuant to the Exchange Act and particularly, Sections 2, 3(b), 6, 9(h), 10, 11A, 15, 15A, 17, 19, 23(a), and 36 thereof, 15 U.S.C. 78b, 78c(b), 78(f), 78i(h), 78j, 78k-1, 78o, 78o-3, 78q, 78s, 78w(a), and 78mm the Commission is proposing amendments to §§ 242.200 and 242.201 of Regulation SHO.

D. Small Entities Subject to the Proposed Amendments

The proposed modified uptick rule and proposed circuit breaker modified uptick rule would require each trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order at a down-bid price.[441] A "trading center" is defined as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker-dealer that executes orders internally by trading as principal or crossing orders as agent."[442]

Rule 0-10(e) under the Exchange Act provides that the term "small business" or "small organization," when referring to an exchange, means any exchange that: (i) has been exempted from the reporting requirements of Rule 601 under the Exchange Act;[443] and (ii) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as

---

[441] See proposed Rule 201(b)(1).

[442] See 17 CFR 242.600(b)(78).

[443] 17 CFR 242.601

defined by Rule 0-10.[444] No national securities exchanges are small entities because none meets these criteria. There is one national securities association (FINRA) that would be subject to the proposed modified uptick rule. FINRA is not a small entity as defined by 13 CFR 121.201. Thus, the current national securities exchanges and one national securities association that would be subject to the proposed modified uptick rule are not considered "small entities" for purposes of the Regulatory Flexibility Act.

The remaining non-SRO trading centers that would be subject to the proposed modified uptick rule or the proposed circuit breaker modified uptick rule are registered broker-dealers. The Commission has preliminarily determined that approximately 372 broker-dealers registered with the Commission that could meet the proposed definition of a trading center,[445] which includes broker-dealers operating as equity ATSs, broker-dealers registered as market makers or specialists in NMS stocks, and any broker-dealer that is in the business of executing orders internally in NMS stocks. Pursuant to Rule 0-10(c) under the Exchange Act, 17 CFR 240.0-10(c), a broker-dealer is defined as a small entity for purposes of the Exchange Act and the Regulatory Flexibility Act if the broker-dealer had a total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and it is not affiliated with any person (other than a natural person) that is not a small entity.[446] Of these 372 non-SRO trading centers, only five[447] are

---

[444] See 17 CFR 240.0-10(e) and 13 CFR 121.201.

[445] See supra note 10.

[446] 17 CFR 240.0-10(c)(1).

[447] This number was derived from OEA's review of 2007 FOCUS Report filings and discussion with SRO staff.

considered small for purposes of the Regulatory Flexibility Act pursuant to the standards of Rule 0-10(c) under the Exchange Act.

The entities covered by the proposed uptick rule, the proposed circuit breaker uptick rule, the proposed circuit breaker halt rule, and the proposed "short exempt" marking requirements, would include small entities that are small broker-dealers, small businesses, and any investor who effected a short sale that qualifies as a small entity. Although we are not aware of data that is available to permit us to quantify every type of small entity covered by the proposed amendments, paragraph (c)(1) of Rule 0-10 under the Exchange Act, as mentioned above, states that the term "small business" or "small organization," when referring to a broker-dealer, means a broker-dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to §240.17a-5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. We estimate that as of 2007 there were approximately 896 broker-dealers that qualified as small entities as defined above.[448]

As mentioned above, paragraph (e) of Rule 0-10 under the Exchange Act[449] states that the term "small business" or "small organization," when referring to an exchange, means any exchange that: (i) has been exempted from the reporting requirements of Rule 11Aa3-1 under the Exchange Act; and (ii) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined by Rule 0-10. As mentioned above, no U.S. registered exchange is a small entity because none meets these criteria. Any business, however, regardless of industry, could be subject to the proposed uptick rule and the proposed provisions

---

[448] These numbers are based on OEA's review of 2007 FOCUS Report filings reflecting registered broker-dealers, including introducing broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[449] 17 CFR 240.0-10(e).

contained in paragraph (c) and (d) of the proposed modified uptick rule (or paragraph (c) or (d) of the proposed circuit breaker modified uptick rule), or the exceptions contained in paragraph (c) of the proposed uptick rule (or paragraph (c) of the proposed circuit breaker uptick rule), or the exceptions contained in paragraph (c) of the proposed circuit breaker halt rule if it effects a short sale. The Commission believes that, except for the broker-dealers discussed above, it is not possible to estimate the number of small entities that would fall under the proposed amendments because we are not aware of data, including the number of investors, who do or will engage in short selling.

E. Projected Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendment may impose some new or additional reporting, recordkeeping, or compliance costs on trading centers and other broker-dealers that are small entities. The proposed modified uptick rule would focus on a trading center's written policies and procedures as the mechanism through which to help prevent the execution or display of short sale orders on a down-bid price. In addition, the proposed modified uptick rule's "broker-dealer" provision (and the proposed circuit breaker modified uptick rule's "broker-dealer" provision) would include a policies and procedures requirement to help prevent incorrect identification of orders for purposes of the proposed "broker-dealer" provision. In order to comply with Regulation NMS when it became effective in 2005, entities were required to modify their systems and surveillance mechanisms in order to comply with the order protection rule's policies and procedures requirement. Thus, the five non-SRO trading centers that would qualify as small entities may already have in place most of the infrastructure necessary to comply with the proposed modified uptick rule (or the proposed circuit breaker modified uptick rule), if adopted.

In addition, in order to implement and comply with former Rule 10a-1, entities were required to modify their systems and surveillance mechanisms. Thus, the small entities that would be subject to the proposed uptick rule (or proposed circuit breaker uptick rule or proposed circuit breaker halt rule) may already be familiar with, and may have retained systems, that would aid in their implementation and compliance with the proposed uptick rule (or proposed circuit breaker uptick rule or proposed circuit breaker halt rule). Small entities, however, may still need to make some modifications to their systems and surveillance mechanisms to implement and ensure compliance with the proposed uptick rule (or proposed circuit breaker uptick rule or proposed circuit breaker halt rule), if adopted.[450]

In addition, the proposed amendment to Rule 200(g)(2) that would require that a sale order be marked "short exempt" only if the provisions of proposed Rule 201(c) or (d) of the proposed modified uptick rule (or proposed Rule 201 (c) or (d) of the proposed circuit breaker modified uptick rule) are met, or if the seller is relying on an exception from the proposed uptick rule (or the proposed circuit breaker uptick rule), could impose some new or additional reporting, recordkeeping, or compliance costs on broker-dealers that are small entities. We believe, however, that such costs would not be significant. Rule 200(g) currently requires that broker-dealers mark all sell orders of any equity security as either "long" or "short."[451] Broker-dealers that are small entities should already be familiar with the current marking requirements and should already have in place mechanisms that could be used to comply with the proposed "short exempt" marking requirement if adopted.

---

[450] See letter from Credit Suisse. See also supra note 122 and accompanying text.

[451] See 17 CFR 242.200(g).

F. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that there are no rules that duplicate, overlap, or conflict with the proposed amendments to Rules 200(g) and 201 of Regulation SHO.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small entities.[452] In connection with the proposed amendments, we considered the following alternatives: (i) establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for small entities; (iii) using performance rather than design standards; and (iv) exempting small entities from coverage of the rule, or any part of the rule.

A primary goal of the proposed amendments is to help restore investor confidence by restricting short selling at successively lower prices and, thereby, help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool for driving the market down or from being used to accelerate a declining market by exhausting all remaining bids at one price level, while at the same time allowing relatively unrestricted short selling in an advancing market. As such we believe that imposing different compliance requirements, and possibly a different timetable for implementing compliance requirements, for small entities would undermine the goal of restoring investor confidence. It also could create confusion in the market if some sellers were not required to comply. Further, it could undermine the goals of the proposed short sale price test restrictions or the proposed circuit breaker rules because it could

---

[452] See 5 U.S.C. 603(c).

provide an avenue for short sellers to evade the proposed amendments. In addition, we have concluded similarly that it is not consistent with the primary goal of the proposals to further clarify, consolidate or simplify the proposals for small entities. Finally, the proposals would impose performance standards rather than design standards.

H. General Request for Comments

We solicit written comments regarding our IRFA analysis. In particular, the Commission seeks comment on the number of small entities that would be affected by the proposed amendments. We request that commenters provide empirical data to quantify the number of small entities that could be affected by the proposed amendments. We request comment on whether the proposed amendments would have any effects that we have not discussed. We also request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

XIII. Additional Request for Comment

In addition to the specific requests for comment found throughout this proposing release, we seek comment generally from all members of the public on all aspects of the proposed amendments to Rules 200(g) and 201 of Regulation SHO. We request that commenters provide empirical data to support their views and arguments related to these proposals. In addition to the questions set forth above, commenters are welcome to offer their views on any other matter raised by the proposed amendments to Regulation SHO. Specifically, are there any other possible restrictions on short selling that the Commission should consider, particularly ones that might be helpful in a severe market decline?

XIV. Statutory Authority

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 6, 9(h), 10, 11A, 15, 15A, 17, 19, 23(a), and 36 thereof, 15 U.S.C. 78b, 78c(b), 78(f), 78i(h), 78j, 78k-1, 78o, 78o-3, 78q, 78s, 78w(a), and 78mm the Commission is proposing amendments to §§ 242.200 and 242.201 of Regulation SHO.

XV. Text of the Amendments to Regulation SHO

List of Subjects

17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II, Part 242, of the Code of Federal Regulations is proposed to be amended as follows.

PART 242 — REGULATIONS M, SHO, ATS, AC, AND NMS AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

1. The authority citation for part 242 continues to read as follows:

Authority: Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 6, 9(h), 10, 11A, 15, 15A, 17, 19, 23(a), and 36 thereof, 15 U.S.C. 78b, 78c(b), 78(f), 78i(h), 78j, 78k-1, 78o, 78o-3, 78q, 78s, 78w(a), and 78mm the Commission is proposing amendments to §§242.200 and 242.201 of Regulation SHO.

Alternative I – Price Tests

A. Modified Uptick Rule

2. Section 242.200 is amended by revising paragraph (g) introducing text and adding paragraph (g)(2) to read as follows:

§242.200 Definition of "short sale" and marking requirements.

*****

(g) A broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."

(1) * * *

(2) A sale order shall be marked "short exempt" only if the provisions of § 242.201(c) or (d) are met.

*****

3. Section 242.201 is revised to read as follows:

§242.201 Price test.

(a) Definitions. For the purposes of this section:

(1) The term covered security shall mean any NMS stock as defined in §242.600(b)(47).

(2) The term down-bid price shall mean a price that is less than the current national best bid or, if the last differently priced national best bid was greater than the current national best bid, a price that is less than or equal to the current national best bid.

(3) The term national best bid shall have the same meaning as in §242.600(b)(42).

(4) The term national market system plan shall have the same meaning as in §242.600(b)(43).

(5) The term odd lot shall have the same meaning as in §242.600(b)(49).

(6) The term riskless principal shall mean a transaction in which a broker or dealer, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell.

(7) The term trading center shall have the same meaning as in §242.600(b)(78).

(b)(1) A trading center shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a down-bid price. Provided, however,

(i) The policies and procedures must be reasonably designed to permit the execution of a displayed short sale order of a covered security by a trading center if, at the time of display of the short sale order, the order was not at a down-bid price.

(ii) The policies and procedures must be reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price.

(2) A trading center shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (b)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(c) A broker or dealer may mark a short sale order of a covered security "short exempt" if the broker or dealer that submits the order identifies that the order is not on a down-bid price at the time of submission of the order to the trading center. Provided, however,

(1) The broker or dealer that identifies a short sale order of a covered security in accordance with this paragraph must establish, maintain, and enforce written policies and procedures reasonably designed to prevent incorrect identification of orders for purposes of this paragraph; and

(2) The broker or dealer shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (c) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(d) A broker or dealer may mark a short sale order of a covered security "short exempt" if

the broker or dealer has a reasonable basis to believe:

(1) The short sale order of a covered security is by a person that is deemed to own the covered security pursuant to §242.200, provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.

(2) The short sale order of a covered security is by a market maker to off-set customer odd-lot orders or to liquidate an odd-lot position that changes such broker's or dealer's position by no more than a unit of trading.

(3) The short sale order of a covered security is for a good faith account by a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such securities of the issuer.

(4) The short sale order of a covered security is for a good faith account submitted to profit from a current price difference between a security on a foreign securities market and a security on a securities market subject to the jurisdiction of the United States, provided that the short seller has an offer to buy on a foreign market that allows the seller to immediately cover the short sale at the time it was made. For the purposes of this section, a depository receipt of a security shall be deemed to be the same security as the security represented by such receipt.

(5) (i) The short sale order of a covered security is by an underwriter or member of a syndicate or group participating in the distribution of a security in connection with an over-allotment of securities; or

(ii) Any short sale order with respect to a lay-off sale by an underwriter or member of a syndicate or group in connection with a distribution of securities through a rights or standby underwriting commitment.

(6) The short sale order of a covered security is by a broker or dealer effecting the execution of a customer purchase or the execution of a customer "long" sale on a riskless principal basis; provided, however, the purchase or sell order must be given the same per-share price at which the broker or dealer sold shares to satisfy the facilitated order, exclusive of any explicitly disclosed markup or markdown, commission equivalent or other fee. In addition, for purposes of this section, a broker or dealer must have written policies and procedures in place to assure that, at a minimum: the customer order was received prior to the offsetting transaction; the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and the broker or dealer has supervisory systems in place to produce records that enable the broker or dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which a broker or dealer relies pursuant to this exception.

(7) The short sale order is for the sale of a covered security at the volume weighted average price (VWAP) that meets the following criteria:

(i) The VWAP for the covered security is calculated by:

(A) Calculating the values for every regular way trade reported in the consolidated system for the security during the regular trading session, by multiplying each such price by the total number of shares traded at that price;

(B) Compiling an aggregate sum of all values; and

(C) Dividing the aggregate sum by the total number of reported shares for that day in the security.

(ii) The transactions are reported using a special VWAP trade modifier.

(iii) No short sales used to calculate the VWAP are marked "short exempt."

(iv) The VWAP matched security:

(A) Qualifies as an "actively-traded security"; or

(B) The proposed short sale transaction is being conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than five percent of the value of the basket traded.

(v) The transaction is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security.

(vi) A broker or dealer shall be permitted to act as principal on the contra-side to fill customer short sale orders only if the broker's or dealer's position in the covered security, as committed by the broker or dealer during the pre-opening period of a trading day and aggregated across all of its customers who propose to sell short the same security on a VWAP basis, does not exceed 10% of the covered security's relevant average daily trading volume.

(e) No self-regulatory organization shall have any rule that is not in conformity with, or conflicts with this section.

(f) The provisions of this section shall apply to short sale orders in a covered security at times when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.

(g) Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any person or class of persons, to any transaction or class of transactions, or to any

security or class of securities to the extent that such exemption is necessary or appropriate, in the public interest, and is consistent with the protection of investors.

B. Uptick Rule

2. Section 242.200 is amended by revising paragraph (g) introducing text and adding paragraph (g)(2) to read as follows:

§242.200 Definition of "short sale" and marking requirements.

*****

(g) A broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."

(1) * * *

(2) A sale order shall be marked "short exempt" if the seller is relying on an exception from the price test of §242.201.

*****

3. Section 242.201 is revised to read as follows:

§242.201 Price test.

(a) Definitions. For the purposes of this section:

(1) The term actively traded security shall have the same meaning as in §242.101(c)(1).

(2) The term average daily trading volume shall have the same meaning as in §242.100(b).

(3) The term national market system plan shall have the same meaning as in §242.600(b)(43).

(4) The term covered security shall mean any NMS stock as defined in §242.600(b)(47).

(5) The term odd lot shall have the same meaning as in §242.600(b)(49).

(6) The term riskless principal shall mean a transaction in which a broker or dealer, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell.

(b) No person shall, for his own account or for the account of any other person, effect a short sale of any covered security, if trades in such security are reported pursuant to an effective national market system plan and information as to such trades is made available in accordance with such plan on a real-time basis to vendors of market transaction information:

(1) Below the price at which the last sale thereof, regular way, was reported pursuant to an effective national market system plan; or

(2) At such price unless such price is above the next preceding different price at which a sale of such security, regular way, was reported pursuant to an effective national market system plan.

(c) The provisions of paragraph (b) of this section shall not apply to:

(1) Any sale by any person of a covered security that the person is deemed to own pursuant to §242.200, provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.

(2) Any sale by a broker or dealer of a covered security for an account in which it has no interest, pursuant to an order marked long.

(3) Any sale of a covered security by a market maker to off-set customer odd-lot orders or to liquidate an odd-lot position which changes such broker's or dealer's position by no more than a unit of trading.

(4) Any sale of a covered security for a good faith account by a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such securities of the issuer.

(5) Any sale of a covered security for a good faith account submitted to profit from a current price difference between a security on a foreign securities market and a security on a securities market subject to the jurisdiction of the United States, provided that the short seller has an offer to buy on a foreign market that allows the seller to immediately cover the short sale at the time it was made. For the purposes of this section, a depository receipt of a security shall be deemed to be the same security as the security represented by such receipt.

(6) (i)Any sale of a covered security by an underwriter or member of a syndicate or group participating in the distribution of a security in connection with an over-allotment of securities; or

(ii) Any lay-off sale by an underwriter or member of a syndicate or group in connection with a distribution of securities through a rights or standby underwriting commitment.

(7) Any sale of a covered security at the volume weighted average price (VWAP) that meets the following criteria:

(i) The VWAP for the covered security is calculated by:

(A) Calculating the values for every regular way trade reported in the consolidated system for the security during the regular trading session, by multiplying each such price by the total number of shares traded at that price;

(B) Compiling an aggregate sum of all values; and

(C) Dividing the aggregate sum by the total number of reported shares for that day in the security.

(ii) The transactions are reported using a special VWAP trade modifier.

(iii) No short sales used to calculate the VWAP are marked "short exempt";

(iv) The VWAP matched security:

(A) Qualifies as an "actively-traded security"; or

(B) The proposed short sale transaction is being conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than five percent of the value of the basket traded.

(v) The transaction is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security.

(vi) A broker or dealer shall be permitted to act as principal on the contra-side to fill customer short sale orders only if the broker's or dealer's position in the covered security, as committed by the broker or dealer during the pre-opening period of a trading day and aggregated across all of its customers who propose to sell short the same security on a VWAP basis, does not exceed 10% of the covered security's relevant average daily trading volume.

(8) Any sale of a covered security in an electronic trading system that matches buying and selling interest at various times throughout the day that meets the following criteria:

(i) Matches occur at an externally derived price within the existing market and above the current national best bid;

(ii) Sellers and purchasers are not assured of receiving a matching order;

(iii) Sellers and purchasers do not know when a match will occur;

(iv) Persons relying on the exception contained in paragraph (c)(8) of this section shall not be represented in the primary market offer or otherwise influence the primary market bid or offer at the time of the transaction;

(v) Transactions shall not be made for the purpose of creating actual, or apparent, active trading in, or depressing or otherwise manipulating the price of, any security;

(vi) The covered security:

(A) Qualifies as an "actively-traded security"; or

(B) The proposed short sale transaction is being conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than five percent of the value of the basket traded; and

(vii) During the period of time in which the electronic trading system may match buying and selling interest, there can be no solicitation of customer orders, or any communication with customers that the match has not yet occurred.

(9) Any sale of a covered security by a broker or dealer effecting the execution of a customer purchase or the execution of a customer "long" sale on a riskless principal basis; provided, however, the purchase or sell order must be given the same per-share price at which the broker or dealer sold shares to satisfy the facilitated order, exclusive of any explicitly disclosed markup or markdown, commission equivalent or other fee. In addition, for purposes of

this section, a broker or dealer must have written policies and procedures in place to assure that, at a minimum: the customer order was received prior to the offsetting transaction; the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and the broker or dealer has supervisory systems in place to produce records that enable the broker or dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which a broker or dealer relies pursuant to this exception.

(10) Any sale of a covered security (except a sale to a stabilizing bid complying with §242.104) by a registered specialist or registered exchange market maker for its own account on any exchange with which it is registered for such security, or by a third market maker for its own account over-the-counter:

(i) Effected at a price equal to the most recent offer communicated for the security by such registered specialist, registered exchange market maker or third market maker to an exchange or a national securities association ("association") pursuant to §242.602, if such offer, when communicated, was equal to or above the last sale, regular way, reported for such security pursuant to an effective national market system plan. Provided, however,

(ii) That any self-regulatory organization, by rule, may prohibit its registered specialist and registered exchange market makers from availing themselves of the exemption afforded by this paragraph (c)(10) if that self-regulatory organization determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors.

(11) Any sale of a covered security (except a sale to a stabilizing bid complying with §242.104) by any broker or dealer, for his own account or for the account of any other person, effected at a price equal to the most recent offer communicated by such broker or dealer to an

exchange or association pursuant to §242.602 in an amount less than or equal to the quotation size associated with such offer, if such offer, when communicated, was:

(i) Above the price at which the last sale, regular way, for such security was reported pursuant to an effective national market system plan; or

(ii) At such last sale price, if such last sale price is above the next preceding different price at which a sale of such security, regular way, was reported pursuant to an effective national market system plan.

(12) Any sale of a security by a registered market maker or specialist publishing two-sided quotes to facilitate customer market or marketable limit buy orders.

(d) No self-regulatory organization shall have any rule that is not in conformity with, or conflicts with this section.

(e) The provisions of this section shall apply to short sale orders in a covered security at times when a last sale price for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.

(f) Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any person or class of persons, to any transaction or class of transactions, or to any security or class of securities to the extent that such exemption is necessary or appropriate, in the public interest, and is consistent with the protection of investors.

Alternative II – Circuit Breaker Rules

A. Circuit Breaker Halt Rule

2. Section 242.200is amended by revising paragraph (g) introducing text and adding paragraph (g)(2) to read as follows:

§242.200 Definition of "short sale" and marking requirements.

*****

(g) A broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."

(1) * * *

(2) A sale order shall be marked "short exempt" if the seller is relying on an exception from the prohibition against short selling of §242.201.

*****

3. Section 242.201 is revised to read as follows:

§242.201 Circuit breaker.

(a) Definitions. For the purposes of this section:

(1) The term covered security shall mean any NMS stock as defined in §242.600(b)(47).

(2) The term regular trading hours shall have the same meaning as in §242.600(b)(64).

(3) The term national market system plan shall have the same meaning as in §242.600(b)(43).

(b) If the price of a covered security, as reported in the consolidated system, decreases by ten percent or more from that covered security's last price reported during regular trading hours the prior day, as reported in the consolidated system, no person shall, for his own account or for the account of any other person, effect a short sale of that covered security, wherever traded, at times when a last sale price for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan, for the remainder of the day.

(c) The provisions of paragraph (b) of this section shall not apply if the decrease in the price of a covered security occurs within thirty minutes from the end of regular trading hours.

(d) The provisions of paragraph (b) of this section shall not apply to:

(1) Any sale of a covered security by a registered market maker, block positioner, or other market maker obligated to quote in the over-the-counter market, in each case that are selling short a covered security as part of bona fide market making in such covered security.

(2) Any sale of a covered security by any person as a result of automatic exercise or assignment of an equity option, or in connection with a futures contract, that is held prior to the trigger event identified in paragraph (b) of this section due to expiration of the option or futures contract.

(3) Any sale of a covered security by any person that is the writer of a call option if the sale is as a result of assignment following exercise by the holder of the call.

(4) Any sale of a covered security by any person that is a market maker, including an over-the-counter market maker, if the sale is part of a bona fide market making and hedging activity related directly to bona fide market making in: (i) derivative securities based on that covered security; or (ii) exchange traded funds and exchange traded notes of which that covered security is a component.

(5) Any sale of a covered security by any person that is deemed to own the covered security pursuant to §242.200, provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.

(e) No self-regulatory organization shall have any rule that is not in conformity with, or conflicts with, this section.

(f) Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any person or class of persons, to any transaction or class of transactions, or to any security or class of securities to the extent that such exemption is necessary or appropriate, in the public interest, and is consistent with the protection of investors.

B. Circuit Breaker with Modified Uptick Rule

2. Section 242.200 is amended by revising paragraph (g) introducing text and adding paragraph (g)(2) to read as follows:

§242.200 Definition of "short sale" and marking requirements.

*****

(g) A broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."

(1) * * *

(2) A sale order shall be marked "short exempt" only if the provisions of § 242.201(d) or (e) are met.

*****

3. Section 242.201 is revised to read as follows:

§242.201 Circuit breaker.

(a) Definitions. For the purposes of this section:

(1) The term covered security shall mean any NMS stock as defined in §242.600(b)(47).

(2) The term regular trading hours shall have the same meaning as in §242.600(b)(64).

(3) The term down-bid price shall mean a price that is less than the current national best bid or, if the last differently priced national best bid was greater than the current national best bid, a price that is less than or equal to the current national best bid.

(4) The term national best bid shall have the same meaning as in §242.600(b)(42).

(5) The term national market system plan shall have the same meaning as in §242.600(b)(43).

(6) The term odd lot shall have the same meaning as in §242.600(b)(49).

(7) The term riskless principal shall mean a transaction in which a broker or dealer, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell.

(8) The term trading center shall have the same meaning as in §242.600(b)(78).

(b) (1) A trading center shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent, when the price of a covered security decreases by ten percent or more from that covered security's last price reported during regular trading hours the prior day, as reported in the consolidated system, the execution or display of a short sale order of that covered security at a down-bid price at times when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan, for the remainder of the day. Provided, however,

(i) The policies and procedures must be reasonably designed to permit the execution of a displayed short sale order of a covered security by a trading center if, at the time of display of the short sale order, the order was not at a down-bid price.

(ii) The policies and procedures must be reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a down-bid price.

(2) A trading center shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (b)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(c) The provisions of paragraph (b) of this section shall not apply if the decrease in the price of a covered security occurs within thirty minutes from the end of regular trading hours.

(d) A broker or dealer may mark a short sale order of a covered security "short exempt" if the broker or dealer that submits the order identifies that the order is not on a down-bid price at the time of submission of the order to the trading center. Provided, however,

(1) The broker or dealer that identifies a short sale order of a covered security in accordance with this paragraph must establish, maintain, and enforce written policies and procedures reasonably designed to prevent incorrect identification of orders for purposes of this paragraph; and

(2) The broker or dealer shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (c) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(e) A broker or dealer may mark a short sale order of a covered security "short exempt" if the broker or dealer has a reasonable basis to believe:

(1) The short sale order of a covered security is by a person that is deemed to own the covered security pursuant to §242.200, provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.

(2) The short sale order of a covered security is by a market maker to off-set customer odd-lot orders or to liquidate an odd-lot position that changes such broker's or dealer's position by no more than a unit of trading.

(3) The short sale order of a covered security is for a good faith account by a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such securities of the issuer.

(4) The short sale order of a covered security is for a good faith account submitted to profit from a current price difference between a security on a foreign securities market and a security on a securities market subject to the jurisdiction of the United States, provided that the short seller has an offer to buy on a foreign market that allows the seller to immediately cover the short sale at the time it was made. For the purposes of this section, a depository receipt of a security shall be deemed to be the same security as the security represented by such receipt.

(5) (i) The short sale order of a covered security is by an underwriter or member of a syndicate or group participating in the distribution of a security in connection with an over-allotment of securities; or

(ii) Any short sale order with respect to a lay-off sale by an underwriter or member of a syndicate or group in connection with a distribution of securities through a rights or standby underwriting commitment.

(6) The short sale order of a covered security is by a broker or dealer effecting the execution of a customer purchase or the execution of a customer "long" sale on a riskless principal basis; provided, however, the purchase or sell order must be given the same per-share price at which the broker or dealer sold shares to satisfy the facilitated order, exclusive of any explicitly disclosed markup or markdown, commission equivalent or other fee. In addition, for purposes of this section, a broker or dealer must have written policies and procedures in place to assure that, at a minimum: the customer order was received prior to the offsetting transaction; the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and the broker or dealer has supervisory systems in place to produce records that enable the broker or dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which a broker or dealer relies pursuant to this exception.

(7) The short sale order is for the sale of a covered security at the volume weighted average price (VWAP) that meets the following criteria:

(i) The VWAP for the covered security is calculated by:

(A) Calculating the values for every regular way trade reported in the consolidated system for the security during the regular trading session, by multiplying each such price by the total number of shares traded at that price;

(B) Compiling an aggregate sum of all values; and

(C) Dividing the aggregate sum by the total number of reported shares for that day in the security.

(ii) The transactions are reported using a special VWAP trade modifier.

(iii) No short sales used to calculate the VWAP are marked "short exempt."

(iv) The VWAP matched security:

(A) Qualifies as an "actively-traded security"; or

(B) The proposed short sale transaction is being conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than five percent of the value of the basket traded.

(v) The transaction is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security.

(vi) A broker or dealer shall be permitted to act as principal on the contra-side to fill customer short sale orders only if the broker's or dealer's position in the covered security, as committed by the broker or dealer during the pre-opening period of a trading day and aggregated across all of its customers who propose to sell short the same security on a VWAP basis, does not exceed 10% of the covered security's relevant average daily trading volume.

(f) No self-regulatory organization shall have any rule that is not in conformity with, or conflicts with, this section.

(g) Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any person or class of persons, to any transaction or class of transactions, or to any security or class of securities to the extent that such exemption is necessary or appropriate, in the public interest, and is consistent with the protection of investors.

C. Circuit Breaker with Uptick Rule

2. Section 242.200 is amended by revising paragraph (g) introducing text and adding paragraph (g)(2) to read as follows:

§242.200 Definition of "short sale" and marking requirements.

*****

(g) A broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."

(1) * * *

(2) A sale order shall be marked "short exempt" if the seller is relying on an exception from the price test of §242.201.

*****

3. Section 242.201 is revised to read as follows:

§242.201 Circuit breaker.

(a) Definitions. For the purposes of this section:

(1) The term covered security shall mean any NMS stock as defined in §242.600(b)(47).

(2) The term regular trading hours shall have the same meaning as in §242.600(b)(64).

(3) The term actively traded security shall have the same meaning as in §242.101(c)(1).

(4) The term average daily trading volume shall have the same meaning as in §242.100(b).

(5) The term national market system plan shall have the same meaning as in §242.600(b)(43).

(6) The term odd lot shall have the same meaning as in §242.600(b)(49).

(7) The term riskless principal shall mean a transaction in which a broker or dealer, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell.

(b) If the price of a covered security, as reported in the consolidated system, decreases by ten percent or more from that covered security's last price reported during regular trading hours

the prior day, as reported in the consolidated system, no person shall, for his own account or for the account of any other person, effect a short sale of that covered security, wherever traded, at times when a last sale price for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan, for the remainder of the day, if trades in such security are reported pursuant to an effective national market system plan and information as to such trades is made available in accordance with such plan on a real-time basis to vendors of market transaction information:

(1) Below the price at which the last sale thereof, regular way, was reported pursuant to an effective national market system plan; or

(2) At such price unless such price is above the next preceding different price at which a sale of such security, regular way, was reported pursuant to an effective national market system plan.

(c) The provisions of paragraph (b) of this section shall not apply if the decrease in the price of a covered security occurs within thirty minutes from the end of regular trading hours.

(d) The provisions of paragraph (b) of this section shall not apply to:

(1) Any sale by any person of a covered security that the person is deemed to own pursuant to §242.200, provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.

(2) Any sale by a broker or dealer of a covered security for an account in which it has no interest, pursuant to an order marked long.

(3) Any sale of a covered security by a market maker to off-set customer odd-lot orders or to liquidate an odd-lot position which changes such broker's or dealer's position by no more than a unit of trading.

(4) Any sale of a covered security for a good faith account by a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such securities of the issuer.

(5) Any sale of a covered security for a good faith account submitted to profit from a current price difference between a security on a foreign securities market and a security on a securities market subject to the jurisdiction of the United States, provided that the short seller has an offer to buy on a foreign market that allows the seller to immediately cover the short sale at the time it was made. For the purposes of this section, a depository receipt of a security shall be deemed to be the same security as the security represented by such receipt.

(6) (i)Any sale of a covered security by an underwriter or member of a syndicate or group participating in the distribution of a security in connection with an over-allotment of securities; or

(ii) Any lay-off sale by an underwriter or member of a syndicate or group in connection with a distribution of securities through a rights or standby underwriting commitment.

(7) Any sale of a covered security at the volume weighted average price (VWAP) that meets the following criteria:

(i) The VWAP for the covered security is calculated by:

(A) Calculating the values for every regular way trade reported in the consolidated system for the security during the regular trading session, by multiplying each such price by the total number of shares traded at that price;

(B) Compiling an aggregate sum of all values; and

(C) Dividing the aggregate sum by the total number of reported shares for that day in the security.

(ii) The transactions are reported using a special VWAP trade modifier.

(iii) No short sales used to calculate the VWAP are marked "short exempt."

(iv) The VWAP matched security:

(A) Qualifies as an "actively-traded security"; or

(B) The proposed short sale transaction is being conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than five percent of the value of the basket traded.

(v) The transaction is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security.

(vi) A broker or dealer shall be permitted to act as principal on the contra-side to fill customer short sale orders only if the broker's or dealer's position in the covered security, as committed by the broker or dealer during the pre-opening period of a trading day and aggregated across all of its customers who propose to sell short the same security on a VWAP basis, does not exceed 10% of the covered security's relevant average daily trading volume.

(8) Any sale of a covered security in an electronic trading system that matches buying and selling interest at various times throughout the day that meets the following criteria:

(i) Matches occur at an externally derived price within the existing market and above the current national best bid;

(ii) Sellers and purchasers are not assured of receiving a matching order;

(iii) Sellers and purchasers do not know when a match will occur;

(iv) Persons relying on the exception contained in paragraph (c)(8) of this section shall not be represented in the primary market offer or otherwise influence the primary market bid or offer at the time of the transaction;

(v) Transactions shall not be made for the purpose of creating actual, or apparent, active trading in, or depressing or otherwise manipulating the price of, any security;

(vi) The covered security:

(A) Qualifies as an "actively-traded security"; or

(B) The proposed short sale transaction is being conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than five percent of the value of the basket traded; and

(vii) During the period of time in which the electronic trading system may match buying and selling interest, there can be no solicitation of customer orders, or any communication with customers that the match has not yet occurred.

(9) Any sale of a covered security by a broker or dealer effecting the execution of a customer purchase or the execution of a customer "long" sale on a riskless principal basis; provided, however, the purchase or sell order must be given the same per-share price at which the broker or dealer sold shares to satisfy the facilitated order, exclusive of any explicitly disclosed markup or markdown, commission equivalent or other fee. In addition, for purposes of

this section, a broker or dealer must have written policies and procedures in place to assure that, at a minimum: the customer order was received prior to the offsetting transaction; the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and the broker or dealer has supervisory systems in place to produce records that enable the broker or dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which a broker or dealer relies pursuant to this exception.

(10) Any sale of a covered security (except a sale to a stabilizing bid complying with §242.104) by a registered specialist or registered exchange market maker for its own account on any exchange with which it is registered for such security, or by a third market maker for its own account over-the-counter:

(i) Effected at a price equal to the most recent offer communicated for the security by such registered specialist, registered exchange market maker or third market maker to an exchange or a national securities association ("association") pursuant to §242.602, if such offer, when communicated, was equal to or above the last sale, regular way, reported for such security pursuant to an effective national market system plan. Provided, however,

(ii) That any self-regulatory organization, by rule, may prohibit its registered specialist and registered exchange market makers from availing themselves of the exemption afforded by this paragraph (d)(10) if that self-regulatory organization determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors.

(11) Any sale of a covered security (except a sale to a stabilizing bid complying with §242.104) by any broker or dealer, for his own account or for the account of any other person, effected at a price equal to the most recent offer communicated by such broker or dealer to an

exchange or association pursuant to §242.602 in an amount less than or equal to the quotation size associated with such offer, if such offer, when communicated, was:

(i) Above the price at which the last sale, regular way, for such security was reported pursuant to an effective national market system plan; or

(ii) At such last sale price, if such last sale price is above the next preceding different price at which a sale of such security, regular way, was reported pursuant to an effective national market system plan.

(12) Any sale of a security by a registered market maker or specialist publishing two-sided quotes to facilitate customer market or marketable limit buy orders.

(e) No self-regulatory organization shall have any rule that is not in conformity with, or conflicts with this section.

(f) Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any person or class of persons, to any transaction or class of transactions, or to any security or class of securities to the extent that such exemption is necessary or appropriate, in the public interest, and is consistent with the protection of investors.

By the Commission.

Florence E. Harmon

Florence E. Harmon
Deputy Secretary

Dated: April 10, 2009

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1993
Release No. 9024 / April 10, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59749 / April 10, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13099

In the Matter of **NEWBRIDGE SECURITIES CORP., GUY S. AMICO, SCOTT H. GOLDSTEIN, ERIC M. VALLEJO, and DANIEL M. KANTROWITZ,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING A CEASE-AND-DECIST ORDER AND REMEDIAL SANCTIONS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO DANIEL M. KANTROWITZ**

I.

Daniel M. Kantrowitz ("Kantrowitz" or "Respondent"), pursuant to Rule 240(a) of the Rules of Practice of the Securities and Exchange Commission ("Commission") [17 C.F.R.§ 201.240(a)] submitted an Offer of Settlement ("Offer") in the above-captioned proceeding instituted against Respondent on July 25, 2008 by the Commission, pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"). The Commission deems it appropriate and in the public interest to accept the Offer.

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or to which the Commission is a party, and without admitting or denying the findings herein, except for the Commission's jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing A Cease-and-Desist Order and Remedial Sanctions Pursuant to

Section 8A of the Securities Act and 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:

FINDINGS

A. RESPONDENT

1. Daniel M. Kantrowitz, 45, resides in Boca Raton, Florida. Kantrowitz was a registered representative at Newbridge. In 1996, the Financial Industry Regulatory Authority ("FINRA") censured and fined Kantrowitz $10,000, suspended Kantrowitz from associating with any member for 120 days in any capacity and required him to pay $3,625 in restitution to NAIB Trading Corporation because he arranged a fictitious, profitable trade on behalf of a customer as a reward for the customer's business in violation of the FINRA Rules of Fair Practice. (FINRA Case Number CMS950084 filed July 24, 1995.) During the relevant time period, Kantrowitz participated in offerings of Concorde America, Inc. and Roanoke Technology Corp. stock, which were penny stocks.

B. BACKGROUND

2. Newbridge Securities Corp. ("Newbridge"), a Fort Lauderdale, Florida broker-dealer, has been registered with the Commission since 2000 and is a member of FINRA. Over the course of the past five years, FINRA has brought numerous actions against Newbridge alleging the firm failed to comply with various broker-dealer regulations.

3. Concorde America, Inc. ("Concorde") is a Nevada corporation with its principal place of business in Boca Raton, Florida. Concorde's securities, which are quoted on the Pink Sheets, are not registered with the Commission. On February 14, 2005, the Commission filed a civil injunctive action against Concorde and others based on their violations of the antifraud provisions of the federal securities laws for their participation in a fraudulent manipulation of Concorde shares. SEC v. Concorde America, Inc., Absolute Health and Fitness, Inc., et al., Case No. 05-80128-CIV-ZLOCH (S.D. Fla.). Concorde consented to all non-monetary relief sought in the complaint and the court entered a final judgment of permanent injunction on February 9, 2007.

4. Donald Oehmke ("Oehmke"), 58, resides in Kalamazoo, Michigan. Oehmke, a former registered representative, was permanently barred from association with any FINRA member in 1991. Oehmke controlled a shell company, which later became Concorde, and executed numerous fraudulent securities transactions in Concorde through Newbridge and another broker-dealer registered with the Commission ("other broker-dealer"). The Commission named

[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.

Oehmke as a defendant in the Concorde action based on his violation of the antifraud provisions of the federal securities laws, for his participation in the fraudulent manipulation of Concorde shares. On November 28, 2006, the court entered a final judgment against Oehmke enjoining him from future violations of the antifraud provisions of the federal securities laws and imposing a penny stock bar, an unregistered offering bar, disgorgement in the amount of $1,095,177, prejudgment interest of $109,307, and a civil penalty of $250,000.

5. Roanoke Technology Corp. ("Roanoke") is a Florida corporation headquartered in Rocky Mount, North Carolina. Roanoke's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. On January 15, 2008, the Commission revoked Roanoke's registration for its repeated failure to file required periodic reports. The stock was quoted on the Over-The-Counter Bulletin Board, then quoted on the Pink Sheets. Prior to the Commission revoking Roanoke's registration, the Commission filed a civil injunctive action on December 21, 2005 against Roanoke and others for their participation in a fraudulent S-8 scheme, and charged Roanoke with antifraud, registration, and reporting violations of the federal securities laws. SEC v. Roanoke Technology Corp. et al., Case No. 6:05-CV-1880-ORL-3-KRS (M.D. Fla.). Roanoke consented to all non-monetary relief sought in the complaint and the court entered a final judgment of permanent injunction on September 27, 2006.

6. Thomas L. Bojadzijev ("Bojadzijev"), 29, resides in Orlando, Florida, and is purportedly a self-employed consultant. Bojadzijev participated in a sham S-8 scheme with Roanoke, and executed numerous fraudulent securities transactions in Roanoke through Newbridge. The Commission named Bojadzijev as a defendant in the Roanoke civil injunctive action based on his violations of the antifraud, registration, and reporting provisions of the federal securities laws for participating in the fraudulent S-8 scheme. On January 3, 2007, the court entered a judgment against Bojadzijev enjoining him from future violations of the antifraud, registration, and reporting provisions of the federal securities laws, and imposing a penny stock bar. On August 31, 2007, the court entered a final judgment against Bojadzijev ordering him to pay disgorgement in the amount of $2,681,866, prejudgment interest of $291,565 and a civil penalty in the amount of $120,000.

7. In 2003 and 2004, Kantrowitz engaged in the manipulation of Concorde and Roanoke shares on behalf of Oehmke and Bojadzijev, respectively. Kantrowitz used Newbridge's market making capacity to manipulate the securities.

C. MANIPULATION OF CONCORDE

8. From June through October 2004, Kantrowitz engaged in a manipulation scheme involving the securities of Concorde that enabled Oehmke to reap more than $5.8 million in sales proceeds by liquidating more than 1.5 million Concorde shares.

9. In June 2004, Oehmke obtained ten million shares of Concorde, which constituted almost all of Concorde's publicly tradable shares. Oehmke subsequently distributed the shares to a number of offshore nominee entities that maintained brokerage accounts at Newbridge and the other broker-dealer, who also made a market in Concorde.

10. Beginning on June 30, 2004, Oehmke directed Kantrowitz and the other broker-dealer's market making activities to increase Concorde's share price. At Oehmke's direction, Kantrowitz and the other broker-dealer placed increasing bids on Concorde stock, even though no Concorde shares were traded and no news items were disseminated. From June 30 to July 27, 2004, Kantrowitz manipulated Concorde's share price upward from $0.01 to $3.00.

11. Despite raising the bid price for Concorde shares on an almost daily basis, Kantrowitz was aware that Oehmke had no interest in buying Concorde shares. Oehmke had communicated to Kantrowitz that Oehmke intended to liquidate the large number of Concorde shares he deposited with the firm through an account he maintained at Newbridge as well as, in a representative capacity, through an account maintained by one of the offshore nominee entities.

12. After raising the price of Concorde shares under Oehmke's direction through increasing fictitious bids, Kantrowitz took part in a scheme to dispose of the shares without drawing attention to Oehmke's control over the supply of Concorde shares. Beginning in July 2004, Oehmke directed Kantrowitz and the other broker-dealer to sell his Concorde shares, which he had deposited at each firm.

13. Kantrowitz followed another Oehmke tactic designed to artificially stimulate market activity in Concorde shares. To further create the appearance of an active and competitive market, Oehmke directed wash trades between accounts he controlled and directed Kantrowitz and the other broker-dealer to post quotes to buy the stock. Kantrowitz followed Oehmke's instructions.

14. Additionally, Kantrowitz complied with Oehmke's instruction to stay "close" to and shadow the bids posted by the other broker-dealer in Concorde stock, by either posting the same or incrementally higher quotes, despite an August 11, 2004 Concorde disclaimer press release that caused the stock price to drop more than 80%.

15. In August 2004, Oehmke started another campaign to raise Concorde's share price. Oehmke directed Kantrowitz and the other broker-dealer to make a series of incrementally higher bid quotes. By utilizing two market makers, Oehmke was able to cause Kantrowitz and the other broker-dealer to create the appearance of buyers at each firm engaging in a bidding war for the stock. Kantrowitz complied with Oehmke's instruction to incrementally increase Newbridge's bids in accordance to bids posted by the other broker-dealer. As a result, Kantrowitz and the other broker-dealer rapidly manipulated Concorde's share price upward on August 13, 2004 from $1.75 to $5.45 over a period of an hour and twenty minutes, creating another rise in Concorde's share price that enabled Oehmke to liquidate additional Concorde shares at a substantial profit.

16. Kantrowitz knew that Oehmke had no bona fide interest in buying Concorde shares. Through a series of instant-messages, Oehmke conveyed to Kantrowitz his manipulative intent. One example is Oehmke directing Kantrowitz to stay "close" to and shadow the bids posted by the other broker-dealer in Kantrowitz's quoting activities.

17. Based upon the foregoing, Kantrowitz knew or was reckless in not knowing that he was fraudulently manipulating the market in Concorde shares, in furtherance of Oehmke's manipulative scheme. Kantrowitz knew Oehmke wanted to liquidate a large number of Concorde shares and that Oehmke had no interest in buying any Concorde stock. Further, Kantrowitz knew that Oehmke was liquidating Concorde shares through the other broker-dealer, and was manipulating the market by having Kantrowitz shadow the other broker-dealer's bids and enter into trades with the other broker-dealer.

D. UNREGISTERED DISTRIBUTION OF ROANOKE

18. From November through December 2003, Bojadzijev received 300 million shares of Roanoke, totaling nearly half of Roanoke's outstanding shares. Bojadzijev posed as a consultant to the company and obtained these shares through a sham S-8 scheme. Bojadzijev deposited his Roanoke holdings with Newbridge for liquidation, in blocks of 50 million shares.

19. Newbridge maintained an internal stock certificate deposit form that registered representatives were required to complete prior to liquidating any stock that a customer deposited in his account. A registered representative was required to complete a form for each deposit of securities. According to Newbridge's policies and procedures, no trades could be effected and no sales proceeds distributed until the form was completed.

20. Kantrowitz failed to inquire adequately as to the source of Bojadzijev's Roanoke shares. Kantrowitz asked Bojadzijev for the minimal information necessary to complete Newbridge's internal stock certificate deposit forms while ignoring Bojadzijev's suspect and contradictory information regarding the source of his Roanoke shares.

21. When Kantrowitz belatedly completed Newbridge's internal stock certificate form for the blocks of Roanoke shares Bojadzijev initially deposited with the firm, Kantrowitz falsely represented on the internal stock certificate form that Bojadzijev received such shares through a private transaction. In contrast, Roanoke's public filing showed that Roanoke had issued Bojadzijev shares through a Form S-8.

22. After Kantrowitz had already begun liquidating Bojadzijev's Roanoke shares, Kantrowitz asked Bojadzijev to obtain a letter from Roanoke confirming that his shares would not be cancelled. On November 28, 2003, Bojadzijev faxed Kantrowitz a letter written by Roanoke's former president to Bojadzijev which noted: "As we discussed, the 300 million shares registered on 11-21-2003 will not be cancelled under any circumstances. They will be issued to you in lots of 50 million, which keeps you under the 10% rule." Kantrowitz never questioned Roanoke's confirming letter outlining the highly suspect manner in which the company was issuing the shares to Bojadzijev.

23. Kantrowitz repeatedly liquidated Bojadzijev's shares and wired the sales proceeds despite the following: (1) Bojadzijev repeatedly pressured Kantrowitz to process his wire requests faster; (2) Bojadzijev informed Kantrowitz that his ability to deposit additional blocks of

Roanoke shares depended on how quickly Newbridge wired out the proceeds of his sales; (3) Bojadzijev informed Kantrowitz that he forwarded his Roanoke sales proceeds to a third party, a practice inconsistent with his claims that the shares were compensation for consulting services; and (4) Kantrowitz failed to complete the forms for each block of Bojadzijev's Roanoke shares until after he liquidated each block.

E. MANIPULATION OF ROANOKE

24. In order to liquidate his S-8 shares into the market, Bojadzijev instructed Kantrowitz to post increasing bids for Roanoke to artificially buoy the stock price. Kantrowitz complied and regularly quoted bids that were greater than or equal to the highest prevailing bids posted by other market makers.

25. Kantrowitz knew that Bojadzijev had no interest in buying Roanoke shares. Bojadzijev had communicated to Kantrowitz that Bojadzijev intended to liquidate the large number of Roanoke shares he owned.

26. As a means of determining the highest price at which he could start liquidating his Roanoke shares, Bojadzijev instructed Kantrowitz to "test" the market and post an ask quote in Roanoke. Kantrowitz complied before Bojadzijev had yet to deposit any shares of Roanoke with Newbridge to sell.

27. Kantrowitz proceeded with other Bojadzijev tactics designed to artificially stimulate market activity in Roanoke shares. At one point, Bojadzijev's efforts to manipulate Roanoke's bid price upward was temporarily impeded when Kantrowitz's bid price came close to equaling the inside ask price being posted by another market maker. Bojadzijev instructed Kantrowitz to purchase the shares offered by the market maker on the inside ask, effectively removing those shares from the inside ask. Kantrowitz knew that Bojadzijev was attempting to increase the inside ask so that he could continue directing Kantrowitz to increase Roanoke's bid price.

28. Kantrowitz also knew that Bojadzijev was privy to information regarding when Roanoke planned to issue press releases. Bojadzijev repeatedly told Kantrowitz when the company expected to issue news and even confirmed when the company actually issued press releases. Kantrowitz followed Bojadzijev's instructions to post increasing bids in Roanoke stock, which enabled Bojadzijev to time his sales of Roanoke shares with the issuance of Roanoke press releases.

29. Through a series of instant-messages, Bojadzijev conveyed to Kantrowitz his manipulative intent. For example, Bojadzijev told Kantrowitz, "I want to make 150k profit next batch trying to move this up." Nonetheless, Kantrowitz repeatedly complied with Bojadzijev's instructions.

30. From November through December 2003, Kantrowitz enabled Bojadzijev to raise over $1.1 million in sales proceeds through the manipulation of Roanoke shares.

31. Based upon the foregoing, Kantrowitz knew or was reckless in not knowing that he was fraudulently manipulating the market in Roanoke shares in furtherance of Bojadzijev's manipulative scheme. Kantrowitz knew Bojadzijev wanted to liquidate a large number of Roanoke shares and that Bojadzijev had no interest in buying any Roanoke stock. Further, Kantrowitz knew that Bojadzijev was providing him with instructions to manipulate Roanoke's share price rather than for the purpose of effecting legitimate trades.

H. VIOLATIONS

32. As a result of the conduct described above, Kantrowitz willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities. Among other things, Kantrowitz participated in a scheme with Newbridge customers Oehmke and Bojadzijev to manipulate Concorde and Roanoke stock, respectively.

33. As a result of the conduct described above, Kantrowitz willfully violated Sections 5(a) and 5(c) of the Securities Act by directly or indirectly, offering to sell and selling Roanoke shares through the use of any means or instrumentality of transportation, communication in interstate commerce, or of the mails when the Roanoke shares were not the subject of an effective registration statement.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act and Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Kantrowitz shall cease and desist from committing or causing violations of and any future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act, and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder;

B. Kantrowitz be, and hereby is barred from association with any broker or dealer;

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

not related to the conduct that served as the basis for the Commission order.

D. Kantrowitz be, and hereby is, barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

E. Kantrowitz shall pay disgorgement in the amount of $217,000, plus prejudgment interest in the amount of $3,996.41, and a civil money penalty in the amount of $50,000 to the United States Treasury within ten (10) days after entry of this Order. Such payment shall be: (a) made by United States postal money order, certified check, bank cashier's check, bank money order or funds directly from an escrow agent; (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 Newbridge as a Respondent in these proceedings and sets forth the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to C. Ian Anderson, Securities and Exchange Commission, Southeast Regional Office, 801 Brickell Ave., Suite 1800, Miami, Florida 33131

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59753; File Nos. 4-579 and S7-04-09]

ROUNDTABLE ON OVERSIGHT OF CREDIT RATING AGENCIES

AGENCY: Securities and Exchange Commission.

ACTION: Notice of roundtable discussion; request for comment.

SUMMARY: The Credit Rating Agency Reform Act of 2006 provided the Securities and Exchange Commission for the first time with authority over credit rating agencies that register with the Commission as Nationally Recognized Statistical Rating Organizations ("NRSROs"). Most of the Act's provisions became effective in June 2007. Pursuant to the Act, the Commission has adopted two sets of rules, and Commission staff has conducted an extensive 10-month examination of the three largest credit rating agencies. In February 2009, the Commission issued a proposing release that included several proposals to further the Act's purpose of promoting accountability, transparency, and competition in the credit rating industry. The proposing release is available on the Commission's Web site at http://www.sec.gov/rules/proposed/2009/34-59343.pdf.

The Commission will host a roundtable discussion regarding the oversight of credit rating agencies, as it relates to both the Commission's pending proposals and more broadly. The roundtable will consist of four panels. Roundtable participants will include leaders from investor organizations, financial services associations, credit rating agencies, and academia.

The roundtable discussion will be held in the auditorium at the Commission's headquarters at 100 F Street, NE, in Washington, DC on April 15, 2009, from 10:00 am to 4:30 pm. The roundtable will be open to the public with seating on a first-come, first-served basis.

The roundtable discussion also will be available via webcast on the Commission's Web site at www.sec.gov. The roundtable agenda and other materials related to the roundtable, including a list of participants and moderators, will be accessible at http://www.sec.gov/spotlight/cra-oversight-roundtable.htm. The Commission welcomes feedback regarding any of the topics to be addressed at the roundtable.

DATES: Comments should be received on or before May 15, 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/spotlight/cra-oversight-roundtable.htm); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-579 and/or File Number S7-04-09 on the subject line.

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 4-579. For comments specifically related to the proposed amendments, such submissions also should refer to File Number S7-04-09. This file number(s) 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/spotlight/cra-oversight-roundtable.htm). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will

be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Marlon Quintanilla Paz, Division of Trading and Markets, at (202) 551-5756, U.S. Securities and Exchange Commission, 100 F Street NE, Washington DC 20549.

SUPPLEMENTARY INFORMATION: The roundtable discussion will concern the Commission's oversight of credit rating agencies. The panel discussions will focus on:

- The perspective of current NRSROs: What went wrong and what corrective steps is the industry taking?
- Competition Issues: What are current barriers to entering the credit rating agency industry?
- The perspective of users of credit ratings.
- Approaches to improve credit rating agency oversight.

The Credit Rating Agency Reform Act of 2006 was designed to improve ratings quality for the protection of investors, serving the public interest by fostering accountability, transparency, and competition in the credit rating industry. The Act grants the Commission broad authority to examine all books and records of an NRSRO with regard to compliance with substantive Commission rules applicable to NRSROs, including rules addressing conflicts of interest and rules prohibiting certain unfair, coercive, or abusive practices. The Commission issued final rules establishing a regulatory program for NRSROs in June 2007.

Since the passage of the Act and the implementation of the June 2007 final rules, the Commission has used its authority to examine the adequacy of the NRSROs' public disclosures, their recordkeeping, their procedures to prevent the misuse of material nonpublic information, their management of conflicts of interest, and their approaches to preventing unfair, abusive or coercive practices. On July 8, 2008, the Commission released findings from a 10-month staff examination of three major credit rating agencies. The staff examinations uncovered weaknesses in ratings practices and the need for remedial action by the firms to provide meaningful ratings and the necessary levels of disclosure to investors.

In June and July of 2008, the Commission proposed a three-fold set of reforms that would address further the conflicts of interests, disclosures, internal policies, and business practices of credit rating agencies registered as NRSROs. With respect to the first set of reforms, in February 2009, the Commission issued final rule amendments to existing NRSRO rules. In conjunction with the adoption of these new measures, the Commission proposed an additional amendment that would require NRSROs to disclose ratings history information, in XBRL format, for 100% of all issuer-paid credit ratings determined after June 26, 2007 (the effective date of most of the provisions of the Credit Rating Agency Reform Act of 2006). Finally, in February 2009, the Commission issued a release proposing an amendment that would require NRSROs that are hired

by arrangers to perform credit ratings for structured finance products to disclose to other NRSROs (and only other NRSROs) that they are hired to determine credit ratings for those deals and to obtain from such arrangers a representation that they will provide information given to the hired NRSRO to other NRSROs.

By the Commission.

Florence E. Harmon
Deputy Secretary

Dated: April 13, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59751 / April 13, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2960 / April 13, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13439

In the Matter of

Jesus A. Lago, CPA,

Respondent.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted against Jesus A. Lago, CPA ("Respondent" or "Lago") pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[1]

II.

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

[1] Rule 102(e)(1)(ii) provides, in pertinent part, that:

> The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public 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[2] that:

A. SUMMARY

VoIP Inc. ("VoIP" or "the Company") is a telecommunications company based in Altamonte Springs, Florida. Among other things, VoIP fraudulently overstated its revenues and understated its net losses for the year ended December 31, 2004, through a series of phony sales and sham transactions, in violation of generally accepted accounting principles ("GAAP"). As engagement partner for Berkovits & Co. LLP f/k/a Berkovits, Lago & Co. ("BLC"), Lago supervised BLC's annual audit of VoIP's 2004 financial statements. In March 2005, BLC issued an audit report, signed by Lago, containing an unqualified audit opinion on VoIP's 2004 financial statements. In supervising the audit, Lago did not adequately perform his work in accordance with the auditing standards of the Public Company Accounting Oversight Board ("PCAOB"). With regard to certain audit items in the 2004 audit, he did not adequately plan and supervise the audits, did not obtain sufficient competent evidential matter, did not maintain an attitude of professional skepticism, and did not ensure adequate work paper documentation. Lago thereby engaged in improper professional conduct in connection with BLC's audit of VoIP's 2004 financial statements within the meaning of Rule 102(e)(ii).

B. RESPONDENT

Lago, 47, is a resident of Aventura, Florida. Until September 2007, Lago was a partner of a Fort Lauderdale, Florida firm, BLC, and, from 2004 to September 2007, served as the engagement partner for the firm's annual audits of VoIP. In September 2007, Lago left BLC to become a partner for another accounting firm. Lago is a certified public accountant and has been licensed to practice in the state of Florida since 1983.

C. OTHER RELEVANT ENTITY

VoIP is a Texas corporation with principle executive offices in Altamonte Springs, Florida. VoIP provided voice-over-Internet telecommunication services to retail and wholesale customers. VoIP's common stock has been registered pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") since January 19, 2000. From April 2004 through July 2007, VoIP's stock traded on the Over-The-Counter Bulletin Board. It is currently quoted on the Pink Sheets disseminated by Pink OTC Markets, Inc. VoIP closed its offices in Altamonte Springs and ceased the majority of its operations in February 2008.

---

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

D. FACTS

1. VoIP's False Financial Statements

a. VoIP engaged in fraudulent accounting practices that resulted in inflated revenues and understated net losses in its annual financial statements for 2004, among other quarters. These practices involved the recording of fictitious sales and sham transactions on the books of a VoIP subsidiary, DTNet Technologies, Inc. ("DTNet"), by the Company's former CFO, and the former General Manager of DTNet. As part of this scheme, VoIP overstated its revenues by recording phony sales to five companies owned and operated by the former owner of DTNet. The purported products and services, however, were not actually provided to these companies. VoIP also overstated its revenues by reporting sham sales transactions with a plumbing supply company owned and operated by long-time friends of the DTNet General Manager. Under these arrangements, DTNet agreed to ship inventory to the plumbing supply company with the agreement that it would be repurchased at a later date. VoIP improperly recorded the phony sales and sham transactions as revenue and accounts receivable.

b. As a result, VoIP filed a Form 10-K for the year ended December 31, 2004 that materially overstated VoIP's revenues and understated its losses. In May 2006, VoIP restated its financial statements for the year ended December 31, 2004. The restatements establish that VoIP's revenues and net loss for the year ended December 31, 2004 were misstated by 43% ($791,200) and 8% ($462,618), respectively.

2. Lago's 2004 Audit of VoIP

a. In March 2005, Lago issued an unqualified audit report on behalf of BLC stating that VoIP's 2004 financial statements were presented fairly, in all material respects, in conformity with GAAP. However, Lago did not adequately conduct the 2004 Audit in accordance with the auditing standards of the PCAOB (hereinafter referred to as the "Auditing Standards"). Among other things, Lago did not properly plan and supervise the audit, exercise due professional care and skepticism, obtain sufficient competent evidential matter to afford a reasonable basis for an opinion regarding the financial statements, and prepare appropriate audit documentation.

Lago Did Not Adequately Plan the 2004 Audit

b. As the engagement partner, Lago was responsible for VoIP's audit planning. Proper audit planning under the Auditing Standards requires, among other things, (1) the identification of areas requiring special attention or of special concern; (2) the consideration of conditions that may require the extension or modification of audit tests, such as the risk of material error or fraud; (3) the incorporation of identified risks into both audit planning and audit execution; and (4) adequate communication of identified risks to the audit team. As discussed below, Lago's planning for VoIP's 2004 Audit did not comply with these Auditing Standards.

c. Lago did not comply with the Auditing Standards because he did not incorporate, or confirm that the BLC audit team incorporated, known risks into the BLC audit plan

for VoIP. During an initial planning meeting, the BLC audit team identified several potential risks, including VoIP's small and inexperienced accounting staff, the pressures on VoIP to meet budget expectations, and the potential for VoIP's management to manipulate information and improperly recognize revenue. Despite identifying potential fraud risk factors during the initial planning meeting, Lago did not further address these risks in the planning of the audit, or require that the BLC audit team document these risks or otherwise address them in their audit planning. Lago further did not incorporate appropriate audit procedures that would require the audit team to heighten their overall awareness or levels of professional skepticism as they related to the identified risks.

d. Lago also did not require that the BLC audit team perform the most basic preliminary and analytical procedures necessary for audit planning and fraud consideration, including the assessment and documentation of the risk of material misstatement, the assessment and risk of management override of internal controls, and the assessment and identification of potential related parties and related transactions. Lago's failure to require the BLC audit team to perform these basic planning procedures during VoIP's 2004 audit represented a significant departure from the Auditing Standards.

Lago Did Not Obtain Sufficient Competent Evidence and Maintain an Attitude of Professional Skepticism

e. Although the Auditing Standards presume there to be a material risk of misstatement due to fraud in the recognition of revenue, the 2004 VoIP audit work papers reveal that Lago's audit team performed limited procedures regarding the existence and accuracy of VoIP's recorded revenues. While Lago's audit identified this Auditing Standard requirement, he did not incorporate the risk into audit procedures and did not maintain the required heightened sense of skepticism in this area. BLC's own audit program, included in the audit work papers, included procedures for testing revenue, including, but not limited to, basic audit steps such as sales cutoff testing and the investigation of revenue transactions with related parties. However, the overwhelming majority of these audit steps were either ignored, initialed as "not considered necessary," or initialed as "done" without any supporting documentation.

f. For example, one of the steps in BLC's audit program required the audit team to scan VoIP's sales journals and investigate large or unusual transactions near year end. The BLC audit program reflected the step as done and it was initialed and dated by a member of the audit team. There was no further explanation or supporting documentation evidencing this audit step. However, on the last day of 2004 (i.e., December 31st) $250,000 in revenues from sales to only two customers had been record on DTNet's sale journal, representing more than 8% of VoIP's consolidated revenues for the entire year. Given the size and timing of these transactions, the audit team's failure to review or obtain supporting documentation constituted a clear departure from the Auditing Standards.

g. Lago also did not obtain sufficient evidence and did not maintain an attitude of professional skepticism while performing the audit procedures related to VoIP's accounts receivable. Because he did not perform any planning procedures with respect to related

parties, he could not ensure that he would respond appropriately to suspicious receivables. For example, as part of the accounts receivable confirmation process, the audit team received a confirmation response related to amounts due to VoIP from entities that the team noted should be considered related parties. The confirmed balance represented almost 17% of VoIP's receivable balance at the end of 2004 (or approximately $254,000). Nonetheless, the audit team did not perform additional audit procedures to understand the nature or purpose of these related party transactions as required under the Auditing Standards. Although BLC's audit program required certain procedures to be performed with respect to accounts receivable and related party transactions, the steps were either documented as "done," without any supporting evidence, or "not considered necessary" in BLC's audit program. These same transactions were found to be fictitious and were reversed when VoIP restated its 2004 financial statements.

Lago Did Not Obtain Adequate Work Paper Documentation

h. The Auditing Standards require that the auditors' work papers clearly demonstrate the work that was, in fact, performed. They must also contain sufficient information to enable an experienced auditor, having no previous connection to the engagement, to: (1) understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached and (2) determine who performed the work and the date such work was completed, as well as the person who reviewed the work and the date of such review.

i. Certain documentation of substantive procedures in many of the BLC audit work papers was inadequate, with little evidence of analysis, tests performed, or information obtained. In numerous instances, the work paper documentation simply consisted of the auditor initialing or stating "done" on the audit program, without further explanation or supporting work papers. By not directing the BLC audit team to get, and to confirm that they obtained, the appropriate documentation, Lago violated the Auditing Standards. This also impeded BLC's ability to adequately test and determine whether VoIP's financial statements were prepared in conformity with GAAP.

Lago Did Not Adequately Supervise the 2004 Audit

j. The Auditing Standards require that audits be adequately staffed and audit assistants be properly supervised, and that the auditor with final responsibility (generally, the audit partner) assign tasks to, and supervise, any assistants. As noted above, the Auditing Standards relating to documentation also require that work papers contain enough information to be able to determine the person who reviewed the work and the date of such review.

k. Lago, as engagement partner, was responsible for ensuring that the 2004 VoIP audit was properly staffed and supervised. He was also responsible for reviewing the work of the senior member of the audit staff. However, certain of the audit work papers prepared by the senior staff, including planning areas and areas considered to be high risk such as accounts receivable and revenue, were not reviewed. This constituted a violation of the Auditing Standards and added to the audit team's inability to respond to "red flags" and other significant matters identified during the VoIP audit.

3. **Violations**

a. Rule 102(e)(1)(ii) provides that the Commission may temporarily or permanently deny an accountant the privilege of appearing or practicing before it if it finds, after notice and opportunity for hearing, that the accountant engaged in "improper professional conduct." Such improper professional conduct includes, as applicable here, negligent conduct, defined as "repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards that indicate a lack of competence to practice before the Commission." Rule 102(e)(1)(iv)(A)-(B).

b. Lago failed (i) to exercise due professional care in the planning and performance of the audit, Auditing Standards § AU 230, (ii) to properly plan and supervise the audit, Auditing Standards §AU 311, (iii) to appropriately consider fraud, risk and materiality in conducting the audit, Auditing Standards § AU 312 and § AU 316, (iv) to obtain sufficient competent evidential matter to afford a reasonable basis for the opinion rendered, Auditing Standards §AU 326, (v) to appropriately consider related parties, Auditing Standards § AU 334, and (vi) failed to adequately prepare audit documentation, Auditing Standards No. 3. As a result of the actions detailed above, Lago engaged in improper professional conduct with respect to BLC's audit of VoIP's 2004 financial statements.

4. **Findings**

a. Based on the foregoing, the Commission finds that Lago engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

IV.

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

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

A. Lago is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After one year from the date of this Order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the

Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the PCAOB in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the PCAOB and that inspection did not identify any criticisms of or potential defects in the Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the PCAOB (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the PCAOB, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
April 13, 2009

Administrative Proceeding File No. 3-13440

In the Matter of:	:	ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934
VoIP, Inc.	:	
Respondent.	:	

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against VoIP, Inc. (CIK No. 0001100954) ("VoIP" or "Respondent").

II.

As a result of its investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. VoIP is a Texas corporation with principle executive offices in Altamonte Springs, Florida. VoIP provided voice-over-Internet telecommunication services to retail and wholesale customers. VoIP's common stock has been registered pursuant to Section 12(g) of the Exchange Act since January 19, 2000. From April 2004 through July 2007, VoIP's stock traded on the Over-The-Counter Bulletin Board. VoIP's stock is currently quoted on the Pink Sheets operated by Pink OTC Markets Inc. under the trading symbol "VOIC." VoIP closed its offices in Altamonte Springs and ceased the majority of its operations in February 2008.

B. DELINQUENT PERIODIC FILINGS

2. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports, 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).

3. VoIP has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission in that it has not filed an Annual Report on Form 10-K since December 31, 2006 or periodic or quarterly reports on Form 10-Q for any fiscal period subsequent to its fiscal quarter ending September 30, 2007.

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

III.

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

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

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

IV.

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

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

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against 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 or registered 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

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 13, 2009

IN THE MATTER OF	:	
	:	
VOIP, INC.	:	ORDER OF SUSPENSION
	:	OF TRADING
File No. 500-1	:	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of VoIP, Inc. ("VoIP") because it has not filed not filed an Annual Report on Form 10-K since December 31, 2006 or periodic or quarterly reports on Form 10-Q for any fiscal period subsequent to its fiscal quarter ending September 30, 2007.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities in the above listed company is suspended for the period from 9:30 a.m. EDT, April 13, 2009 through 11:59 p.m. EDT, on April 24, 2009.

By the Commission.

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Elizabeth M. Murphy
Secretary

28 of 59

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59758 / April 13, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2961 / April 13, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13441

In the Matter of **ANTONIO CANOVA (CPA),** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Rule 102(e) of the Commission's Rules of Practice against Antonio Canova, CPA ("Canova" or "Respondent").[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the

---

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.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. Canova, age 46, is and has been a certified public accountant licensed to practice in the State of California. He served as Chief Financial Officer of Brocade Communications Systems, Inc. ("Brocade") beginning in 2001 through 2005.

2. Brocade was, at all relevant times, a Delaware corporation with its principal place of business in San Jose, California. Brocade develops and sells computer storage networking products. Since May 1999 when it completed its initial public offering of stock, Brocade's securities have been traded on the Nasdaq National Market, and the company has had common stock registered with the Commission under Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act").

3. On April 6, 2009, a final judgment was entered by consent against Canova, permanently enjoining him from future violations of Sections 17(a)(2) and (3) of the Securities Act of 1933 ("Securities Act") and Section 13(b)(5) of the Exchange Act and Rules 13b2-1, 13b2-2, and 13a-14 thereunder, and from aiding and abetting future violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder, in the civil action entitled *Securities and Exchange Commission v. Gregory L. Reyes, et al.*, No. 3:06-cv-04435-CRB, in the United States District Court for the Northern District of California.

4. The Commission's complaint alleged that, during his tenure as CFO, Canova received information calling into question the integrity of Brocade's financial statements based on its options granting process carried out by Brocade's then chief executive officer. Canova received emails and other information suggesting that Reyes was backdating options grants to executives and others so that the grantees would receive in-the-money options that appeared to be granted at-the-money. The complaint further alleged that Canova did not, in a timely manner, investigate or review the impact of certain options grants on Brocade's financial statements, and that, as a consequence, Brocade issued materially misleading financial statements included in annual and quarterly reports filed on Forms 10-K and 10-Q with the Commission during the company's fiscal years 2001 through 2004, which Canova certified and which should have recorded a compensation expense for the in-the-money options grants but did not.

IV.

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

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

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

B. After three years from the date of this Order, Respondent may request that the Commission consider his reinstatement by submitting an application (Attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However,

if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 9025 / April 13, 2009

Securities Exchange Act of 1934
Release No. 59759 / April 13, 2009

ORDER APPROVING INCREASE TO PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD ANNUAL ACCOUNTING SUPPORT FEE FOR CALENDAR YEAR 2009

The Sarbanes-Oxley Act of 2002 (the "Act") established the Public Company Accounting Oversight Board ("PCAOB") to oversee the audits of public companies and related matters, to protect investors, and to further the public interest in the preparation of informative, accurate and independent audit reports. The PCAOB is to accomplish these goals through registration of public accounting firms and standard setting, inspection, and disciplinary programs. Section 109 of the Act provides that the PCAOB shall establish a reasonable annual accounting support fee, as may be necessary or appropriate to establish and maintain the PCAOB. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act. Under Section 109(f), the aggregate annual accounting support fee shall not exceed the PCAOB's aggregate "recoverable budget expenses," which may include operating, capital and accrued items. Section 109(b) of the Act directs the PCAOB to establish a budget for each fiscal year in accordance with the PCAOB's internal procedures, subject to approval by the Securities and Exchange Commission (the "Commission").

On July 18, 2006, the Commission amended its Rules of Practice related to its Informal and Other Procedures to add a rule to facilitate the Commission's review and approval of PCAOB budgets and accounting support fees.[1] This budget rule provides, among other things, a timetable for the preparation and submission of the PCAOB budget and for Commission actions related to each budget, a description of the information that should be included in each budget submission, limits on the PCAOB's ability to incur expenses and obligations except as provided in the approved budget, procedures relating to supplemental budget requests, requirements for the PCAOB to furnish on a quarterly basis certain budget-related information, a list of definitions that apply to the rule and to general discussions of PCAOB budget matters, and the ability of the Commission to waive compliance with any provisions of the rule.

On December 17, 2008, the Commission approved the PCAOB's 2009 budget of $157.6 million and 2009 annual accounting support fee of $151.8 million.[2] Due to the development of certain unforeseen contingencies, on March 16, 2009 the PCAOB requested Commission approval to increase its 2009 annual accounting support fee by $5.6 million, to $157.4 million. The primary reason for the requested increase relates to proposed legislation in Congress that would increase the PCAOB's responsibilities over auditors of broker-dealers.

Specifically, the PCAOB's request would create an additional reserve for contingencies in addition to the five month working capital reserve provided for in the

---

1 17 CFR 202.11. See Release No. 33-8724 (July 18, 2006) [71 FR 41998 (July 24, 2006)].

2 See Release No. 33-8989 (December 17, 2008) [73 FR 78861 (December 23, 2008)].

Commission's budget rule.[3] Therefore, the requested amount of the increase to the annual accounting support fee would result in the PCAOB being noncompliant with certain provisions of the Commission's budget rule. The Commission's budget rule provides that the Commission, in its discretion, may waive compliance with any provision of the rule,[4] and the PCAOB has requested a waiver. In approving the PCAOB's request to increase its 2009 annual accounting support fee, the Commission is hereby waiving paragraph (d)(3) of the budget rule with respect to the PCAOB's 2009 budget and annual accounting support fee.

Pursuant to the budget rule, and as the PCAOB indicates in its request, the incremental monies collected by the PCAOB are to be held by the PCAOB until the Commission, through the approval of a supplemental budget, later approves disbursement of such monies. The procedures for submitting a supplemental budget request are provided in the budget rule. Prior to submission of any such supplemental budget request or to the implementation of any legislation that expands the PCAOB's authority over the auditors of broker-dealers, the PCAOB shall consult with the Commission on a timely basis about the PCAOB's plans for additional resources, program changes, or information technology developments and enhancements contemplated.

The Commission has determined that the PCAOB's increased annual accounting support fee is consistent with Section 109 of the Act. Accordingly,

---

[3] See 17 CFR 202.11(d)(3), which provides that, "In addition to amounts needed to fund disbursements during the budget year, a budget may reflect receipts in amounts needed to fund expend expected disbursements during a period not to exceed the first five months of the fiscal year immediately following the budget year (the working capital reserve), provided such amounts shall be disbursed only as specified in the following year's budget or in a supplemental budget approved by the Commission."

[4] See 17 CFR 202.11(i).

IT IS ORDERED, pursuant to Section 109 of the Act, that the PCAOB's increase to its annual accounting support fee for calendar year 2009 is approved.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
ECURITIES AND EXCHANGE COMMISSION
April 14, 2009

ROCEEDING

, INC. and
CHMAN,

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against GLB Trading, Inc. and Robert A. Lechman ("Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. GLB Trading, Inc. ("GLB Trading") has been registered with the Commission as a broker-dealer (File No. 008-65790) since 2003. GLB Trading was headquartered in Irvine, California until December 2008, when the firm moved to Chicago, Illinois.

2. Robert A. Lechman ("Lechman") founded GLB Trading and was its president, CEO, chief compliance officer, and branch manager of the firm's Irvine, California office from December 2002 until his retirement in December 2008. Lechman continues to own GLB Trading through his family trust. Lechman, 58 years old, is a resident of Carlsbad, California.

B. OTHER RELEVANT ENTITIES AND PERSONS

1. Tuco Trading, LLC ("Tuco") was a Nevada limited liability company that provided day-trading capabilities to its customers. It was not registered with the Commission in any capacity. In March 2008, Tuco by consent was permanently enjoined from future antifraud and broker-dealer registration violations and ordered to pay disgorgement with prejudgment interest and a civil penalty in amounts to be determined. SEC v. Tuco Trading, LLC, et al., Civil Case No. CV-08-400-DMS (S.D. Cal.) (Mar. 17, 2008). Tuco maintained three accounts at GLB Trading.

2. Douglas G. Frederick ("Frederick") formed Tuco in August 2006 and was its sole managing member. On March 18, 2008, Frederick by consent was permanently enjoined from future antifraud and broker-dealer registration violations and ordered to pay disgorgement with prejudgment interest and a civil penalty in amounts to be determined. SEC v. Tuco Trading, LLC, et al., Civil Case No. CV-08-400-DMS (S.D. Cal.) (Mar. 17, 2008). Frederick was barred in a follow-on administrative proceeding from future association with any broker or dealer. In re Frederick, Rel. No. 34-58751 (Oct. 8, 2008). Frederick, age 38, resides in San Diego, California.

C. FACTS

1. In early 2006, Frederick approached GLB Trading seeking to obtain better clearing rates for a day-trading firm, the "predecessor firm" to Tuco, that he ran at another broker-dealer. Lechman knew of the predecessor firm and that it engaged in day-trading. Lechman encouraged Frederick to join GLB Trading as a broker and offered to let Frederick operate his day-trading firm from GLB Trading's offices rent-free. In April 2006, Frederick became a registered representative of GLB Trading and opened an account in the name of Tuco's predecessor to continue his day-trading firm activities.

2. Also in July 2006, Frederick completed three outside activity forms that Frederick, as a registered representative, was required to submit to GLB Trading and FINRA. In those forms, Frederick disclosed, among other things, that: (1) he headed the predecessor firm and that it engaged in the business of "trading" that "traders trade in;" (2) he spent thirty hours per week working for that firm; (3) the firm had been operating since January 2006; (4) the firm facilitated clearing and provided trading software for its traders; (5) he received commissions from the traders as compensation; and (6) in August 2006, the firm would change its name to Tuco. Lechman read and reviewed each of Frederick's outside activity forms at or near the time they were created, and was familiar with Frederick's statements contained therein. In addition, GLB Trading provided clearance to Frederick to engage in those outside business activities.

3. In August 2006, Frederick opened three "master" accounts in Tuco's name at GLB Trading and was the registered representative for each account. Customers of the predecessor firm then became customers of Tuco.

4. Tuco described itself on its website as a "private equity trading firm" that provided "trading solutions for the active trader." To trade through Tuco, a customer had to contribute funds to Tuco and sign an operating agreement, which, among other things, deemed the customer to be a member of Tuco. Tuco pooled customer funds into the "master accounts" and used its own back office system to create "sub-accounts" within the master accounts for each customer to day-trade securities. Tuco provided customers access to software to place and route securities trades.

5. By February 2008, Tuco was providing day-trading capabilities to 259 customers who conducted substantial amounts of trading, including those of public companies. Frederick controlled Tuco and determined how much of Tuco's equity, or buying power, each customer could use to trade. Tuco charged its customers commissions on their securities trades and deducted the commission for each trade from the customer's sub-account. The commissions were collected at GLB Trading's clearing firm. The clearing firm and GLB Trading then subtracted certain expenses from the commissions. GLB Trading received from Frederick a monthly fee of $15,000. Respondents received about $210,000 in fees from Tuco's broker-dealer activities. GLB Trading paid the net commission amount to Frederick.

6. From 2006 to March 2008, Respondents knowingly and actively participated in and facilitated Tuco's broker-dealer activities. Respondents allowed Tuco to trade through GLB Trading. Respondents also helped Tuco solicit new customers in person and by preparing advertisements with Frederick seeking new customers for Tuco. Additionally, Respondents created a structure by which GLB Trading and Frederick would operate Tuco. Furthermore, Lechman loaned Tuco funds to meet day-trading calls in Tuco's master accounts sixteen times. The loan amounts ranged from $100,000 to $780,000, and Lechman charged interest each time for a total of $6,507.

7. GLB Trading and Lechman helped Tuco solicit new customers by arranging for spam e-mails to promote Tuco, posting ads on day-trading websites, and making "pitches" to potential new customers. In August 2006, just two weeks after Frederick opened the master accounts, Lechman suggested that Tuco send a spam e-mail ad to solicit new customers. He also reviewed the ad.

8. In September 2006, Lechman suggested that another spam e-mail be sent for "GLB/Tuco," which Lechman again reviewed. The ad, without identifying GLB Trading or Tuco, stated that they were looking for new traders, that the positions were not salaried, that traders would have to make an initial contribution to their account, and that the firm offered top flight software at competitive rates. The ads closely tracked the statements on Tuco's website and described many features offered by Tuco but not GLB Trading. Lechman sent the responses GLB Trading received to Frederick, but if Frederick was unavailable, Lechman would solicit the potential new Tuco customers himself.

9. On or about September 27, 2006, Lechman informed Frederick about the solicitation efforts and predicted that, in 2007, Tuco would be bigger than another established day-trading firm.

10. Lechman created a structure and allocation of responsibilities by which GLB Trading and Frederick would operate Tuco. On or about October 1, 2006, Lechman informed Frederick of a proposal for Tuco's organizational structure, stating that he no longer wanted to "pitch" potential new Tuco customers. He proposed that going forward Frederick would take charge of all of Tuco's sales, marketing, and advertising and set the commission rates for Tuco's customers. Lechman offered to handle the accounting and issues with GLB Trading's clearing broker. He further stated that GLB Trading's operations principal would handle credit and margin issues. Frederick replied that he looked forward to discussing Lechman's proposal further. Subsequently, Tuco's operations followed Lechman's model.

11. Lechman loaned Tuco funds to meet day-trading calls in Tuco's master accounts sixteen times. The loan amounts ranged from $100,000 to $780,000, and Lechman charged interest each time for a total of about $6,507. Lechman loaned the funds through a limited liability company he controlled, which was also a Tuco customer. Lechman's loans to Tuco violated NASD Conduct Rule 2370, which prohibits associated persons, such as Lechman, from setting up borrowing or lending arrangements with a customer.

D. VIOLATIONS

As a result of the conduct described above, Respondents willfully aided and abetted and caused Tuco's violations of Section 15(a) of the Exchange Act, which requires brokers and dealers who effect securities transactions through interstate commerce to be registered with the Commission.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

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

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

C. Whether, pursuant to Section 21C of the Exchange Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15(a) of the Exchange Act and whether Respondents should be ordered to pay disgorgement pursuant to Section 21C(e) 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 not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

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

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

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

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 14, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13442

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

RESPONDENT

1. Poseidis, Inc. ("Poseidis" or "Respondent") is a Florida corporation headquartered in West Palm Beach, Florida. Poseidis has no current operations and was purportedly in the business of developing a sparkling mineral water spring in central France. Poseidis's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and its stock is presently quoted on the Pink Sheets operated by Pink OTC Markets Inc. ("Pink Sheets") (ticker symbol "PSED").

DELINQUENT FILINGS

2. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires issuers to file quarterly reports.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220 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 it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310].

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

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

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 14, 2009

IN THE MATTER OF POSEIDIS, 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 Poseidis, Inc. ("Poseidis") because it has not filed a periodic report since its 10-QSB/A for the quarterly period ended May 31, 2006, filed on November 21, 2007.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in Poseidis securities is suspended for the period from 9:30 a.m. EDT on April 14, 2009, through 11:59 p.m. EDT on April 27, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59767 / April 14, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2963 / April 14, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13445

In the Matter of **Stratum Holdings, Inc.,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing 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:

1. Stratum is a Nevada corporation located in Houston, Texas. Stratum has two wholly-owned subsidiaries: CYMRI, LLC ("CYMRI") and Decca Consulting Ltd. ("Decca"). CYMRI owns working interests in roughly 70 operated and non-operated wells in South Texas and South Louisiana. Decca provides consulting services to the Canadian energy market. The company's common stock (symbol "STTH") is quoted on the OTC Bulletin Board and the Pink Sheets operated by Pink OTC Markets Inc.

2. Stratum failed to comply with Items 307 and 308T of Regulation S-B in its 10-KSB report filed on April 8, 2008 for the fiscal year ended December 31, 2007, as a result of which the Respondent violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-15 of the Exchange Act thereunder.

IV.

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

Accordingly, it is hereby ORDERED that:

Pursuant to Section 21C of the Exchange Act, Respondent Stratum cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-15 thereunder.

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. 59766 / April 14, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2962 / April 14, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13444

In the Matter of	**ORDER OF FORTHWITH SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**
STEPHEN P. CORSO, JR., CPA	
Respondent.	

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Stephen P. Corso, Jr., CPA ("Corso") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(2)].[1]

II.

The Commission finds that:

1. From April 1992 to June 2005, Corso was licensed as a certified public accountant in New Jersey, from June 1993 to July 2007, Corso was licensed as a certified public accountant in New York, and from November 1995 to July 2005, Corso was licensed as a certified public accountant in California.

2. On February 20, 2009, a judgment was entered convicting Corso of one count of wire fraud in violation of Title 18 United States Code, section 1343, and one count of

[1] Rule 102(e)(2) provides, in pertinent part, "[A]ny person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

Commissioner Walter not participating
Commissioner Paredes not participating

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 28695 / April 14, 2009

In the Matter of

UBS AG
UBS IB CO-INVESTMENT 2001 GP LIMITED
c/o UBS Investment Bank
677 Washington Boulevard
Stamford, CT 06901

UBS FINANCIAL SERVICES INC.
1200 Harbor Boulevard
Weehawken, NJ 07086

UBS FUND ADVISOR, L.L.C.
UBS WILLOW MANAGEMENT, L.L.C.
UBS EUCALYPTUS MANAGEMENT, L.L.C.
UBS TAMARACK MANAGEMENT, L.L.C.
UBS JUNIPER MANAGEMENT, L.L.C.
UBS ENSO MANAGEMENT, L.L.C.
51 West 52nd Street
23rd Floor
New York, NY 10019

UBS GLOBAL ASSET MANAGEMENT (AMERICAS) INC.
One North Wacker Drive
Chicago, IL 60606

UBS GLOBAL ASSET MANAGEMENT (US) INC.
51 West 52nd Street
16th Floor
New York, NY 10019

(812-13645)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

UBS AG, UBS Financial Services Inc., UBS Fund Advisor, L.L.C., UBS Willow Management, L.L.C., UBS Eucalyptus Management, L.L.C., UBS Tamarack Management, L.L.C., UBS Juniper Management, L.L.C., UBS Enso Management, L.L.C., UBS Global Asset Management (Americas) Inc., UBS Global Asset Management (US) Inc., and UBS IB Co-Investment 2001 GP Limited (collectively, "Applicants") filed an application on March 19, 2009, requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting Applicants and any other company of which UBS AG is or hereafter becomes an affiliated person (together with Applicants, "Covered Persons") from section 9(a) of the Act with respect to an injunction entered by the United States District Court for the District of Columbia on March 19, 2009.

On March 19, 2009, the Commission simultaneously issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act (Investment Company Act Release No. 28652) until the Commission takes final action on the application for a permanent order. The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the prohibitions of section 9(a) as applied to the Applicants would be unduly and disproportionately severe and the conduct of the Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application filed by UBS AG et al. (File No. 812-13645), as amended, that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, entered by the United States District Court for the District of Columbia on March 19, 2009.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 211, 229, 239, 240, and 249

[Release Nos. 33-9026; 34-59775; FR-79]

TECHNICAL AMENDMENTS TO RULES, FORMS, SCHEDULES AND CODIFICATION OF FINANCIAL REPORTING POLICIES

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical amendment.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting technical amendments to various rules, forms and schedules under the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"). The Commission also is making certain technical changes to the Codification of Financial Reporting Policies ("CFRP"). These revisions are necessary to conform those rules, forms, schedules and the CFRP to two recently issued Statements of Financial Accounting Standards ("SFAS") issued by the Financial Accounting Standards Board ("FASB"). SFAS 141 (revised 2007), Business Combinations, and SFAS 160, Noncontrolling Interests in Consolidated Financial Statements - an amendment of ARB No. 51 (collectively "Statements") were both issued in December 2007. The technical amendments include revision of certain rules in Regulation S-X, certain items in Regulation S-K, certain sections in the CFRP and various forms and schedules prescribed under the Securities Act and Exchange Act.

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

FOR FURTHER INFORMATION CONTACT: Steven C. Jacobs, Associate Chief Accountant, at (202) 551-3400, Division of Corporation Finance, or Eric C. West, Associate

Chief Accountant, at (202) 551-5300, Office of the Chief Accountant, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Regulation S-X, [1] Regulation S-K, [2] rules, forms and schedules under the Securities Act of 1933[3] and the Securities Exchange Act of 1934[4] and making technical changes to the CFRP. In Regulation S-X, we are adopting amendments to Rules 1-02, 3-01, 3-04, 3-05, 3-10, 3A-02, 4-08, 5-02, 5-03, 5-04, 7-03, 7-04, 7-05, 8-03, 8-04, 8-08, 9-03, 9-04, 9-06, 10-01, 11-01, and 11-02.[5] In Regulation S-K, we are adopting amendments to Items 301, 302, 305, and 503.[6] We are making technical changes to CFRP sections 201.01, 201.02, 213.02(b), and 507.03. We are amending Exchange Act Rule 12b-2.[7] We are amending Securities Act Forms S-3, S-4, F-3, and 1-A.[8] We are amending Exchange Act Schedule 14A.[9] Finally, we are amending Exchange Act Form 20-F.[10]

I. Background and Summary

---

[1] 17 CFR 210.

[2] 17 CFR 229.

[3] 15 U.S.C. 77a et seq.

[4] 15 U.S.C. 78a et seq.

[5] 17 CFR 210.1-02, 210.3-01, 210.3-04, 210.3-05, 210.3-10, 210.3A-02, 210.4-08, 210.5-02, 210.5-03, 210.5-04, 210.7-03, 210.7-04, 210.7-05, 210.8-03, 210.8-04, 210.8-08, 210.9-03, 210.9-04, 210.9-06, 210.10-01, 210.11-01, and 210.11-02.

[6] 17 CFR 229.301, 229.302, 229.305, and 229.503.

[7] 17 CFR 240.12b-2.

[8] 17 CFR 239.13, 239.25, 239.33, and 239.90.

[9] 17 CFR 240.14a-101.

[10] 17 CFR 249.220f.

On April 25, 2003, the Commission issued a policy statement recognizing the FASB's financial accounting and reporting standards as "generally accepted" for purposes of the Federal securities laws.[11] The Commission's rules and regulations generally require compliance with U.S. generally accepted accounting principles ("GAAP"),[12] and the requirements of the Commission's rules, forms and schedules generally are used to interpret, supplement, or expand upon GAAP requirements. The purpose of these technical amendments and revisions is to eliminate obsolete terminology and revise reporting and disclosure requirements as necessary to achieve consistency between the Commission's compliance requirements and SFAS 141(R) and SFAS 160, both issued by the FASB in December 2007.

II. Business Combinations

The FASB issued SFAS 141(R), Business Combinations, in December 2007. SFAS 141(R) is effective at the beginning of the first annual reporting period beginning on or after December 15, 2008. SFAS 141(R) addresses the accounting for all transactions in which an enterprise obtains control of one or more other businesses. The new standard retains the fundamental requirement in SFAS 141 that the acquisition method of accounting (called the "purchase method" in SFAS 141) be used for all business combinations. The existing requirement that an acquirer be identified for each business combination also was not modified. SFAS 141(R) defines the acquirer as the enterprise that obtains control of one or more businesses and establishes the acquisition date as the date control is achieved. The application of SFAS 141 was limited to business combinations in which control was obtained by transfer of consideration. SFAS 141(R) requires that the acquisition method of accounting

[11] See Financial Reporting Release No. 70.

[12] See, e.g., Rule 4-01(a)(1) of Regulation S-X [17 CFR 210.4-01(a)(1)].

be applied to all transactions and other events in which one entity obtains control over one or more businesses. In addition, SFAS 141(R) generally requires an acquirer to recognize assets acquired, liabilities assumed and any noncontrolling interest in the acquiree at their fair values as of the acquisition date (rather than the announcement date as required in SFAS 141). SFAS 141(R) also makes significant changes in accounting for contingencies, goodwill, bargain purchases and income taxes related to business combinations.

III. Noncontrolling Interests in Consolidated Financial Statements

The FASB issued SFAS 160, Noncontrolling Interests in Consolidated Financial Statements - an amendment of ARB 51, in December 2007. SFAS 160 is effective for fiscal years and interim periods within those fiscal years beginning on or after December 15, 2008. SFAS 160 amends ARB 51[13] to establish accounting and reporting standards for the noncontrolling interest in a subsidiary and for the deconsolidation of a subsidiary. It specifies that a noncontrolling interest in a subsidiary is an ownership interest in the consolidated entity that should be reported as equity in the consolidated financial statements. Prior to the advent of SFAS 160, little guidance existed for reporting noncontrolling interests. As a result, there were widely divergent practices for reporting such outside interests.

Most significantly, SFAS 160 changes the way the consolidated income statement is presented. It requires consolidated net income to be reported at amounts that include the amounts attributable to both the parent and the noncontrolling interest. In this regard, it requires disclosure on the face of the consolidated statement of income of the consolidated net income attributable to the parent and to the noncontrolling interest. Further, SFAS 160 establishes that all changes in a parent's ownership interest in a subsidiary shall be accounted

[13] ARB 51 is Accounting Research Bulletin No. 51, Consolidated Financial Statements, adopted in August 1959 by the Committee on Accounting Procedure of the Accounting Principles Board.

for as equity transactions as long as the parent retains a controlling financial interest in the subsidiary. In addition, SFAS 160 requires that a parent recognize a gain or loss when a subsidiary is deconsolidated. Finally, SFAS 160 significantly expands disclosures in the consolidated financial statements regarding the interests of the parent's owners and the interests of noncontrolling owners.

IV. Summary of Amendments

The table which follows is presented as a guide to assist the reader in understanding the various changes being made by the technical amendments that are described at the end of this release. The table presents a brief description of each category of the changes and an explanation of the rationale for each change. Conforming amendments are being made to update the CFRP.

Amendment	Rationale
Amend various rules in Regulation S-X, items in Regulation S-K, and forms and schedules filed under the Securities Act and the Exchange Act to replace references to "minority interests" with "noncontrolling interests."	These amendments will replace references to "minority interests" with "noncontrolling interests" in order to be consistent with SFAS 160.
Under Regulation S-X, delete paragraphs 12 of Rule 5-03, 10 of Rule 7-04, and 14(e) of Rule 9-04.	SFAS 160 requires that consolidated financial statements report the net income attributable to the parent (or controlling interest) and the net income attributable to the noncontrolling interest. These amendments will make the rules consistent with this requirement.
Under Regulation S-X, delete paragraphs 27 of Rule 5-02, 20 of Rule 7-03, and 18 of Rule 9-03.	SFAS 160 requires that noncontrolling interests be presented in the consolidated statement of financial position within the equity section separate from the parent's equity. These amendments will eliminate the Commission's current requirement to present equity attributable to the noncontrolling interest outside of the consolidated equity section.

Amend various rules in Regulation S-X, items in Regulation S-K, and forms and schedules filed under the Securities Act and the Exchange Act to rescind guidance related to business combinations accounted for as "pooling of interests" and update references to specify which rules apply to combinations of entities under common control.	These amendments will eliminate "pooling of interests" accounting by registrants in accordance with the requirements of SFAS 141(R).
Amend various rules in Regulation S-X, items in Regulation S-K, and forms and schedules filed under the Securities Act and the Exchange Act to distinguish between income attributable to a noncontrolling interest and income attributable to a controlling interest.	SFAS 160 requires net income or loss be attributed to the parent (or controlling interest) and the noncontrolling interest. These amendments will make the rules consistent with this requirement.
Amend various rules in Regulation S-X, items in Regulation S-K, and forms and schedules filed under the Securities Act and the Exchange Act to remove the term "purchase method."	Under SFAS 141(R), a business combination can occur in the absence of a purchase transaction. These amendments will update the terminology in order to achieve consistency with SFAS 141(R).
Amend Rule 3-04 under Regulation S-X to require a separate schedule in the notes to the financial statements that shows the effects of any changes in the registrant's ownership interest in a subsidiary to the equity attributable to the registrant.	This amendment will conform Rule 3-04 to the requirements of SFAS 160.

V. Certain Findings

Under the Administrative Procedure Act, a notice of proposed rulemaking is not required when the agency, for good cause, finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.[14] These amendments are technical changes to eliminate obsolete terminology and revise reporting and disclosure requirements as necessary to achieve consistency between the Commission's compliance requirements and SFAS 141(R) and SFAS 160. Because no one is likely to want to comment

[14] 5 U.S.C. 553(b).

on such non-substantive, technical amendments, the Commission finds that it is unnecessary to publish notice of these amendments.[15]

The Administrative Procedure Act also requires publication of a rule at least 30 days before its effective date unless the agency finds otherwise for good cause.[16] Due to the need to coordinate the effectiveness of the amendments with the effective dates of SFAS 141(R) and SFAS 160 and for the same reasons described with respect to opportunity for notice and comment, the Commission finds there is good cause for the amendments to take effect on [insert date of publication in the Federal Register].

VI. Consideration of Competitive Effects of Amendments

Section 23(a)(2) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the competitive effects of such rules, if any, and to refrain from adopting a rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[17] Because these amendments merely make technical changes to update references to applicable FASB pronouncements, we do not anticipate any competitive advantages or disadvantages will be created.

---

[15] For similar reasons, the amendments do not require analysis under the Regulatory Flexibility Act or analysis of major rule status under the Small Business Regulatory Enforcement Fairness Act. See 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analysis, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking); and 5 U.S.C. 804(3)(C) (for purposes of Congressional review of agency rulemaking, the term "rule" does not include any rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties).

[16] See 5 U.S.C. 553(d)(3).

[17] 15 U.S.C. 78w(a)(2).

VII. Update to Codification of Financial Reporting Policies

The Commission amends the "Codification of Financial Reporting Policies" announced in Financial Reporting Release 1 (April 15, 1982) [47 FR 21028] as follows:

1. By removing and reserving Sections 201.01 and 201.02.

2. By revising Section 213.02(b) to replace the term "minority interest" in each place it appears with the term "noncontrolling interest".

3. By revising Section 507.03 to replace the term "minority interest" in each place it appears with the term "noncontrolling interest".

The CFRP is a separate publication issued by the Commission. It will not be published in the Federal Register or Code of Federal Regulations. For more information about the CFRP, contact the Commission's Public Reference Room at (202) 551-5850.

VIII. Statutory Basis and Text of Amendments

We are adopting these technical amendments pursuant to Sections 6, 7, 10 and 19(a) of the Securities Act,[18] and Sections 12, 13, 14(a), 15(d) and 23(a) of the Exchange Act.[19]

List of Subjects in 17 CFR Parts 210, 211, 229, 239, 240, and 249

Accounting, Reporting and recordkeeping requirements, Securities.

Text of Amendments

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

---

[18] 15 U.S.C. 77f, 77g, 77j, and 77s(a).

[19] 15 U.S.C. 78l, 78m, 78n(a), 78o(d), and 78w(a).

PART 210 - FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, unless otherwise noted.

2. Amend § 210.1-02 by revising paragraphs (w)(1) and (w)(3), the Computational Notes 1 and 2 following the Note to paragraph (w), (bb)(1)(i) and (bb)(1)(ii) to read as follows:

§ 210.1-02 Definitions of terms used in Regulation S-X (17 CFR part 210).

* * * * *

(w) * * *

(1) The registrant's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year (for a proposed combination between entities under common control, this condition is also met when the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or

(2) * * *

(3) The registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in

accounting principle of the subsidiary exclusive of amounts attributable to any noncontrolling interests exceeds 10 percent of such income of the registrant and its subsidiaries consolidated for the most recently completed fiscal year.

* * * * *

Computational note: * * *

1. When a loss exclusive of amounts attributable to any noncontrolling interests has been incurred by either the parent and its subsidiaries consolidated or the tested subsidiary, but not both, the equity in the income or loss of the tested subsidiary exclusive of amounts attributable to any noncontrolling interests should be excluded from such income of the registrant and its subsidiaries consolidated for purposes of the computation.

2. If income of the registrant and its subsidiaries consolidated exclusive of amounts attributable to any noncontrolling interests for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be submitted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

* * * * *

(bb) * * *

(1) * * *

(i) Current assets, noncurrent assets, current liabilities, noncurrent liabilities, and, when applicable, redeemable preferred stocks (see § 210.5-02.27) and noncontrolling interests (for specialized industries in which classified balance sheets are normally not presented, information shall be provided as to the nature and amount of the majority components of assets and liabilities);

(ii) Net sales or gross revenues, gross profit (or, alternatively, costs and expenses applicable to net sales or gross revenues), income or loss from continuing operations before extraordinary items and cumulative effect of a change in accounting principle, net income or loss, and net income or loss attributable to the entity (for specialized industries, other information may be substituted for sales and related costs and expenses if necessary for a more meaningful presentation); and

* * * * *

3. Amend § 210.3-01 by revising paragraphs (c)(2) and (c)(3) to read as follows:

§ 210.3-01 Consolidated balance sheets.

* * * * *

(c) * * *

(2) For the most recent fiscal year for which audited financial statements are not yet available the registrant reasonably and in good faith expects to report income attributable to the registrant, after taxes but before extraordinary items and cumulative effect of a change in accounting principle; and

(3) For at least one of the two fiscal years immediately preceding the most recent fiscal year the registrant reported income attributable to the registrant, after taxes but before extraordinary items and cumulative effect of a change in accounting principle.

* * * * *

4. Amend § 210.3-04 by revising it to read as follows:

§ 210.3-04 Changes in stockholders' equity and noncontrolling interests.

An analysis of the changes in each caption of stockholders' equity and noncontrolling

interests presented in the balance sheets shall be given in a note or separate statement. This analysis shall be presented in the form of a reconciliation of the beginning balance to the ending balance for each period for which an income statement is required to be filed with all significant reconciling items described by appropriate captions with contributions from and distribution to owners shown separately. Also, state-separately the adjustments to the balance at the beginning of the earliest period presented for items which were retroactively applied to periods prior to that period. With respect to any dividends, state the amount per share and in the aggregate for each class of shares. Provide a separate schedule in the notes to the financial statements that shows the effects of any changes in the registrant's ownership interest in a subsidiary on the equity attributable to the registrant.

5. Remove the authority citation following § 210.3-04.

6. Amend § 210.3-05 by revising paragraphs (a)(1)(i) and (a)(1)(ii) to read as follows:

§ 210.3-05 Financial statements of businesses acquired or to be acquired.

(a) * * *

(1) * * *

(i) A business combination has occurred or is probable (for purposes of this section, this encompasses the acquisition of an interest in a business accounted for by the equity method); or

(ii) Consummation of a combination between entities under common control is probable.

* * * * *

7. Remove the authority citation following § 210.3-05.

8. Amend § 210.3-10 by revising paragraph (i)(3) to read as follows:

§ 210.3-10 Financial statements of guarantors and issuers of guaranteed securities registered or being registered.

* * * * *

(i) * * *

(3) The parent company column should present investments in all subsidiaries based upon their proportionate share of the subsidiary's net assets;

* * * * *

9. Amend § 210.3A-02 by:

a. Revising paragraph (a), third sentence, the phrase "or in bankruptcy, or when control is likely to be temporary)." to read "or in bankruptcy).''; and

b. Revising paragraph (b)(2), first sentence, the reference "pooling of interests" to read "combination between entities under common control".

10. Amend § 210.4-08, paragraph (e)(3), last sentence, by revising the reference "(§ 210.5-02.28) and minority interests" to read "(§ 210.5-02.27) and noncontrolling interests".

11. Amend § 210.5-02 by:

a. Removing the undesignated heading "Minority Interests" following paragraph 26;

b. Removing paragraph 27;

c. Redesignating paragraphs 28, 29, 30, and 31 as paragraphs 27, 28, 29, and 30;

d. Revising the reference "§ 210.5-02.29" in newly redesignated paragraph 27, last sentence, to read "§ 210.5-02.28";

e. Adding an undesignated heading following newly redesignated paragraph 30 and a new paragraph 31; and

f. Revising paragraph 32.

The additions and revision read as follows:

§ 210.5-02 Balance sheets.

* * * * *

30. * * *

Noncontrolling Interests

31. Noncontrolling interests in consolidated subsidiaries. State separately in a note the amounts represented by preferred stock and the applicable dividend requirements if the preferred stock is material in relation to the consolidated equity.

32. Total liabilities and equity.

12. Remove the authority citation following § 210.5-02.

13. Amend § 210.5-03 by:

a. Removing paragraph 12 and redesignating paragraphs 13, 14, 15, 16, 17, 18, and 19 as paragraphs 12, 13, 14, 15, 16, 17, and 18;

b. Redesignating paragraph 20 as paragraph 21; and

c. Adding new paragraphs 19 and 20.

The additions read as follows:

§ 210.5-03 Income statements.

* * * * *

19. Net income attributable to the noncontrolling interest.

20. Net income attributable to the controlling interest.

* * * * *

14. Amend § 210.5-04, Schedule I, last sentence, by revising the phrase "(§ 210.5-02.28) and minority interests" to read "(§ 210.5-02.27) and noncontrolling interests".

15. Remove the authority citation for §§ 210.7-01 through 210.7-05 following the undesignated heading "Insurance Companies".

16. Amend § 210.7-03 by:

a. Removing the undesignated heading "Minority Interests" preceding paragraph 20;

b. Removing paragraph 20;

c. Redesignating paragraphs 21, 22, 23, and 24 as paragraphs 20, 21, 22, and 23;

d. Revising newly redesignated paragraphs 20, 21, 22, and 23(b);

e. Adding an undesignated heading following newly redesignated paragraph 23(c) and a new paragraph 24; and

f. Revising paragraph 25.

The revisions and addition read as follows:

§ 210.7-03 Balance sheets.

* * * * *

Redeemable Preferred Stocks

20. Preferred stocks subject to mandatory redemption requirements or whose redemption is outside the control of the issuer. The classification and disclosure requirements of § 210.5-02.27 shall be followed.

Nonredeemable Preferred Stocks

21. Preferred stocks which are not redeemable or are redeemable solely at the option of the issuer. The classification and disclosure requirements of § 210.5-02.28 shall be followed.

Common Stocks

22. Common stocks. The classification and disclosure requirements of § 210.5-02.29 shall be followed.

Other Stockholders' Equity

23. Other stockholders' equity.

* * * * *

(b) The classification and disclosure requirements of § 210.5-02.30(b) shall be followed for dating and effect of a quasi-reorganization.

(c) * * *

Noncontrolling Interests

24. Noncontrolling interests in consolidated subsidiaries. The disclosure requirements of § 210.5-02.31 shall be followed.

25. Total liabilities and equity.

* * * * *

17. Amend § 210.7-04 by:

a. Removing paragraph 10;

b. Redesignating paragraphs 11, 12, 13, 14, 15, 16, and 17 as paragraphs 10, 11, 12, 13, 14, 15, and 16;

c. Redesignating paragraph 18 as paragraph 19; and

d. Adding new paragraphs 17 and 18.

The additions read as follows:

§ 210.7-04 Income statements.

* * * * *

17. Net income attributable to the noncontrolling interest.

18. Net income attributable to the controlling interest.

* * * * *

18. Amend § 210.7-05, Schedule II, last sentence, by revising the reference "(§ 210.7-03.21) and minority interests" to read "(§ 210.7-03.20) and noncontrolling interests".

19. Remove the authority citation following § 210.7-05.

20. Amend § 210.8-03 by revising paragraphs (b)(3) and (b)(4) to read as follows:

§ 210.8-03 Interim financial statements.

* * * * *

(b) * * *

(3) Significant equity investees. Sales, gross profit, net income (loss) from continuing operations, net income, and net income attributable to the investee must be disclosed for equity investees that constitute 20 percent or more of a registrant's consolidated assets, equity or income from continuing operations attributable to the registrant.

(4) Significant dispositions and business combinations. If a significant disposition or business combination has occurred during the most recent interim period and the transaction required the filing of a Form 8–K (§ 249.308 of this chapter), pro forma data must be presented that reflects revenue, income from continuing operations, net income, net income attributable to the registrant and income per share for the current interim period and the

corresponding interim period of the preceding fiscal year as though the transaction occurred at the beginning of the periods.

* * * * *

21. Amend § 210.8-04 by:

a. Revising paragraph (a), first sentence, the phrase "If a business combination accounted for as a "purchase" has occurred or is probable," to read "If a business combination has occurred or is probable,";

b. Revising paragraph (a)(1) to read "This encompasses the purchase of an interest in a business accounted for by the equity method.";

c. Revising paragraph (b)(3), the phrase "of the acquiree" to read "of the acquiree exclusive of amounts attributable to any noncontrolling interests"; and

d. Revising Computational note to § 210.8-04(b), the first sentence, the phrase "its subsidiaries consolidated" to read "its subsidiaries consolidated exclusive of amounts attributable to any noncontrolling interests".

22. Amend § 210.8-08 by revising paragraphs (b)(2) and (b)(3) to read as follows:

§ 210.8-08 Age of financial statements.

* * * * *

(b) * * *

(2) For the most recent fiscal year for which audited financial statements are not yet available, the smaller reporting company reasonably and in good faith expects to report income from continuing operations attributable to the registrant before taxes; and

(3) For at least one of the two fiscal years immediately preceding the most recent fiscal year the smaller reporting company reported income from continuing operations attributable to the registrant before taxes.

23. Amend § 210.9-03 by:

a. Removing paragraph 18;

b. Redesignating paragraphs 19, 20, 21, and 22 as paragraphs 18, 19, 20, and 21;

c. Revising redesignated paragraphs 18, 19, 20, and 21;

d. Adding an undesignated heading following redesignated paragraph 21;

e. Adding new paragraph 22; and

f. Revising paragraph 23.

The revisions and addition read as follows:

§ 210.9-03 Balance sheets.

* * * * *

Redeemable Preferred Stocks

18. Preferred stocks subject to mandatory redemption requirements or whose redemption is outside the control of the issuer. See § 210.5-02.27.

Non-redeemable Preferred Stocks

19. Preferred stocks which are not redeemable or are redeemable solely at the option of the issuer. See § 210.5-02.28.

Common Stocks

20. Common stocks. See § 210.5-02.29.

Other Stockholders' Equity

21. Other stockholders' equity. See § 210.5-02.30.

Noncontrolling Interests

22. Noncontrolling interests in consolidated subsidiaries. The disclosure requirements of § 210.5-02.31 shall be followed.

23. Total liabilities and equity.

24. Remove the authority citation following § 210.9-03.

25. Amend § 210.9-04 by:

a. Removing paragraph 14(e);

b. Redesignating paragraph 21 as paragraph 23; and

c. Adding new paragraphs 21 and 22.

The additions read as follows:

§ 210.9-04 Income statements.

* * * * *

21. Net income attributable to the noncontrolling interest.

22. Net income attributable to the controlling interest.

* * * * *

26. Amend § 210.9-06 by revising the last sentence to read as follows:

§ 210.9-06 Condensed financial information of registrant.

* * * Redeemable preferred stocks (§ 210.5-02.27) and noncontrolling interests shall be deducted in computing net assets for purposes of this test.

27. Amend § 210.10-01 by revising paragraphs (b)(3) and (b)(4) to read as follows:

§ 210.10-01 Interim financial statements.

* * * * *

(b) * * *

(3) If, during the most recent interim period presented, the registrant or any of its consolidated subsidiaries entered into a combination between entities under common control, the interim financial statements for both the current year and the preceding year shall reflect the combined results of the combined businesses. Supplemental disclosure of the separate results of the combined entities for periods prior to the combination shall be given, with appropriate explanations.

(4) Where a material business combination has occurred during the current fiscal year, pro forma disclosure shall be made of the results of operations for the current year up to the date of the most recent interim balance sheet provided (and for the corresponding period in the preceding year) as though the companies had combined at the beginning of the period being reported on. This pro forma information shall, at a minimum, show revenue, income before extraordinary items and the cumulative effect of accounting changes, including such income on a per share basis, net income, net income attributable to the registrant, and net income per share.

* * * * *

28. Remove the authority citation for §§ 210.11-01 through 210.11-03 following the undesignated heading "Pro Forma Financial Information".

29. Amend § 210.11-01 by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 210.11-01 Presentation requirements.

(a) * * *

(1) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3-01, a significant business combination has occurred (for

purposes of these rules, this encompasses the acquisition of an interest in a business accounted for by the equity method);

(2) After the date of the most recent balance sheet filed pursuant to § 210.3-01, consummation of a significant business combination or a combination of entities under common control has occurred or is probable;

* * * * *

30. Amend § 210.11-02 by revising paragraph (b)(3) and Instruction 2 to Instructions, first sentence, to read as follows:

§ 210.11-02 Preparation requirements.

* * * * *

(b) * * *

(3) The pro forma condensed financial information need only include major captions (i.e., the numbered captions) prescribed by the applicable sections of this Regulation. Where any major balance sheet caption is less than 10 percent of total assets, the caption may be combined with others. When any major income statement caption is less than 15 percent of average net income attributable to the registrant for the most recent three fiscal years, the caption may be combined with others. In calculating average net income attributable to the registrant, loss years should be excluded unless losses were incurred in each of the most recent three years, in which case the average loss shall be used for purposes of this test. Notwithstanding these tests, de minimis amounts need not be shown separately.

* * * * *

Instructions: * * *

2. For a business combination, pro forma adjustments for the income statement shall include amortization, depreciation and other adjustments based on the allocated purchase price of net assets acquired. * * *

* * * * *

PART 211 - INTERPRETATIONS RELATING TO FINANCIAL REPORTING MATTERS

31. Amend Part 211, Subpart A, by adding "Technical Amendments to Rules, Forms, Schedules and Codification of Financial Reporting Policies", Release No. FR-79 and the release date of April 15, 2009 to the list of interpretive releases.

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

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

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; 18 U.S.C. 1350, unless otherwise noted.

* * * * *

33. Amend § 229.301, Instruction 2 to the Instructions to Item 301, first sentence, by revising the reference "§ 210.5-02.28(a)" to read "§ 210.5-02.27(a)".

34. Amend § 229.302 by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 229.302 (Item 302) Supplementary financial information.

(a) * * *

(1) Disclosure shall be made of net sales, gross profit (net sales less costs and expenses associated directly with or allocated to products sold or services rendered), income (loss) before extraordinary items and cumulative effect of a change in accounting, per share data based upon such income (loss), net income (loss) and net income (loss) attributable to the registrant, for each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included by Article 3 of Regulation S-X (Part 210 of this chapter).

(2) When the data supplied pursuant to paragraph (a) of this section vary from the amounts previously reported on the Form 10-Q (§ 249.308a of this chapter) filed for any quarter, such as would be the case when a combination between entities under common control occurs or where an error is corrected, reconcile the amounts given with those previously reported and describe the reason for the difference.

* * * * *

35. Amend § 229.305, Instruction 3.C.ii., General Instructions to Paragraphs 305(a) and 305(b), first sentence, by revising the reference "minority interests" to read "noncontrolling interests".

36. Amend § 229.503 by revising Instruction 1.(C) to the Instructions to paragraph 503(d) to read as follows:

§ 229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.

* * * * *

(d) * * *

Instructions to paragraph 503(d):

1. Definitions. * * *

(C) Earnings. The term "earnings" is the amount resulting from adding and subtracting the following items. Add the following: (a) pre-tax income from continuing operations before adjustment for income or loss from equity investees; (b) fixed charges; (c) amortization of capitalized interest; (d) distributed income of equity investees; and (e) your share of pre-tax losses of equity investees for which charges arising from guarantees are included in fixed charges. From the total of the added items, subtract the following: (a) interest capitalized; (b) preference security dividend requirements of consolidated subsidiaries; and (c) the noncontrolling interest in pre-tax income of subsidiaries that have not incurred fixed charges. Equity investees are investments that you account for using the equity method of accounting. Public utilities following SFAS 71 should not add amortization of capitalized interest in determining earnings, nor reduce fixed charges by any allowance for funds used during construction.

* * * * *

PART 239 - FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

37. 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.

* * * * *

38. Amend Form S-3 (referenced in § 239.13) by revising Item 11(b)(iii) to read as follows:

[Note: The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.]

FORM S-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Item 11. Material Changes.

* * * * *

(b) * * * (iii) restated financial statements prepared in accordance with Regulation S-X where a combination of entities under common control has been consummated subsequent to the most recent fiscal year and the transferred businesses, considered in the aggregate, are significant pursuant to Rule 11-01(b), or * * *

* * * * *

39. Amend Form S-4 (referenced in § 239.25) by revising the Instruction to paragraphs (e) and (f) in Item 3 and Item 12(b)(2)(iv) to read as follows:

[Note: The text of Form S-4 does not, and this amendment will not, appear in the Code of Federal Regulations.]

FORM S-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Item 3. Risk Factors, Ratio of Earnings to Fixed Charges and Other Information.

* * * * *

Instruction to paragraphs (e) and (f).

For a business combination, the financial information required by paragraphs (e) and (f) shall be presented only for the most recent fiscal year and interim period. For a combination between entities under common control, the financial information required by

paragraphs (e) and (f) (except for information with regard to book value) shall be presented for the most recent three fiscal years and interim period. For a combination between entities under common control, information with regard to book value shall be presented as of the end of the most recent fiscal year and interim period. Equivalent pro forma per share amounts shall be calculated by multiplying the pro forma income (loss) per share before non-recurring charges or credits directly attributable to the transaction, pro forma book value per share, and the pro forma dividends per share of the registrant by the exchange ratio so that the per share amounts are equated to the respective values for one share of the company being acquired.

* * * * *

Item 12. Information with Respect to S-3 Registrants.

* * * * *

(b) * * *

(2) * * *

(iv) restated financial statements prepared in accordance with Regulation S-X where a combination under common control has been consummated subsequent to the most recent fiscal year and the businesses transferred, considered in the aggregate, are significant pursuant to Rule 11-01(b) of Regulation S-X; and

* * * * *

40. Amend Form F-3 (referenced in § 239.33) by revising Item 5(b)(1)(iii) to read as follows:

[Note: The text of Form F-3 does not, and this amendment will not, appear in the Code of Federal Regulations.]

FORM F-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Item 5. Material Changes.

* * * * *

(b)(1) * * *

(iii) restated financial statements where a combination of entities under common control has been consummated subsequent to the most recent fiscal year and the transferred businesses, considered in the aggregate, are significant under Rule 11-01(b) of Regulation S-X; or

* * * * *

41. Amend Form 1-A (referenced in § 239.90), Part F/S, by revising paragraphs (3)(a)(i), (3)(a)(ii), and (4)(a) to read as follows:

[Note: The text of Form 1-A does not, and this amendment will not, appear in the Code of Federal Regulations.]

FORM 1-A

REGULATION A OFFERING STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Part F/S

* * * * *

(3) Financial Statements of Businesses Acquired or to be Acquired.

(a) * * *

(i) A significant business combination has occurred or is probable (for purposes of this rule, this encompasses the acquisition of an interest in a business accounted for by the equity

method); or

(ii) Consummation of a combination between entities under common control.

* * * * *

(4) Pro Forma Financial Information.

(a) Pro forma information shall be furnished if any of the following conditions exist (for purposes of this rule, "business combination" encompasses the acquisition of an interest in a business accounted for by the equity method):

(i) During the most recent fiscal year or subsequent interim period for which a balance sheet of the registrant is required, a significant business combination has occurred.

(ii) After the date of the registrant's most recent balance sheet, consummation of a significant business combination or a combination between entities under common control has occurred or is probable.

* * * * *

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

42. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

43. Amend § 240.12b-2 to revise the definition of "Significant subsidiary" and Computational Note following it to read as follows:

§ 240.12b-2 Definitions.

* * * * *

Significant subsidiary. The term significant subsidiary means a subsidiary, including its subsidiaries, which meets any of the following conditions:

(1) The registrant's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year (for a proposed combination between entities under common control, this condition is also met when the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or

(2) The registrant's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary exceeds 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(3) The registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle of the subsidiary exclusive of amounts attributable to any noncontrolling interests exceeds 10 percent of such income of the registrant and its subsidiaries consolidated for the most recently completed fiscal year.

Computational note: For purposes of making the prescribed income test the following guidance should be applied:

1. When a loss exclusive of amounts attributable to any noncontrolling interests has been incurred by either the parent and its subsidiaries consolidated or the tested subsidiary, but not both, the equity in the income or loss of the tested subsidiary exclusive of amounts

attributable to any noncontrolling interests should be excluded from such income of the registrant and its subsidiaries consolidated for purposes of the computation.

2. If income of the registrant and its subsidiaries consolidated exclusive of amounts attributable to any noncontrolling interests for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

* * * * *

44. Amend § 240.14a-101, Item 14, by revising Instruction 1 to the Instructions to paragraphs (b)(8), (b)(9) and (b)(10) to read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 14. * * *

Instructions to paragraphs (b)(8), (b)(9) and (b)(10):

1. For a business combination, present the financial information required by paragraphs (b)(9) and (b)(10) only for the most recent fiscal year and interim period. For a combination between entities under common control, present the financial information required by paragraphs (b)(9) and (b)(10) (except for information with regard to book value) for the most recent three fiscal years and interim period. For purposes of these paragraphs, book value information need only be provided for the most recent balance sheet date.

* * * * *

PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934

45. The authority citation for Part 249 continues to read in part as follows:

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

* * * * *

46. Amend Form 20-F (referenced in § 249.220f) by, in Item 11, General Instructions to Items 11(a) and 11(b), revising Instruction 3.C.ii to read as follows:

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

FORM 20-F

* * * * *

Item 11. Quantitative and Qualitative Disclosures About Market Risk.

* * * * *

General Instructions to Items 11(a) and 11(b).

* * * * *

3. * * *

C.i. * * *

ii. Other financial instruments exclude employers and plans obligations for pension and other post-retirement benefits, substantively extinguished debt, insurance contracts, lease contracts, warranty obligations and rights, unconditional purchase obligations, investments accounted for under the equity method, noncontrolling interests in consolidated enterprises, and equity instruments issued by the registrant and classified in stockholders' equity in the statement of financial position (see, e.g., FAS 107, paragraph 8 (December 1991)). For purposes of this item, trade accounts receivable and trade accounts payable need not be

considered other financial instruments when their carrying amounts approximate fair value; and

* * * * *

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: April 15, 2009

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 248

Release Nos. 34-59769, IA-2866, IC-28697; File No. S7-09-07

RIN 3235-AJO6

Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Securities and Exchange Commission ("Commission") is reopening the period for public comment on proposed amendments to Regulation S-P, which implements the privacy provisions of the Gramm-Leach-Bliley Act ("GLB Act"), originally published in the Federal Register on March 29, 2007. The proposed amendments would, if adopted, create a safe harbor for a model form that financial institutions may use to provide disclosures in initial and annual privacy notices required under Regulation S-P.

DATES: Comments should be received on or before [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-09-07 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-09-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Paula Jenson, Deputy Chief Counsel, or Brice Prince, Special Counsel, Office of Chief Counsel, Division of Trading and Markets, (202) 551-5550; or Penelope Saltzman, Assistant Director, or Thoreau Bartmann, Senior Counsel, Office of Regulatory Policy, Division of Investment Management, (202) 551-6792, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is reopening the period for public comment on proposed rule amendments,[1] which were proposed pursuant to the Financial Services Regulatory Relief Act of 2006 (the "Act"), enacted on October 13, 2006.[2] The proposal

---

1 See Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act, Securities Exchange Act Release No. 55497, Investment Company Act Release No. 27755 (Mar. 20, 2007) [72 FR 14940 (Mar. 29, 2007)] ("Interagency Proposal") and [72 FR 16875 (Apr. 5, 2007)] (correction notice).

2 P.L. 109-351 (Oct. 13, 2006), 120 Stat. 1966.

was published on March 29, 2007, and the comment period closed on May 29, 2007. Section 728 of the Act added subsection (e) to section 503 of the GLB Act, which directs the Commission, together with seven other federal agencies[3] (collectively the "Agencies") responsible for implementing Title V, Subtitle A of the GLB Act, to "jointly develop a model form which may be used, at the option of the financial institution, for the provision of disclosures under this section."[4] The proposed amendments would, if adopted, create a safe harbor for a model privacy notice form that financial institutions may use to provide disclosures required under the privacy rules[5] adopted by the Agencies pursuant to section 504 of the GLB Act.[6]

In connection with the development of the model form, an outside consultant, Macro International ("Macro") was retained to conduct quantitative testing to evaluate the effectiveness of four different types of privacy notices, including a slightly revised version of the proposed model privacy notice form.[7] Macro tested the notices on approximately 1,000 consumers at five retail shopping mall locations around the country. Each of the four notices used for testing was printed in a double-sided format, using the front and back sides of an 8½ x 11-inch piece of white paper. We have placed in the comment file for the proposed rule (available at http://www.sec.gov/comments/s7-09-07/s70907.shtml and at

---

3 The seven other agencies are the: Commodity Futures Trading Commission ("CFTC"), Federal Deposit Insurance Corporation ("FDIC"), Board of Governors of the Federal Reserve System ("Board"), Federal Trade Commission ("FTC"), National Credit Union Administration ("NCUA"), Office of the Comptroller of the Currency ("OCC"), and Office of Thrift Supervision ("OTS").

4 See supra note 2, adding 15 U.S.C. 6803(e). The Act stipulates that the model form shall be a safe harbor for financial institutions that elect to use it.

5 For the Agencies' privacy rules see 12 CFR Part 40 (OCC); 12 CFR Part 216 (Board); 12 CFR Part 332 (FDIC); 12 CFR Part 573 (OTS); 12 CFR Part 716 (NCUA); 16 CFR Part 313 (FTC); 17 CFR part 160 (CFTC); 17 CFR Part 248 (Commission).

6 Codified at 15 U.S.C. 6804.

7 As described in the Interagency Proposal, the consumer research project on privacy notices was launched in 2004. Interagency Proposal supra note 1, at Section I.B.

http://www.ftc.gov/privacy/privacyinitiatives/financial_rule_inrp.html) the following documents from the testing: (i) the test data collected and provided by Macro together with the codebook that relates to the data; (ii) the report provided by Macro, which includes a summary of the methodology used in collecting the data, the interview protocol, and the four test notices; and (iii) a report describing the results of the test data prepared by Dr. Alan Levy and Dr. Manoj Hastak.[8]

We are reopening the comment period before final action is taken on the proposal in order to provide all persons who are interested in this matter an opportunity to comment on these additional quantitative testing documents. Accordingly, we are reopening the comment period until **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: April 15, 2009

---

[8] Dr. Levy and Dr. Hastak are consultants to the model privacy notice research project.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33-9027; 34-59776; 39-2465; IC-28698]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. The revisions were made primarily to improve the Form D filing process. The revisions to the Filer Manual reflect changes within Volume I entitled EDGAR Filer Manual, Volume I: "General Information," Version 6 (March 2009) and Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 11 (March 2009). The updated manual will be incorporated by reference into the Code of Federal Regulations.

EFFECTIVE DATE: [Insert date of publication in the Federal Register.] The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: In the Office of Information Technology, contact Rick Heroux, at (202) 551-8800; in the Office of Interactive Disclosure for questions concerning the XBRL/Interactive Data and the 2008 Mutual Fund Risk/Return Summary Taxonomy contact Jeffrey Naumann, Assistant Director of the Office of Interactive Disclosure, at (202) 551-5352; in the Division of Corporation Finance, for questions on saving a partially completed Form D filing, minor Form D screen changes, and the ability to attach a PDF document to a Form ID submission contact Cecile Peters, Chief, Office of Information Technology, at (202)

551-3600; Office of Disclosure Regulation, at (202) 551-6784; and for the removal of submission form types 497K1, 497K2, 497K3A and 497K3B, the new submission form type 497K or N-4 filings, contact Ruth Armfield Sanders, Senior Special Counsel, Office of Legal and Disclosure, at (202) 551-6989; and in the Division of Trading and Markets for the addition of the Office of Thrift Supervision (OTS) as a new Appropriate Regulatory Agency (ARA) on InfoPath Forms TA-1 and TA-1/A and the ability to use an older version of the InfoPath Forms TA-1 and TA-1/A after they have been updated contact Catherine Moore, Special Counsel, Office of Clearance and Settlement, at (202) 551-5710.

SUPPLEMENTARY INFORMATION: We are adopting an updated EDGAR Filer Manual, Volume I and Volume II. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink[2] and the Online Forms/XML Web site.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers may consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

---

[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33-6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on April 16, 2009. See Release No. 33-9022 (April 8, 2009).

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

[3] See Rule 301 of Regulation S-T (17 CFR 232.301).

[4] See Release No. 33-9022 (April 8, 2009) in which we implemented EDGAR Release 9.14. For a complete history of Filer Manual rules, please see the cites therein.

The EDGAR system was upgraded to Release 9.15.1 on March 16, 2009 to improve the Form D filing process by allowing filers to save a partially completed Form D filing offline to a designated location on their computer. The file generated can be used at a later date to complete the Form D submission. The Form D online application can be accessed from the EDGAR OnlineForms/XML Web site (https://www.onlineforms.edgarfiling.sec.gov) by logging in and selecting the "File Form D" link. Filers can also log in by clicking the "Would you like to File a Form D?" link from the EDGAR Portal Web site (http://www.portal.edgarfiling.sec.gov). Minor Form D screen elements and functionality will be updated. The changes will be as follows:

- Issuer(s) Information screen: Wording will be changed from "Primary Filing Issuer's Information:" to "Issuer(s) Identified in the Filing"
- Item 1 – Issuer's Identity: The order of the choices for "Year of Incorporation/Organization" will be changed so that "Over Five Years Ago" appears first and "Yet to be Formed" is last
- Item 1 – Issuer's Identify: The "Previous Name" field will default to None
- Item 6 – Federal Exemption(s) and Exclusion(s) Claimed: Help text will be displayed when the filer hovers over the "Securities Act Section 4 (6)" label with their mouse
- Item 6 – Federal Exemption(s) and Exclusion(s) Claimed:) – If the filer has chosen "Investment Company Act Section 3(c)" under Item 6, the system shall pre-populate the "Pooled Investment Fund Interests" option under Item 9. The filer will have the option of retaining the "Investment Company Act Section 3(C)" option if the "Pooled Investment Fund Interests" option in deselected.

- Item 12 – Sales Compensation: The State(s) of Solicitation list will be limited to US States and US Territories
- Item 13 – Offering and Sales Amounts: The "Total Remaining to be Sold" calculation will be performed before the filer leaves the screen
- Signature and Submission Screen: The "I also am a duly authorized representative of the other identified issuer(s) in Item 1 above and authorized to sign on their behalf" checkbox will only be visible when there is more that one issuer
- Signature and Submission Screen: The following language will be inserted directly above the signature block; "For signature, type in the signer's name or other letters or characters adopted or authorized as the signer's signature."

The online Form ID application process was updated to allow filers to attach a scanned notarized authentication PDF document to the Form ID submission as an alternative to faxing the document (does not apply to updating passcodes or converting to an electronic filer). Filers can complete a fillable PDF version of the Form ID document that can be found on the SEC's public website. Once completed, the fillable PDF can be printed, signed, notarized, scanned and attached to your electronic Form ID application. Filers can continue to fax their authentication document if desired.

A new EDGAR submission form type 497K was added for the Summary Prospectus effective March 31, 2009. It cannot be filed before that date. Also, effective March 31, 2009, EDGAR submission form types 497K1, 497K2, 497K3A and 497K3B will be removed as of close of business (5:30 PM EST) March 30, 2009.

EDGAR will not accept XBRL submissions that include both EX-100 and EX-101 exhibit types within the same submission. XBRL submissions must use either EX-100 or EX-101. For

investment companies submitting under the voluntary program, only document type EX-100 may be used.

N-4 filings will no longer be suspended if the company does not have an 811 file number and is adding series and classes in their N-4 filing.

Notices and orders related to form type 40-8F-2 will be added to EDGAR.

The Office of Thrift Supervision (OTS) was added as an Appropriate Regulatory Agency (ARA) on EDGARLite Forms TA-1 and TA-1/A. In addition TA-1 filers can use older versions of the EDGARLite Forms TA-1 and TA-1/A after they've been updated to a new version as long as the older form version contains all required fields. If the older form version does not include all of the required fields, the submission will be suspended and a version that contains all required fields must be used.

Revisions were also made to support the 2008 Mutual Fund Risk/Return Summary Taxonomy.

Chapter 6 (Interactive Data) of the EDGAR Filer Manual, Volume II – EDGAR Filing, has been updated to make clarifications to the instructions on XBRL/Interactive Data tagging.

EDGARLink submission template 3 was updated to add submission form type 497K. It is highly recommended that filers download, install, and use the new EDGARLink software and submission template to ensure that submissions will be processed successfully. Previous versions of the templates may not work properly. Notice of the update has previously been provided on the EDGAR Filing Web site and on the Commission's public Web site. The discrete updates are reflected on the EDGAR Filing Web site and in the updated Filer Manual, Volume II.

It is anticipated that the EDGAR system will be upgraded to Release 9.15.2 in the third quarter of fiscal year 2009. Within this minor release, EDGAR will be modified to support the validation of submission type SH-ER information table XML documents against the schema documents provided in the EDGAR Submission Type SH-ER Information Table XML Technical Specification posted on http://www.sec.gov.info/edgar.shtml

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S-T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1520, Washington DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. We will post electronic format copies on the Commission's Web site; the address for the Filer Manual is http://www.sec.gov/info/edgar.shtml.

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA)[5]. It follows that the requirements of the Regulatory Flexibility Act[6] do not apply.

The effective date for the updated Filer Manual and the rule amendments is [Insert date of publication in the Federal Register]. In accordance with the APA[7], we find that there is good

---

[5] 5 U.S.C. 553(b).

[6] 5 U.S.C. 601- 612.

[7] 5 U.S.C. 553(d)(3).

cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 9.15.1 became available on March 16, 2009. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the system upgrade.

Statutory Basis

We are adopting the amendments to Regulation S-T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[8] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,[9] Section 319 of the Trust Indenture Act of 1939,[10] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[11]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENT

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

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

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

---

[8] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[9] 15 U.S.C. 78c, 78l, 78m, 78n, 78o, 78w, and 78ll.

[10] 15 U.S.C. 77sss.

[11] 15 U.S.C. 80a-8, 80a-29, 80a-30, and 80a-37.

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

*****

2. Section 232.301 is revised to read as follows:

§232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: "General Information," Version 6 (March 2009). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 11 (March 2009). Additional provisions applicable to Form N-SAR filers are set forth in the EDGAR Filer Manual, Volume III: "N-SAR Supplement," Version 1 (September 2005). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1520, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Electronic copies are available on the Commission's Web site. The address for the Filer Manual is http://www.sec.gov/info/edgar.shtml. You can also inspect the document at the National Archives

and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to:

http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

April 16, 2009

Commissioner Casey not participating
Commissioner Aguilar not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59785 / April 17, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2964 / April 17, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13447

In the Matter of **KEVIN E. BROOKS, CPA,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Kevin E. Brooks ("Respondent" or "Brooks") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.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. Brooks, age 39, is a vice-president of sales programs at Quest Software, Inc. ("Quest"). He previously served as Quest's controller and principal accounting officer from 1999 until October 26, 2006. Brooks is a certified public accountant licensed in the State of California whose license was obtained in 1992, but is currently inactive.

2. Quest is a California corporation headquartered in Aliso Viejo, California. Since its initial public offering on August 13, 1999, Quest's common stock has been registered pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and listed on the Nasdaq National Market under the symbol "QSFT." Quest develops and markets, among other things, database management software.

3. On April 1, 2009, a final judgment was entered against Brooks permanently enjoining him from future violations of Section 17(a)(2) and (3) of the Securities Act of 1933 and Sections 13(b)(5) and 16(a) of the Exchange Act and Rules 13b2-1, 13b2-2, and 16a-3 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder, in the civil action entitled SEC v. Quest Software, Inc., et al., Civil Action Number SA CV 09-315 AG (MLGx), in the United States District Court for the Central District of California. The final judgment also ordered Brooks to pay a civil penalty of $60,000, disgorgement of $34,775, and prejudgment interest of $5,808.29. Brooks consented to the entry of the judgment without admitting or denying any of the allegations in the complaint.

4. The Commission's complaint alleged, among other things, that Quest, in part through the misconduct of Brooks, misstated its financial statements by failing to report compensation expense associated with stock options granted in-the-money through undisclosed backdating of grant dates from 1999 through 2001. The complaint also alleged that Brooks failed to ensure that the stock option grants at Quest were properly accounted for and disclosed. The complaint further alleged that Brooks caused misrepresentations to be made to Quest's auditors by stating in management representation letters that all stock options were made with an exercise price equal to the fair market value of Quest stock on the date of grant.

IV.

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

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

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

B. After five years from the date of this Order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in Respondent's or the firm's quality control system that would indicate that Respondent will not receive appropriate supervision;

c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is

current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

Commissioner Casey
Disapproved
Commissioner Paredes
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2867 / April 17, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13446

In the Matter of **AMERICAN SKANDIA INVESTMENT SERVICES, INC.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The United States Securities and Exchange Commission (the "Commission") deems it appropriate and in the public interest that administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against American Skandia Investment Services, Inc. ("ASISI" or "Respondent")[1].

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, and without admitting or denying the findings, except those findings pertaining to the jurisdiction of the Commission over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the

[1] Respondent ASISI is now known as AST Investment Services, Inc.

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[2] that:

SUMMARY

1. These proceedings concern market-timing related misconduct by ASISI as investment adviser to the American Skandia Trust ("AST") portfolios that serve as a funding vehicle for variable annuities issued by American Skandia Life Assurance Corporation ("ASLAC"). From at least January 2000 through in or around September 2003, ASISI accommodated widespread market timing in the AST portfolios (hereafter referred to as "sub-accounts").

2. Throughout this period, ASISI negligently failed to consider and to investigate adequately credible complaints from the investment advisers that had been hired to sub-advise certain of AST's sub-accounts (hereafter referred to as "sub-advisers") to the effect that market timing was having a detrimental effect on the performance of the sub-accounts and negligently failed to inform the AST Board of Trustees of these complaints.

3. The AST Board of Trustees was not aware of the complaints from sub-advisers or of ASISI's negligent failure to consider and to investigate adequately the sub-advisers' complaints at the same time that it was accommodating widespread market-timing assets. Consequently, the AST Board of Trustees lacked adequate information to give informed consideration to whether the sub-accounts had adequate policies and procedures in place with respect to market timing and further lacked information as to whether performance in certain AST sub-accounts was adversely affected by market timing. In addition, ASISI did not inform the AST Board of Trustees that ASISI internally classified certain AST sub-accounts as either "available for" or "restricted" from market timing and steered those engaged in active trading, including market timers, into the "available" accounts. As a result, and as described more fully below, ASISI violated Section 206(2) of the Advisers Act.

RESPONDENT

4. ASISI is based in Shelton, Connecticut, and was incorporated in Connecticut on October 11, 1991. ASISI, at all relevant times, was the investment adviser to AST. At all relevant times, ASISI was registered with the Commission as an investment adviser under Section 203 of the Advisers Act. ASISI was formerly an indirect wholly owned subsidiary of Skandia Insurance Company Ltd. (publ). On May 1, 2003, ASISI became an indirect subsidiary of Prudential Financial, Inc. ("PFI").

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

FACTS

5. From at least January 2000 through in or around September 2003, ASLAC offered and its affiliates distributed variable annuities and other investment products to investors in the United States. Variable annuities are securities in the form of insurance contracts that provide for tax-deferred accumulation during the accumulation period and various payout options, including a series of payments to be made to a person named as the "annuitant" in the contract. The payments typically begin upon the annuitant's retirement. Hedge funds and others that engaged in market timing through variable annuities, however, did not purchase the products to obtain retirement income. Rather, they often purchased variable annuities to be able to market time the underlying mutual-fund portfolios.

6. Investors in variable annuities could invest, depending on the year, in 50-91 sub-accounts, of which, depending on the year, 33-41 were sub-accounts of AST. ASISI acted as the investment adviser to the AST sub-accounts. ASISI contracted with other investment advisers, the sub-accounts' sub-advisers, to make the day-to-day investment decisions for the sub-accounts. The value of the variable annuities depended on the performance of the investment options chosen by the contract holder.

7. Variable annuities were a substantial part of ASISI's business, and as of December 31, 2003, ASISI acted as adviser for more than $25.8 billion in investor assets invested in ASLAC annuity accounts. ASLAC offered its variable annuities to the investing public through registration statements filed with the Commission. The variable annuities were distributed by an affiliated broker-dealer through a network of independent broker-dealers and banks.

8. "Market timing" refers to (a) frequent buying and selling of shares of the same mutual fund or (b) buying or selling mutual-fund shares in order to exploit inefficiencies in mutual-fund pricing. Market timing, while not illegal *per se*, can harm other mutual-fund shareholders because it can dilute the value of their shares, if the market timer is exploiting pricing inefficiencies, and can disrupt the management of the mutual fund's investment sub-account. Market timing can also cause the targeted mutual fund to incur additional costs, which are borne by all the shareholders, to accommodate the market timer's frequent buying and selling of shares.

ASISI ACCOMMODATED CERTAIN MARKET TIMING

9. From at least January 2000 through in or around September 2003, ASISI accommodated certain market timing in certain AST sub-accounts, which diluted certain sub-accounts by at least $ 34 million and earned ASISI management fees on market-timing assets.

10. During the same period, ASISI wholesalers accommodated business from known market timers. Among other things, these wholesalers alerted customers to the availability of market-timing capacity.

11. In response to internal concerns and sub-advisers' complaints concerning the detrimental effects of large cash flows into and out of certain of their sub-accounts, in early

2000, ASISI created certain guidelines regarding excessive trading. Pursuant to these guidelines, annuity funds were classified as "restricted" or "available." ASISI assigned two employees (the "market-timing police") to provide sub-advisers with advance warning of large cash flows in or out of ASISI-advised sub-accounts. As the market-timing police became more aware that market timing caused large cash flows in and out of certain of the sub-accounts, they created and enforced an anti-market-timing policy based on their understanding of the ASLAC prospectuses, their experience with portfolio managers, and some internet research. The policy attempted to restrict market timing in sub-accounts deemed sensitive, and to allow market timing in the remaining sub-accounts considered less sensitive to market-timing harm. Contract holders who were actively market timing certain of the AST sub-accounts, and who contacted ASISI wholesalers, were able, for example, to negotiate with the market-timing police to receive a certain amount of market-timing "capacity" in certain sub-accounts. The market-timing police would set limits on the dollar amount and/or frequency of trading that these market timers could conduct, and after 4:00 p.m. each day would manually review daily trade reports to either "bust or adjust" (*i.e.*, either cancel or reduce the size of) trades that they were able to catch that exceeded agreed-to limits.

12. In some instances, wholesalers worked directly with the market-timing police regarding the availability of capacity in certain sub-accounts. For example, in early 2003, an ASISI wholesaler summarized a market-timing arrangement he and one of the market-timing police for the AST funds had created for an $8.8 million annuity investment by a market timer:

> Using the following structure . . . we believe we can handle [the investor's] moves without causing problems with the portfolio manager . . . . I hope that this arrangement represents an alternative that is more attractive than moving the money [out of AST sub-accounts].

ASISI FAILED TO INVESTIGATE ADEQUATELY MARKET-TIMING CONCERNS RAISED BY ITS SUB-ADVISERS AND FAILED TO INFORM THE AST BOARD OF TRUSTEES ADEQUATELY OF INFORMATION CONCERNING MARKET TIMING.

13. Throughout the period that ASISI accommodated market timers, ASISI received oral and written complaints from sub-advisers concerning the detrimental effect that market timing was having on the performance of certain of the AST sub-accounts. ASISI negligently failed to investigate these complaints adequately and did not properly determine the impact that market timing had on certain of the sub-accounts.

14. The complaints were numerous and detailed. For example, in December 2000, one sub-adviser informed ASISI that:

> The extreme level of volatility [in an AST sub-account] is impacting the management of the fund in several ways: 1) because the vast majority of flows have been "hot money" – these flows remain uninvested and dilute portfolio performance, 2) this forces us to exceed the 20% cash limit on a regular basis, 3) the frequency of flows is distracting to the portfolio team and monitoring the flows is cumbersome to both the investment and client service teams, and 4) as

long-term investors start to come into the fund, this level of "hot money" seriously hurts their performance opportunity.

15. As further examples, in June 2002, one sub-adviser stated that the sub-adviser's international sub-account "could easily be losing half of [its] anticipated active return due to the market timer flows." And in September 2002, the same sub-adviser informed ASISI that the sub-adviser's small capitalization growth sub-account, with only $10 million under management, was regularly experiencing $2 million cash inflows and outflows from market-timing activity. As a result, the sub-adviser was forced to hold nearly half of the sub-account's assets in futures contracts to accommodate market-timer-related cash flows. Another sub-adviser, in a letter addressed directly to the ASISI manager responsible for evaluating sub-adviser performance, stated that "the impact [of market timing] has been 100-200 bp [basis points] per year."

16. During this same period, these and other complaints from sub-advisers and internal concerns prompted an internal discussion within ASISI of market timing in the sub-accounts. As early as November 2000, at least some ASISI managers were arguing that ASISI's failure to deal with market timing was hurting its funds' performance. One manager argued, "If we could actually implement the necessary system to allow monitoring [of timing trades on a before-the-fact basis], adding a basis point or two to net performance [of the ASISI funds] is probably a layup."

17. But the committee did little to address the complaints or concerns. In March 2001, an ASISI executive advised other managers that:

> "[w]e are close to losing some [sub-advisers] in some of our funds if we do not get our collective arms around this issue. . . . We need to decide as an organization if and how we can support the needs of both our clients, including market timers/allocators and our buy and hold investors.

18. Despite this warning, another ASISI manager responded that he saw little progress:

> [B]efore we can do anything, we need to be sure we have a clear understanding of the problem .... We need to start by understanding who owns this and who is taking charge of defining the problem and leading the project to identify solutions.

19. As late as September 2001, internal emails make it clear that ASISI was still debating whether accommodating market timers was beneficial to ASISI's (not the sub-accounts') bottom line. One executive updated other managers on his conversations with the market-timing police, saying that:

> It once again seems that [the market-timing police] are in the middle of warring factions. On one side [are two executives] wanting to completely remove timers from our funds and on the other side [are two other executives] who feel that timing needs to be analyzed and possibly embraced.

In the same email, the executive asked, "Has anyone actually analyzed timers and their trades to see if they end up hurting American Skandia financially?"

20. ASISI's market-timing review continued without resolution until the December 2002 announcement that PFI would purchase ASISI, Inc. ("ASI"), the parent company of ASISI and its affiliates. But even though PFI did not complete the purchase until May 2003, the announcement effectively halted further action by ASISI because some ASISI personnel apparently concluded that market timing would become "[PFI's] problem now."[3]

21. Beginning in July 2000, ASISI reviewed the performance of each sub-account on a quarterly basis. In conducting those reviews, the sub-account performance-review manager considered but failed to give weight to claims by certain sub-advisers that market timing was harming the performance of their sub-accounts. Based on his review, the manager decided instead that the investment performance of the sub-advisers had lagged. The manager stated, however, that his review "never got to market timing as a factor" and that he "did not know" whether there was any way to determine whether market timing had a detrimental effect on the performance of a sub-account. ASISI eventually terminated two of the sub-advisers for their investment performance, but between 2000 and 2002, one of the terminated sub-accounts experienced significant market-timing dilution.

22. ASISI failed to adequately consider, investigate or analyze the impact of market timing on the management and performance of the AST sub-accounts, despite indications of its potential detrimental effect on performance. Thus, ASISI negligently failed to inform the Board of Trustees or its client, AST, of the possibility that market timing was having a significant adverse impact on sub-account performance. As a result, the AST Board did not have the information necessary to consider whether sufficient restrictions on market timing were in place in the AST sub-accounts. ASISI knew or should have known that the AST Board needed periodic information relevant to the AST sub-accounts' ability to achieve their investment objectives and performance goals, including information reasonably necessary for the Board to make policy and operational determinations on matters such as limits on market timing.

[3] On May 1, 2003, PFI completed the purchase of ASI. In 2003 and the first half of 2004, PFI adopted controls, procedures, and measures to identify short-term trading in the AST sub-accounts and to protect investors in those sub-accounts. These measures included: fair market valuation of international securities in the AST sub-accounts; refined controls relating to the approval of investment transfers in which the investor had a pattern of frequent trading in an annuity contract; technological investment in ASISI's operational surveillance capabilities, which resulted in system locks to limit the number of transfers in and out of particular sub-accounts; and enhanced supervision and training of operational personnel responsible for monitoring short-term trading in the AST sub-accounts.

VIOLATIONS

23. As a result of the conduct described above, ASISI willfully[4] violated Section 206(2) of the Advisers Act. Section 206(2) prohibits an investment adviser from engaging in transactions, practices, or courses of business that operate or would operate as a fraud or deceit upon clients or prospective clients. A violation of Section 206(2) may be established by a showing of negligence. SEC v. Steadman, 967 F.2d 636, 643 n. 5 (D.C. Cir. 1992). Despite internal discussions about the potential adverse impact of market timing on sub-account performance, and the adequacy of its own policies and procedures with respect to market timing, ASISI negligently failed to consider, investigate or analyze sub-adviser complaints that market timing was having adverse effects on the AST sub-accounts. In doing so, ASISI negligently failed to inform the AST Board of Trustees of material information concerning market timing and its potential effects. As a result, the AST Board of Trustees had insufficient information regarding the potential causes of the sub-advisers' investment results in certain of the AST sub-accounts, and ASISI's implementation of its own market-timing policies and procedures. In addition, the AST Board lacked adequate information to consider whether the sub-accounts had adequate policies and procedures in place with respect to market timing.

REMEDIAL EFFORTS

24. In determining to accept the Offer, the Commission considered remedial acts undertaken by the Respondent and cooperation afforded the Commission staff.

UNDERTAKINGS

25. Ongoing Cooperation. In determining to accept the Offer, the Commission has considered the following undertakings by ASISI:

ASISI shall cooperate fully with the Commission in any and all investigations, litigation, or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, ASISI has undertaken:

a. to produce, without service of a notice or subpoena, any and all non-privileged documents and other information requested by the Commission's staff;

b. to use its best efforts to cause its employees to be interviewed by the Commission's staff at such times as the staff reasonably may direct;

---

[4] A willful violation of the securities laws means merely "'that the person charged with the violation 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)).

c. to use its best efforts to cause its employees to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission's staff; and

d. that in connection with any testimony of ASISI to be conducted by the staff of the Commission at deposition, hearing or trial pursuant to a notice or subpoena, ASISI:

i. agrees that any such notice or subpoena for ASISI's appearance and testimony may be served by regular mail on its attorney, Stephen J. Shine, Chief Regulatory Counsel, The Prudential Insurance Company of America, 751 Broad Street, Newark, New Jersey 07102; and

ii. agrees that any such notice or subpoena for ASISI's appearance and testimony in an action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure.

26. Periodic Compliance Review. ASISI completed a compliance review in 2006 and has undertaken that by no later than 2009, ASISI shall undergo a compliance review by a third party, who is not an interested person, as defined in the Investment Company Act. At the conclusion of the review, the third party shall issue a report of its findings and recommendations concerning ASISI's supervisory, compliance, and other policies and procedures designed to prevent and detect breaches of fiduciary duty, breaches of the code of ethics and federal securities law violations by ASISI and its employees in connection with their duties and activities on behalf of and related to the AST funds. The report shall be promptly delivered to ASISI's Board of Directors, to the Audit Committee of the AST Board of Trustees and to the staff of the Commission. If ASISI has a third party conduct ASISI's annual review under Rule 206(4)-7 of the Advisers Act [17 C.F.R. § 275.206(4)-7], that party may also conduct the compliance review required by this paragraph.

27. Independent Distribution Consultant. ASISI shall retain, within 90 days of the date of entry of this Order, the services of an Independent Distribution Consultant not unacceptable to the staff of the Commission and the independent members of the AST Board of Trustees. The Independent Distribution Consultant's compensation and expenses shall be borne exclusively by ASISI (except for a payment permitted by paragraph XI of the Offer).[5] ASISI

[5] Paragraph XI of the Offer states that:

> Respondent agrees that it shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source including, but not limited to, payments made pursuant to any insurance policy, with regard to any penalty amount that Respondent shall pay pursuant to this Order, regardless of whether such penalty amount or any part thereof is added to a distribution fund or otherwise used for the benefit of investors. Respondent further agrees that it shall not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state or local tax for any penalty amount that Respondent shall pay pursuant to this Order, regardless of whether such penalty amount or any part thereof is added to a distribution fund or otherwise used for the benefit of investors. The provisions of this paragraph do not apply to or prevent any

shall cooperate fully with the Independent Distribution Consultant and shall provide the Independent Distribution Consultant with access to its files, books, records, and personnel as reasonably requested for the review. ASISI shall require that the Independent Distribution Consultant develop a Distribution Plan for the distribution of all of the disgorgement and penalties ordered in Section IV of this Order, and any interest or earnings thereon, according to a methodology developed in consultation with ASISI and acceptable to the staff of the Commission and the independent Trustees of the AST funds.

a. ASISI shall require that the Independent Distribution Consultant submit a Distribution Plan to ASISI and the staff of the Commission no more than 250 days after the date of entry of this Order.

b. The Distribution Plan developed by the Independent Distribution Consultant shall be binding upon ASISI and the staff of the Commission unless, within 280 days after the date of entry of this Order, ASISI or the staff of the Commission advises, in writing, the Independent Distribution Consultant of any determination or calculation from the Distribution Plan that it considers to be inappropriate and states in writing the reasons for considering such determination or calculation inappropriate.

c. With respect to any determination or calculation with which ASISI or the staff of the Commission do not agree, such parties shall attempt in good faith to reach an agreement within 310 days of the date of entry of this Order. In the event that ASISI and the staff of the Commission are unable to agree on an alternative determination or calculation, the determinations and calculations of the Independent Distribution Consultant shall be binding, but must be approved by the Commission pursuant to sub-section 27(d) below.

d. Within 325 days of the date of entry of this Order, ASISI shall require that the Independent Distribution Consultant submit to the Division of Enforcement the Distribution Plan for the administration and distribution of disgorgement and penalty funds pursuant to Rule 1101 [17 C.F.R. § 201.1101] of the Commission's Rules regarding Fair Fund and Disgorgement Plans. Following a Commission order approving a final plan of disgorgement, as provided in Rule 1104 [17 C.F.R. § 201.1104] of the Commission's Rules regarding Fair Fund and Disgorgement Plans, ASISI shall require that the Independent Distribution Consultant, with ASISI, take all necessary and appropriate steps to administer the final plan for distribution of disgorgement and penalty funds. ASISI shall pay all reasonable costs of the distribution.

---

payment directly or indirectly from Skandia Insurance Company Ltd. (publ) or an affiliate to Prudential Financial, Inc. or an affiliate as provided in the December 19, 2002 Stock Purchase Agreement among Prudential Financial, Inc., Skandia Insurance Company Ltd. (publ), and others and in the August 3, 2005 letter agreement among Prudential Financial, Inc., Prudential Annuities Holding Company, Inc., and Skandia Insurance Company Ltd. (publ).

e. ASISI shall require that, without prior written consent of a majority of the independent Trustees and the staff of the Commission, the Independent Distribution Consultant, for the period of the engagement and for a period of two years from completion of the engagement, not enter into any employment, consultant, attorney-client, auditing or other professional relationship with ASISI, or any of its present or former affiliates, successors, directors, officers, employees, or agents acting in their capacity as such. ASISI shall require that any firm with which the Independent Distribution Consultant is affiliated in performance of his or her duties under this Order not, without prior written consent of a majority of the independent Trustees and the staff of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with ASISI, or any of its present or former affiliates, successors, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

f. The compensation and expenses of any tax administrator appointed by the Commission to provide tax administration services relating to ASISI's payment of disgorgement and civil penalties shall be borne exclusively by ASISI (except for a payment permitted by paragraph XI of the Offer).

28. Certification. No later than twenty-four months after the date of entry of this Order, ASISI's chief executive officer shall certify to the Commission in writing that ASISI has fully adopted and complied in all material respects with the undertakings set forth in paragraphs 26 through 27 as applicable to the date of the certification or, in the event of material non-adoption or non-compliance, shall describe such material non-adoption and non-compliance.

29. Recordkeeping. ASISI shall preserve for a period not less than six years from the end of the fiscal year last used, the first two years in an easily accessible place, any record of ASISI's compliance with the undertakings set forth in paragraphs 26 through 27.

30. Continuing Application of Undertakings. ASISI's undertakings herein shall continue to apply respectively to ASISI or its successors for as long as ASISI continues to provide investment advisory services or until an undertaking terminates according to its terms; provided, however, that any successor to ASISI may petition the Commission and obtain relief from such undertakings if the successor can demonstrate that it has sufficient controls and procedures reasonably designed and implemented to detect and prevent the occurrence of the conduct summarized herein.

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

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Offer. Accordingly, it is hereby ORDERED, that:

A. pursuant to Section 203(k) of the Advisers Act, ASISI shall cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act;

B. pursuant to Section 203(e) of the Advisers Act, ASISI is hereby censured; and

C. ASISI shall comply with the undertakings set forth in paragraphs 25 through 30 above.

D. Disgorgement and Civil Money Penalties.

1. ASISI, within 10 days of the entry of this Order, shall pay disgorgement in the total amount of $34 million ("Disgorgement") and a civil money penalty in the total amount of $34 million ("Penalty"), for a total payment of $68 million, to the Securities and Exchange Commission. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check, wire transfer, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) wire transferred, 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 ASISI as the Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order, wire transfer, or check shall be sent to Robert J. Burson, Senior Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, Illinois 60604.

2. There shall be, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund established for the funds described in Section IV.D.1. above. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, ASISI agrees that it shall not, after offset or reduction in any Related Investor Action based on ASISI's payment of disgorgement in this action, further benefit by offset or reduction of any part of ASISI's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, ASISI agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against ASISI by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

E. Other Obligations and Requirements. Nothing in this Order shall relieve ASISI of any other applicable legal obligation or requirement, including any rule adopted by the Commission subsequent to this Order.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

Commissioner Casey
Disapproved
Commissioner Paredes
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 9029 / April 17, 2009

Administrative Proceeding
File No. 3-13446

In the Matter of **AMERICAN SKANDIA, INVESTMENT SERVICES, INC.,** **Respondent.**	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION.**

I.

American Skandia Investment Services, Inc. ("ASISI") has submitted a letter, dated February 3, 2009, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption from registration under Regulation E arising from ASISI's settlement of an administrative proceeding commenced by the Commission.

II.

On April 17, 2009, the Commission entered an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "Order"). The Order finds that ASISI willfully violated Section 206(2) of Investment Advisers Act of 1940 ("Advisers Act"). Specifically, the Order finds that from at least January 2000 through in or around September 2003, ASISI accommodated widespread market timing in the portfolios (hereinafter referred to as "sub-accounts") of the American Skandia Trust ("AST") that serve as funding vehicles for variable annuities issued by American Skandia Life Assurance Corporation ("ASLAC"). At all relevant times, ASISI was registered with the Commission as an investment adviser under Section 203 of the Advisers Act and was investment adviser to AST. The Order finds that during this period, ASISI negligently failed to investigate credible complaints from the investment advisers hired to sub-advise certain sub-accounts to the effect that market timing was having a detrimental effect on the performance of the sub-accounts and negligently failed to inform the AST Board of Trustees of such complaints. In addition, the Order finds that the AST Board of Trustees lacked adequate information to give informed consideration to whether sub-accounts had

adequate policies and procedures in place with respect to market timing and as to whether performance in certain AST sub-accounts was adversely affected by market timing. Further, the Order censures ASISI and requires ASISI to pay disgorgement in the amount of $34 million and a civil monetary penalty of $34 million to the Commission. Finally, ASISI neither admits nor denies the findings in the Order, except for findings pertaining to jurisdiction.

III.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if, among other things, any investment adviser or underwriter for the securities to be offered is "subject to an order of the Commission entered pursuant to . . . section 203(e) of the Investment Advisers Act of 1940." *See* 17 C.F.R. 230.602(c)(3). 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 ASISI'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 Order.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provision of Rule 602(c)(3) under the Securities Act resulting from the entry of the Order is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

Commissioner Casey
Disapproved
Commissioner Paredes
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9028 / April 17, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59780 / April 17, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13446

In the Matter of **AMERICAN SKANDIA INVESTMENT SERVICES, INC.,** **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 AMERICAN SKANDIA INVESTMENT SERVICES, INC., AND ITS AFFILIATES**

American Skandia Investment Services, Inc. ("ASISI") has submitted a letter on behalf of itself and any of its current and future affiliates, dated February 3, 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 administrative action filed by the Commission.

On April 17, 2009, the Commission entered an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "Order"). The Order finds that ASISI willfully violated Section 206(2) of Investment Advisers Act of 1940 ("Advisers Act"). Specifically, the Order finds that from at least January 2000 through in or around September 2003, ASISI accommodated widespread market timing in the portfolios (hereinafter referred to as "sub-accounts") of the American Skandia Trust ("AST") that

serve as funding vehicles for variable annuities issued by American Skandia Life Assurance Corporation ("ASLAC"). At all relevant times, ASISI was registered with the Commission as an investment adviser under Section 203 of the Advisers Act and was investment adviser to AST. The Order finds that during this period, ASISI negligently failed to investigate credible complaints from the investment advisers hired to sub-advise certain sub-accounts to the effect that market timing was having a detrimental effect on the performance of the sub-accounts and negligently failed to inform the AST Board of Trustees of such complaints. In addition, the Order finds that the AST Board of Trustees lacked adequate information to give informed consideration to whether sub-accounts had adequate policies and procedures in place with respect to market timing and as to whether performance in certain AST sub-accounts was adversely affected by market timing. Further, the Order censures ASISI and requires ASISI to pay disgorgement in the amount of $34 million and a civil monetary penalty of $34 million to the Commission. Finally, ASISI neither admits nor denies the findings in the Order, except for findings pertaining to jurisdiction.

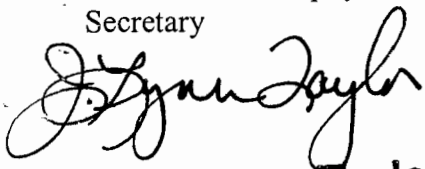
The safe harbor provisions of Section 27A(c) of the Securities Act and Section 21E(c) of the Exchange Act are not available for any forward-looking statement that is "made with respect to the business or operations of an issuer, if the issuer . . . during the 3-year period preceding the date on which 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 ASISI's letter, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the entry of the Order 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 ASISI and any of its current or future affiliates resulting from the entry of the Order is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59792; File No. PCAOB-2008-06)

April 20, 2009

Public Company Accounting Oversight Board; Notice of Filing of Proposed Amendment to Board Rules Relating to Inspections

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on December 9, 2008, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "SEC" or "Commission") the proposed rule changes described in Items I, II, and III below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule

On December 4, 2008, the Board adopted an amendment to its rule relating to the frequency of inspections. The proposed amendment adds a new paragraph (f) to existing Rule 4003. The text of the proposed amendment is set out below. Language added by the amendment is in italics.

Rule 4003. Frequency of Inspections

* * *

(f) With respect to any foreign registered public accounting firm concerning which the preceding provisions of this Rule would set a 2008 deadline for the first Board inspection, such deadline is extended to 2009.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose Of, and Statutory Basis for, the Proposed Rule

(a) Purpose

The Sarbanes-Oxley Act of 2002 ("the Act") directs the Board to conduct a continuing program of inspections to assess registered public accounting firms' compliance with certain requirements.[1/] The Act prescribes inspection frequency requirements but also authorizes the Board to adjust the frequency requirements by rule if the Board finds that an adjustment is consistent with the purposes of the Act, the public interest, and the protection of investors.[2/] Inspection frequency requirements adopted by the Board are set out in PCAOB Rule 4003, "Frequency of Inspections."

The Board began a regular cycle of inspections of U.S. firms in 2004 and has conducted 911 such inspections, including repeat inspections of several firms. Inspections of non-U.S. firms began in 2005, and the Board has inspected 123 non-U.S. firms that have issued audit reports while registered with the Board. Those firms are located in 24 jurisdictions.[3/] There are, however, 21 non-U.S. firms that have issued audit reports while registered and that Rule 4003 requires the Board to inspect by the end of 2008, but that the Board has not yet inspected. For

---

1/ See Section 104(a) of the Act.

2/ See Section 104(b) of the Act.

3/ The Board has inspected non-U.S. firms located in Argentina, Australia, Bermuda, Brazil, Canada, Chile, Colombia, Greece, Hong Kong, India, Indonesia, Ireland, Israel, Japan, Kazakhstan, Mexico, New Zealand, Panama, Peru, Singapore, South Africa, South Korea, Taiwan R.O.C., and the United Kingdom.

the reasons described below, the Board has adopted Rule 4003(f) to extend for one year the deadline for the Board to conduct the first inspections of non-U.S. firms that are otherwise required before the end of 2008.[4/]

The PCAOB has recognized since the outset of its inspection program that inspections of non-U.S. firms pose special issues.[5/] In its oversight of non-U.S. firms, the Board seeks, to the extent reasonably possible, to coordinate and cooperate with local authorities. Since 2003, when the PCAOB began operations, a number of jurisdictions have also developed their own auditor oversight authorities with inspection responsibilities or enhanced existing oversight systems.[6/] The Board has a specific framework for working cooperatively with its non-U.S. counterparts to conduct joint inspections and, to the extent deemed appropriate by the Board in any particular case, relying on inspection work performed by that counterpart.[7/] The Board has previously expressed the view that it is in the interests of the public and investors for the Board to develop

---

4/ Existing Rule 4003 effectively sets deadlines for the Board's inspections not only of firms that issue audit reports, but also of firms that play a substantial role in the preparation or furnishing of an audit report (as defined in PCAOB Rule 1001(p)(ii)). The Board has previously submitted for Commission approval amendments to Rules 4003(b) and 4003(d) that would eliminate from the Rule any frequency requirement or deadline for the Board to inspect a firm that plays a substantial role but does not issue an audit report. Unless and until the Commission approves such a rule change, however, the one-year extension in proposed rule 4003(f) would (if approved by the Commission) apply to required 2008 PCAOB inspections of non-U.S. firms that have played a substantial role as well as to required 2008 inspections of non-U.S. firms that have issued audit reports.

5/ See Briefing Paper, Oversight of Non-U.S. Public Accounting Firms (October 28, 2003); Final Rules Relating to the Oversight of Non-U.S. Public Accounting Firms, PCAOB Release No. 2004-005 (June 9, 2004) (hereinafter "Oversight of Non-U.S. Firms").

6/ In 2006, for instance, the European Union enacted a directive requiring the creation of an effective system of public oversight for statutory auditors and audit firms within each Member State. See The Directive 2006/43/EC of the European Parliament and the Council (May 17, 2006) (the "Eighth Directive"). In addition, among others, Canada created the Canadian Public Accountability Board, and in Australia, the responsibilities of the Australian Securities and Investments Commission were expanded to include auditor oversight. In Asia, Japan created the Certified Public Accountants and Auditing Oversight Board, South Korea gave responsibility for auditor oversight to its Financial Supervisory Service, and Singapore created the Accounting and Corporate Regulatory Authority.

7/ See PCAOB Rules 4011 and 4012; see also Oversight of Non-U.S. Firms at 2-3.

efficient and effective cooperative arrangements with its non-U.S. counterparts.[8/] In jurisdictions that have their own inspection programs, this may include conducting joint inspections of firms that are subject to both regulators' authority. Even where the Board does not work with a local regulator to conduct joint inspections, the Board communicates with its counterpart or other local authorities (such as securities regulators or other government agencies and ministries) regarding its inspections to be conducted in the jurisdiction.

In some jurisdictions, the PCAOB's ability to conduct inspections, either by itself or jointly with a local regulator, is complicated by the need to address with local authorities potential legal obstacles and sovereignty concerns. The Board seeks to work with the home-country authorities to try to resolve potential conflicts of laws.[9/]

In addition, PCAOB Rule 4011 permits non-U.S. firms that are subject to Board inspection to formally request that the Board, in conducting its inspection, rely on a non-U.S. inspection to the extent deemed appropriate by the Board. If a Rule 4011 request is made, Rule 4012 provides that the Board will, at an appropriate time before each inspection of the firm, determine the degree, if any, to which the Board may rely on the non-U.S. inspection. Rule 4012 describes aspects of the non-U.S. system that the Board will evaluate in making that determination.

Where the need arises to try to resolve potential conflicts of law, or to evaluate a non-U.S. system in response to a Rule 4011 request, the effort can be substantial. The effort typically involves negotiating the principles of an arrangement for cooperation consistent with the inspection obligations that the Act imposes on the Board. It also involves the Board gaining a

---

[8/] See Oversight of Non-U.S. Firms at 2-3.

[9/] See Oversight of Non-U.S. Firms at 3.

detailed understanding of the other jurisdiction's auditor oversight system in order for the Board to determine the degree of reliance it is willing to place on inspection work performed under that system in a particular inspection year.

Additional effort is involved in coordinating the scheduling of specific inspections. Where possible, the Board seeks to conduct inspections jointly with local authorities both to take advantage of potential efficiencies and to avoid imposing unnecessary regulatory burdens on the firm. Like the PCAOB, several of these other authorities proceed according to inspection frequency requirements. While some of the Board's counterparts are established and have inspection programs, many are new organizations still building up their inspections resources. As a result, synchronizing the inspections schedules of these authorities and the PCAOB's requirements may sometimes require one-time scheduling adjustments by the PCAOB and/or the other authority.

Notwithstanding these challenges, the Board has so far conducted 123 non-U.S. inspections. Fifty-seven of those inspections, in five jurisdictions, have been conducted jointly with other auditor oversight authorities, while 66 have been conducted solely by the PCAOB.

Because of the types of issues described above, however, the Board faces certain challenges related to conducting, in 2008, the inspections of 18 non-U.S. firms that have issued audit reports while registered and that the Board is currently required to inspect by the end of 2008.[10/] Those 18 inspections involve firms in nine jurisdictions, several of which have newly

---

[10/] Inspections of three other non-U.S. firms that have issued audit reports while registered and that the Board is currently required to conduct by the end of 2008 will be delayed beyond 2008 for reasons unrelated to the issues discussed above. In October 2007, after soliciting public comment, the Board adopted and submitted for Commission approval an amendment to Rule 4003 that would give the Board discretion not to conduct an otherwise required inspection of a firm if, after the firm issued the audit report that gave rise to the inspection requirement, the firm went two consecutive calendar years without issuing an audit report. The three non-U.S. firms referred to here fall into that category and, although the Commission has not acted on that proposed rule amendment, the Board's planning for, and conduct of, 2008 inspections did not include those three firms.

established auditor oversight entities that have just recently started their own inspections programs. In some of those nine jurisdictions, the auditor oversight authority's 2008 inspection schedules did not include some or any of the firms the PCAOB is required to inspect in 2008. In still other jurisdictions, local authorities have raised sovereignty concerns or potential legal conflicts, and efforts to resolve those issues are incomplete.

The Board has made an effort to resolve issues with authorities in the nine jurisdictions in time to conduct these inspections in 2008.[11/] The Board remains hopeful that ongoing discussions with these authorities will result in the resolution of outstanding issues. It is now apparent, however, that this will not occur in time to conduct those inspections in 2008. Accordingly, the choice the Board now faces is whether to (1) postpone these inspections while continuing discussions on the outstanding issues or (2) proceed with inspections by making inspection demands on the individual firms over the objection of local authorities, including in circumstances where local authorities take the position that a firm's cooperation in a Board inspection would violate local law.

Neither option is ideal. While the Board sees value in cooperation and joint inspections, that value must be balanced against the statutory presumption that PCAOB-registered firms will be subject to timely PCAOB inspections in order to protect the interests of investors in U.S. markets. On balance, in light of the status of the ongoing discussions with authorities in the nine jurisdictions described above, the Board believes that a rule amendment allowing the Board to postpone those inspections for up to one year is the appropriate course. For that reason, the Board is adopting a new paragraph (f) to Rule 4003, which extends for one year the deadline for

---

[11/] In two of these jurisdictions, the Board was able to arrange for and conduct some joint inspections in 2008, but, due to scheduling conflicts, could not conduct joint inspections of all firms with 2008 deadlines.

the Board to conduct the first inspection of any non-U.S. firm that existing Rule 4003 otherwise requires the Board to conduct by the end of 2008. The Board is adopting Rule 4003(f) to take effect upon Commission approval.

In the Board's view, this adjustment to the inspection frequency requirement is consistent with the purposes of the Act, the public interest, and the protection of investors. The Board believes that its approach to implementing Rules 4011 and 4012, developing cooperative arrangements, and conducting joint inspections with foreign regulators is enhancing the Board's efforts to carry out its inspection responsibilities. There is long-term value in accepting a limited delay in inspections to continue working toward cooperative arrangements where it appears reasonably possible to reach them. The Board recognizes that some non-U.S. firms may be reluctant to comply with PCAOB inspection demands because of a concern that doing so might violate local law. Up to a point, the purposes of the Act, the public interest, and the protection of investors are better served by delaying a first inspection to work toward a cooperative resolution than by precipitating legal disputes involving conflicts between U.S. and non-U.S. law that could arise if the Board sought to enforce compliance with its preferred schedule without regard for the concerns of non-U.S. authorities.

The Board will continue to work toward cooperation and coordination with authorities in all relevant jurisdictions. The Board does not intend, however, to make any further adjustments to the inspection frequency requirements applicable to firms whose first inspection was due no later than 2008.[12/]

[12/] Nothing in this notice is inconsistent with the Board's willingness to place reliance on a non-U.S. inspection consistent with Rules 4011 and 4012, or suggests any position on the nature of the inspection process in circumstances in which the Board relies on a non-U.S. inspection to the maximum extent that would be consistent with the Board's responsibilities under the Act.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rule will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule imposes no burden beyond the burdens clearly imposed and contemplated by the Act.

C. Board's Statement on Comments on the Proposed Rule Received from Members, Participants or Others

The Board did not solicit or receive comments before adopting the proposed rule.

III. Date of Effectiveness of the Proposed Rule and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period as (i) the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule changes are consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/pcaob.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number PCAOB-2008-06 on the subject line.

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 PCAOB-2008-06. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/pcaob/shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the PCAOB.

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. All submissions should refer to File Number PCAOB-2008-06 and should be submitted on or before [**insert date 21 days from publication in the Federal Register**].

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13450

In the Matter of	
X-Ramp.com, Inc., **Xraymedia, Inc.** **(f/k/a Xraymedia.com, Inc.)** **Zenith Holding Corp., and** **Zydant Corp.,**	**CORRECTED ORDER INSTITUTING ADMINISTRATIVE 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 X-Ramp.com, Inc., Xraymedia, Inc. (f/k/a Xraymedia.com, Inc.), Zenith Holding Corp., and Zydant Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. X-Ramp.com, Inc. (CIK No. 1066821) is a permanently revoked Nevada corporation located in Rochester, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). X-Ramp.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2000, which reported a net loss of $539,368 for the prior year.

2. Xraymedia, Inc. (f/k/a Xraymedia.com, Inc.) (CIK No. 1097068) is a Minnesota corporation located in Enschede, The Netherlands with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Xraymedia is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of $1,022,470 for the prior nine months.

3. Zenith Holding Corp. (CIK No. 1100741) is an inactive Florida corporation located in Woodstock, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Zenith Holding is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2002.

4. Zydant Corp. (CIK No. 1108800) is a permanently revoked Nevada corporation located in League City, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Zydant is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 2001, which reported a net loss of $189,978 for the prior three months.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against 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

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Appendix 1

Chart of Delinquent Filings
In the Matter of X-Ramp.com, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
X-Ramp.com, Inc.					
	10-QSB	03/31/01	05/15/01	Not filed	95
	10-QSB	06/30/01	08/14/01	Not filed	92
	10-QSB	09/30/01	11/14/01	Not filed	89
	10-KSB	12/31/01	04/01/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-QSB	06/30/02	08/14/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	77
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-Q[1]	03/31/08	05/15/08	Not filed	11
	10-Q[1]	06/30/08	08/14/08	Not filed	8
	10-Q[1]	09/30/08	11/14/08	Not filed	5
	10-K[1]	12/31/08	03/31/09	Not filed	1

Total Filings Delinquent **31**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Xraymedia, Inc. (f/k/a Xraymedia.com, Inc.)					
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	10-Q[1]	03/31/08	05/15/08	Not filed	11
	10-Q[1]	06/30/08	08/14/08	Not filed	8
	10-Q[1]	09/30/08	11/14/08	Not filed	5
	10-K[1]	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	**13**				
Zenith Holding Corp.					
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Zenith Holding Corp. ***(Continued)***	*10-QSB*	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	10-Q[1]	03/31/08	05/15/08	Not filed	11
	10-Q[1]	06/30/08	08/14/08	Not filed	8
	10-Q[1]	09/30/08	11/14/08	Not filed	5
	10-K[1]	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	**25**				
Zydant Corp.					
	10-Q	08/31/01	10/15/01	Not filed	90
	10-Q	11/30/01	01/14/02	Not filed	87
	10-K	02/28/02	05/29/02	Not filed	83
	10-Q	05/31/02	07/15/02	Not filed	81
	10-Q	08/31/02	10/15/02	Not filed	78
	10-Q	11/30/02	01/14/03	Not filed	75
	10-K	02/28/03	05/29/03	Not filed	71
	10-Q	05/31/03	07/15/03	Not filed	69
	10-Q	08/31/03	10/15/03	Not filed	66
	10-Q	11/30/03	01/14/04	Not filed	63
	10-K	02/29/04	06/01/04	Not filed	58
	10-Q	05/31/04	07/15/04	Not filed	57
	10-Q	08/31/04	10/15/04	Not filed	54
	10-Q	11/30/04	01/14/05	Not filed	51
	10-K	02/28/05	05/31/05	Not filed	47
	10-Q	05/31/05	07/15/05	Not filed	45
	10-Q	08/31/05	10/17/05	Not filed	42
	10-Q	11/30/05	01/17/06	Not filed	39
	10-K	02/28/06	05/30/06	Not filed	35
	10-Q	05/31/06	07/17/06	Not filed	33
	10-Q	08/31/06	10/16/06	Not filed	30
	10-Q	11/30/06	01/16/07	Not filed	27
	10-K	02/28/07	05/29/07	Not filed	23
	10-Q	05/31/07	07/16/07	Not filed	21
	10-Q	08/31/07	10/15/07	Not filed	18

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Zydant Corp. *(Continued)*	*10-Q*	11/30/07	01/14/08	Not filed	15
	10-K	02/28/08	05/28/08	Not filed	11
	10-Q	05/31/08	07/16/08	Not filed	9
	10-Q	08/31/08	10/15/08	Not filed	6
	10-Q	11/30/08	01/14/09	Not filed	3

Total Filings Delinquent **30**

[1] Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now 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) 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
April 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13448

In the Matter of	
I Incubator.com, Inc., **I Storm, Inc.,** **iBeam Broadcasting Corp.,** **I.C.H. Corp.,** **IDream WS, Inc., and** **Images of Life, Inc.,**	**ORDER INSTITUTING ADMINISTRATIVE 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 I Incubator.com, Inc., I Storm, Inc., iBeam Broadcasting Corp., I.C.H. Corp., IDream WS, Inc., and Images of Life, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. I Incubator.com, Inc. (CIK No. 1044693) is a Florida corporation located in Irvine, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). I Incubator.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2002, which reported a net loss of over $1.5 million for the prior nine months.

2. I Storm, Inc. (CIK No. 754499) is a permanently revoked Nevada corporation located in Mountain View, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). I Storm 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

$735,000 for the prior three months. As of April 17, 2009, the company's stock (symbol "ISTM") was traded on the over-the-counter markets.

3. iBeam Broadcasting Corp. (CIK No. 1098570) is a delinquent Delaware corporation located in Sunnyvale, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). iBeam 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 $93,321 for the prior six months. On October 11, 2001, the company filed a Chapter 11 petition with the U.S. Bankruptcy Court for the District of Delaware, and the case terminated on November 30, 2004. As of April 17, 2009, the company's stock (symbol "IBEMQ") was traded on the over-the-counter markets.

4. I.C.H. Corp. (CIK No. 49588) is a forfeited Delaware corporation located in San Diego, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). I.C.H. 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 $174,000 for the prior three months. On February 5, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of New York, and the case was terminated on February 14, 2007.

5. IDream WS, Inc. (CIK No. 1121902) is a California corporation located in San Diego, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDream 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 $21,586 since its inception on April 13, 2000.

6. Images of Life, Inc. (CIK No. 1050815) is a Nevada corporation located in Toronto, Ontario, Canada and Tucson, Arizona with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Images of Life 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 26, 2000, which reported a net loss of $34,905 for the six months ended June 30, 2000.

B. DELINQUENT PERIODIC FILINGS

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

8. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the

Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires issuers to file quarterly reports.

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

III.

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

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

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

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against 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

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

Appendix 1

Chart of Delinquent Filings
In the Matter of I Incubator.com, Inc.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
I Incubator.com, Inc.					
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	25				
I Storm, Inc.					
	10-KSB	12/31/00	04/02/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	95
	10-QSB	06/30/01	08/14/01	Not filed	92
	10-QSB	09/30/01	11/14/01	Not filed	89
	10-KSB	12/31/01	04/01/02	Not filed	84

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
I Storm, Inc.					
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-QSB	06/30/02	08/14/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	77
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	33				
iBeam Broadcasting Corp.					
	10-Q	09/30/01	11/14/01	Not filed	89
	10-Q	12/31/01	2/14/02	Not filed	86
	10-Q	03/31/02	5/15/02	Not filed	83
	10-K	06/30/02	9/30/02	Not filed	79
	10-Q	09/30/02	11/14/02	Not filed	77
	10-Q	12/31/02	2/14/03	Not filed	74

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
iBeam Broadcasting Corp.					
	10-Q	03/31/03	5/15/03	Not filed	71
	10-K	06/30/03	9/29/03	Not filed	67
	10-Q	09/30/03	11/14/03	Not filed	65
	10-Q	12/31/03	2/17/04	Not filed	62
	10-Q	03/31/04	5/17/04	Not filed	59
	10-K	06/30/04	9/28/04	Not filed	55
	10-Q	09/30/04	11/15/04	Not filed	53
	10-Q	12/31/04	2/14/05	Not filed	50
	10-Q	03/31/05	5/16/05	Not filed	47
	10-K	06/30/05	9/28/05	Not filed	43
	10-Q	09/30/05	11/14/05	Not filed	41
	10-Q	12/31/05	2/14/06	Not filed	38
	10-Q	03/31/06	5/15/06	Not filed	35
	10-K	06/30/06	9/28/06	Not filed	31
	10-Q	09/30/06	11/14/06	Not filed	29
	10-Q	12/31/06	2/14/07	Not filed	26
	10-Q	03/31/07	5/15/07	Not filed	23
	10-K	06/30/07	9/28/07	Not filed	19
	10-Q	09/30/07	11/14/07	Not filed	17
	10-Q	12/31/07	2/14/08	Not filed	14
	10-Q	03/31/08	5/15/08	Not filed	11
	10-K	06/30/08	9/29/08	Not filed	7
	10-Q	09/30/08	11/14/08	Not filed	5
	10-Q	12/31/08	2/17/09	Not filed	2
Total Filings Delinquent	30				
I.C.H. Corp.					
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
I.C.H. Corp.					
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
Total Filings Delinquent	28				
IDream WS, Inc.					
	10-KSB	12/31/00	04/02/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	95
	10-QSB	06/30/01	08/14/01	Not filed	92
	10-QSB	09/30/01	11/14/01	Not filed	89
	10-KSB	12/31/01	04/01/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-QSB	06/30/02	08/14/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	77
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDream WS, Inc.					
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
Total Filings Delinquent	32				
Images of Life, Inc.					
	10-QSB	09/30/00	12/08/00	Not filed	100
	10-KSB	12/31/00	04/02/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	95
	10-QSB	06/30/01	08/14/01	Not filed	92
	10-QSB	09/30/01	11/14/01	Not filed	89
	10-KSB	12/31/01	04/01/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-QSB	06/30/02	08/14/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	77
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Images of Life, Inc.					
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
Total Filings Delinquent	33				

* Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now 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) 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
April 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13449

In the Matter of	
I.A. Europe Group, Inc. (n/k/a Ghost Technology, Inc.), I-Carauction.com, Inc., ICIS Management Group, Inc., iCommerce Group, Inc., IDM Environmental Corp., and Illinois Creek Corp.,	**ORDER INSTITUTING ADMINISTRATIVE 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 I.A. Europe Group, Inc. (n/k/a Ghost Technology, Inc.), I-Carauction.com, Inc., ICIS Management Group, Inc., iCommerce Group, Inc., IDM Environmental Corp., and Illinois Creek Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. I.A. Europe Group, Inc. (n/k/a Ghost Technology, Inc.) (CIK No. 1121795) is a Delaware corporation located in Coral Gables, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). I.A. Europe 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, 2003, which reported a net loss of $354,925 since its inception on November 12, 1999. As of April 17, 2009, the company's stock (symbol "GHST") was traded on the over-the-counter markets.

2. I-Carauction.com, Inc. (CIK No. 1128727) is a void Delaware corporation located in Miami, Florida with a class of equity securities registered with the Commission

pursuant to Exchange Act Section 12(g). I-Carauction.com 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 September 30, 2001, which reported a net loss since its December 23, 1999 inception of $87,806.

3. ICIS Management Group, Inc. (CIK No. 870394) is a dissolved Florida corporation located in Lighthouse Point, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). ICIS 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, 1996, which reported a net loss of $626,088 for the prior six months.

4. iCommerce Group, Inc. (CIK No. 1104201) is a void Delaware corporation located in Knoxville, Tennessee with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). iCommerce 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 May 10, 2000, which reported a net loss of over $1.1 million for the fiscal year ended December 31, 1999. As of April 17, 2009, the company's stock (symbol "ICGI") was traded on the over-the-counter markets.

5. IDM Environmental Corp. (CIK No. 909792) is a New Jersey corporation located in South River, New Jersey with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IDM is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2000, which reported a net loss of over $1.45 million for the prior three months.

6. Illinois Creek Corp. (CIK No. 1098963) is a void Delaware corporation located in Atlanta, Georgia with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Illinois Creek is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended August 31, 2000.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against 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: Jill M. Peterson
Assistant Secretary

Appendix 1

Chart of Delinquent Filings
In the Matter of I.A. Europe, Inc. (n/k/a Ghost Technology, Inc.), et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
I.A. Europe Group, Inc. (n/k/a Ghost Technology, Inc.)					
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	23				
I-Carauction.com, Inc.					
	10-KSB	12/31/01	04/01/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-QSB	06/30/02	08/14/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	77

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
I-Carauction.com, Inc.					
(continued)	*10-KSB*	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	29				
ICIS Management Group, Inc.					
	10-QSB	09/30/96	11/14/96	Not filed	149
	10-KSB	12/31/96	03/31/97	Not filed	145
	10-QSB	03/31/97	05/15/97	Not filed	143
	10-QSB	06/30/97	08/14/97	Not filed	140
	10-QSB	09/30/97	11/14/97	Not filed	137
	10-KSB	12/31/97	03/31/98	Not filed	133
	10-QSB	03/31/98	05/15/98	Not filed	131
	10-QSB	06/30/98	08/14/98	Not filed	128

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
ICIS Management Group, Inc.					
(continued)	*10-QSB*	09/30/98	11/16/98	Not filed	125
	10-KSB	12/31/98	03/31/99	Not filed	121
	10-QSB	03/31/99	05/17/99	Not filed	119
	10-QSB	06/30/99	08/16/99	Not filed	116
	10-QSB	09/30/99	11/15/99	Not filed	113
	10-KSB	12/31/99	03/30/00	Not filed	109
	10-QSB	03/31/00	05/15/00	Not filed	107
	10-QSB	06/30/00	08/14/00	Not filed	104
	10-QSB	09/30/00	11/14/00	Not filed	101
	10-KSB	12/31/00	04/02/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	95
	10-QSB	06/30/01	08/14/01	Not filed	92
	10-QSB	09/30/01	11/14/01	Not filed	89
	10-KSB	12/31/01	04/01/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-QSB	06/30/02	08/14/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	77
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-KSB	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
ICIS Management Group, Inc. ***(continued)***					
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	50				
iCommerce Group, Inc.					
	10-QSB	03/31/00	08/23/00	Not filed	104
	10-QSB	06/30/00	08/23/00	Not filed	104
	10-QSB	09/30/00	11/14/00	Not filed	101
	10-KSB	12/31/00	04/02/01	Not filed	96
	10-QSB	03/31/01	05/15/01	Not filed	95
	10-QSB	06/30/01	08/14/01	Not filed	92
	10-QSB	09/30/01	11/14/01	Not filed	89
	10-KSB	12/31/01	04/01/02	Not filed	84
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-QSB	06/30/02	08/14/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	77
	10-KSB	12/31/02	03/31/03	Not filed	73
	10-QSB	03/31/03	05/15/03	Not filed	71
	10-QSB	06/30/03	08/14/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-KSB	12/31/03	03/30/04	Not filed	61
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-KSB	12/31/04	03/31/05	Not filed	49
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-KSB	12/31/05	03/31/06	Not filed	37
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-KSB	12/31/06	04/02/07	Not filed	24
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	17

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
iCommerce Group, Inc. ***(continued)***	*10-KSB*	12/31/07	03/31/08	Not filed	13
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	36				
IDM Environmental Corp.					
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
IDM Environmental Corp.					
(continued)	*10-Q*	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	35				
Illinois Creek Corp.					
	10-QSB	11/30/00	01/16/01	Not filed	99
	10-KSB	02/28/01	05/29/01	Not filed	95
	10-QSB	05/31/01	07/16/01	Not filed	93
	10-QSB	08/31/01	10/15/01	Not filed	90
	10-QSB	11/30/01	01/14/02	Not filed	87
	10-KSB	02/28/02	05/29/02	Not filed	83
	10-QSB	05/31/02	07/15/02	Not filed	81
	10-QSB	08/31/02	10/15/02	Not filed	78
	10-QSB	11/30/02	01/14/03	Not filed	75
	10-KSB	02/28/03	05/29/03	Not filed	71
	10-QSB	05/31/03	07/15/03	Not filed	69
	10-QSB	08/31/03	10/15/03	Not filed	66
	10-QSB	11/30/03	01/14/04	Not filed	63
	10-KSB	02/29/04	06/01/04	Not filed	58
	10-QSB	05/31/04	07/15/04	Not filed	57
	10-QSB	08/31/04	10/15/04	Not filed	54
	10-QSB	11/30/04	01/14/05	Not filed	51
	10-KSB	02/28/05	05/31/05	Not filed	47
	10-QSB	05/31/05	07/15/05	Not filed	45
	10-QSB	08/31/05	10/17/05	Not filed	42
	10-QSB	11/30/05	01/17/06	Not filed	39
	10-KSB	02/28/06	05/30/06	Not filed	35
	10-QSB	05/31/06	07/17/06	Not filed	33
	10-QSB	08/31/06	10/16/06	Not filed	30
	10-QSB	11/30/06	01/16/07	Not filed	27
	10-KSB	02/28/07	05/29/07	Not filed	23
	10-QSB	05/31/07	07/16/07	Not filed	21

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Illinois Creek Corp.					
(continued)	*10-QSB*	08/31/07	10/15/07	Not filed	18
	10-QSB	11/30/07	01/14/08	Not filed	15
	10-KSB	02/28/08	05/28/08	Not filed	11
	*10-Q**	05/31/08	07/15/08	Not filed	9
	*10-Q**	08/31/08	10/15/08	Not filed	6
	*10-Q**	11/30/08	01/14/09	Not filed	3
	*10-K**	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	34				

* Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now 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) 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
April 21, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13452

In the Matter of	
Act Manufacturing, Inc., Aerovox, Inc. (n/k/a New Bedford Capacitor, Inc.), Agility Capital, Inc., Air Water International Corp. (f/k/a Universal Communications, Systems, Inc.), Allegiant Physician Services, Inc., and Alpha Microsystems, Inc. (n/k/a NQL, Inc.),	**ORDER INSTITUTING ADMINISTRATIVE 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 Act Manufacturing, Inc., Aerovox, Inc. (n/k/a New Bedford Capacitor, Inc.), Agility Capital, Inc., Air Water International Corp. (f/k/a Universal Communications Systems, Inc.), Allegiant Physician Services, Inc., and Alpha Microsystems, Inc. (n/k/a NQL, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Act Manufacturing, Inc. (CIK No. 937971) is a dissolved Massachusetts corporation located in Hudson, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Act Manufacturing 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 over $27 million for the prior nine months. On December 21, 2001, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of

Massachusetts, its reorganization plan was confirmed by the court on August 13, 2003, and the case was terminated on May 1, 2006. As of April 17, 2009, the company's stock (symbol "AMNUQ") was quoted on the Pink Sheets of the 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).

2. Aerovox, Inc. (n/k/a New Bedford Capacitor, Inc.) (CIK No. 856164) is a forfeited Delaware corporation located in New Bedford, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Aerovox 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. On June 6, 2001, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts, which terminated on February 23, 2006. As of April 17, 2009, the company's stock (symbol "ARVXQ") was quoted on the Pink Sheets, had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

3. Agility Capital, Inc. (CIK No. 1014747) is a Texas corporation located in Austin, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Agility 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, 2002, which reported a net loss of over $1.7 million for the prior nine months. As of April 17, 2009, the company's stock (symbol "AGTY") 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). Agility also has preferred stock.

4. Air Water International Corp. (f/k/a Universal Communications Systems, Inc.) (CIK No. 1098207) is a Nevada corporation located in Miami Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Air Water 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 June 30, 2006, which reported a net loss of $226,193 million for the prior nine months. As of April 17, 2009, the company's stock (symbol "AWTI") was quoted on the Pink Sheets, had thirteen market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Allegiant Physician Services, Inc. (CIK No. 883168) is an inactive Delaware corporation located in Atlanta, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Allegiant is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1996, which reported a net loss of over $5.2 million for the prior six months. As of April 17, 2009, the company's common stock (symbol "ALPS") was traded on the over-the-counter markets, had four market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

6. Alpha Microsystems (CIK No. 352869) (n/k/a NQL, Inc.) (CIK No. 1122965) 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).

Alpha Microsystems 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 over $7.1 million for the prior nine months. On February 15, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey. Its liquidation plan was approved on November 25, 2003. As of April 17, 2009, the company's common stock (symbol "NQLIQ") 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).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further

order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

Appendix 1

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

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Act Manufacturing, Inc.					
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1

Total Filings Delinquent **29**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Aerovox, Inc. (n/k/a New Bedford Capacitor, Inc.)					
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	10/06/01	11/20/01	Not filed	89
	10-K	01/05/02	04/05/02	Not filed	84
	10-Q	04/06/02	05/21/02	Not filed	83
	10-Q	07/06/02	08/20/02	Not filed	80
	10-Q	10/05/02	11/19/02	Not filed	77
	10-K	01/04/03	04/04/03	Not filed	72
	10-Q	04/05/03	05/20/03	Not filed	71
	10-Q	04/05/03	05/20/03	Not filed	71
	10-Q	10/04/03	11/18/03	Not filed	65
	10-K	01/03/04	04/02/04	Not filed	60
	10-Q	04/03/04	05/18/04	Not filed	59
	10-Q	07/03/04	08/17/04	Not filed	56
	10-Q	10/02/04	11/16/04	Not filed	53
	10-K	01/01/05	04/01/05	Not filed	48
	10-Q	04/02/05	05/17/05	Not filed	47
	10-Q	07/02/05	08/16/05	Not filed	44
	10-Q	10/01/05	11/15/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	04/01/06	05/16/06	Not filed	35
	10-Q	07/01/06	08/15/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	01/06/07	04/06/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	10/06/07	11/20/07	Not filed	17
	10-K	01/05/08	04/04/08	Not filed	12
	10-Q	04/05/08	05/20/08	Not filed	11
	10-Q	07/05/08	08/19/08	Not filed	8
	10-Q	10/04/08	11/18/08	Not filed	5
	10-K	01/05/09	04/06/09	Not filed	0

Total Filings Delinquent **31**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Agility Capital, Inc.					
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	**27**				
Air Water International Corp. (f/k/a Universal Communications Systems, Inc.)					
	10-KSB	09/30/06	12/29/06	Not filed	28
	10-QSB	12/31/06	02/14/07	Not filed	26
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	20

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Air Water International Corp. (f/k/a Universal Communications Systems, Inc.)					
	10-KSB	09/30/07	12/29/07	Not filed	16
	10-QSB	12/31/07	02/14/08	Not filed	14
	*10-Q**	03/31/08	05/15/08	Not filed	11
	*10-Q**	06/30/08	08/14/08	Not filed	8
	*10-K**	09/30/08	12/29/08	Not filed	4
	*10-Q**	12/31/08	02/17/09	Not filed	2
Total Filings Delinquent	**10**				
Allegiant Physician Services, Inc.					
	10-Q	09/30/96	11/14/96	Not filed	149
	10-Q	09/30/96	11/14/96	Not filed	149
	10-K	12/31/96	03/31/97	Not filed	145
	10-Q	03/31/97	05/15/97	Not filed	143
	10-Q	06/30/97	08/14/97	Not filed	140
	10-Q	09/30/97	11/14/97	Not filed	137
	10-K	12/31/97	03/31/98	Not filed	133
	10-Q	03/31/98	05/15/98	Not filed	131
	10-Q	06/30/98	08/14/98	Not filed	128
	10-Q	09/30/98	11/16/98	Not filed	125
	10-K	12/31/98	03/31/99	Not filed	121
	10-Q	03/31/99	05/17/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-K	12/31/99	03/30/00	Not filed	109
	10-Q	03/31/00	05/15/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-K	12/31/00	04/02/01	Not filed	96
	10-Q	03/31/01	05/15/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	92

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Allegiant Physician Services, Inc.					
	10-Q	09/30/01	11/14/01	Not filed	89
	10-K	12/31/01	04/01/02	Not filed	84
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5
	10-K	12/31/08	03/31/09	Not filed	1
Total Filings Delinquent	**51**				
Alpha Microsystems (n/k/a NQL, Inc.)					
	10-K	12/31/01	04/01/02	Not filed	84

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Alpha Microsystems (n/k/a NQL, Inc.)					
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-K	12/31/02	03/31/03	Not filed	73
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-K	12/31/03	03/30/04	Not filed	61
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-K	12/31/04	03/31/05	Not filed	49
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-K	12/31/05	03/31/06	Not filed	37
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-K	12/31/06	04/02/07	Not filed	24
	10-Q	03/31/07	05/15/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-K	12/31/07	03/31/08	Not filed	13
	10-Q	03/31/08	05/15/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	5

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Alpha Microsystems (n/k/a NQL, Inc.)					
	10-K	12/31/08	03/31/09	Not filed	1

Total Filings Delinquent **29**

* Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now 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) 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

April 21, 2009

IN THE MATTER OF	
Act Manufacturing, Inc., **Aerovox, Inc. (n/k/a New Bedford Capacitor, Inc.),** **Agility Capital, Inc.,** **Air Water International Corp. (f/k/a Universal Communications Systems, Inc.),** **Allegiant Physician Services, Inc., and** **Alpha Microsystems, Inc. (n/k/a NQL, Inc.),**	**ORDER OF SUSPENSION OF TRADING**
File No. 500-1	

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Aerovox, Inc. (n/k/a New Bedford Capacitor, Inc.) because it has not filed any periodic reports since the period ended March 31, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Agility Capital, Inc. because it has not filed any periodic reports since the period ended June 30, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Air Water International Corp. (f/k/a Universal Communications Systems, Inc.) because it has not filed any periodic reports since the period ended June 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Allegiant Physician Services, Inc. because it has not filed any periodic reports since the period ended June 30, 1996.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Alpha Microsystems, Inc. (n/k/a NQL, Inc.) because it has not filed any periodic reports since the period ended September 30, 2001.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on April 21, 2009, through 11:59 p.m. EDT on May 4, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

Commissioner Walter not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59803 / April 21, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2965 / April 21, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13453

In the Matter of **RANDY S. CASSTEVENS (CPA),** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Randy S. Casstevens ("Respondent" or "Casstevens") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.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. Casstevens, age 43, is a certified public accountant licensed to practice in the State of North Carolina, who is currently on inactive status. Casstevens was employed by Krispy Kreme Doughnuts, Inc. ("Krispy Kreme" or the "Company") between May 1993 and January 31, 2004. During that time period, he held a variety of increasingly senior finance positions, including being made the Company's Chief Financial Officer in January 2002, a position he held until December 23, 2003.

2. Krispy Kreme was, at all relevant times, a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina. Krispy Kreme was engaged in the business of making and selling doughnuts through stores owned either by Krispy Kreme or franchisees. At all relevant times, Krispy Kreme's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and listed on the New York Stock Exchange.

3. On March 4, 2009, the Commission filed a complaint against Casstevens in SEC v. Randy S. Casstevens, et al. (Civil Action No. 1:09cv159). On April 1, 2009, the court entered an order permanently enjoining Casstevens, by consent, from future violations of Section 17(a)(3) of the Securities Act of 1933 ("Securities Act") and Section 13(b)(5) of the Exchange Act and Rules 13a-14 and 13b2-1 thereunder and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Casstevens was also ordered on consent to pay $50,000 in disgorgement of ill-gotten gains plus $18,964.05 in prejudgment interest and a $25,000 civil monetary penalty.

4. The Commission's complaint alleged, among other things, that between approximately February 2003 and December 2003, Casstevens, in a departure from Generally Accepted Accounting Principles, improperly accounted for Krispy Kreme's Senior Executive Incentive Compensation Plan by improperly under-accruing or reversing amounts for the Company's quarterly incentive compensation expense, thereby misrepresenting the Company's earnings. In addition, the Complaint alleges that, in Company filings and analyst conference

calls, Casstevens misrepresented the Company's financial performance and failed to disclose that but for these under-accruals and reversals, the Company would have failed to exceed its previously announced quarterly earnings per share guidance by one penny in the affected quarters. As a result of his actions, Krispy Kreme filed materially false and misleading financial information for the fourth quarter of the Company's 2003 fiscal year in the Company's Form 10-K for the year ended February 2, 2003, in various current reports filed during the relevant periods, and in the Company's quarterly reports on Form 10-Q for the first three quarters of the Company's 2004 fiscal year.

IV.

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

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

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

B. After two years from the date of this Order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Commissioner Casey not participating
Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59812 / April 22, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-133455

In the Matter of **DAVID SCOTT CACCHIONE,** **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 David Scott Cacchione ("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.

III.

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

1. Cacchione was a registered representative associated with various registered broker-dealers from 1989 through June 2008. Cacchione was employed most recently at registered broker-dealer Merriman Curhan Ford & Co. ("Merriman") as the Managing Director of Merriman's Client Services Group from December 2005 through June 4, 2008 when his employment was terminated. Cacchione has a disciplinary history. In January 2004, he consented to a thirty day suspension and was fined $30,000 after the NASD found that he sold unregistered securities to public customers without proper disclosure. Cacchione, 44 years old, is a resident of Woodside, California.

2. On March 31, 2009, a final judgment was entered by consent against Cacchione, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. David Scott Cacchione, Civil Action Number CV-09-01259 CRB, in the United States District Court for the Northern District of California.

3. The Commission's complaint alleged that, in connection with the sale of securities, Cacchione, among other things, engaged in unauthorized trading in his customers' accounts; supplied the account statements of unknowing Merriman customers to another customer and friend so that his friend could fraudulently pledge the securities in the accounts as collateral for loans; signed lending agreements fraudulently certifying that the securities held by several unknowing Merriman customers belonged to another customer and friend; and otherwise engaged in a variety of conduct which operated as a fraud and deceit on investors.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Cacchione 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: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33-9030; 34-59850 / April 30, 2009]

Order Making Fiscal Year 2010 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

I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 ("Securities Act") requires the Commission to collect fees from issuers on the registration of securities.[1] Section 13(e) of the Securities Exchange Act of 1934 ("Exchange Act") requires the Commission to collect fees on specified repurchases of securities.[2] Section 14(g) of the Exchange Act requires the Commission to collect fees on proxy solicitations and statements in corporate control transactions.[3] Finally, Sections 31(b) and (c) of the Exchange Act require national securities exchanges and national securities associations, respectively, to pay fees to the Commission on transactions in specified securities.[4]

The Investor and Capital Markets Fee Relief Act ("Fee Relief Act")[5] amended Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act to require the Commission to make annual adjustments to the fee rates applicable under

---

1 15 U.S.C. 77f(b).

2 15 U.S.C. 78m(e).

3 15 U.S.C. 78n(g).

4 15 U.S.C. 78ee(b) and (c). In addition, Section 31(d) of the Exchange Act requires the Commission to collect assessments from national securities exchanges and national securities associations for round turn transactions on security futures. 15 U.S.C. 78ee(d).

5 Pub. L. No. 107-123, 115 Stat. 2390 (2002).

these sections for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates under these sections for fiscal year 2012 and beyond.[6]

II. Fiscal Year 2010 Annual Adjustment to the Fee Rates Applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act

Section 6(b)(5) of the Securities Act requires the Commission to make an annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act in each of the fiscal years 2003 through 2011.[7] In those same fiscal years, Sections 13(e)(5) and 14(g)(5) of the Exchange Act require the Commission to adjust the fee rates under Sections 13(e) and 14(g) to a rate that is equal to the rate that is applicable under Section 6(b). In other words, the annual adjustment to the fee rate under Section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under Sections 13(e) and 14(g) of the Exchange Act.

Section 6(b)(5) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2010. Specifically, the Commission must adjust the fee rate under Section 6(b) to a "rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2010], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target offsetting collection amount for [fiscal year 2010]." That is, the adjusted rate is

---

6 See 15 U.S.C. 77f(b)(5), 77f(b)(6), 78m(e)(5), 78m(e)(6), 78n(g)(5), 78n(g)(6), 78ee(j)(1), and 78ee(j)(3). Section 31(j)(2) of the Exchange Act, 15 U.S.C. 78ee(j)(2), also requires the Commission, in specified circumstances, to make a mid-year adjustment to the fee rates under Sections 31(b) and (c) of the Exchange Act in fiscal years 2002 through 2011.

7 The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the "target offsetting collection amount" specified in Section 6(b)(11)(A) for that fiscal year.

determined by dividing the "target offsetting collection amount" for fiscal year 2010 by the "baseline estimate of the aggregate maximum offering prices" for fiscal year 2010.

Section 6(b)(11)(A) specifies that the "target offsetting collection amount" for fiscal year 2010 is $334,000,000. Section 6(b)(11)(B) defines the "baseline estimate of the aggregate maximum offering price" for fiscal year 2010 as "the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2010] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget . . . ."

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2010, the Commission is using the same methodology it developed in consultation with the Congressional Budget Office ("CBO") and Office of Management and Budget ("OMB") to project aggregate offering price for purposes of the fiscal year 2009 annual adjustment. Using this methodology, the Commission determines the "baseline estimate of the aggregate maximum offering price" for fiscal year 2010 to be $4,683,504,368,794.[8] Based on this estimate, the Commission calculates the fee rate for fiscal 2010 to be $71.30 per million. This adjusted fee rate applies to Section 6(b) of the Securities Act, as well as to Sections 13(e) and 14(g) of the Exchange Act.

---

[8] Appendix A explains how we determined the "baseline estimate of the aggregate maximum offering price" for fiscal year 2010 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2010 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its "baseline estimate of the aggregate maximum offering price" for fiscal year 2010.

III. Fiscal Year 2010 Annual Adjustment to the Fee Rates Applicable under Sections 31(b) and (c) of the Exchange Act

Section 31(b) of the Exchange Act requires each national securities exchange to pay the Commission a fee at a rate, as adjusted by our order pursuant to Section 31(j)(2),[9] which currently is $25.70 per million of the aggregate dollar amount of sales of specified securities transacted on the exchange. Similarly, Section 31(c) requires each national securities association to pay the Commission a fee at the same adjusted rate on the aggregate dollar amount of sales of specified securities transacted by or through any member of the association otherwise than on an exchange. Section 31(j)(1) requires 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.[10]

Section 31(j)(1) specifies the method for determining the annual adjustment for fiscal year 2010. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a "uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for [fiscal year 2010], is reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under [Section 31(d)]) that are equal to the target offsetting collection amount for [fiscal year 2010]."

---

9 Order Making Fiscal 2009 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934, Rel. No. 34-59477 (February 27, 2009), 74 FR 9644 (March 5, 2009).

10 The annual adjustments, as well as the mid-year adjustments required in specified circumstances under Section 31(j)(2) in fiscal years 2002 through 2011, 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 31 equal to the "target offsetting collection amount" specified in Section 31(j)(1) for that fiscal year.

Section 31(l)(1) specifies that the "target offsetting collection amount" for fiscal year 2010 is $1,161,000,000. Section 31(l)(2) defines the "baseline estimate of the aggregate dollar amount of sales" as "the baseline estimate of the aggregate dollar amount of sales of securities . . . to be transacted on each national securities exchange and by or through any member of each national securities association (otherwise than on a national securities exchange) during [fiscal year 2010] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget . . . ."

To make the baseline estimate of the aggregate dollar amount of sales for fiscal year 2010, the Commission is using the same methodology it developed in consultation with the CBO and OMB to project dollar volume for purposes of prior fee adjustments.[11] Using this methodology, the Commission calculates the baseline estimate of the aggregate dollar amount of sales for fiscal year 2010 to be $84,822,877,437,603. Based on this estimate, and an estimated collection of $9,966 in assessments on security futures transactions under Section 31(d) in fiscal year 2010, the uniform adjusted rate for fiscal year 2010 is $12.70 per million.[12]

IV. Effective Dates of the Annual Adjustments

Section 6(b)(8)(A) of the Securities Act provides that the fiscal year 2010 annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act shall take

---

[11] Appendix B explains how we determined the "baseline estimate of the aggregate dollar amount of sales" for fiscal year 2010 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2010 annual adjustment based on that estimate. The appendix also includes the data used by the Commission in making its "baseline estimate of the aggregate dollar amount of sales" for fiscal year 2010.

[12] The calculation of the adjusted fee rate assumes that the current fee rate of $25.70 per million will apply through October 31, 2009, due to the operation of the effective date provision contained in Section 31(j)(4)(A) of the Exchange Act.

effect on the later of October 1, 2009, or five days after the date on which a regular appropriation to the Commission for fiscal year 2010 is enacted.[13] Sections 13(e)(8)(A) and 14(g)(8)(A) of the Exchange Act provide for the same effective date for the annual adjustments to the fee rates applicable under Sections 13(e) and 14(g) of the Exchange Act.[14]

Section 31(j)(4)(A) of the Exchange Act provides that the fiscal year 2010 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2009, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2010 is enacted.

V. Conclusion

Accordingly, pursuant to Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act,[15]

IT IS HEREBY ORDERED that the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act shall be $71.30 per million effective on the later of October 1, 2009, or five days after the date on which a regular appropriation to the Commission for fiscal year 2010 is enacted; and

---

13 15 U.S.C. 77f(b)(8)(A).

14 15 U.S.C. 78m(e)(8)(A) and 78n(g)(8)(A).

15 15 U.S.C. 77f(b), 78m(e), 78n(g), and 78ee(j).

IT IS FURTHER ORDERED that the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall be $12.70 per million effective on the later of October 1, 2009, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2010 is enacted.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

APPENDIX A

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the "aggregate maximum offering prices," which measures the aggregate dollar amount of securities registered with the Commission over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2010, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an ARIMA model was used to forecast the value of the aggregate maximum offering prices for months subsequent to March 2009, the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

A. Baseline estimate of the aggregate maximum offering prices for fiscal year 2010.

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (March 1999 - March 2009). Next, calculate the percentage change in the AMOP from month to month.

Model the monthly percentage change in AMOP as a first order moving average process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more "typical" value of AMOP.

Use the estimated moving average model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from March 1999 to March 2009.

2. Divide each month's AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).

3. For each month t, the natural logarithm of AAMOP is reported in column E.

4. Calculate the change in log(AAMOP) from the previous month as $\Delta_t = \log(AAMOP_t) - \log(AAMOP_{t-1})$. This approximates the percentage change.

5. Estimate the first order moving average model $\Delta_t = \alpha + \beta e_{t-1} + e_t$, where e_t denotes the forecast error for month t. The forecast error is simply the difference between the one-month ahead forecast and the actual realization of Δ_t. The forecast error is expressed as $e_t = \Delta_t - \alpha - \beta e_{t-1}$. The model can be estimated using standard commercially available software such as SAS or Eviews. Using least squares, the estimated parameter values are α=0.0003187 and β=–0.88747.

6. For the month of April 2009 forecast $\Delta_{t=4/09} = \alpha + \beta e_{t=3/09}$. For all subsequent months, forecast $\Delta_t = \alpha$.

7. Calculate forecasts of log(AAMOP). For example, the forecast of log(AAMOP) for June 2009 is given by $FLAAMOP_{t=6/09} = \log(AAMOP_{t=3/09}) + \Delta_{t=4/09} + \Delta_{t=5/09} + \Delta_{t=6/09}$.

8. Under the assumption that e_t is normally distributed, the n-step ahead forecast of AAMOP is given by $\exp(FLAAMOP_t + \sigma_n^2/2)$, where σ_n denotes the standard error of the n-step ahead forecast.

9. For June 2009, this gives a forecast AAMOP of $18.4 Billion (Column I), and a forecast AMOP of $404.4 Billion (Column J).

10. Iterate this process through September 2010 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2010 of $4,683,504,368,794.

B. Using the forecasts from A to calculate the new fee rate.

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/1/09 and 9/30/10 to be $4,683,504,368,794.

2. The rate necessary to collect the target $334,000,000 in fee revenues set by Congress is then calculated as: $334,000,000 ÷ $4,683,504,368,794 = 0.00007131.

3. Round the result to the seventh decimal point, yielding a rate of .0000713 (or $71.30 per million).

Table A. Estimation of baseline of aggregate maximum offering prices .

Fee rate calculation.

a. Baseline estimate of the aggregate maximum offering prices, 10/1/09 to 9/30/10 ($Millions)	4,683,504
b. Implied fee rate ($334 Million / a)	$71.30

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Maximum Offering Prices, in $Millions	(D) Average Daily Aggregate Max. Offering Prices (AAMOP) in $Millions	(E) log(AAMOP)	(F) Change in AAMOP	(G) Forecast log(AAMOP)	(H) Standard Error	(I) Forecast AAMOP, in $Millions	(J) Forecast Aggregate Maximum Offering Prices, in $Millions
Mar-99	23	415,145	18,050	23.616					
Apr-99	21	431,280	20,537	23.746	0.129				
May-99	20	229,082	11,454	23.162	-0.584				
Jun-99	22	367,943	16,725	23.540	0.379				
Jul-99	21	332,623	15,839	23.486	-0.054				
Aug-99	22	240,157	10,916	23.114	-0.372				
Sep-99	21	236,011	11,239	23.143	0.029				
Oct-99	21	216,883	10,328	23.058	-0.085				
Nov-99	21	372,582	17,742	23.599	0.541				
Dec-99	22	319,846	14,538	23.400	-0.199				
Jan-00	20	282,165	14,108	23.370	-0.030				
Feb-00	20	665,367	33,268	24.228	0.858				
Mar-00	23	550,107	23,918	23.898	-0.330				
Apr-00	19	244,510	12,869	23.278	-0.620				
May-00	22	269,774	12,262	23.230	-0.048				
Jun-00	22	406,409	18,473	23.640	0.410				
Jul-00	20	230,894	11,545	23.169	-0.470				
Aug-00	23	257,797	11,209	23.140	-0.030				
Sep-00	20	332,120	16,606	23.533	0.393				
Oct-00	22	362,493	16,477	23.525	-0.008				
Nov-00	21	317,653	15,126	23.440	-0.086				
Dec-00	20	246,006	12,300	23.233	-0.207				
Jan-01	21	462,726	22,035	23.816	0.583				
Feb-01	19	388,304	20,437	23.741	-0.075				
Mar-01	22	523,443	23,793	23.893	0.152				
Apr-01	20	289,212	14,461	23.395	-0.498				
May-01	22	274,298	12,468	23.246	-0.148				

Jun-01	21	348,268	16,584	23.532	0.285				
Jul-01	21	264,590	12,600	23.257	-0.275				
Aug-01	23	245,591	10,678	23.091	-0.165				
Sep-01	15	178,524	11,902	23.200	0.108				
Oct-01	23	260,719	11,336	23.151	-0.049				
Nov-01	21	286,199	13,629	23.335	0.184				
Dec-01	20	395,230	19,762	23.707	0.372				
Jan-02	21	401,290	19,109	23.673	-0.034				
Feb-02	19	476,837	25,097	23.946	0.273				
Mar-02	20	380,160	19,008	23.668	-0.278				
Apr-02	22	282,947	12,861	23.277	-0.391				
May-02	22	215,645	9,802	23.006	-0.272				
Jun-02	20	277,757	13,888	23.354	0.348				
Jul-02	22	208,638	9,484	22.973	-0.381				
Aug-02	22	265,750	12,080	23.215	0.242				
Sep-02	20	109,565	5,478	22.424	-0.791				
Oct-02	23	179,374	7,799	22.777	0.353				
Nov-02	20	243,590	12,179	23.223	0.446				
Dec-02	21	212,838	10,135	23.039	-0.184				
Jan-03	21	201,839	9,611	22.986	-0.053				
Feb-03	19	144,642	7,613	22.753	-0.233				
Mar-03	21	444,331	21,159	23.775	1.022				
Apr-03	21	142,373	6,780	22.637	-1.138				
May-03	21	328,792	15,657	23.474	0.837				
Jun-03	21	281,580	13,409	23.319	-0.155				
Jul-03	22	304,383	13,836	23.351	0.031				
Aug-03	21	328,351	15,636	23.473	0.122				
Sep-03	21	459,563	21,884	23.809	0.336				
Oct-03	23	285,039	12,393	23.240	-0.569				
Nov-03	19	257,779	13,567	23.331	0.091				
Dec-03	22	244,998	11,136	23.133	-0.197				
Jan-04	20	369,784	18,489	23.640	0.507				
Feb-04	19	221,517	11,659	23.179	-0.461				
Mar-04	23	448,543	19,502	23.694	0.514				

Apr-04	21	260,029	12,382	23.240	-0.454				
May-04	20	227,239	11,362	23.154	-0.086				
Jun-04	21	370,668	17,651	23.594	0.441				
Jul-04	21	305,519	14,549	23.401	-0.193				
Aug-04	22	179,688	8,168	22.823	-0.577				
Sep-04	21	357,007	17,000	23.556	0.733				
Oct-04	21	254,489	12,119	23.218	-0.338				
Nov-04	21	363,406	17,305	23.574	0.356				
Dec-04	22	570,918	25,951	23.979	0.405				
Jan-05	20	375,484	18,774	23.656	-0.324				
Feb-05	19	338,922	17,838	23.605	-0.051				
Mar-05	22	590,862	26,857	24.014	0.409				
Apr-05	21	282,018	13,429	23.321	-0.693				
May-05	21	323,652	15,412	23.458	0.138				
Jun-05	22	517,022	23,501	23.880	0.422				
Jul-05	20	457,487	22,874	23.853	-0.027				
Aug-05	23	605,534	26,328	23.994	0.141				
Sep-05	21	312,281	14,871	23.423	-0.571				
Oct-05	21	258,956	12,331	23.235	-0.187				
Nov-05	21	192,736	9,178	22.940	-0.295				
Dec-05	21	308,134	14,673	23.409	0.469				
Jan-06	20	526,550	26,328	23.994	0.585				
Feb-06	19	301,446	15,866	23.487	-0.506				
Mar-06	23	1,211,344	52,667	24.687	1.200				
Apr-06	19	407,345	21,439	23.788	-0.899				
May-06	22	260,121	11,824	23.193	-0.595				
Jun-06	22	375,296	17,059	23.560	0.367				
Jul-06	20	232,654	11,633	23.177	-0.383				
Aug-06	23	310,050	13,480	23.325	0.147				
Sep-06	20	236,782	11,839	23.195	-0.130				
Oct-06	22	213,342	9,697	22.995	-0.200				
Nov-06	21	292,456	13,926	23.357	0.362				
Dec-06	20	349,512	17,476	23.584	0.227				
Jan-07	20	372,740	18,637	23.648	0.064				

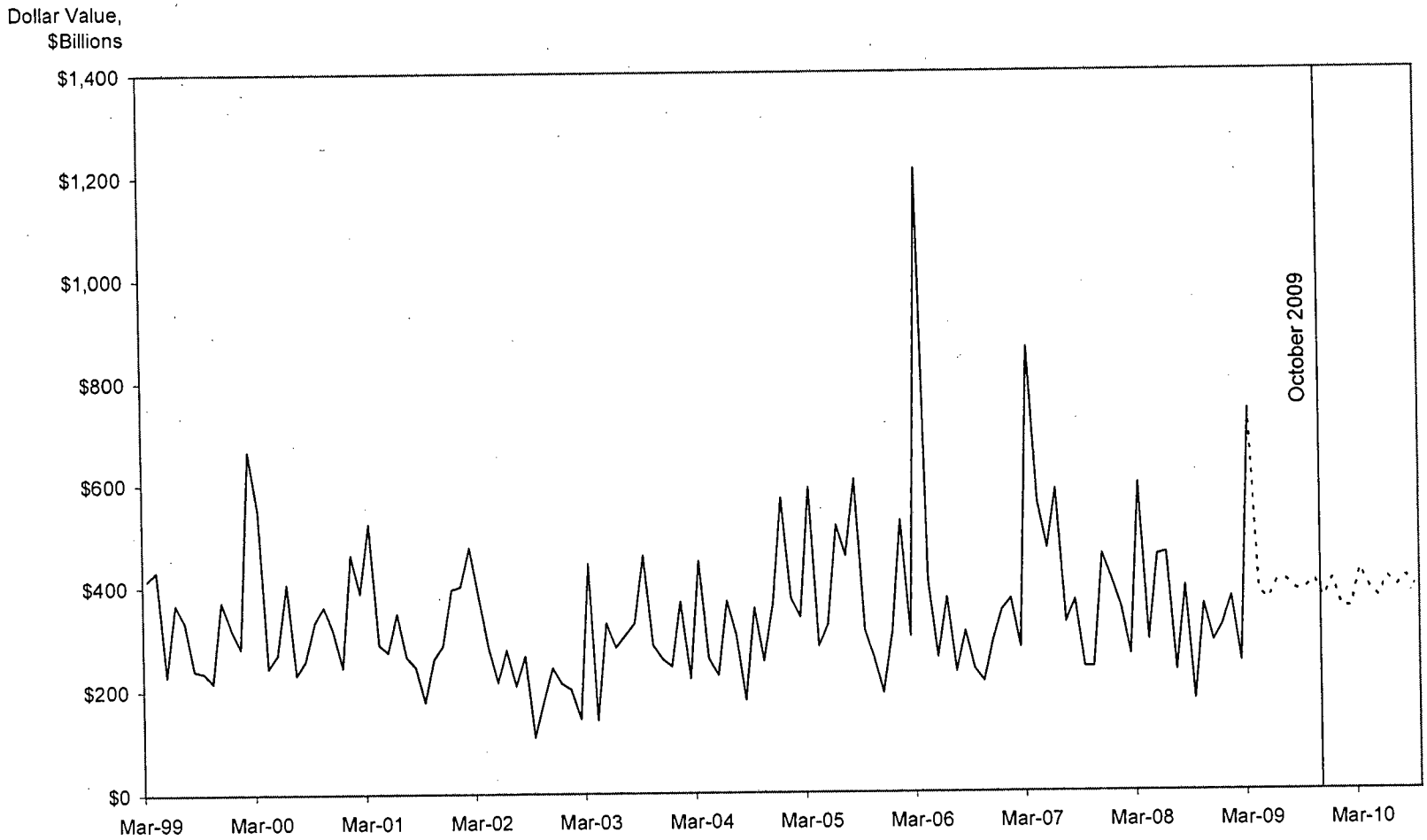
Feb-07	19	278,753	14,671	23.409	-0.239				
Mar-07	22	862,786	39,218	24.392	0.983				
Apr-07	20	562,103	28,105	24.059	-0.333				
May-07	22	470,843	21,402	23.787	-0.272				
Jun-07	21	586,822	27,944	24.053	0.267				
Jul-07	21	326,612	15,553	23.468	-0.586				
Aug-07	23	369,172	16,051	23.499	0.032				
Sep-07	19	241,059	12,687	23.264	-0.235				
Oct-07	23	239,652	10,420	23.067	-0.197				
Nov-07	21	458,654	21,841	23.807	0.740				
Dec-07	20	410,200	20,510	23.744	-0.063				
Jan-08	21	354,433	16,878	23.549	-0.195				
Feb-08	20	263,410	13,171	23.301	-0.248				
Mar-08	20	596,923	29,846	24.119	0.818				
Apr-08	22	292,534	13,297	23.311	-0.809				
May-08	21	456,077	21,718	23.801	0.491				
Jun-08	21	461,087	21,957	23.812	0.011				
Jul-08	22	232,896	10,586	23.083	-0.730				
Aug-08	21	395,440	18,830	23.659	0.576				
Sep-08	21	177,636	8,459	22.858	-0.800				
Oct-08	23	360,494	15,674	23.475	0.617				
Nov-08	19	288,911	15,206	23.445	-0.030				
Dec-08	22	319,584	14,527	23.399	-0.046				
Jan-09	20	375,065	18,753	23.655	0.255				
Feb-09	19	249,666	13,140	23.299	-0.356				
Mar-09	22	739,931	33,633	24.239	0.940				
Apr-09	21					23.565	0.365	18,337	385,086
May-09	20					23.566	0.368	18,359	367,175
Jun-09	22					23.566	0.370	18,380	404,363
Jul-09	22					23.566	0.372	18,402	404,834
Aug-09	21					23.567	0.374	18,423	386,883
Sep-09	21					23.567	0.377	18,444	387,333
Oct-09	22					23.567	0.379	18,466	406,250
Nov-09	20					23.568	0.381	18,487	369,748

Dec-09	22					23.568	0.383	18,509	407,197
Jan-10	19					23.568	0.386	18,531	352,080
Feb-10	19					23.569	0.388	18,552	352,490
Mar-10	23					23.569	0.390	18,574	427,195
Apr-10	21					23.569	0.392	18,595	390,502
May-10	20					23.570	0.394	18,617	372,339
Jun-10	22					23.570	0.396	18,639	410,050
Jul-10	21					23.570	0.399	18,660	391,867
Aug-10	22					23.571	0.401	18,682	411,006
Sep-10	21					23.571	0.403	18,704	392,781

Figure A

Aggregate Maximum Offering Prices Subject to Securities Act Section 6(b)

(Dashed Line Indicates Forecast Values)



APPENDIX B

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to investors based on the value of their transactions. This appendix provides the formula for determining such fees, which the Commission adjusts annually, and may adjust semi-annually.[16] In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected dollar transaction volume on the securities exchanges and certain over-the-counter markets over the course of the year. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected dollar transaction volume.

For 2010, the Commission has estimated dollar transaction volume by projecting forward the trend established in the previous decade. More specifically, dollar transaction volume was forecasted for months subsequent to March 2009, the last month for which the Commission has data on transaction volume.

The following sections describe this process in detail.

A. Baseline estimate of the aggregate dollar amount of sales for fiscal year 2010.

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (March 1999 - March 2009). The monthly aggregate dollar amount of sales (exchange plus certain over-the-counter markets) is presented in column C of Table B.

Next, calculate the change in the natural logarithm of ADS from month to month. The average monthly percentage growth of ADS over the entire sample is 0.010 and the standard deviation is 0.130. Assuming the monthly percentage change in ADS follows a random walk,

---

[16] Congress requires that the Commission make a mid-year adjustment to the fee rate if four months into the fiscal year it determines that its forecasts of aggregate dollar volume are reasonably likely to be off by 10% or more.

calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 1.8 %.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for March 2009 ($267,521,624,488) to forecast ADS for April 2009 ($272,427,017,936 = $267,521,624,488 x 1.018).[17] Multiply by the number of trading days in April 2009 (21) to obtain a forecast of the total dollar volume for the month ($5,720,967,376,649). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column G of Table B. 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 $\mu = 0.010$ 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 $ADS_t = 1.018 \times ADS_{t-1}$.

---

[17] The value 1.018 has been rounded. All computations are done with the unrounded value.

6. For April 2009, this gives a forecast ADS of 1.018 × $267,521,624,488 = $272,427,017,936. Multiply this figure by the 21 trading days in April 2009 to obtain a total dollar volume forecast of $5,720,967,376,649.

7. For May 2009, multiply the April 2009 ADS forecast by 1.018 to obtain a forecast ADS of $277,422,358,822. Multiply this figure by the 20 trading days in May 2009 to obtain a total dollar volume forecast of $5,548,447,176,435.

8. Repeat this procedure for subsequent months.

B. Using the forecasts from A to calculate the new fee rate.

1. Use Table B to estimate fees collected for the period 10/1/09 through 10/31/09. The projected aggregate dollar amount of sales for this period is $6,683,755,563,790. Projected fee collections at the current fee rate of 0.0000257 are $171,772,518.

2. Estimate the amount of assessments on securities futures products collected during 10/1/09 and 9/30/19 to be $9,966 by projecting a 1.8% monthly increase from a base of $663 in March 2009.

3. Subtract the amounts $171,772,518 and $9,966 from the target offsetting collection amount set by Congress of $1,161,000,000 leaving $989,217,516 to be collected on dollar volume for the period 11/1/09 through 9/30/10.

4. Use Table B to estimate dollar volume for the period 11/1/09 through 9/30/10. The estimate is $78,139,121,873,813. Finally, compute the fee rate required to produce the additional $989,217,516 in revenue. This rate is $989,217,516 divided by $78,139,121,873,813 or 0.0000126597.

5. Round the result to the seventh decimal point, yielding a rate of .0000127 (or $12.70 per million).

Table B. Estimation of baseline of the aggregate dollar amount of sales.

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/09 to 10/31/09 ($Millions)	6,683,756
b. Baseline estimate of the aggregate dollar amount of sales, 11/1/09 to 9/30/10 ($Millions)	78,139,122
c. Estimated collections in assessments on securities futures products in FY 2010 ($Millions)	0.010
d. Implied fee rate (($1,161,000,000 - 0.0000257*a - c) /b)	$12.70

Data

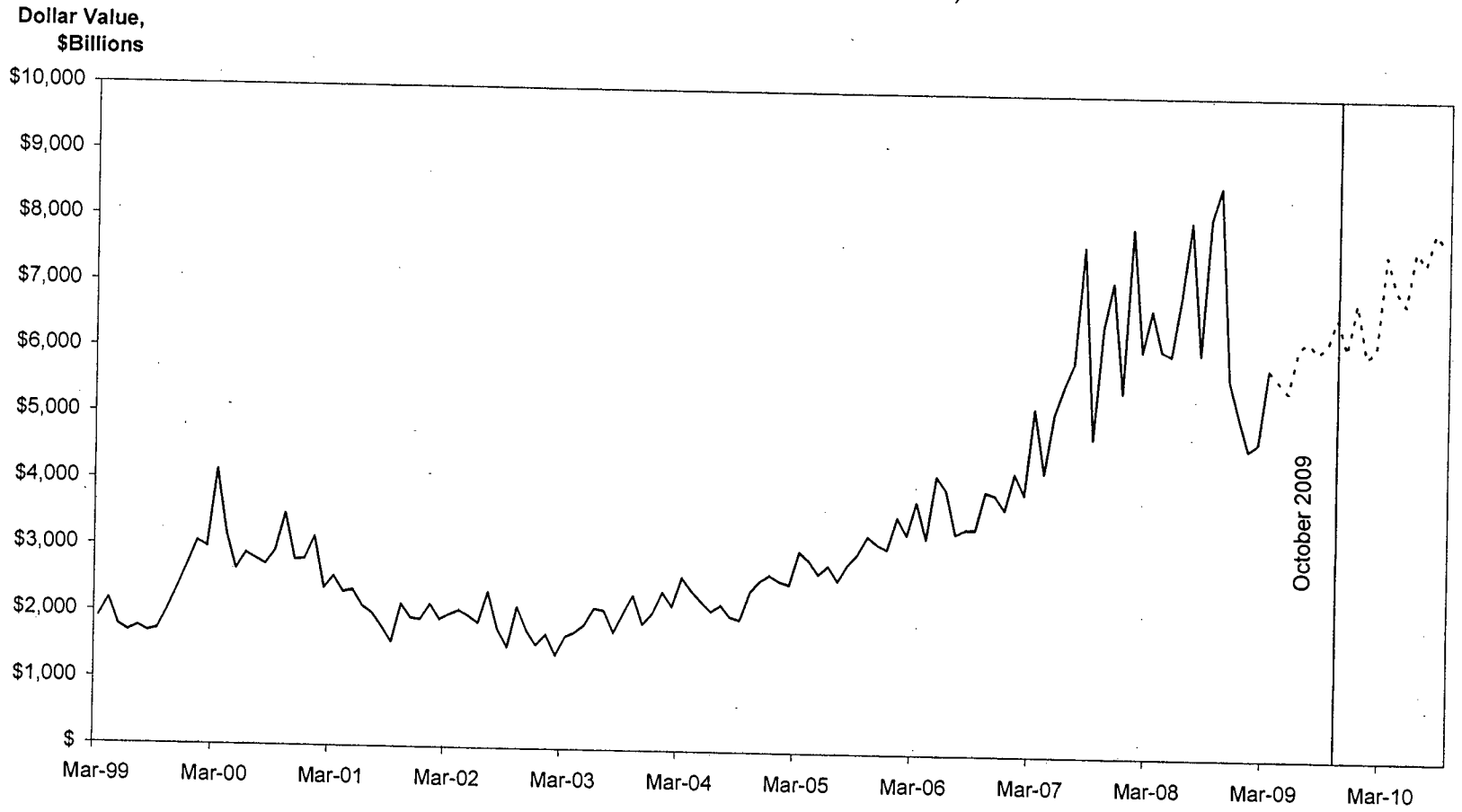
(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Mar-99	23	1,908,967,664,074	82,998,594,090	-		
Apr-99	21	2,177,601,770,622	103,695,322,411	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	4,771,424,513,087	251,127,605,952	0.073		
Mar-09	22	5,885,475,738,738	267,521,624,488	0.063		
Apr-09	21				272,427,017,936	5,720,967,376,649
May-09	20				277,422,358,822	5,548,447,176,435
Jun-09	22				282,509,296,462	6,215,204,522,163
Jul-09	22				287,689,510,414	6,329,169,229,116
Aug-09	21				292,964,711,034	6,152,258,931,719
Sep-09	21				298,336,640,039	6,265,069,440,810
Oct-09	22				303,807,071,081	6,683,755,563,790
Nov-09	20				309,377,810,339	6,187,556,206,780
Dec-09	22				315,050,697,107	6,931,115,336,350
Jan-10	19				320,827,604,406	6,095,724,483,718
Feb-10	19				326,710,439,603	6,207,498,352,458
Mar-10	23				332,701,145,038	7,652,126,335,865
Apr-10	21				338,801,698,666	7,114,835,671,980
May-10	20				345,014,114,712	6,900,282,294,237
Jun-10	22				351,340,444,334	7,729,489,775,354
Jul-10	21				357,782,776,302	7,513,438,302,342
Aug-10	22				364,343,237,685	8,015,551,229,067
Sep-10	21				371,023,994,555	7,791,503,885,662

Figure B.

Aggregate Dollar Amount of Sales Subject to Exchange Act Sections 31(b) and 31(c)[1]
Methodology Developed in Consultation With OMB and CBO
(Dashed Line Indicates Forecast Values)



[1]Forecasted line is not smooth because the number of trading days varies by month.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59855; File No. 4-581]

Roundtable on Short Selling Price Test Restrictions and Short Sale Circuit Breakers

AGENCY: Securities and Exchange Commission.

ACTION: Notice of roundtable discussion; request for comment.

SUMMARY: In light of current instability in the financial markets and the erosion of investor confidence, the Commission is evaluating the issue of short sale price test restrictions and short sale circuit breakers. On April 8, 2009, the Commission unanimously voted to propose two new approaches to short selling regulation. The first approach proposes two permanent market-wide short sale price test restrictions. The second approach proposes three circuit breaker rules that, when triggered by a significant intraday decline in a security's price, would impose either a temporary halt on short selling of an individual security, or a temporary price test restriction.

The proposing release is available on the Commission's Internet Web site at http://www.sec.gov/rules/proposed/2009/34-59748.pdf. The Commission will host a roundtable to discuss the effectiveness and impact of short sale price test restrictions generally, as well as the proposed regulatory alternatives. The roundtable discussion will be held in the auditorium of the Securities and Exchange Commission headquarters at 100 F Street, NE, in Washington, DC on May 5, 2009 from 10:00 am to approximately 3:30 pm. The public is invited to observe the roundtable discussion. Seating will be available on a first-come, first-served basis. The roundtable discussion also will be available via webcast on the Commission's Web site at www.sec.gov.

DATES: The roundtable discussion will take place on May 5, 2009. The Commission will accept comments regarding issues addressed in the roundtable discussion and otherwise regarding the proposed rule amendments until June 19, 2009.

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

Electronic Comments:

- Use the Commission's Internet comment form (www.sec.gov/news/press.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-581 on the subject line.

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 4-581. 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). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: The Division of Trading and Markets, at (202) 551-5720, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-7561.

SUPPLEMENTARY INFORMATION: On April 8, 2009, the Commission proposed amendments to Rule 201 of Regulation SHO under the Securities Exchange Act of 1934. The proposed amendments would permanently place restrictions on the prices at which NMS stocks may be sold short ("short sale price tests" or "short sale price test restrictions") or would impose temporary limitations on short selling in a particular NMS stock during a specified market decline in the price of that security ("proposed circuit breaker rules"). In connection with the proposed short sale price tests and the proposed circuit breaker rules, the Commission also proposed to amend Regulation SHO to require that a broker-dealer mark a sell order "short exempt" if the seller is relying on an exception to a proposed short sale price test restriction or a proposed circuit breaker rule.

The proposed amendments would come almost two years after the Commission eliminated all short sale price test restrictions in July 2007. Prior to removing short sale price test restrictions, the Commission reviewed the issue extensively, sought public comment and directed staff study and empirical analysis on the market impact of short sale price test restrictions over a period of several years.

As the current financial crisis has continued to erode investor confidence, the Commission has received requests from many commenters to consider imposing restrictions with regard to short selling, in particular to reinstate some form of short sale price test restrictions. Due to the extreme current market conditions, the Commission believes it is appropriate at this time to examine and seek comment on whether to impose a short sale price test or a short sale

circuit breaker rule. The May 5, 2009 roundtable will help ensure that any policy decisions the Commission makes based on these proposals is the product of a highly deliberate evaluation process.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: May 1, 2009

F

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2871 / April 22, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13454

In the Matter of **HENNESSEE GROUP LLC and CHARLES J. GRADANTE,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f), AND 203(k) 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 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Hennessee Group LLC ("Hennessee Group") and Charles J. Gradante ("Gradante") (together, "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 and Cease-And-Desist Proceedings Pursuant to Sections 203(e), 203(f), and 203(k). of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

A. RESPONDENTS AND OTHER RELEVANT ENTITIES

Respondents

Hennessee Group LLC is an investment adviser registered with the Commission pursuant to Section 203(a) of the Advisers Act, and is a New York limited liability company with its principal place of business in New York City. Hennessee Group is a hedge fund consultant that provides a range of hedge fund investment advisory services for its clients, which consist largely of qualified individual investors and family groups as well as foundations, endowments, and similar institutions. In 2005, Hennessee Group had approximately 100 clients and $1.35 billion in client assets under management.

Charles J. Gradante ("Gradante"), age 63, resides in New York City. From 1997 through the present, Gradante has served as president, chief executive officer, chief investment officer, and a managing principal of Hennessee Group, which he co-founded with his spouse. At all relevant times, Gradante was a principal, agent, and control person of Hennessee Group and an investment adviser to Hennessee Group's clients. Gradante supervised all aspects of Hennessee Group's due diligence evaluation concerning the Bayou hedge funds and ultimately was responsible for Hennessee Group's decision to recommend investments in the funds to its clients.

Other Relevant Individuals and Entities

Bayou Fund LLC was a Stamford, Connecticut hedge fund formed in 1996 that was directed, managed, and controlled by an investment adviser, Bayou Management, LLC, that, in turn, was directed, managed, and controlled by Samuel Israel III, Daniel E. Marino, and, from 1996 through October 2001, James G. Marquez ("Marquez"). In January 2003, Bayou Management reorganized Bayou Fund into four successor funds: Bayou Superfund, LLC; Bayou Accredited Fund, LLC; Bayou Affiliates Fund, LLC; and Bayou No Leverage Fund, LLC. The successor funds are collectively referred to as the "Bayou Funds" and, for ease of reference, the Bayou Fund, the successor Bayou Funds, and Bayou Management, LLC are collectively referred to herein as "Bayou." Neither the Bayou Funds nor Bayou Management was registered with the Commission in any capacity.

Samuel Israel III ("Israel"), age 49, was the owner and managing member of Bayou Management from the time of its inception in 1996 until it ceased operation as a hedge fund in late 2005.

---

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

Daniel E. Marino ("Marino"), age 48, was the chief operating officer and chief financial officer of Bayou Management from the time of its inception in 1996 until it ceased operation as a hedge fund in late 2005.

B. SUMMARY

Hennessee Group is a hedge fund consultant and investment adviser that recommends hedge funds for client investment and monitors those investments on its clients' behalf. In the course of soliciting clients, Hennessee Group, by and through its principal, Charles Gradante, made numerous representations concerning the quality and rigor of its due diligence process for evaluating hedge funds. Hennessee Group also routinely represented to clients and prospective clients that it would not recommend investments in hedge funds that did not satisfy all phases of its due diligence. Hennessee Group's services in this regard were particularly important to its clients when, as was the case with Bayou, information regarding a fund's trading strategies, solvency, and management was not publicly available. With regard to Bayou, Hennessee Group, at Gradante's direction, did not perform several key elements of its advertised due diligence practices.

From February 2003 through August 2005, approximately forty clients of Hennessee Group invested a total of over $56 million in the Bayou funds after receiving Hennessee Group's recommendations. Most of those monies were lost and dissipated by Bayou's principals, who defrauded their investors by fabricating Bayou's performance in client account statements, periodic newsletters, and year-end financial statements that included a phony audit opinion fabricated by one of Bayou's principals.

Hennessee Group and Gradante, in their capacities as investment advisers, owed fiduciary duties to their clients to perform the services that they represented they would provide and to disclose all material departures from the representations that they made to their clients. Despite their representations about their services, with regard to the Bayou Funds and the funds' management, Hennessee Group and Gradante did not perform two of the five elements of the due diligence evaluation that they had represented to their clients they would undertake. In addition, Hennessee Group and Gradante failed to adequately respond to information that they received that suggested that the identity of Bayou's outside auditor was in doubt and that there existed a potential conflict of interest between one of Bayou's principals and its purported outside auditor.

As a result of the conduct described above, Hennessee Group and Gradante willfully violated Section 206(2) of the Advisers Act, which prohibits any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client, and Gradante caused Hennessee Group's violations of Section 206(2) of the Advisers Act.

C. FACTS

Background – The Bayou Fraud

In 1996, Israel, Marino, and Marquez founded the Bayou Fund as a hedge fund or private investment pool. Israel and Marquez were Bayou's portfolio managers and Marino served as chief financial officer and chief operating officer. Marquez resigned from the Bayou entities in October 2001, and Israel and Marino continued to operate Bayou Fund and its four successor funds through 2005.

Bayou's purported investment strategy was day trading – buying and selling stocks throughout the day in an attempt to capture profits from market momentum. Israel represented to investors that he had developed a unique trading system and technical analysis that enabled him to trade profitably regardless of market conditions. Bayou also represented that, in order to maintain liquidity and minimize overnight exposure, virtually all of Bayou's securities positions were converted into cash at the close of each trading day.

Almost from its inception, the Bayou Fund lost money from trading. By 1997, Bayou devised and implemented a scheme to defraud investors and prospective investors by fabricating the fund's performance in monthly client account statements, periodic newsletters, and year-end financial statements. In 1998, realizing that the funds could not withstand an independent audit, Bayou's principals dismissed the funds' then-auditor, Grant Thornton LLP ("Grant Thornton"), and Marino fabricated "independent" audited financial statements and a phony auditor opinion letter. The bogus opinion letter was written on the stationery of a purported accounting firm named "Richmond-Fairfield Associates" ("Richmond-Fairfield"). From 1996 through mid-2005, Bayou attracted over $400 million in investor capital by concealing trading losses and giving investors the misleading impression that the funds achieved modest and steady profits. The fraud unraveled in August 2005, after Bayou issued worthless redemption checks to certain investors from overdrawn bank accounts and began shutting down its operations.

Hennessee Group's Hedge Fund Consulting Services

Gradante managed Hennessee Group as an independent hedge fund consulting firm since its founding in 1997. Hennessee Group and its principals held themselves out as "Pioneers in Hedge Fund Consulting" with years of experience helping clients achieve "higher investment returns with lower risk" by recommending "a customized portfolio of hedge funds, properly diversified and managed." Hennessee Group's client relationships typically began with a meeting with the prospective client during which Gradante and others described Hennessee Group's services and provided a written presentation outlining its hedge fund evaluation and selection process and containing sample portfolios of hedge funds. If the prospective client wished to retain Hennessee Group, the parties executed an advisory agreement. Hennessee Group's advisory fee was one percent or less of the value of the assets that a client invested in hedge funds based on the firm's recommendation.

From 2002 through 2005 (the "relevant period"), Hennessee Group promoted its process for evaluating and selecting hedge funds as the "Five Level Due Diligence Process." Hennessee Group represented to clients and prospective clients that it would not recommend investment in hedge funds that did not satisfactorily complete all five levels of its due diligence evaluation. As explained to clients and prospective clients, that process included:

> (i) a request for general information and data on "historical returns" from the hedge fund;
>
> (ii) a face-to-face initial interview with the fund manager that covered numerous topics such as the background of the fund manager, the fund's "portfolio construction and attributes" and "risk management" principles, and the name and contact information of the fund's outside audit firm;
>
> (iii) a detailed review and analysis of the fund's investment portfolio, trading practices, and risk management discipline, generally based on prime brokerage reports sufficient to reflect the fund's actual activity over a given period;
>
> (iv) an on-site visit to the fund's offices to meet and interview key personnel such as the portfolio manager and head trader, examine the fund's "technology and systems," discuss the results of the Level III portfolio/trading analysis, and address any remaining issues from Hennessee Group's earlier due diligence; and
>
> (v) a reference and background check on the fund's manager, consisting primarily of "utiliz[ing] the principals' contacts to verify [the] reputation of [the] portfolio manager," and a "review of all audited financial statements," as well as a review of the fund's offering memorandum and "subscription documents."

Hennessee Group's marketing materials, its website, and its oral and written presentations described or referred to this "Five Level Due Diligence Process." Hennessee Group routinely touted the excellence and rigor of the process.

Hennessee Group had an Investment Committee, chaired by Gradante and comprised of the firm's research staff, that met each month to review the status of each fund then undergoing the due diligence process and determine whether to proceed to the next level of evaluation of a particular fund. After recommending an investment in a hedge fund to its clients, Hennessee Group committed to monitor the fund for its clients on a monthly basis. Hennessee Group made monthly requests to funds for performance data, and conducted periodic meetings or conference calls with the fund manager to inquire about the manager's current market views and concerns, the fund's portfolio structure, the manager's expectations for the fund, and any organizational changes.

Hennessee Group's Recommendation of Bayou

In April 2002, a Hennessee Group client suggested that Hennessee Group review Bayou and several other funds with a view toward possibly recommending investments in Bayou to

Hennessee Group's clients. Hennessee Group contacted Bayou to initiate review and Bayou agreed to begin the process shortly thereafter. Hennessee Group began recommending Bayou to its clients in December 2002. Thereafter, Hennessee Group conducted ongoing monitoring of Bayou, which consisted of inquiries about the manager's current market views and concerns, the fund's portfolio structure, the manager's expectations for the fund, and any organizational changes, and continued recommending client investments in Bayou from January 2003 through July 2005, when Bayou announced that it would be liquidating the funds.

During the relevant period, Hennessee Group collected over $500,000 in advisory fees for referring approximately forty clients to the Bayou Funds. By mid-2005, just prior to the public disclosure of Bayou's failure, Hennessee Group clients had placed over $56 million in capital contributions into Bayou.

Hennessee Group Did Not Conduct a Due Diligence Evaluation of Bayou Consistent With its Representations to Clients and Prospective Clients

With regard to Bayou, Hennessee Group, at Gradante's direction, failed to perform two elements of the due diligence evaluation that Hennessee Group had told its clients and prospective clients that it would do: (1) a portfolio/trading analysis; and (2) a verification of Bayou's relationship with its purported independent auditor. By not conducting the entire due diligence evaluation that it had advertised, and by failing to disclose to clients that its evaluation of Bayou deviated from its prior representations, Hennessee Group and Gradante rendered the prior representations about the due diligence process materially misleading and breached their fiduciary duties to Hennessee Group's clients.

A. Hennessee Group Did Not Conduct a Portfolio/Trading Analysis on the Bayou Funds

Hennessee Group maintained detailed procedures on how the five levels of due diligence that were described in its marketing materials and website were to be conducted. Hennessee Group's evaluation purportedly included a detailed review and analysis of a fund's portfolio and trading records (also known as a "Level III review"). The promotional materials that Hennessee Group distributed to clients and prospective clients created the impression that the portfolio/trading analysis was Hennessee Group's specialty and a core element of its due diligence process, stating, for example, that investors "need to see more than just the returns; [they] should be able to understand how the returns were achieved and what factors affected them."

In order to conduct its portfolio/trading analysis, Hennessee Group sought prime brokerage reports either directly from a fund or from the fund's prime broker, consisting of a "portfolio snapshot" of a fund's investments at a given time and "trading activity reports" (also known as "realized and unrealized gain/loss reports"). Hennessee Group purportedly used the data in the reports to evaluate a manager's risk management discipline, hedging strategies, stop losses, distribution of returns by security, pricing of securities, and other trading practices. Although Hennessee Group often was unable to obtain such reports from funds, the firm failed to disclose to its clients that it did not conduct a portfolio/trading analysis under such circumstances.

In the fall of 2002, Bayou refused to provide Hennessee Group with the prime brokerage reports that Hennessee Group had requested. However, instead of insisting that Bayou provide the reports as a condition of potentially being recommended, Hennessee Group proceeded to the next phases of due diligence. Gradante decided that a portfolio/trading analysis was irrelevant for a day-trading fund like Bayou, which stated in marketing materials that it held securities positions for brief periods of time and converted positions to cash prior to each day's market closing.

As a result, Hennessee Group did not obtain or evaluate any quantitative information about Bayou's portfolio characteristics, investment and trading strategies, or risk management discipline. Instead of confirming Bayou's results and processes through an analysis of Bayou's historical trading data to determine whether the fund was, in fact, executing its purported "high-velocity" day-trading strategy and utilizing appropriate risk management techniques, Gradante and Hennessee Group relied entirely on Bayou's uncorroborated representations and purported rates of return that Bayou had provided during its initial information-gathering phases.

Hennessee Group never told the clients to whom it recommended Bayou that it had not conducted a portfolio/trading analysis on the funds. By failing to disclose this information in connection with its recommendation of Bayou, Hennessee Group left those clients with the misleading impression that it had conducted a portfolio, trading, and risk management evaluation of Bayou and that Bayou had satisfied Hennessee Group's purported standards. In so doing, Hennessee Group and Gradante breached their fiduciary duties to Hennessee Group's clients.

B. Hennessee Group Failed to Verify Bayou's Relationship with its Independent Auditor

Hennessee Group told many of the clients to whom it recommended an investment in Bayou, that as part of its review of a fund's audited financial statements, Hennessee Group verified the fund's relationship with its purported independent auditor and that the audit firm had actually conducted the audit. Hennessee Group's staff frequently made this representation to prospective clients. In reality, Hennessee Group's "Verify Auditor" procedure consisted only of confirming that a fund's financial statements contained an unqualified audit opinion letter.

In mid-2002, Bayou provided Hennessee Group with copies of its three most-recent annual financial statements, for fiscal years 1999 through 2001. Those financial statements were presented on Richmond-Fairfield stationery and included unqualified audit opinions purportedly issued by Richmond-Fairfield, but in fact were drafted by Marino and signed by him in the firm's name. Bayou also told Hennessee Group numerous times during the due diligence process that the funds had "outgrown" Richmond-Fairfield and had selected another accounting firm, Hertz, Herson & Co., LLP ("Hertz Herson"), to serve as its new auditor beginning with the 2002 annual audit. However, despite having represented to prospective clients that it verified a fund's audit relationship, Hennessee Group took no steps during the initial evaluation to contact either Hertz Herson, which was an actual accounting firm, or Richmond-Fairfield to confirm whether either had an audit relationship with Bayou.

Auditor verification was particularly warranted with regard to Bayou. Hennessee Group had no prior dealings with and was unfamiliar with Richmond-Fairfield and Hertz Herson. Of the approximately 150 hedge funds that Hennessee Group monitored on behalf of its clients, none other than Bayou had ever used Hertz Herson or Richmond-Fairfield as its outside auditor.

Hennessee Group Disregarded Red Flags
During its Due Diligence Review and Subsequent Monitoring of Bayou

Hennessee Group also failed to adequately investigate and reconcile certain negative and contradictory information about Bayou that Hennessee Group had a duty to investigate by virtue of its representations to its clients that it would conduct on-going monitoring of the clients' investments.

Although Hennessee Group reviewed audited financial statements of the Bayou funds, Hennessee Group failed to reconcile Bayou's conflicting claims about its auditor's identity, and accepted without the requisite skepticism or searching inquiry Bayou's claim that it had changed outside auditors several times. During the due diligence process, Bayou provided Hennessee Group with several contradictory responses regarding the identity of its auditor. In June 2002, Bayou informed Hennessee Group that its auditor was Grant Thornton. During the fall of 2002, Bayou gave Hennessee Group three different marketing documents, two identifying Hertz Herson as Bayou Fund's auditor, and the third identifying Grant Thornton as Bayou Fund's auditor. In fact, Grant Thornton had not audited Bayou since fiscal year 1997, and Hertz Herson had never been retained to audit the hedge fund.

In September 2002, Israel and Marino told Gradante that, while Bayou's original auditor had been Grant Thornton, "bad service" had prompted Bayou to switch to the "more client friendly" Richmond-Fairfield in 1999. At that time, Israel and Marino also told Gradante that Bayou had "outgrown" Richmond-Fairfield and had selected Hertz Herson to be its new auditor. Marino later provided Hennessee Group with the name of the purported engagement partner at Hertz Herson.

Hennessee Group did not attempt to investigate this inconsistent information to determine whether Hertz Herson had in fact been retained to conduct the audit of Bayou Fund for 2002. In fact, Hertz Herson had not been retained to conduct the 2002 audit of the Bayou Fund. In addition, Hennessee Group also failed to contact Richmond-Fairfield or Grant Thornton to verify those past relationships and obtain their perspectives on whether and why Bayou had terminated them.

In the spring of 2003, after Hennessee Group had already begun recommending investments in Bayou, Bayou sent Hennessee Group two marketing documents that identified Hertz Herson as Bayou's auditor. One of those documents further stated, "In 2002, *Hertz Herson conducted a first time audit* for the Bayou Fund LLC. Previous auditor for the Bayou Fund LLC was Richmond Fairfield." (Emphasis added.) As noted above, Bayou previously had told Hennessee Group during the due diligence process in 2002 that it had outgrown Richmond-Fairfield and retained Hertz Herson as its new auditor.

Shortly thereafter, in May of 2003, Hennessee Group received a copy of Bayou Fund's audited financial statements for fiscal year 2002, presented on Richmond-Fairfield stationery, which included an audit opinion from Richmond-Fairfield, rather than Hertz Herson. Gradante and a Hennessee Group research analyst both reviewed Bayou's audit report as part of the firm's routine monitoring process, and noted the discrepancy in the information that Bayou had provided concerning the identity of its outside auditor, but made no effort to inquire into Bayou's prior representations about having retained Hertz Herson.

The following year, in June 2004, Hennessee Group received a copy of the Bayou Funds' audited financial statements for fiscal year 2003, which again purportedly had been prepared and certified by Richmond-Fairfield, not Hertz Herson. Despite this, Hennessee Group and Gradante took no action to investigate this inconsistency in Bayou's representations regarding its auditor, and relied solely on an explanation from Bayou.

In late April 2005, Marino told Hennessee Group that "[t]he audit for 2004 was recently completed by Hertz Herson and he anticipates it being sent out in the next week or two." However, Hennessee Group did not actually receive Bayou's fiscal year 2004 audit until mid-July 2005. As with the 2002 and 2003 audits, Bayou's 2004 audit purportedly had been conducted and certified by Richmond-Fairfield, instead of Hertz Herson. One week after Hennessee Group received the 2004 audit report, Bayou announced that it was liquidating the funds. Hennessee Group and Gradante did not disclose to any of their clients the contradictory information that Bayou had provided over several years concerning the identity of its auditor.

Hennessee Group and Gradante Failed to Investigate a Rumor
That Marino was Affiliated With Bayou's Outside Auditing Firm

Hennessee Group also failed to investigate a rumor concerning Marino's connection to Richmond-Fairfield. On Friday, January 14, 2005, a client of Hennessee Group who had invested in Bayou sent an email to Hennessee Group stating:

> I am told the head of back office for Bayou is also a principal in the firm that does their annual audit; also that there have been discrepancies in K-1's put out by Bayou. Seems like a lot of smoke. For a 12 to 15% return fully taxed at ordinary rates, I'm thinking I shouldn't take a chance on another implosion. When will your next due diligence take place on Bayou and will it cover such things as the fact it appears the head of back office (Marino or some name like that) is auditing himself by being a principal of the outside audit firm?

On January 19, four days after Hennessee Group received the investor's email, Gradante sent an email to Israel and Marino titled "RUMOR WITH POTENTIALLY DAMAGING IMPACT ON BAYOU" that stated:

> A CLIENT of hennessee and bayou has heard that dan marino is a principal or has an economic interest in your accounting firm.....i know you guys are always doing the right thing so i wouldn't be surprised if this is a stretch of

the truth.....can you go on the record for me so i can help us all "NIP THIS IN THE BUD."[2]

Marino called Gradante in response to the email and told Gradante that, before joining Bayou in 1999, he had been associated with Bayou's audit firm, but that he had severed all ties with the audit firm when he joined Bayou. Gradante accepted Marino's explanation and requested that Marino put a statement of denial in an email or letter. Marino agreed to provide an email by January 21 that would give "a full explanation" of his resume and background.

On January 25, 2005, Marino sent an email to Gradante in which he represented that from 1991 through 1998, Marino operated his own accounting practice at a firm known as "Marino & Group, CPA"; in 1997, Marino began providing accounting and tax advice for the Bayou entities; in 1998, Marino began performing audit work for the Bayou Fund; and in January 1999, Marino sold his share of the accounting firm and accepted Israel's offer to join Bayou full time to manage operations and the back office, and had served as Bayou's chief financial officer and chief operating officer since that time.

Marino's assertions in the email, however, conflicted with information that Bayou had provided to Hennessee Group during the previous three years. For example, at least two Bayou marketing documents provided to Hennessee Group in early 2003 contained biographical information about Marino that stated, "*In 1996*, Mr. Marino joined Mr. Israel as part of the original management team at Bayou as CFO and COO, and *has performed these functions for Bayou since its inception*." (Emphasis added.) These earlier disclosures directly contradicted Marino's assertion in the email to Gradante that he had joined Israel at Bayou in January 1999 as chief financial officer and chief operating officer. In addition, at that time, Hennessee Group's due diligence file and materials on Bayou already contained several statements from Marino that Bayou had switched auditors from Grant Thornton to "a more client friendly" Richmond-Fairfield in 1999, which directly conflicted with Marino's claim in the email that "Marino & Group, CPA" had begun performing audit work for Bayou in 1998.

Gradante read Marino's email shortly after it was received. Although Hennessee Group had information in its files that directly contradicted Marino's explanation, the firm made no effort to verify the assertions Marino made in his email. Gradante took no other steps to verify Marino's claims, such as contacting Richmond-Fairfield or conducting internet and/or public records searches on Richmond-Fairfield or Marino. In fact, Marino was listed as Richmond-Fairfield's registered agent in New York State public records. Publicly-available state accountancy board records disclosed that Richmond Fairfield had been registered with New York State in October 2000 under Marino's name and personal address.

Shortly thereafter, Gradante told the investor that the rumor was false and that Marino had provided a full explanation.

---

[2] At some point, Hennessee Group received information suggesting that the source of the rumor may have been an individual affiliated with a rival hedge fund consulting group that had advised its clients to withdraw all of their money from Bayou.

D. VIOLATIONS

Hennessee Group and Gradante, in their capacities as investment advisers, owed fiduciary duties to their clients to not misrepresent the services that they were providing and to disclose all material departures from the representations that they made to their clients. With regard to the Bayou Funds and the funds' management, Hennessee Group and Gradante failed to conduct two of the five elements of the due diligence review that they had represented to their clients they would undertake. In addition, Hennessee Group and Gradante failed to adequately respond to information that they received that suggested that the identity of Bayou's outside auditor was in doubt and that there existed a potential conflict of interest between one of Bayou's principals and the purported outside auditor of Bayou. Hennessee Group and Gradante breached their fiduciary duties to their investment advisory clients.

As a result of the conduct described above, Hennessee Group and Gradante willfully violated Section 206(2) of the Advisers Act, which prohibits any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client, and Gradante caused Hennessee Group's violations of Section 206(2) of the Advisers Act. Scienter is not a required element of Section 206(2); negligence suffices for liability. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963); *SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992). An investment adviser is accountable for the actions of its principals. *See SEC v. Manor Nursing Ctrs. Inc.*, 458 F.2d 1082, 1089 n.3, 1096-97 nn.16-18 (2d Cir. 1972) (company's scienter imputed from individuals who control it).

E. UNDERTAKINGS

Respondents have undertaken to:

1. Adopt policies and procedures to ensure adequate oral and written disclosures to clients and prospective clients regarding Hennessee Group's process for evaluating, selecting, and monitoring hedge funds, and maintain a written manual setting forth such policies and procedures.

2. Within thirty (30) days of the issuance of this Order, mail a copy of this Order, together with a cover letter in a form not unacceptable to the Commission staff, to each of Hennessee Group's existing clients. Respondents shall also provide a copy of this Order to any new client that engages Hennessee Group or Gradante within two (2) years of the date of 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 Respondents' Offers.

Accordingly, pursuant to 203(e), 203(f), and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents Hennessee Group and Gradante be, and hereby are, censured.

B. Respondents Hennessee Group and Gradante cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act.

C. Respondents shall comply with the undertakings enumerated in Section III.E., above.

D. IT IS FURTHER ORDERED that Respondents Hennessee Group and Gradante shall, within three hundred sixty-five (365) days of the entry of this Order, jointly and severally pay disgorgement of $549,076.00[3] and prejudgment interest of $165,568.12 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice Section 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 Hennessee Group or Gradante 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 Yuri B. Zelinsky, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549.

E. IT IS FURTHER ORDERED that Respondents Hennessee Group and Gradante shall, within thirty (30) days of the entry of this Order, jointly and severally pay a civil money penalty in the amount of $100,000.00 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. Section 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 Hennessee Group or Gradante 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 Yuri B. Zelinsky, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549.

F. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the disgorgement, interest, and penalties referenced in Sections IV.D and E above (the "Distribution Fund"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that they shall not, after offset or reduction in any Related Investor Action based on Respondents' payment of disgorgement in this action, argue that they are

---

[3] The disgorgement amount takes into consideration payments that Hennessee Group previously has made to certain of its clients.

entitled to, nor shall they further benefit by offset or reduction of any part of a Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

G. Respondents shall cooperate with the Distribution Fund Administrator, including upon request, providing any documents, records, and information as are necessary for the Distribution Fund Administrator to carry out his duties.

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. 59817 / April 23, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2966 / April 23, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-11714

In the Matter of Bryan E. Palbaum, 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 20, 2004, Bryan E. Palbaum ("Palbaum") 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 Palbaum pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[1] This order is issued in response to Palbaum'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.

Palbaum was alleged to have engaged in improper professional conduct in connection with performing the reviews and audits of the financial statements filed by Gemstar-TV Guide International, Inc. ("Gemstar") from the fiscal year ended March 31, 2000 through the fiscal year ended March 31, 2002. During most of this time, Palbaum was employed as the co-engagement partner for KPMG LLP's audits and reviews of the financial statements of Gemstar. The Commission alleged that Palbaum failed to exercise professional care and skepticism, failed to obtain sufficient competent evidential matter and over-relied on Gemstar's management representations with respect to the audit and review of Gemstar's financial statements. In addition, Palbaum failed to take appropriate action to correct disclosures that did not comply with GAAP and were inconsistent with Gemstar's financial statements. Finally, Palbaum failed to render accurate audit reports.

[1] *See* Accounting and Auditing Enforcement Release No. 2125 dated October 20, 2004. Palbaum was permitted, pursuant to the order, to apply for reinstatement after three years upon making certain showings.

In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Palbaum 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. Palbaum 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, Palbaum's suspension from practice before the Commission as an independent accountant continues in effect until the Commission determines that a sufficient showing has been made in this regard in accordance with the terms of the original suspension order.

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

On the basis of information supplied, representations made, and undertakings agreed to by Palbaum, it appears that he has complied with the terms of the October 20, 2004 order denying him the privilege of appearing or practicing before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Palbaum, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, has shown good cause for reinstatement. Therefore, it is accordingly,

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Bryan E. Palbaum, 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 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

SECURITIES EXCHANGE ACT OF 1934
Release No. 59831 / April 28, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13457

In the Matter of **Brad E. Parish,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b)(6) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against Brad E. Parish ("Parish" or "Respondent").

II.

In anticipation of the institution of these proceedings, Parish has submitted an Offer of Settlement 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)(6) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that[1]:

[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.

Summary

1. Respondent failed reasonably to supervise David L. McMillan ("McMillan") with a view to preventing and detecting his violations of the federal securities laws during the period January 1999-December 2004. During at least this time period, McMillan operated a Ponzi scheme and defrauded at least 28 investors by lying about purchases and sales of securities, by misappropriating funds for his personal use, and by sending certain investors falsified statements relating to their investment accounts.

Respondent

2. Parish, age 45, resides in Glendale, Arizona. He was a registered representative with Royal Alliance Associates, Inc. ("Royal Alliance") from 1993 through 2004 and with another brokerage firm from January 2005 to the present. Royal Alliance has been registered with the Commission as a broker-dealer since November 1984. Parish was McMillan's immediate supervisor at Royal Alliance from at least 1998 through December 2004.

Other Relevant Person

3. McMillan, age 43, was a registered representative with Royal Alliance from 1994 through 2004, and with another brokerage firm from January 2005 through October 2005 until his fraud was uncovered. McMillan operated a one-man satellite office in Bullhead City, Arizona, which was located about 200 miles away from the Office of Supervisory Jurisdiction ("OSJ") office in Phoenix where Parish was located.

Commission's Civil Action Against McMillan

4. On April 4, 2006, the Commission filed an injunctive action in the United States District Court for the District of Arizona alleging that McMillan committed securities fraud by telling clients he had invested their money in particular investments when in fact he either used the funds for his personal use or to repay earlier investors. The Commission charged McMillan with violating Sections 206(1) and (2) of the Investment Advisers Act of 1940 ("Advisers Act"), Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The court entered a temporary restraining order and asset freeze against McMillan on April 4, 2006 and a preliminary injunction on April 13, 2006. McMillan did not answer the Commission's complaint and the Court entered a default against McMillan on August 29, 2006.

McMillan's Misconduct

5. During at least 1999 through October 2005, McMillan defrauded at least 28 investors, many of whom had accounts with Royal Alliance, out of at least $3 million through the offer and sale of fictitious investments in annuities, fictitious loans to a real estate developer, and real estate loans that were to be secured by fraudulent first deeds of

trust. McMillan falsely represented to investors that their money would continue to be invested in securities when, in fact, he misappropriated their funds either to repay other investors, for his own personal use, or to fund a new outside business activity. He also sent certain investors falsified statements relating to their investments in the fraudulent securities.

Parish's Failure to Supervise McMillan

Parish Failed To Follow Written Procedures Requiring Review of Operational Bank Records of a Remote Office in 2000 and 2001

6. Parish was required to review McMillan's business bank account during each satellite exam starting in 2000. Parish falsely claimed on a satellite exam workpaper that he reviewed McMillan's business banking account in 2001. In fact, the account he claimed to have reviewed was not opened until weeks after the exam. If Parish had properly reviewed McMillan's business bank account that was opened at the time of the 2001 exam, the fraud likely would have been detected because the account contained large checks to and from McMillan's victims. Royal Alliance policy prohibited client checks from being deposited in a representative's business banking account and proper review of McMillan's bank records relating to the bank account that was opened at the time of the exam in 2001 could have uncovered the fraud. Parish also failed to review any business bank account of McMillan's in 2000 as required by the satellite exam workbook. Proper review of McMillan's business bank account in 2000 could have likely prevented or detected the fraud because it also contained checks to and from McMillan's victims.

Parish Failed to Follow Written Procedures Requiring Reasonable Examination of Files at Remote Offices

7. Parish was required to examine McMillan's files to confirm that McMillan was maintaining separate files for outside business activities and was not commingling them with customers' securities files. In order to accomplish this task, Parish examined McMillan's office files during his exams. However, despite years of conducting exams, Parish never examined numerous files located in a room next to the office of McMillan's support staff that held files relating to McMillan's fraudulent investments. If Parish had examined these files, he likely could have prevented or detected the fraud.

Parish Failed To Follow Up On Red Flags

8. First, Parish was confronted with McMillan's declining commissions from 2002-2004. He reviewed McMillan's commissions on a regular basis, which should have given him an understanding of McMillan's income and how it was dropping significantly. McMillan earned $149,000 in 2000, $93,000 in 2001, $40,000 in 2002, $71,000 in 2003, and $13,000 in 2004. He also reviewed McMillan's business banking account on a regular basis during his 2002-2004 satellite exams (a change from his 1999-

2001 exams), which should have given him an understanding of McMillan's expenses of roughly $90,000 per year and the fact that they exceeded his income for 2002-2004. These facts taken together represent red flags regarding McMillan's finances, but Parish failed to make a reasonable inquiry into the issue.

9. Second, Parish missed a suspicious annuity transaction in 2002 despite reviewing the transaction during two separate satellite exams. During the first exam in March 2002, Parish reviewed a February 8, 2002 variable annuity transaction. In the middle of 2002, Royal Alliance provided additional guidance to Parish relating to the review of variable annuity transactions. During the second exam in December 2002, Parish reviewed the February 8, 2002 transaction again and this time asked McMillan for an explanation regarding the purchase of the annuity. McMillan indicated that it was purchased primarily because the client wanted the death benefit. Parish overlooked documents in the file he was reviewing reflecting that the client liquidated almost all of her annuity in July 2002, a fact that should have raised a red flag as to the truthfulness of McMillan's explanation. In fact, McMillan used the money liquidated from this client's annuity to perpetrate his fraud.

10. Finally, from 2000-2004, Parish missed undisclosed outside business activities while reviewing McMillan's files. Parish inspected McMillan's files on a yearly basis and read the labels on the files. An entire shelf of one filing cabinet Parish reviewed contained files relating to one of McMillan's fraudulent investments, but Parish never asked any questions relating to this undisclosed activity. The files were labeled Riverside Associates L.P., which did not match the name of any product or investment McMillan was authorized to sell through Royal Alliance or through an approved outside business activity. The files contained checks to investors signed by McMillan from an undisclosed banking account as well as correspondence relating to McMillan's fraud to investors that was not included in the correspondence file.

Conclusions

11. Section 15(b)(6) of the Exchange Act, incorporating by reference Section 15(b)(4)(E) of the Exchange Act, authorizes the Commission to sanction a person who is associated, or at the time of the alleged misconduct was associated, with a broker or dealer for failing reasonably to supervise, with a view to preventing violations of the federal securities law, another person who commits such a violation if that person is subject to the person's supervision. Parish was responsible for supervising McMillan.

12. Because McMillan violated Sections 206(1) and (2) of the Advisers Act, Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Parish failed to follow written supervisory procedures and failed to adequately investigate red flags of McMillan's fraud, Parish failed reasonably to supervise McMillan within the meaning of Section 15(b)(6) 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 Parish's Offer.

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

A. Parish shall, within ten days of the entry of this Order, pay disgorgement of $1 and a civil money penalty in the amount of $30,000 to the Clerk of the Court, U.S. District Court for the District of Arizona, to be held in such Court's Registry Investment system account established for the Matter of *Securities and Exchange Commission v. David L. McMillan*, Case No. CV-06-0951-PCT-SMM, until further order of such Court. Such payment shall be made by United States postal money order, certified check, bank cashier's check, or bank money order and submitted under cover letter that identifies Parish 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 Donald Hoerl, Regional Director, Securities and Exchange Commission, 1801 California Street., Suite 1500, Denver, CO 80202.

B. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Fund distribution). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of this civil penalty, Parish agrees that he shall not argue that he is entitled to, nor shall he further benefit by offset or reduction of any part of his payment of a civil penalty in this action ("Penalty Offset"). If the Court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this Paragraph, a "Related Investor Action" means a private damages action brought against Parish by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

C. Parish shall be barred from association with any broker or dealer in a supervisory capacity, with the right to reapply for association in such capacity after one year to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by Parish will be subject to the applicable laws and regulations governing the reentry process, and the reentry may be conditioned upon a number of facts, including but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Parish, 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: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59830 / April 28, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13456

In the Matter of **Royal Alliance Associates, Inc.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b)(4) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b)(4) of the Securities Exchange Act of 1934 ("Exchange Act") against Royal Alliance Associates, Inc. ("Royal Alliance" or "Respondent").

II.

In anticipation of the institution of these proceedings, Royal Alliance has submitted an Offer of Settlement 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)(4) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that[1]:

[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.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

(Release No. 34-59829)

Delegation of Authority to the General Counsel

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending its rules to delegate to the General Counsel its authority to designate officers in authorized investigations conducted by the Office of General Counsel. The Office of General Counsel of the Commission has the authority to conduct authorized investigations under Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) of possible violations by attorneys of the Commission Rules of Practice. In connection with these investigations, it may be necessary from time to time to amend the formal orders to add or remove officers designated to conduct the inquiry.

A delegation of authority to the General Counsel to designate officers would spare the Commissioners and their staffs from having to review matters in which the Commission has already issued an order and which implicate no policy issues. This would allow the General Counsel to designate additional officers to take testimony and conduct investigations in those matters or similarly remove officer designations as may be necessary. This authority is identical to that granted to the Director of the Division of Enforcement with respect to authorized investigations conducted by that Division.

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

FOR FURTHER INFORMATION CONTACT: Donna McCaffrey, 202-551-5174, Office of

200-30-14 Delegation of authority to the General Counsel.

*****

(m) (1) To designate officers empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records in the course of investigations instituted by the Commission pursuant to Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) including for possible violations by attorneys of Rule 102(e) of the Commission Rules of Practice (17 CFR 201.102(e)).

(2) To terminate the authority of officers to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records in the course of investigations instituted by the Commission pursuant to Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) including for possible violations by attorneys of Rule 102(e) of the Commission Rules of Practice (17 CFR 201.102(e)).

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: April 28, 2009

Commissioner Casey not participating
Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59849 / April 30, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13459

In the Matter of

Paul M. Gozzo,

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 Paul M. Gozzo ("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. Paul M. Gozzo, age 32, is a resident of Jupiter, Florida, and was Managing Director and sole owner of PMG Capital, LLC. Gozzo has been associated with the following registered broker-dealers in a variety of capacities: Fano Securities (1998-1999), Worldco, LLC (1999-2001), Lion's Group Trading, LLC (2002-2003), Gryphon Financial Securities Corporation (2005-2006), W. Quillen Securities (2007), Source Capital Group, Inc. (2007-2008) and Merger & Acquisition Capital Services, Inc. (2008). Gozzo has held Series 7, 24, and 55 licenses at various points between 1999 and 2008.

2. On April 17, 2009, a final judgment was entered by consent against Gozzo, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Paul M. Gozzo and PMG Capital, LLC, Civil Action Number 09-80432 in the United States District Court for the Southern District of Florida. The court also entered an order prohibiting Gozzo from participating in the offering of penny stock and ordering him to pay $402,678 in disgorgement and $35,110 in prejudgment interest (subject to a reduction for court-ordered restitution in a related criminal proceeding).

3. The Commission's complaint alleged that Gozzo, in coordination with others, manipulated the stock of numerous issuers to artificially maintain the stock prices for himself and others who liquidated their positions in the otherwise thinly traded stocks at inflated prices. While acting as a "consultant" for the issuers, Gozzo routinely engaged in manipulative trading in their stocks, including placing manipulative orders to support artificially high stock prices, trading in multiple accounts at several brokerage firms to give the appearance of greater market depth, coordinating trading with others to increase trading volume and prices, and coordinating with others who controlled the public float of stocks while manipulating the stock prices.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act that Respondent Gozzo 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

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary