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 **May 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

(50 Documents)

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

In the Matter of

National Lampoon, Inc. and Advatech Corporation

File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of the issuers listed below.

National Lampoon, Inc. is incorporated in Delaware and headquartered in Los Angeles, California. The company's common stock is listed on the NYSE Alternext under the ticker symbol "NLN."

Advatech Corporation is incorporated in Florida and headquartered in West Palm Beach, Florida. The company's common stock trades on the grey market under the symbol "ADVA."

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 above-listed companies is suspended for the period commencing at 9:30 a.m. EST, December 15, 2008, and terminating at 11:59 p.m. EST, on December 29, 2008.

By the Commission.

Florence E. Harmon
Acting Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

1 of 50

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.

EMM
Elizabeth M. Murphy
Secretary

Dated: May 1, 2009

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 5, 2009

In the Matter of Harvard Industries, Inc., HealthCor Holdings, Inc., and Helm Capital Group, 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 Harvard Industries, Inc. because it has not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of HealthCor Holdings, Inc. because it has not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Helm Capital Group, Inc. because it has not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2000.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 5, 2009, through 11:59 p.m. EDT on May 18, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 5, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13460

In the Matter of Hamilton Digital Controls, Inc., Hamilton-McGregor International, Inc., Happiness Express, Inc., Harvard Industries, Inc., Haven Holding, Inc. (n/k/a Haven Holdings I, Inc.), HealthCor Holdings, Inc., and Helm Capital Group, Inc., Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Hamilton Digital Controls, Inc., Hamilton-McGregor International, Inc., Happiness Express, Inc., Harvard Industries, Inc., Haven Holding, Inc. (n/k/a Haven Holdings I, Inc.), HealthCor Holdings, Inc., and Helm Capital Group, Inc.

II.

After an investigation, the Division of Enforcement alleges that

A. RESPONDENTS

1. Hamilton Digital Controls, Inc. (CIK No. 45136) is an inactive New York corporation located in Utica, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Hamilton Digital is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended January 31, 1995, which reported a net loss of $138,594 for the prior three months. As of April 23, 2009, the company's common stock (symbol "HDIG") was traded on the over-the-counter markets.

2. Hamilton-McGregor International, Inc. (CIK No. 1082253) is an inactive New York corporation located in Parsippany, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Hamilton-McGregor 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 $20,304 for the prior nine months.

3. Happiness Express, Inc. (CIK No. 923662) 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). Happiness Express is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 1995, which reported a net loss of $1.9 million for the prior nine months. As of April 23, 2009, the company's stock (symbol "HAPY") was traded on the over-the-counter markets.

4. Harvard Industries, Inc. (CIK No. 46012) is a delinquent Delaware corporation located in Lebanon, New Jersey with classes of securities registered with the Commission pursuant to Exchange Act Section 12(g). Harvard Industries 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 $39 million for the prior nine months. On January 15, 2002, Harvard Industries filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey, and the case was closed on November 19, 2007. As of April 23, 2009, the company's stock (symbol "HAVA") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Haven Holding, Inc. (n/k/a Haven Holdings I, Inc.) (CIK No. 1107126) is an inactive Florida corporation located in East Moriches, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Haven 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 August 31, 2004. On May 8, 2007, Haven Holding, Inc. changed its name to Haven Holdings I, Inc., but failed to report this change through the Commission's EDGAR database as required by Commission rules.

6. HealthCor Holdings, Inc. (CIK No. 1015604) is a dissolved Delaware corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). HealthCor is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 1999, which reported a net loss of $11.4 million for the prior three months. On July 27, 1999, HealthCor filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Texas, and the case was closed on January 7, 2004. As of April 23, 2009, the company's stock (symbol "HCOR") 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).

7. Helm Capital Group, Inc. (CIK No. 351685) is a void Delaware corporation located in Chappaqua, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Helm Capital 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 $129,000 for the prior three months. As of April 23, 2009, the company's stock (symbol "HCGI") 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 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 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 or Express Mail, or by other means permitted by the Commission's Rules of Practice.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

By: Jill M. Peterson
Assistant Secretary

Chart of Delinquent Filings
Hamilton Digital Controls, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Hamilton Digital Controls, Inc.					
	10-KSB	04/30/95	07/31/95	Not filed	165
	10-QSB	07/31/95	09/14/95	Not filed	163
	10-QSB	10/31/95	12/15/95	Not filed	160
	10-QSB	01/31/96	03/18/96	Not filed	157
	10-KSB	04/30/96	07/29/96	Not filed	153
	10-QSB	07/31/96	09/16/96	Not filed	151
	10-QSB	10/31/96	12/16/96	Not filed	148
	10-QSB	01/31/97	03/17/97	Not filed	145
	10-KSB	04/30/97	07/29/97	Not filed	141
	10-QSB	07/31/97	09/15/97	Not filed	139
	10-QSB	10/31/97	12/15/97	Not filed	136
	10-QSB	01/31/98	03/17/98	Not filed	133
	10-KSB	04/30/98	07/29/98	Not filed	129
	10-QSB	07/31/98	09/14/98	Not filed	127
	10-QSB	10/31/98	12/15/98	Not filed	124
	10-QSB	01/31/99	03/17/99	Not filed	121
	10-KSB	04/30/99	07/29/99	Not filed	117
	10-QSB	07/31/99	09/14/99	Not filed	115
	10-QSB	10/31/99	12/15/99	Not filed	112
	10-QSB	01/31/00	03/16/00	Not filed	109
	10-KSB	04/30/00	07/31/00	Not filed	105
	10-QSB	07/31/00	09/14/00	Not filed	103
	10-QSB	10/31/00	12/15/00	Not filed	100
	10-QSB	01/31/01	03/19/01	Not filed	97
	10-KSB	04/30/01	07/30/01	Not filed	93
	10-QSB	07/31/01	09/14/01	Not filed	91
	10-QSB	10/31/01	12/17/01	Not filed	88
	10-QSB	01/31/02	03/18/02	Not filed	85
	10-KSB	04/30/02	07/29/02	Not filed	81
	10-QSB	07/31/02	09/16/02	Not filed	79
	10-QSB	10/31/02	12/16/02	Not filed	76
	10-QSB	01/31/03	03/17/03	Not filed	73
	10-KSB	04/30/03	07/29/03	Not filed	69
	10-QSB	07/31/03	09/15/03	Not filed	67

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Hamilton Digital Controls, Inc. *(continued)*	*10-QSB*	10/31/03	12/15/03	Not filed	64
	10-QSB	01/31/04	03/16/04	Not filed	61
	10-KSB	04/30/04	07/29/04	Not filed	57
	10-QSB	07/31/04	09/14/04	Not filed	55
	10-QSB	10/31/04	12/15/04	Not filed	52
	10-QSB	01/31/05	03/17/05	Not filed	49
	10-KSB	04/30/05	07/29/05	Not filed	45
	10-QSB	07/31/05	09/14/05	Not filed	43
	10-QSB	10/31/05	12/15/05	Not filed	40
	10-QSB	01/31/06	03/17/06	Not filed	37
	10-KSB	04/30/06	07/31/06	Not filed	33
	10-QSB	07/31/06	09/14/06	Not filed	31
	10-QSB	10/31/06	12/15/06	Not filed	28
	10-QSB	01/31/07	03/19/07	Not filed	25
	10-KSB	04/30/07	07/30/07	Not filed	21
	10-QSB	07/31/07	09/14/07	Not filed	19
	10-QSB	10/31/07	12/17/07	Not filed	16
	10-QSB	01/31/08	03/17/08	Not filed	13
	10-KSB	04/30/08	07/29/08	Not filed	9
	*10-Q**	07/31/08	09/15/08	Not filed	7
	*10-Q**	10/31/08	12/15/08	Not filed	4
	*10-Q**	01/31/09	03/17/09	Not filed	1
Total Filings Delinquent	**56**				
Hamilton-McGregor International, Inc.					
	10-QSB	09/30/00	11/14/00	Not filed	101
	10-QSB	12/31/00	02/14/01	Not filed	98
	10-QSB	03/31/01	05/15/01	Not filed	95
	10-KSB	06/30/01	09/28/01	Not filed	91
	10-QSB	09/30/01	11/14/01	Not filed	89
	10-QSB	12/31/01	02/14/02	Not filed	86
	10-QSB	03/31/02	05/15/02	Not filed	83
	10-KSB	06/30/02	09/30/02	Not filed	79
	10-QSB	09/30/02	11/14/02	Not filed	77
	10-QSB	12/31/02	02/14/03	Not filed	74

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Hamilton-McGregor International, Inc. ***(continued)***	*10-QSB*	03/31/03	05/15/03	Not filed	71
	10-KSB	06/30/03	09/29/03	Not filed	67
	10-QSB	09/30/03	11/14/03	Not filed	65
	10-QSB	12/31/03	02/17/04	Not filed	62
	10-QSB	03/31/04	05/17/04	Not filed	59
	10-KSB	06/30/04	09/28/04	Not filed	55
	10-QSB	09/30/04	11/15/04	Not filed	53
	10-QSB	12/31/04	02/14/05	Not filed	50
	10-QSB	03/31/05	05/16/05	Not filed	47
	10-KSB	06/30/05	09/28/05	Not filed	43
	10-QSB	09/30/05	11/14/05	Not filed	41
	10-QSB	12/31/05	02/14/06	Not filed	38
	10-QSB	03/31/06	05/15/06	Not filed	35
	10-KSB	06/30/06	09/28/06	Not filed	31
	10-QSB	09/30/06	11/14/06	Not filed	29
	10-QSB	12/31/06	02/14/07	Not filed	26
	10-QSB	03/31/07	05/15/07	Not filed	23
	10-KSB	06/30/07	09/28/07	Not filed	19
	10-QSB	09/30/07	11/14/07	Not filed	17
	10-QSB	12/31/07	02/14/08	Not filed	14
	10-QSB	03/31/08	05/15/08	Not filed	11
	10-KSB	06/30/08	09/29/08	Not filed	7
	*10-Q**	09/30/08	11/14/08	Not filed	5
	*10-Q**	12/31/08	02/17/09	Not filed	2
Total Filings Delinquent	**34**				
Happiness Express, Inc.					
	10-K	03/31/96	07/01/96	Not filed	153
	10-Q	06/30/96	08/14/96	Not filed	152
	10-Q	09/30/96	11/14/96	Not filed	149
	10-Q	12/31/96	02/14/97	Not filed	146
	10-K	03/31/97	06/30/97	Not filed	142
	10-Q	06/30/97	08/14/97	Not filed	140
	10-Q	09/30/97	11/14/97	Not filed	137
	10-Q	12/31/97	02/17/98	Not filed	134

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Happiness Express, Inc.					
(continued)	*10-K*	03/31/98	06/29/98	Not filed	130
	10-Q	06/30/98	08/14/98	Not filed	128
	10-Q	09/30/98	11/16/98	Not filed	125
	10-Q	12/31/98	02/16/99	Not filed	122
	10-K	03/31/99	06/29/99	Not filed	118
	10-Q	06/30/99	08/16/99	Not filed	116
	10-Q	09/30/99	11/15/99	Not filed	113
	10-Q	12/31/99	02/14/00	Not filed	110
	10-K	03/31/00	06/29/00	Not filed	106
	10-Q	06/30/00	08/14/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	101
	10-Q	12/31/00	02/14/01	Not filed	98
	10-K	03/31/01	06/29/01	Not filed	94
	10-Q	06/30/01	08/14/01	Not filed	92
	10-Q	09/30/01	11/14/01	Not filed	89
	10-Q	12/31/01	02/14/02	Not filed	86
	10-K	03/31/02	07/01/02	Not filed	81
	10-Q	06/30/02	08/14/02	Not filed	80
	10-Q	09/30/02	11/14/02	Not filed	77
	10-Q	12/31/02	02/14/03	Not filed	74
	10-K	03/31/03	06/30/03	Not filed	70
	10-Q	06/30/03	08/14/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	65
	10-Q	12/31/03	02/17/04	Not filed	62
	10-K	03/31/04	06/29/04	Not filed	58
	10-Q	06/30/04	08/16/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	53
	10-Q	12/31/04	02/14/05	Not filed	50
	10-K	03/31/05	06/29/05	Not filed	46
	10-Q	06/30/05	08/15/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	41
	10-Q	12/31/05	02/14/06	Not filed	38
	10-K	03/31/06	06/29/06	Not filed	34
	10-Q	06/30/06	08/14/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	29
	10-Q	12/31/06	02/14/07	Not filed	26

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Happiness Express, Inc. ***(continued)***	*10-K*	03/31/07	06/29/07	Not filed	22
	10-Q	06/30/07	08/14/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	17
	10-Q	12/31/07	02/14/08	Not filed	14
	10-K	03/31/08	06/30/08	Not filed	10
	10-Q	06/30/08	09/29/08	Not filed	7
	10-Q	09/30/08	11/14/08	Not filed	5
	10-Q	12/31/08	02/17/09	Not filed	2
Total Filings Delinquent	**52**				
Harvard Industries, Inc.					
	10-K	09/30/01	12/31/01	Not filed	88
	10-Q	12/31/01	02/14/02	Not filed	86
	10-Q	03/31/02	05/15/02	Not filed	83
	10-Q	06/30/02	08/14/02	Not filed	80
	10-K	09/30/02	12/30/02	Not filed	76
	10-Q	12/31/02	02/14/03	Not filed	74
	10-Q	03/31/03	05/15/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	68
	10-K	09/30/03	12/29/03	Not filed	64
	10-Q	12/31/03	02/17/04	Not filed	62
	10-Q	03/31/04	05/17/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	56
	10-K	09/30/04	12/29/04	Not filed	52
	10-Q	12/31/04	02/14/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	44
	10-K	09/30/05	12/29/05	Not filed	40
	10-Q	12/31/05	02/14/06	Not filed	38
	10-Q	03/31/06	05/15/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	32
	10-K	09/30/06	12/29/06	Not filed	28
	10-Q	12/31/06	02/14/07	Not filed	26
	10-Q	03/31/07	05/15/07	Not filed	23

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Harvard Industries, Inc. (continued)	*10-Q*	06/30/07	08/14/07	Not filed	20
	10-K	09/30/07	12/31/07	Not filed	16
	10-Q	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	**30**				
Haven Holding, Inc. (n/k/a Haven Holdings I, Inc.)					
	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
	10-QSB	08/31/07	10/15/07	Not filed	18
	10-QSB	11/30/07	01/14/08	Not filed	15
	10-KSB	02/29/08	05/29/08	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
Total Filings Delinquent	**17**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
HealthCor Holdings, Inc.					
	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
	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

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
HealthCor Holdings, 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	**39**				
Helm Capital Group, 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
	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)
Helm Capital 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 **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

May 6, 2009

In the Matter of **Wade Cook Financial Corp.,** **Warning Management Services, Inc.,** **Weldotron Corp.,** **Western Microwave, Inc.,** **Wickes, Inc.,** **Worldwide Technologies, Inc., and** **Worldwide Xceed Group, Inc.** **(n/k/a Liquidating WXG, 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 Wade Cook Financial Corp. because it has not filed any periodic reports since the period ended September 30, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Warning Management Services, Inc. because it has not filed any periodic reports since the period ended December 31, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Weldotron Corp. because it has not filed any periodic reports since February 28, 1998.

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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Western Microwave, 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 Wickes, Inc. because it has not filed any periodic reports since the period ended June 28, 2003.

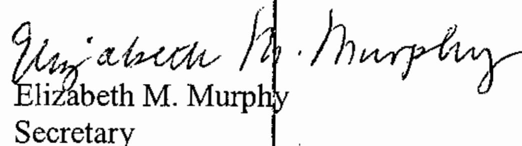
It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Worldwide Technologies, Inc. because it has not filed any periodic reports since the period ended June 30, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Worldwide Xceed Group, Inc. (n/k/a Liquidating WXG, Inc.) because it has not filed any periodic reports since the period ended February 28, 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 May 6, 2009, through 11:59 p.m. EDT on May 19, 2009.

By the Commission.



Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13461

In the Matter of Wade Cook Financial Corp., Warning Management Services, Inc., Weldotron Corp., Western Microwave, Inc., Wickes, Inc., Worldwide Technologies, Inc., and Worldwide Xceed Group, Inc. (n/k/a Liquidating WXG, Inc.), Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Wade Cook Financial Corp., Warning Management Services, Inc., Weldotron Corp., Western Microwave, Inc., Wickes, Inc., Worldwide Technologies, Inc., and Worldwide Xceed Group, Inc. (n/k/a Liquidating WXG, Inc.)

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Wade Cook Financial Corp. (CIK No. 894417) is a revoked Nevada corporation located in Seattle, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wade Cook is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2002, which reported a net loss of over $6.1 million for the prior nine months. On December 19, 2002, an involuntary Chapter 7 petition was filed against the company in the U.S. Bankruptcy Court for the Western

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District of Washington, the case was converted to a Chapter 11 case, and it was terminated on December 23, 2008. The company's stock is not publicly quoted or traded. As of May 1, 2009, the company's stock ("WADCQ") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Warning Management Services, Inc. (CIK No. 1052706) is a New York corporation located in Anaheim, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Warning Management 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, 2004, which reported a net loss of over $4.6 million for the prior three years. As of May 1, 2009, the company's stock ("WNMI") 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).

3. Weldotron Corp. (CIK No. 105519) is a New Jersey corporation located in Bridgewater, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Weldotron is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended February 28, 1998, which reported a net loss of over $5.6 million for the year ended February 28, 1998. As of May 1, 2009, the company's stock ("WDTR") was quoted on the Pink Sheets, had three market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

4. Western Microwave, Inc. (CIK No. 106176) is a purged Virginia corporation located in Sunnyvale, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Western Microwave is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form QSB/A for the period ended March 31, 1997. As of May 1, 2009, the company's stock ("WMICQ") 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).

5. Wickes, Inc. (CIK No. 910620) is a dissolved Delaware corporation located in Vernon Hills, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wickes is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the period ended June 28, 2003, which reported a net loss of over $45 million for the prior six months. On January 20, 2004, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Illinois, a reorganization plan was confirmed on December 2, 2007, and the case was still pending as of May 4, 2009. As of May 1, 2009, the company's stock ("WIKSQ") 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).

6. Worldwide Technologies, Inc. (CIK No. 886184) is a British Columbia corporation located in Ventura County, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Worldwide Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic

reports since it filed a Form 10-QSB for the period ended June 30, 2002, which reported a net loss of $472,163 for the prior nine months. As of May 1, 2009, the company's stock ("WWDE") 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).

7. Worldwide Xceed Group, Inc. (n/k/a Liquidating WXG, Inc.) (CIK No. 721176) is a Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Worldwide Xceed 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 February 28, 2001, which reported a net loss of over $55 million for the prior six months. On July 19, 2001, Worldwide Xceed changed its name in the Delaware corporate records Liquidating WXG, Inc., but failed to report that change to the Commission as required by Commission rules. As of May 1, 2009, the company's stock (symbol "XCEDQ") 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).

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)].

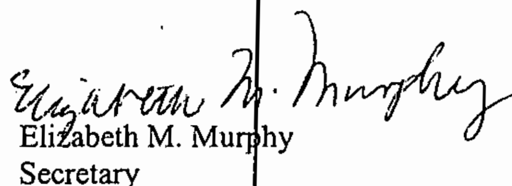
If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 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

<u>Appendix 1</u>

Chart of Delinquent Filings
In the Matter of Wade Cook Financial Corp., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Wade Cook Financial Corp.					
	10-K	12/31/02	03/31/03	Not filed	74
	10-Q	03/31/03	05/15/03	Not filed	72
	10-Q	06/30/03	08/14/03	Not filed	69
	10-Q	09/30/03	11/14/03	Not filed	66
	10-K	12/31/03	03/30/04	Not filed	62
	10-Q	03/31/04	05/17/04	Not filed	60
	10-Q	06/30/04	08/16/04	Not filed	57
	10-Q	09/30/04	11/15/04	Not filed	54
	10-K	12/31/04	03/31/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/31/06	04/02/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-K	12/31/07	03/31/08	Not filed	14
	10-Q	03/31/08	05/15/08	Not filed	12
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-K	12/31/08	03/31/09	Not filed	2
Total Filings Delinquent	**25**				
Warning Management Services, Inc.					
	10-QSB	03/31/05	05/16/05	Not filed	48
	10-QSB	06/30/05	08/15/05	Not filed	45
	10-QSB	09/30/05	11/14/05	Not filed	42
	10-KSB	12/31/05	03/31/06	Not filed	38
	10-QSB	03/31/06	05/15/06	Not filed	36

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Warning Management Services, Inc. ***(continued)***	*10-QSB*	06/30/06	08/14/06	Not filed	33
	10-QSB	09/30/06	11/14/06	Not filed	30
	10-KSB	12/31/06	04/02/07	Not filed	25
	10-QSB	03/31/07	05/15/07	Not filed	24
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-QSB	09/30/07	11/14/07	Not filed	18
	10-KSB	12/31/07	03/31/08	Not filed	14
	*10-Q**	03/31/08	05/15/08	Not filed	12
	*10-Q**	06/30/08	08/14/08	Not filed	9
	*10-Q**	09/30/08	11/14/08	Not filed	6
	*10-K**	12/31/08	03/31/09	Not filed	2
Total Filings Delinquent	**16**				
Weldotron Corp.					
	10-Q	05/31/98	07/15/98	Not filed	130
	10-Q	08/31/98	10/15/98	Not filed	127
	10-Q	11/30/98	01/14/99	Not filed	124
	10-K	02/28/99	06/01/99	Not filed	119
	10-Q	05/31/99	07/15/99	Not filed	118
	10-Q	08/31/99	10/15/99	Not filed	115
	10-Q	11/30/99	01/14/00	Not filed	112
	10-K	02/29/00	05/30/00	Not filed	108
	10-Q	05/31/00	07/17/00	Not filed	106
	10-Q	08/31/00	10/16/00	Not filed	103
	10-Q	11/30/00	01/16/01	Not filed	100
	10-K	02/28/01	05/29/01	Not filed	96
	10-Q	05/31/01	07/16/01	Not filed	94
	10-Q	08/31/01	10/15/01	Not filed	91
	10-Q	11/30/01	01/14/02	Not filed	88
	10-K	02/28/02	05/29/02	Not filed	84
	10-Q	05/31/02	07/15/02	Not filed	82
	10-Q	08/31/02	10/15/02	Not filed	79
	10-Q	11/30/02	01/14/03	Not filed	76
	10-K	02/28/03	05/29/03	Not filed	72
	10-Q	05/31/03	07/15/03	Not filed	70
	10-Q	08/31/03	10/15/03	Not filed	67
	10-Q	11/30/03	01/14/04	Not filed	64
	10-K	02/29/04	06/01/04	Not filed	59

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Weldotron Corp. ***(continued)***	*10-Q*	05/31/04	07/15/04	Not filed	58
	10-Q	08/31/04	10/15/04	Not filed	55
	10-Q	11/30/04	01/14/05	Not filed	52
	10-K	02/28/05	05/31/05	Not filed	48
	10-Q	05/31/05	07/15/05	Not filed	46
	10-Q	08/31/05	10/17/05	Not filed	43
	10-Q	11/30/05	01/17/06	Not filed	40
	10-K	02/28/06	05/30/06	Not filed	36
	10-Q	05/31/06	07/17/06	Not filed	34
	10-Q	08/31/06	10/16/06	Not filed	31
	10-Q	11/30/06	01/16/07	Not filed	28
	10-K	02/28/07	05/29/07	Not filed	24
	10-Q	05/31/07	07/16/07	Not filed	22
	10-Q	08/31/07	10/15/07	Not filed	19
	10-Q	11/30/07	01/14/08	Not filed	16
	10-K	02/28/08	05/28/08	Not filed	12
	10-Q	05/31/08	07/15/08	Not filed	10
	10-Q	08/31/08	10/15/08	Not filed	7
	10-Q	11/30/08	01/14/09	Not filed	4
Total Filings Delinquent	**43**				
Western Microwave, Inc.					
	10-QSB	06/30/97	08/14/97	Not filed	141
	10-KSB	09/30/97	12/29/97	Not filed	137
	10-QSB	12/31/97	02/17/98	Not filed	135
	10-QSB	03/31/98	05/15/98	Not filed	132
	10-QSB	06/30/98	08/14/98	Not filed	129
	10-KSB	09/30/98	12/29/98	Not filed	125
	10-QSB	12/31/98	02/16/99	Not filed	123
	10-QSB	03/31/99	05/17/99	Not filed	120
	10-QSB	06/30/99	08/16/99	Not filed	117
	10-KSB	09/30/99	12/29/99	Not filed	113
	10-QSB	12/31/99	02/14/00	Not filed	111
	10-QSB	03/31/00	05/15/00	Not filed	108
	10-QSB	06/30/00	08/14/00	Not filed	105
	10-KSB	09/30/00	12/29/00	Not filed	101
	10-QSB	12/31/00	02/14/01	Not filed	99

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

Total Filings Delinquent **47**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Wickes, Inc.					
	10-Q	09/27/03	11/11/03	Not filed	66
	10-K	12/27/03	3/26/04	Not filed	62
	10-Q	03/27/04	5/11/04	Not filed	60
	10-Q	06/26/04	8/10/04	Not filed	57
	10-Q	09/25/04	11/9/04	Not filed	54
	10-K	12/25/04	3/25/05	Not filed	50
	10-Q	03/26/05	5/10/05	Not filed	48
	10-Q	06/25/05	8/9/05	Not filed	45
	10-Q	09/24/05	11/8/05	Not filed	42
	10-K	12/31/05	3/31/06	Not filed	38
	10-Q	03/25/06	5/9/06	Not filed	36
	10-Q	06/24/06	8/8/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/30/06	3/30/07	Not filed	26
	10-Q	03/31/07	5/15/07	Not filed	24
	10-Q	06/30/07	8/14/07	Not filed	21
	10-Q	09/29/07	11/13/07	Not filed	18
	10-K	12/29/07	3/28/08	Not filed	14
	10-Q	03/29/08	5/13/08	Not filed	12
	10-Q	06/28/08	8/12/08	Not filed	9
	10-Q	09/27/08	11/11/08	Not filed	6
	10-K	12/27/08	3/27/09	Not filed	2
Total Filings Delinquent	**22**				
Worldwide Technologies, Inc.					
	10-KSB	09/30/02	12/30/02	Not filed	77
	10-QSB	12/31/02	02/14/03	Not filed	75
	10-QSB	03/31/03	05/15/03	Not filed	72
	10-QSB	06/30/03	08/14/03	Not filed	69
	10-KSB	09/30/03	12/29/03	Not filed	65
	10-QSB	12/31/03	02/17/04	Not filed	63
	10-QSB	03/31/04	05/17/04	Not filed	60
	10-QSB	06/30/04	08/16/04	Not filed	57
	10-KSB	09/30/04	12/29/04	Not filed	53
	10-QSB	12/31/04	02/14/05	Not filed	51
	10-QSB	03/31/05	05/16/05	Not filed	48
	10-QSB	06/30/05	08/15/05	Not filed	45

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
***Worldwide Technologies, Inc.* (continued)**	*10-KSB*	09/30/05	12/29/05	Not filed	41
	10-QSB	12/31/05	02/14/06	Not filed	39
	10-QSB	03/31/06	05/15/06	Not filed	36
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-KSB	09/30/06	12/29/06	Not filed	29
	10-QSB	12/31/06	02/14/07	Not filed	27
	10-QSB	03/31/07	05/15/07	Not filed	24
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-KSB	09/30/07	12/29/07	Not filed	17
	10-QSB	12/31/07	02/14/08	Not filed	15
	10-QSB	03/31/08	05/15/08	Not filed	12
	10-QSB	06/30/08	08/14/08	Not filed	9
	10-KSB	09/30/08	12/29/08	Not filed	5
	*10-Q**	12/31/08	02/17/09	Not filed	3
Total Filings Delinquent	25				
Worldwide Xceed Group, Inc. (n/k/a Liquidating WXG, Inc.)					
	10-Q	05/31/01	07/16/01	Not filed	94
	10-K	08/31/01	11/29/01	Not filed	90
	10-Q	11/30/01	01/14/02	Not filed	88
	10-Q	02/28/02	04/15/02	Not filed	85
	10-Q	05/31/02	07/15/02	Not filed	82
	10-K	08/31/02	11/29/02	Not filed	78
	10-Q	11/30/02	01/14/03	Not filed	76
	10-Q	02/28/03	04/14/03	Not filed	73
	10-Q	05/31/03	07/15/03	Not filed	70
	10-K	08/31/03	12/01/03	Not filed	65
	10-Q	11/30/03	01/14/04	Not filed	64
	10-Q	02/29/04	04/14/04	Not filed	61
	10-Q	05/31/04	07/15/04	Not filed	58
	10-K	08/31/04	11/29/04	Not filed	54
	10-Q	11/30/04	01/14/05	Not filed	52
	10-Q	02/28/05	04/14/05	Not filed	49
	10-Q	05/31/05	07/15/05	Not filed	46
	10-K	08/31/05	11/29/05	Not filed	42
	10-Q	11/30/05	01/16/06	Not filed	40

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Worldwide Xceed Group, Inc. (n/k/a Liquidating WXG, Inc.) ***(continued)***	*10-Q*	02/28/06	04/14/06	Not filed	37
	10-Q	05/31/06	07/17/06	Not filed	34
	10-K	08/31/06	11/29/06	Not filed	30
	10-Q	11/30/06	01/16/07	Not filed	28
	10-Q	02/28/07	04/16/07	Not filed	25
	10-Q	05/31/07	07/16/07	Not filed	22
	10-K	08/31/07	11/29/07	Not filed	18
	10-Q	11/30/07	01/14/08	Not filed	16
	10-Q	02/29/08	04/14/08	Not filed	13
	10-Q	05/31/08	07/15/08	Not filed	10
	10-K	08/31/08	12/01/08	Not filed	5
	10-Q	11/30/08	01/17/09	Not filed	4
	10-Q	02/28/09	04/14/09	Not filed	1

Total Filings Delinquent **32**

* 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

May 6, 2009

In the Matter of Wade Cook Financial Corp., Warning Management Services, Inc., Weldotron Corp., Western Microwave, Inc., Wickes, Inc., Worldwide Technologies, Inc., and Worldwide Xceed Group, Inc. (n/k/a Liquidating WXG, 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 Wade Cook Financial Corp. because it has not filed any periodic reports since the period ended September 30, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Warning Management Services, Inc. because it has not filed any periodic reports since the period ended December 31, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Weldotron Corp. because it has not filed any periodic reports since February 28, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Western Microwave, 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 Wickes, Inc. because it has not filed any periodic reports since the period ended June 28, 2003.

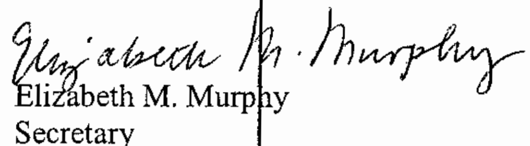
It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Worldwide Technologies, Inc. because it has not filed any periodic reports since the period ended June 30, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Worldwide Xceed Group, Inc. (n/k/a Liquidating WXG, Inc.) because it has not filed any periodic reports since the period ended February 28, 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 May 6, 2009, through 11:59 p.m. EDT on May 19, 2009.

By the Commission.



Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13462

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

I.

The Securities and Exchange Commission's ("Commission") official public files disclose that Royal Spring Water, Inc. ("Royal Spring" or "Respondent"), a Nevada corporation headquartered in Van Nuys, California, has been in the business of bottling drinking water. Royal Spring's shares are registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and the Respondent files its annual and quarterly reports on Forms 10-KSB and 10-QSB respectively.

II.

As a result of its investigation, the Division of Enforcement alleges that Royal Spring failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder by failing to file Form 10-KSB for the year ended August 31, 2008, Forms 10-QSB for the quarters ended November 30, 2007, February 29, 2008 and May 31, 2008, and Form 10-Q for the quarter ended November 30, 2008.

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 proceedings be instituted pursuant to Section 12(j) of the Exchange Act to determine:

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

B. Whether the registration pursuant to Section 12(g) of the Exchange Act of the common stock of Royal Spring, identified in Section I, above, should be suspended for a period not exceeding twelve months, or revoked, pursuant to Section 12(j) 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, above, be held at a time and place to be fixed and before an Administrative Law Judge to be designated by further order as provided by Rule 200 of the Commission's Rules of Practice [17 C.F.R. § 201.200].

IT IS FURTHER ORDERED that the Respondent shall file an answer to the allegations contained in the Order Instituting Proceedings 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), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.221(f) and 201.310].

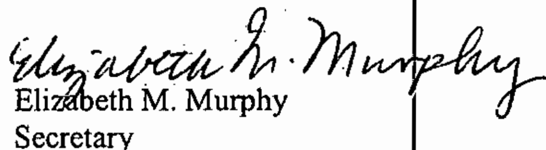
This Order shall be served upon the Respondent personally or by certified mail forthwith.

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.

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 on this matter, except as witness or counsel in proceedings held pursuant to this notice.

Because this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed to be subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.



Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 59874 / May 6, 2009

Admin. Proc. File No. 3-13412

In the Matter of WILLIAM D. SHOVERS c/o Robert E. Forrest Kerr, Russell and Weber, PLC Detroit Center, Suite 2500 500 Woodward Avenue Detroit, Michigan 48226-3427

ORDER DENYING MOTION TO LIFT TEMPORARY SUSPENSION AND DIRECTING HEARING

On March 18, 2009, the Commission issued an Order Instituting Proceedings and Imposing Temporary Suspension ("OIP") 1/ against William D. Shovers pursuant to Commission Rule of Practice 102(e)(3). 2/ Shovers has filed a petition, pursuant to Rule 102(e)(3)(ii),

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1/ William D. Shovers, CPA, Securities Exchange Act Rel. No. 59596 (Mar. 18, 2009), __ SEC Docket __.

2/ Commission Rule of Practice 102(e)(3), 17 C.F.R. § 201.102(e)(3), provides in pertinent part that:

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any . . . accountant . . . who has been by name:

(A) Permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or

(B) Found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless

requesting that his temporary suspension be lifted and that the Commission set the matter down for a hearing.

Shovers was Chief Financial Officer of Hayes-Lemmerz International, Inc. ("Hayes") during the period from 1999 through October 2001, and was Chief Accounting Officer during the period from October 2000 through October 2001. 3/ The Commission filed a complaint in the District Court for the Eastern District of Michigan on April 25, 2006 alleging that senior officers and employees of Hayes engaged in a fraudulent scheme to achieve corporate earnings and mask declining operating results, resulting in materially false filings with the Commission in fiscal years 1999 and 2000 and the first fiscal quarter of 2001. 4/ The complaint also alleged that, after discovering the fraudulent accounting scheme, Shovers made affirmative misrepresentations and concealed improper accounting practices from Hayes' independent auditor, audit committee and board of directors. 5/ A jury found that Shovers violated the antifraud, internal control, books and recordkeeping, and disclosure to auditor provisions of the federal securities laws, and aided and abetted Hayes' violations of reporting, recordkeeping, and internal control provisions of the Exchange Act of 1934. 6/

On December 22, 2008, the District Court entered a final judgment against Shovers 7/ permanently enjoining him from violating Section 10(b) of the Exchange Act and Exchange Act

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> the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

3/ Shovers, __ SEC Docket at __. The OIP found that Shovers was licensed as a certified public accountant ("CPA") in 1980, and that his license has been expired since 1995. Id.

4/ Jury Finds Former Hayes Lemmerz International CEO and CFO Liable for Securities Fraud Arising from Accounting Scheme, Litigation Rel. No. 20686 (Aug. 21, 2008).

5/ Id.

6/ The jury found that Shovers violated the antifraud provisions in Exchange Act Section 10(b) and Rule 10b-5, and Securities Act Section 17(a)(3); internal control and books and recordkeeping provisions in Exchange Act Section 13(b)(5) and Rule 13b2-1; and the requirements regarding disclosure to auditors in Exchange Act Rule 13b2-2. The jury further found that Shovers aided and abetted Hayes' violations of the issuer reporting, books and recordkeeping, and internal control provisions in Exchange Act Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B); and Rules 12b-20, 13a-1 and 13a-13. Id.

7/ Court Imposes Civil Penalties, Injunctions and Other Relief Against Former CEO and CFO of Hayes Lemmerz International, Inc., Litigation Rel. No. 2923 (Jan. 23, 2009).

Rule 10b-5; 8/ Section 17(a)(3) of the Securities Act of 1933; 9/ and Exchange Act Section 13(b)(5) and Exchange Act Rules 13b2-1 and 13b2-2. 10/ The final judgment also permanently enjoined Shovers from aiding and abetting violations of Exchange Act Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B), 11/ and Exchange Act Rules 12b-20, 13a-1 and 13a-13. 12/ The final judgment barred Shovers, for a period of five years, from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act 13/ or that is required to file reports pursuant to Section 15(d) of the Exchange Act, 14/ and ordered him to pay a civil monetary penalty of $50,000.

Based on the District Court findings and final judgment, the Commission issued the OIP and temporarily suspended Shovers from appearing or practicing before the Commission. Shovers requests that the temporary suspension be lifted and modified "to a term whose length at most is in conformity and in parallel with the officer and director bar" imposed by the court. Shovers also requests that the Commission set the matter down for a hearing. Shovers argues that the jury did not make specific scienter findings with respect to his conduct, which he contends was limited to "a short period of time." He further characterizes his misconduct as having failed to transmit "what he then viewed as preliminary, incomplete and in some cases erroneous information to the auditors and more fully to the Board of Directors." He argues that the fraudulent conduct originated from a business unit of the company, and cites the results of an 2001 internal investigation.

In support of his petition, Shovers cites his "demonstrated history of confidence and honesty" prior to the matter at issue, and attaches letters attesting to his character and performance. He also cites statements by the district court judge describing him as having "learned [his] lesson" and as among "the least likely . . . to ever get in trouble with the SEC again." He states that he has paid the civil monetary penalty imposed by the court.

The Division of Enforcement has not filed an opposition to Shovers' petition.

8/ 15 U.S.C. § 78j(b); 17 C.F.R. § 204.10b-5.

9/ 15 U.S.C. § 77(q)(a)(3).

10/ 15 U.S.C. § 78m(b)(5); 17 C.F.R. §§ 240.13b2-1 and 240.13b2-2.

11/ 15 U.S.C. §§ 78m(a), 78(m)(b)(2)(A) and 78(m)(b)(2)(B).

12/ 17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13.

13/ 15 U.S.C. § 78*l*.

14/ 15 U.S.C. § 78*o*(d).

Commission Rule of Practice 102(e)(3) permits the Commission to suspend any accountant or other professional or expert who has been permanently enjoined from violating or aiding and abetting the violation of the Federal securities laws or found to have violated or aided and abetted the violation of the Federal securities laws. The findings of the court, which Shovers is precluded from contesting in this proceeding, and the injunction issued against him, justify the continuance of his suspension until it can be determined what, if any, action may be appropriate to protect the Commission's processes. 15/ As provided in Rule 102(e)(3)(iii), we will set the matter down for a public hearing.

Accordingly, IT IS ORDERED that the petition of William D. Shovers to lift or modify the Commission's order of temporary suspension be, and it hereby is, denied; and it is further

ORDERED that this proceeding be set down for public hearings before an administrative law judge in accordance with Rule of Practice 110. As specified in Rule 102(e)(3)(iii), the hearings in this matter shall be expedited in accordance with Rule 500. Therefore, it is

ORDERED that the administrative law judge shall issue an initial decision no later than 210 days from the date of service of this order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

15/ See Rule of Practice 102(e)(3)(iv), 17 C.F.R. § 201.102(e)(3)(iv) (stating that, in a hearing under Rule 102(3)(3)(ii), the petitioner may not contest any finding made against him or her in the underlying proceeding). We do not believe that Shovers is prejudiced by the temporary suspension given that he has not indicated whether, or in what capacity, he is currently employed, and he has not asserted that he will suffer any harm from a suspension while the proceeding is pending.

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2872 / May 7, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13463

In the Matter of INTECH Investment Management LLC and David E. Hurley 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 INTECH Investment Management LLC, formerly known as Enhanced Investment Technologies, LLC ("INTECH") and David E. Hurley ("Hurley") (collectively, the "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 ("Order"), as set forth below.

III.

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

Summary

1. This case involves a registered investment adviser, INTECH, which, from at least 2003 through 2006 (the "relevant time period"), exercised voting authority over client securities without having written policies and procedures that were reasonably designed to ensure it voted its clients' securities in the best interests of its clients because those policies and procedures did not include how the adviser would address material potential conflicts of interests that may arise between its interests and those of its clients. INTECH also did not sufficiently describe its proxy voting policies and procedures to clients. In determining how to vote securities (or proxies) for those clients who had delegated such voting authority to INTECH, it selected a third-party proxy voting service's guidelines that followed AFL-CIO proxy voting recommendations.[1] Those guidelines, offered by Institutional Shareholder Services ("ISS"), were referred to as the ISS Proxy Voter Services ("ISS-PVS"). INTECH chose to follow ISS-PVS at a time when it was participating in the annual AFL-CIO Key Votes Survey that ranked investment advisers based on their adherence to the AFL-CIO recommendations on certain votes. INTECH believed that following the ISS-PVS Guidelines would improve its ranking in the AFL-CIO Key Votes Survey and that the improved score would likely be helpful in maintaining existing and attracting new union-affiliated clients.

2. In connection with the then-newly effective Investment Advisers Act Rule 206(4)-6 (the "Proxy Voting Rule"), INTECH adopted and implemented written proxy voting policies and procedures and provided them to its clients.[2] Contrary to the Proxy Voting Rule, INTECH's written policies and procedures did not address material potential conflicts that may have arisen between INTECH's interests and those of its clients who were not pro-AFL-CIO. Moreover, INTECH did not sufficiently describe to clients its proxy voting policies and procedures. Using ISS-PVS created a material potential conflict of interest for INTECH because INTECH chose an AFL-CIO-based voting platform for all clients without addressing and describing its potential effect on INTECH's ability to retain and obtain business from existing and prospective union-affiliated clients.

Respondents

3. **INTECH,** a Delaware limited liability company located in West Palm Beach, Florida, has been registered with the Commission as an investment adviser since February 28, 2002. As of September 30, 2008, INTECH had approximately 400 clients with over $55 billion in assets under management. Since 2002, INTECH has exercised voting authority with respect to those clients' proxies for which it had been delegated such authority.

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[1] The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a voluntary federation of national and international labor unions.

[2] Final Rule: Proxy Voting By Investment Managers, Investment Advisers Act Rel. No. 2106 (Jan. 31, 2003).

4. **David E. Hurley**, 65 years old, is a resident of Palm Beach Gardens, Florida. During the relevant time period, he was INTECH's Chief Operating Officer and an Executive Vice President.

INTECH Exercised Voting Authority on Behalf of its Clients

5. During the relevant time period, INTECH managed institutional portfolios for pension plans, foundations, unions (including those referred to as "Taft-Hartley" clients), public funds, and public corporations (hereinafter collectively referred to as "clients"). Most of the assets invested by the public funds and corporations were related to employee pension plans. As part of its investment advisory services, INTECH exercised voting authority with respect to many of its clients' securities. In deciding how to vote client securities, INTECH chose to rely upon the recommendations of a third-party proxy voting service called Institutional Shareholder Services. ISS offered various sets or platforms of recommendations.

6. During 2002, INTECH chose one of ISS' platforms known as the ISS-General Guidelines ("ISS-General"). These guidelines typically recommended voting in accordance with corporations' management's recommendations.

7. In response to this choice, INTECH received inquiries and complaints from some of its union-affiliated clients about proxy votes that INTECH had cast on behalf of its clients as the result of following ISS-General.

INTECH Moved From a Management-Based Platform to the AFL-CIO-Based Voting Platform for All Clients

8. During the relevant time period, INTECH participated in the annual AFL-CIO Key Votes Survey ("AFL-CIO Survey"). The AFL-CIO collects the information regarding proxy voting from investment advisers and the AFL-CIO Survey summarizes and ranks investment advisers based on their proxy voting records on issues the AFL-CIO identifies as "Key Votes." The AFL-CIO Survey places investment advisers into one of three tiers based upon the percentage of votes the adviser cast that were consistent with the AFL-CIO voting recommendations on Key Votes. The AFL-CIO ranks advisers that vote all or the majority of its clients' proxies, including clients that are not pro-AFL-CIO, in accordance with AFL-CIO recommendations, higher than advisers who vote only their union-affiliated clients in accordance with the AFL-CIO recommendations. INTECH recognized this incentive in the AFL-CIO Survey.

9. On January 1, 2003, INTECH switched from ISS-General Guidelines to ISS-PVS Guidelines for all of its clients. INTECH believed that this change could improve its score on the AFL-CIO Survey. INTECH also believed that some union-affiliated clients felt that it was important for INTECH to score well on the AFL-CIO Survey. Moreover, INTECH believed that prospective union-affiliated clients might use the AFL-CIO Survey as a factor in selecting an investment adviser. Further, INTECH made this switch to please its union-affiliated clients, which had communicated displeasure with some of INTECH's 2002 votes made while INTECH followed

the ISS-General Guidelines. INTECH also believed ISS-PVS applied a reasonable standard for enhancing shareholder value as it related to corporate governance matters.[3]

10. INTECH improved its AFL-CIO Survey score by changing to the ISS-PVS recommendations. In 2002, when INTECH followed ISS-General, INTECH scored 68.9% and was ranked in the middle tier. In 2003, when INTECH followed ISS-PVS, INTECH scored 100% and was ranked in the top tier.

11. After switching from the ISS-General Guidelines to the AFL-CIO-based ISS-PVS Guidelines, INTECH received inquiries from some clients as to why there seemed to be a higher number of votes against management on shareholder proposals.

The Proxy Voting Rule Requires Advisers to Adopt
<u>Proxy Voting Policies and Procedures</u>

12. The Proxy Voting Rule became effective on March 10, 2003 and its compliance date was August 6, 2003.[4] The Proxy Voting Rule requires advisers to adopt and implement policies and procedures that are reasonably designed to ensure that advisers vote clients' proxies in the clients' best interests. Such procedures must include how the adviser addresses material conflicts that may arise between the adviser's interests and those of its clients, disclose to clients how they can obtain information about how the adviser voted the proxies, and describe to clients the adviser's proxy voting policies and procedures.[5]

13. In the Adopting Release for the Proxy Voting Rule, the Commission recognized that under the Advisers Act, "an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf, including proxy voting."[6] This duty of care requires an adviser who has voting authority to monitor corporate events and vote the proxies. To satisfy its duty of loyalty, an adviser must cast the proxy votes in a manner consistent with the best interests of its client and must not subrogate a client's interest to its own.[7] The Commission explained that the Proxy Voting Rules "were designed to prevent material conflicts of interest from affecting the manner in which advisers vote" clients' proxies.[8]

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[3] The PVS Proxy Voting guidelines in effect at the time stated that they were "based upon the AFL-CIO Proxy Voting Guidelines, which comply with all the fiduciary standards delineated by the U.S. Department of Labor" and intended to "promot[e] long-term shareholder value, emphasizing the 'economic best interests' of plan participants and beneficiaries." They further stated that "PVS will . . . promote a position that is consistent with the long-term economic best interests of plan members embodied in the principle of a 'worker-owner view of value.'"

[4] <u>Final Rule: Proxy Voting By Investment Managers</u>, Investment Advisers Act Rel. No. 2106 (Jan. 31, 2003).

[5] <u>Rule 206(4)-6 of the Advisers Act,</u> 17 C.F.R. § 275.206(4)-6.

[6] <u>Final Rule: Proxy Voting By Investment Managers</u>, Investment Advisers Act Rel. No. 2106.

[7] <u>Id.</u>

[8] <u>Id.</u>

14. The Commission noted that advisers may use a "predetermined voting policy," such as a third-party proxy voting service's platform, to vote proxies provided that the predetermined policy is "designed to further the interests of clients rather than the adviser."[9]

INTECH Did Not Satisfy the Proxy Voting Rule Requirements

15. In an effort to comply with the new rule, INTECH drafted written proxy voting policies and procedures. Hurley, as Chief Operating Officer, reviewed and edited counsel's drafts of those policies and procedures. On July 22, 2003, INTECH sent those policies and procedures to clients along with a cover letter from Hurley. Those policies and procedures remained in effect as written until 2006. Under INTECH's proxy voting policy, Hurley, as the Chief Operating Officer, had responsibility to evaluate whether certain proxy votes created conflicts between INTECH and its clients' interests.

16. At the same time that Hurley participated in drafting the proxy voting policies and procedures, he knew that INTECH was voting all of its clients' securities in accordance with the ISS-PVS Guidelines. Hurley recognized the potential benefits to INTECH of choosing ISS-PVS, including an improved AFL-CIO Survey score. Hurley also recognized the choice created a potential conflict of interest because he acknowledged that different types of clients may have made a different choice than INTECH made. Although he received some input from counsel during the drafting process, he did not discuss the potential conflict of interest with counsel during the drafting process. The policy, as finalized, did not address this potential conflict.

17. INTECH's final written policies and procedures did not address the potential conflict caused by INTECH choosing the ISS-PVS Guidelines for all of its clients while having an interest in retaining and obtaining union-affiliated clients. Moreover, INTECH told its clients in the cover letter signed by Hurley and stated in its proxy voting policy that, because it relied on a third-party proxy voting service, it did not "expect[] that any conflicts w[ould] arise in the proxy voting process."

18. In addition, INTECH did not sufficiently describe its proxy voting policies and procedures to its clients. INTECH disclosed that it intended to rely on ISS-PVS to vote clients' securities. INTECH, however, did not disclose that ISS-PVS followed AFL-CIO proxy voting recommendations. In fact, INTECH, through Hurley, described its policies and procedures without including references to the fact that the ISS-PVS guidelines it had chosen followed AFL-CIO recommendations. Although INTECH did not sufficiently describe its proxy voting policies and procedures to its clients, it did, on a quarterly basis, send to all of its clients a report showing all proxy votes cast on behalf of clients. The report, however, did not reference the guidelines that were followed that resulted in those votes.

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[9] Id. at n.24.

19. In mid-2005, INTECH considered offering clients the additional option of the ISS-General Guidelines. In December 2005, after the Commission staff began inquiring about INTECH's proxy voting, INTECH offered clients a choice between the ISS-PVS and ISS-General Guidelines to begin in 2006. At that time, INTECH sent a summary of the ISS-PVS Guidelines to clients that explained that the voting recommendations were based upon the AFL-CIO proxy voting recommendations. If clients did not notify INTECH of a choice, the default choice on behalf of clients was to the ISS-PVS recommendations. Approximately 27% of INTECH's clients chose to switch voting recommendations from ISS-PVS to the ISS-General Guidelines.

20. In May 2006, INTECH, in its Form ADV, described its proxy voting policies and procedures. It described that it offered clients a choice between ISS-PVS and ISS-General. It stated that ISS-PVS recommendations are based upon the AFL-CIO proxy voting guidelines and that INTECH's policy may result in INTECH obtaining and retaining Taft-Hartley or other union-affiliated clients. If clients did not notify INTECH of a choice, the default choice on behalf of clients was to the ISS-PVS recommendations.

INTECH Changed its Policies and Procedures to Comply With the Proxy Voting Rule

21. In August 2006, INTECH communicated by letter with clients regarding its proxy voting policies and procedures and addressed the potential conflict of interest that choosing the ISS-PVS voting recommendations caused. INTECH disclosed the potential conflict by stating that INTECH's choice of ISS-PVS may result in INTECH retaining and obtaining Taft-Hartley or other union-affiliated clients. INTECH also disclosed to clients that its standard voting policy was to vote proxies pursuant to ISS-Taft Hartley (formerly known as ISS-PVS) and disclosed that this was developed by ISS in conjunction with the AFL-CIO. At that time, INTECH offered clients the choice of voting proxies pursuant to ISS guidelines known as ISS-US, formerly known as ISS-General, which continued to be more management-friendly.

22. In addition, although not required by the Proxy Voting Rule, starting in November 2006, INTECH allowed clients to choose from several voting recommendations. The default choice was no longer ISS-PVS. Instead, INTECH set the default to recommendations that best represent the client type.

LEGAL ANALYSIS

23. Section 206(4) of the Advisers Act makes it unlawful for investment advisers "to engage in any act, practice, or course of business which is fraudulent, deceptive or manipulative."

24. Rule 206(4)-6 under the Advisers Act provides that "it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 206(4) of the Act for [a registered investment adviser] to exercise voting authority with respect to client securities unless [it]: (a) adopt[s] and implement[s] written policies and procedures that are reasonably designed to ensure that [it] vote[s] client securities in the best interests of clients, which procedures must include how [it] address[es] material conflicts of interest that may arise between [its] interests and those of [its] clients . . . and (c) describe[s] to [its] clients [its] proxy voting policies and

procedures, and, upon request, furnish[es] a copy of the policies and procedures to the requesting client."

25. If registered investment advisers do not satisfy the foregoing conditions, they engage in acts, practices or courses of business that are unlawful.

26. As a result of the conduct described above, INTECH willfully[10] violated Section 206(4) of the Advisers Act and Rules 206(4)-6(a) and 206(4)-6(c) thereunder.

27. As a result of the conduct described above, Hurley willfully aided and abetted and caused INTECH's violations of Section 206(4) of the Advisers Act and Rules 206(4)-6(a) and 206(4)-6(c) thereunder.

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 Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents INTECH and Hurley shall cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rules 206(4)-6(a) and 206(4)-6(c) promulgated thereunder.

B. Respondents INTECH and Hurley are censured.

C. INTECH shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $300,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies INTECH as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Esq., Associate Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

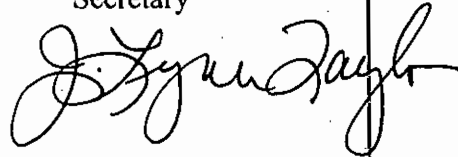
D. Hurley shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $50,000 to the United States Treasury. If timely payment is not made, additional

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

interest shall accrue pursuant to 31 U.S.C. 3717. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Hurley as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Esq., Associate Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

Commissioner Casey and Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59903 / May 12, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2968 / May 12, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13466

In the Matter of INGRAM MICRO 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 Ingram Micro Inc. ("Ingram Micro" 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[1] that:

Summary

These proceedings arise out of the business dealings between Ingram Micro and McAfee, Inc., formerly known as Network Associates, Inc. (referred to herein as "McAfee") during the period from the second quarter of 1998 through the third quarter of 2000 when McAfee was engaged in a massive financial fraud. During that period, McAfee overstated its revenues and earnings by stuffing its distribution channel at Ingram Micro with levels of inventory far in excess of any reasonable expectation of sales to end users while misreporting its revenues from these sales to their distributors.[2] For its part, Ingram Micro, McAfee's largest customer and greatest single source of revenue, engaged in a variety of highly irregular transactions with McAfee, many of them lacking in economic substance, which enabled McAfee to continue overselling its products to Ingram Micro. In the course of its business dealings with McAfee, Ingram Micro failed to keep accurate books and records and failed to devise and maintain an adequate system of internal controls. Ingram Micro was compensated by McAfee for engaging in these irregular transactions through the payment of millions of dollars of unearned profits, cash payments, and improperly recorded excess inventory fees.

Respondent

1. Respondent Ingram Micro Inc. is a Delaware corporation with its principal office in Santa Ana, California. Ingram Micro is a technology distribution company. Ingram Micro's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange under the symbol "IM."

Other Relevant Entity

2. McAfee, Inc. is a Delaware corporation with its principal office in Santa Clara, California. McAfee is a manufacturer of computer programs focusing on network security, anti-virus, and network management products. McAfee's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange under the symbol "MFE." Prior to June 30, 2004, McAfee was known as Network Associates, Inc.

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

[2] On January 4, 2006, the Commission filed a settled civil injunctive action against McAfee, Inc., in which McAfee agreed to be permanently enjoined from violations of the anti-fraud, books and records, and internal controls provisions of the Exchange Act. McAfee also consented to the entry of a permanent injunction and the payment of a $50 million civil penalty. *SEC v. McAfee, Inc.*, Civil Action No. 06-009 (PJH) (N.D. Cal.); Lit. Rel. No. 19520 (Jan. 4, 2006).

Facts

Background

3. Between 1998 and 2000, McAfee overstated its revenues by $622 million in order to meet revenue and earnings targets, and understated its cumulative net losses by $353 million. As the Commission alleged in its January 2006 complaint:

> McAfee stuffed its distribution channel and improperly recorded hundreds of millions of dollars of revenue on sales transactions with distributors in violation of the antifraud and other provisions of the federal securities laws. In a fraudulent scheme to oversell its products and immediately record the revenue from those transactions, McAfee secretly gave its distributors substantial cash payments, price discounts, rebates, and other concessions as inducements to continue buying, as well as to not return, McAfee products that the distributors had no reasonable expectation of selling to customers.

In addition, the Commission's complaint alleged that McAfee concealed its scheme by "falsely record[ing] in its books and records certain of the payments and concessions to distributors," and that McAfee "misled investors by filing with the Commission materially false and misleading annual and quarterly reports and securities registration statements." As a result, McAfee violated antifraud, issuer reporting, books and records, and internal controls provisions of the securities laws. In settlement, McAfee agreed to a permanent injunction and paid a $50 million civil penalty.

4. During the period of McAfee's misconduct, Ingram Micro was McAfee's largest distributor and single most significant source of sales.[3] In 1998, McAfee changed its accounting method to the "sell-in" model, which allowed it to recognize revenue upon the sale of products to distributors like Ingram Micro, instead of deferring revenue recognition until its products had been sold to end-users. Taking advantage of the change to sell-in accounting, McAfee embarked on a scheme to meet quarterly revenue targets through "channel stuffing" – that is, by pushing excessive amounts of products to its distributors, particularly Ingram Micro. End-of-quarter sales to Ingram Micro (memorialized in so-called "buy-in agreements" that were negotiated quarterly between the two companies), in particular, had a significant impact on McAfee's reported revenues and its ability to meet market expectations.

5. Ingram Micro's written contract with McAfee expressly limited Ingram Micro's ability to return products. However, McAfee and Ingram Micro had an unwritten understanding that Ingram Micro had an unlimited right to return unsold products to McAfee. During this period, few vendors extended unlimited return rights to their distributors, but McAfee offered unlimited return rights to Ingram Micro in order to induce Ingram Micro to purchase additional product.

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[3] In the year 2000, for example, sales to Ingram Micro accounted for approximately twenty percent of McAfee's net revenue.

6. Starting in the second quarter of 1998, Ingram Micro's Product Management Group realized that McAfee was willing to provide deep discounts and off-contract enhancements to Ingram Micro in the quarterly "buy-in agreements." As a result, Ingram Micro altered its buying practices and began ordering extraordinarily large amounts of McAfee products, far in excess of the amounts that Ingram Micro reasonably expected to sell. Ingram Micro began to realize significantly higher profit margins in return for taking on excess inventory from McAfee, which consisted mainly of software licenses. In return for Ingram Micro's increased purchases, McAfee provided various forms of compensation – in the form of cash payments, price concessions, and allowances for unlimited returns – that made Ingram Micro's role in McAfee's channel-stuffing scheme highly profitable and low-risk.

7. The McAfee account rapidly became one of Ingram Micro's most profitable vendor relationships, despite the fact that McAfee represented a small percentage of Ingram Micro's total sales. Ingram Micro obtained extraordinary profit margins on its business with McAfee compared to its other vendors because, unlike other vendors, McAfee routinely provided Ingram Micro with nonrefundable discounts on Ingram Micro's orders of McAfee products. Ingram Micro retained these discounts regardless of whether it later sold or returned the purchased products. In addition, McAfee even paid Ingram Micro a profit margin on products that McAfee itself later re-sold through a McAfee subsidiary. Consequently, McAfee paid Ingram Micro millions of dollars to take and hold products that Ingram Micro did not need and was not selling. The combination of an unlimited right of return and payment of nonrefundable discounts created a mutually beneficial and profitable relationship between the companies. Ingram Micro gave McAfee a ready outlet for large volumes of its products, a substantial portion of which ultimately were not sold and were returned to McAfee, and McAfee used these sales to inflate its reported revenue. For its part, Ingram Micro had a cash-rich vendor willing to make extraordinary payments and concessions that enabled Ingram Micro's Product Management Group to post greater profit margins for its software segment, and thereby boost the company's overall performance.

<u>Ingram Micro Ignored Its Internal Inventory Goals and Held Excess McAfee Product</u>

8. During the relevant period, Ingram Micro's internal inventory management goal was to carry no more than eight weeks worth of inventory from any vendor. Ingram Micro monitored its levels of owned inventory on a monthly basis. From the second quarter of 1998 through 2000, in order to take advantage of McAfee's willingness to pay Ingram Micro to buy ever-increasing levels of unneeded products, Ingram Micro disregarded its inventory goals and held excessive amounts of unneeded McAfee products, maintaining inventory levels far in excess of the amount it reasonably expected to sell. By early 2000, Ingram Micro carried as much as *twenty-two months worth* of inventory of McAfee software licenses (that is, the amount of inventory that Ingram Micro ordinarily would expect to sell over the course of twenty-two months). Instead of exercising its unwritten right to return products to McAfee in order to reduce the inventory, Ingram Micro continued purchasing McAfee product in 2000 in order to take advantage of the extraordinary discounts and cash payments offered to Ingram Micro by McAfee as an inducement to purchase additional products.

Ingram Micro Misrecorded on its Books and Records Round-Trip Transactions
With McAfee That Were Not Detected by Ingram Micro's Internal Controls

9. During the relevant period, Ingram Micro and McAfee also engaged in various circular transactions that were lacking in economic substance and were designed solely to inflate McAfee's reported revenues. Ingram Micro profited from these transactions by receiving unearned compensation on sales that it did not originate.

10. From June 1998 through June 2000, McAfee bought back tens of millions of dollars worth of its own products from Ingram Micro – while granting Ingram Micro a significantly higher than normal profit margin – in order to avoid costly direct returns that would have negatively impacted McAfee's revenues. McAfee carried out this subterfuge by using a subsidiary called "Net Tools" to repurchase approximately $45.5 million of inventory it had sold to Ingram Micro. In order to avoid accepting returns directly from Ingram Micro, McAfee acted as a reseller and instructed Ingram Micro to ship the products to buyers identified by McAfee. McAfee reimbursed Ingram Micro for the shipping costs and paid an inflated profit margin to Ingram Micro, even though Ingram Micro had done nothing to bring about the sale of the products. These transactions reduced Ingram Micro's inventory and enabled Ingram Micro to dispose of excess McAfee products at a profit, without directly returning the product to McAfee. McAfee's use of Net Tools as a means for reducing excess inventory held by Ingram Micro was a subject of quarterly buy-in negotiations between McAfee and Ingram Micro concerning the amount of additional McAfee products that Ingram Micro would agree to buy and the terms of those quarterly buy-in transactions. Ingram Micro knew or should have known that McAfee was buying back its own products through Net Tools. Ingram Micro dedicated no selling efforts to these transactions – no sales executive was ever assigned by Ingram Micro to the Net Tools account. Nonetheless, Ingram Micro earned a high profit margin of approximately thirteen percent on its sales to Net Tools, far in excess of its average profit margin of two to three percent during that period.

11. In seven consecutive quarters beginning in 1998, Ingram Micro and McAfee took advantage of asymmetries in the dates on which the companies' respective quarters ended.[4] Before the end of McAfee's quarter, Ingram Micro would agree to purchase millions of dollars of McAfee products that it did not need to meet its inventory requirements or sales goals. Within days, however, after McAfee's quarter closed, but before Ingram Micro's quarter had ended, Ingram Micro returned equivalent product to McAfee to avoid reporting the inventory on its quarter-end financial statements. McAfee exploited the timing of the product sales and returns that occurred during the gaps between the companies' quarter-ends ("gap days") to record revenues in one quarter while deferring recording the related returns until the following quarter. McAfee compensated Ingram Micro for participating in these patently-irregular and nonsubstantive gap day transactions by paying Ingram Micro non-refundable volume-based discounts on the purchases. McAfee, in turn, engaged in the sham gap day transactions and deferred accounting for the product

[4] Ingram Micro's fiscal calendar was organized into four quarters of thirteen weeks, while McAfee's fiscal calendar used the more traditional quarters that ended on the last day of every third month. Consequently, McAfee's fiscal quarter would, at times, end one or more days before Ingram Micro's fiscal quarter ended.

returns until the following quarter, in order to create the appearance that it had met its quarterly sales goals and to inflate its revenue. In total, more than $115 million worth of McAfee products was purchased and returned by Ingram Micro in such gap day transactions.[5]

12. Ingram Micro's participation in the quarter-end transactions was attributable, in part, to a failure to devise and maintain an adequate system of internal controls. Although Ingram Micro's Product Management Group approved the amount and timing of the purchases from and returns to McAfee, properly functioning internal accounting controls would have alerted senior management to the nature, timing, and extent of the nonsubstantive purchase-and-return transactions. Ingram Micro's books and records did not fairly and accurately reflect the true nature of these transactions.

13. In the second quarter of 1999, McAfee arranged sham sales of approximately $11 million worth of products by Ingram Micro to certain customers as another means of bolstering McAfee's reported revenues. To execute these transactions, Ingram Micro needed to make a special purchase of McAfee product, which it then delivered to the customers that had been identified by McAfee. McAfee recorded revenue immediately upon sale of the additional product to Ingram Micro. The products later were returned to Ingram Micro by the customers. McAfee paid Ingram Micro more than $600,000 as a purported profit on the sales, even though Ingram Micro was merely the conduit for the delivery and subsequent return of the products. When Ingram Micro sought to deduct from its accounts payable to McAfee the cost of the goods that it had specially purchased for these transactions, which would have lowered McAfee's revenues in the quarter, McAfee sent Ingram Micro a cash payment equal to the cost of the goods and a profit

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[5] Ingram Micro and McAfee also engaged in other similar transactions that were designed to enable McAfee to record revenue from additional sales to Ingram Micro prior to the end of its quarter, while deferring when Ingram Micro would receive the product and, ultimately, allowing Ingram Micro to return to McAfee in a subsequent quarter a substantial portion of the product that Ingram Micro purchased in such transactions. Ingram Micro and McAfee structured certain quarterly buy-in deals so that McAfee could record revenue from such sales during its quarter, but the purchased product would not "arrive" in Ingram Micro's inventory until after Ingram Micro's quarter had ended. At various times during the relevant period, Ingram Micro insisted on such "slow-boating" arrangements as a condition of its agreement to purchase product from McAfee. McAfee's agreement not to ship the product until after Ingram Micro's quarter had ended enabled Ingram Micro to avoid recording the product in its inventory for its quarterly reports. However, the agreements were contrivances because the products at issue were, for the most part, software licenses and not tangible inventory that needed to be shipped or otherwise physically delivered. McAfee made rebate payments and other concessions in order to induce Ingram Micro to participate in such transactions.

Between the first quarter of 1999 and the fourth quarter of 2000, Ingram Micro placed at least $188.5 million in purchase orders that were designated for shipment after the close of Ingram Micro's quarter. Of this amount, Ingram Micro received about $172 million in McAfee products after the quarter in which the buy-in deal was made. Of the $172 million in products that were received after the quarter of the buy-in deal, Ingram Micro returned approximately $145 million worth to McAfee. These returns effectively completed round-trip transactions that enabled McAfee to inflate its reported financial results. For its part, Ingram Micro received millions of dollars in payments and other concessions from McAfee that, as discussed above, were not contingent on Ingram Micro actually selling the products.

margin of more than $600,000, in order to avoid having to accept a return. Ingram Micro inaccurately recorded the transaction as a sale in its own financial records.

Ingram Micro Was Paid To Not Return McAfee Products

14. McAfee made disguised payments to induce Ingram Micro to refrain from exercising its unlimited right to return unsold inventory to McAfee. On at least four occasions, Ingram Micro requested and received payments for holding "excess inventory," even though the inventory consisted mainly of electronic software licenses represented by bar codes kept in binders that occupied little warehouse space and, as a result, entailed virtually no storage expense for Ingram Micro. The excess inventory fees were calculated as a percentage of the value of Ingram Micro's owned inventory of McAfee products.

15. As Ingram Micro's inventory of McAfee products increased, so did the size of its requests for excess inventory payments, resulting in Ingram Micro obtaining both volume-based discounts at the time of the buy-in agreements, and additional holding fees on the same unsold products for agreeing not to return them to McAfee. Near the end of the first quarter of 2000, Ingram Micro determined that it held $54 million worth of excess McAfee inventory. To forestall a return of some or all of this inventory, senior McAfee officials offered to discount the amount that Ingram Micro owed McAfee by two percent of the value of the excess inventory -- or approximately $1.1 million -- as a further inducement for Ingram Micro to continue holding the excess inventory and purchasing additional inventory in the following quarter. This discount was memorialized in a side letter dated March 8, 2000. Subsequently, Ingram Micro not only did not return the excess McAfee inventory, but, on March 24, 2000, entered into a new agreement to purchase approximately $31.4 million worth of additional McAfee products. Ingram Micro also requested excess inventory fees in the second and third quarters of 2000, similarly calculated as a percentage of the value of the excess stock that Ingram Micro held in its inventory. In June 2000, Ingram Micro received approximately $2.5 million to continue holding excess inventory, and in the third quarter, Ingram Micro was paid approximately $3.8 million in excess inventory payments.

Ingram Micro Misrecorded Excess Inventory Payments as Early Pay Discounts

16. The excess inventory fees negotiated by Ingram Micro for the second and third quarters of 2000 were characterized on Ingram Micro's books in a manner designed to meet quarterly financial targets. In both quarters, Ingram Micro asked McAfee to recharacterize the excess inventory payments as "early pay" discounts, or discounts that would have been earned if Ingram Micro had paid on its account with McAfee earlier than required under their contract. These recharacterizations did not accurately reflect the substance of the McAfee payments. Under Ingram Micro's accounting policies, had the $6.3 million of fees been associated with its inventory, such as an "excess inventory" payment, then Ingram Micro would have been unable to recognize the full amount of the fees in the quarters in which they were received, pending the disposition of the inventory associated with the fees. After McAfee agreed to recharacterize the fees as "early pay discounts," Ingram Micro recognized the fees into income in the quarters they were received, and did not amortize them over time, as required by its accounting policies. In these transactions, Ingram Micro solicited and obtained documentation from McAfee that did not

accurately reflect the substance of the McAfee payments. As a result, Ingram Micro inaccurately recorded those transactions on its books and records as "early pay" discounts, rather than inventory-related payments.

Ingram Micro Accepted and Misrecorded Mischaracterized Payments From McAfee

17. McAfee often mischaracterized in its communications with Ingram Micro the purpose and nature of the payments that it was making to Ingram Micro as inducements for Ingram Micro to hold excess inventory and purchase additional inventory. From September 1999 through October 2000, McAfee mischaracterized in correspondence and communications with Ingram Micro the actual purpose of payments totaling at least $59.5 million. McAfee relied upon the misleading descriptions to disguise and justify its own improper accounting for the discounts and concessions it paid to Ingram Micro. Although Ingram Micro was aware of the mischaracterizations as well as the actual purpose for the payments from McAfee, Ingram Micro accepted the payments and typically recorded them on its books and records with different explanations or designations that comported with Ingram Micro's understanding of the actual purpose of the payments, and not the explanation that had been made by McAfee in its correspondence. A properly functioning system of internal controls would have alerted senior management to these discrepancies.

18. In one instance, on September 30, 1999, McAfee wired a $16 million cash payment to Ingram Micro in order to keep Ingram Micro from reducing its payment on a pending invoice by a corresponding amount. Ingram Micro initially classified the payment as an "unapplied amount for future amounts due," but later, Ingram Micro applied the $16 million cash payment to offset nearly $16 million in planned returns, rather than deducting that amount from a payment to McAfee for product purchases. At the end of the quarter, Ingram Micro paid McAfee in full the invoiced amounts for purchased product, in effect returning the $16 million to McAfee. Ingram Micro's books and records, and internal controls, never properly reflected the purpose of the $16 million payment, which was to prevent Ingram Micro from returning products and reducing its accounts payable to McAfee.

19. Similarly, in November 1999, McAfee sent Ingram Micro a memorandum in which it outlined a plan to pay Ingram Micro $21 million for discounts, fees, and concessions that had been negotiated in prior quarterly buy-in transactions. On November 17, 1999, McAfee delivered eight payments totaling over $21 million to Ingram Micro in eight separate wire transfers. At the same time, McAfee also sent Ingram Micro eight cover letters, each dated November 17, 1999, characterizing the payments as reimbursement for expenses such as "marketing fund rebates and other promotional programs" rather than discounts, fees, and concessions, and attributing the payments to quarters other than those for which the payments actually were being made.

20. McAfee's November 1999 memorandum also revealed that one purpose of the payments was to create a misleading accounts receivable balance that Ingram Micro could confirm to McAfee's outside accountants. In the memorandum, McAfee asked Ingram Micro to confirm to McAfee's outside accountants that Ingram Micro owed McAfee approximately $40 million. However, at the time, Ingram Micro could not truthfully confirm a $40 million balance because

Ingram Micro's records reflected an account payable of only about $19 million, after deducting the $21 million in discounts and other amounts that McAfee previously had agreed to pay to Ingram Micro for purchasing additional products. In the memorandum, McAfee proposed that it would pay Ingram Micro $21 million in order to offset the $21 million in discounts and concessions that Ingram Micro claimed it was owed, and that, Ingram Micro, in turn, would confirm to McAfee's outside auditors that it owed McAfee an undiscounted total of $40 million. McAfee's outside auditors never received the confirmation in question from Ingram Micro. Ingram Micro nevertheless retained the $21 million, canceled the outstanding discounts and reductions on its records, and later sent McAfee a check for approximately $38 million as payment in full under the invoices in question.[6] By participating in this round-tripping of cash payments with McAfee, Ingram Micro helped to create the false impression that McAfee had been paid in full on the outstanding invoices to Ingram Micro. As a result, Ingram Micro overstated its accounts payable for the quarter and its internal controls failed to alert Ingram Micro's senior management that the company was engaging in a highly irregular transaction that lacked economic substance.

Violations

21. A result of the conduct described above, Ingram Micro violated Exchange Act Section 13(b)(2)(A), which required Ingram Micro to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect its transactions.

22. As a further result of the conduct described above, Ingram Micro violated Exchange Act Section 13(b)(2)(B), which required Ingram Micro to devise and maintain a system of internal controls sufficient to provide reasonable assurance that transactions are executed in accordance with management's general or specific authorization.

Ingram Micro's Remedial Efforts

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

IV.

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

Accordingly, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent Ingram Micro Inc. cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

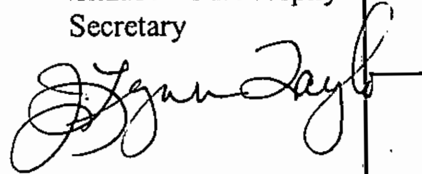
B. IT IS FURTHER ORDERED that Respondent shall, within thirty (30) days of the entry of this Order, pay disgorgement of $15,000,000 to the Clerk of the United States District

[6] McAfee's auditors relied on the fact that Ingram Micro had paid the invoiced amount in full as proof that Ingram Micro, in fact, owed that amount to McAfee.

Court for the Northern District of California to be added to the Distribution Fund established in SEC v. McAfee, Inc., Case Number C06-0009 (PJH). Respondent shall provide proof of payment, in a form acceptable to the staff of the Commission, to Yuri B. Zelinsky, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549. In the event the Court disallows such payment to the Distribution Fund then Respondent shall pay within ten (10) days after the Court disallows said payment $15,000,000 to the United States Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Ingram Micro Inc. 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, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549.

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. 59913 / May 13, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13469

In the Matter of

Wolfe & Hurst Bond Brokers, Inc. and Peter J. Debany

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b), 15B(c) 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), 15B(c) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Wolfe & Hurst Bond Brokers, Inc. ("Wolfe & Hurst") and Peter J. Debany ("Debany") (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement ("Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b), 15B(c) 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 Respondents' Offers, the Commission finds that:

Summary

1. This matter involves the misconduct of Wolfe & Hurst Bond Brokers, Inc. ("Wolfe & Hurst"), a registered broker-dealer that operates as a municipal securities "brokers' broker," and Peter J. Debany ("Debany"), a registered representative formerly associated with the firm. From January 2002 through December 2003 ("the relevant time period"), Wolfe & Hurst and Debany manipulated bids-wanted auctions for municipal bonds by: 1) lowering the bids of the highest bidders and 2) entering cover bids in amounts between the winning bid and the existing cover bid during the auctions and advising the high bidder and the seller that those new bids were cover bids received from other municipal securities broker-dealers.

Respondents

2. **Wolfe & Hurst Bond Brokers, Inc.,** headquartered in Jersey City, New Jersey, is a broker-dealer operating as a brokers' broker registered with the Commission pursuant to Section 15(b) of the Exchange Act since July 2, 1980. Wolfe & Hurst is also a member of the Financial Industry Regulatory Authority. During the relevant time period, the firm employed 39 individuals, of whom 32 were associated persons, and had branch offices in North Carolina, Florida, Illinois, Minnesota, Texas, California and Arizona.

3. **Peter J. Debany,** age 52, was formerly associated with Wolfe & Hurst from May 25, 1985 to September 28, 2007. Debany is not currently associated with any member firm. At all relevant times, Debany held a Series 52 License. Debany worked in Wolfe & Hurst's Jupiter, Florida branch office. During the relevant time period, Debany was one of the firm's most senior municipal bond traders and highest producers.

Background

4. A municipal securities brokers' broker is a securities firm that acts as an agent exclusively for other municipal securities brokers or dealers.[1] The role of the municipal securities

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[1] Exchange Act Rule 15c3-1(a)(8)(ii) defines a municipal securities brokers' broker as "a municipal securities broker or dealer . . . who has no 'customers' as defined in this rule." Rule 15c3-1 establishes net capital requirements for brokers and dealers, including municipal securities brokers' brokers. A "customer" for purposes of this rule is defined within the context of whether a broker "carries customer or broker or dealer accounts and receives or holds funds or securities for those persons." Rule 15c3-1(a)(2)(i). Thus, under Rule 15c3-1(a)(8)(ii), if a brokers' broker does not carry accounts or receive or hold funds for broker-dealers or other persons, it does not have "customers" for purposes of this rule.

brokers' broker is to match buy and sell orders in municipal bonds. The brokers' brokers do not take any positions in municipal issues, and therefore, all transactions by a brokers' broker are effectively riskless-principal transactions, and are only executed when both sides of the transaction have agreed to the trade. In this way, the brokers' broker never holds any securities in inventory. The brokers' broker receives a commission from the selling broker-dealer in a transaction.

5. A brokers' broker sells bonds in two primary ways: "offering" and "bids-wanted." In an "offering," the seller will tell the brokers' broker at what price the seller wants to sell the bond. The brokers' broker will then call all of its contacts and try to sell the bond that is being offered. Potential buyers are free to counter the offer with a bid, and if the bond is ultimately sold, the final price is often a negotiated amount, with the brokers' broker acting as an intermediary. Offerings typically remain open until a transaction is made, or until the selling broker-dealer decides to pull the item from consideration. This is the method selected by the seller when he or she wants the brokers' broker to negotiate a sale of municipal bonds on his or her behalf.

6. In contrast, when a seller wishes to sell bonds at auction for the best price available, the seller asks a brokers' broker to conduct a "bids-wanted" auction on his or her behalf. In this format, the brokers' broker notifies potential bidders of specific bonds that are up for auction via phone, email or the firm's website. Bidders typically phone in bids on the items that interest them, although they can also bid directly through the firm's website, or via email and instant messages. When the auction closes, the seller will receive the highest price bid at the auction. Typically, the brokers' broker allows bidders to change or cancel their bids as long the bidding process remains open. However, the auction is "blind" in that bidders are not allowed to know their position relative to other bidders' positions and the brokers' brokers are not expected to intervene in the bidding process, absent a bona-fide error on the part of a bidder. After an auction is concluded, it is customary for brokers' brokers to tell the winning bidder and the seller the amount of the second-highest, bona-fide bid, also known as the "cover bid."

7. When a brokers' broker operates a bids-wanted auction, bidders and sellers typically judge the performance of the brokers' broker based on, among other things, the spread between the winning bid and the cover bid (the "spread"). A narrow spread may indicate to the seller and bidders that the auction was competitive and, therefore, was well-run. A large spread could convey the opposite impression.

Wolfe & Hurst and Debany Conducted Bids-Wanted Auctions

8. During the relevant time period, Wolfe & Hurst, through Debany, while conducting certain bids-wanted auctions for municipal bonds, knowingly engaged in materially manipulative conduct, which had the effect of reducing the spreads and, in some cases, may have affected the prices paid for the municipal bonds.

9. First, Wolfe & Hurst through Debany, at or near the end of auctions during the relevant time period, on numerous occasions, inserted cover bids at prices between the winning bids and the existing cover bids. When the auctions concluded, Wolfe & Hurst and Debany then communicated the prices of the "new" cover bids to the winning bidders and the sellers advising them that those new bids were cover bids received from other municipal securities broker-dealers. By creating these "new" cover bids, however, Wolfe & Hurst and Debany narrowed the spreads in these auctions. Further, Wolfe & Hurst and Debany did not disclose to the buyers or the sellers participating in these auctions that Debany had entered these "new" cover bids.

10. While the "new" cover bids did not affect the actual prices paid for the municipal bonds at the affected auctions, the information communicated to the high bidder and the seller did not reflect the true spread between the high bid and what others in the market were willing to pay, which may have created a misleading impression about the bidding range and potential demand for the municipal bonds at issue.

11. Further, by reporting these cover bids to the sellers, Wolfe & Hurst and Debany may have made the auction look more competitive by creating the appearance that it had successfully solicited more bids on an item than it actually had been able to obtain. As a result, the seller may have been more likely to employ Wolfe & Hurst for future bids-wanted auctions because it believed that the firm could obtain more bids, and potentially, a higher price for the bonds. By giving the appearance that Wolfe & Hurst was conducting municipal bond auctions with tighter spreads between the winning bids and cover bids and by creating the illusion of additional interest in the bonds through the use of the inserted cover bids, Wolfe & Hurst manipulated the auctions in an attempt to obtain future business.

12. Second, in numerous auctions, Wolfe & Hurst through Debany, lowered the bids of the highest bidders to prices closer to the cover bids, thereby allowing the highest bidders to win these auctions at reduced prices and narrowing the spread for these auctions. Wolfe & Hurst and Debany engaged in this practice in order to earn goodwill from the high bidders who they needed to return and create demand in future auctions.

13. Wolfe & Hurst and Debany failed to disclose to the affected sellers that Debany had lowered the prices of these winning bids and that he had artificially narrowed the spreads. This omission may have potentially misled the sellers, who thought they had received the highest bid placed during the auction. This conduct may have also have deprived the sellers of the opportunity to obtain the highest bids received during the auctions and impacted the prices paid for the bonds offered and sold during the auctions.

Violations

14. Section 15(c)(1)(A) of the Exchange Act makes it unlawful for any broker or dealer "to effect any transaction in … any security … by means of any manipulative, deceptive, or fraudulent device or contrivance."

9. First, Wolfe & Hurst through Debany, at or near the end of auctions during the relevant time period, on numerous occasions, inserted cover bids at prices between the winning bids and the existing cover bids. When the auctions concluded, Wolfe & Hurst and Debany then communicated the prices of the "new" cover bids to the winning bidders and the sellers advising them that those new bids were cover bids received from other municipal securities broker-dealers. By creating these "new" cover bids, however, Wolfe & Hurst and Debany narrowed the spreads in these auctions. Further, Wolfe & Hurst and Debany did not disclose to the buyers or the sellers participating in these auctions that Debany had entered these "new" cover bids.

10. While the "new" cover bids did not affect the actual prices paid for the municipal bonds at the affected auctions, the information communicated to the high bidder and the seller did not reflect the true spread between the high bid and what others in the market were willing to pay, which may have created a misleading impression about the bidding range and potential demand for the municipal bonds at issue.

11. Further, by reporting these cover bids to the sellers, Wolfe & Hurst and Debany may have made the auction look more competitive by creating the appearance that it had successfully solicited more bids on an item than it actually had been able to obtain. As a result, the seller may have been more likely to employ Wolfe & Hurst for future bids-wanted auctions because it believed that the firm could obtain more bids, and potentially, a higher price for the bonds. By giving the appearance that Wolfe & Hurst was conducting municipal bond auctions with tighter spreads between the winning bids and cover bids and by creating the illusion of additional interest in the bonds through the use of the inserted cover bids, Wolfe & Hurst manipulated the auctions in an attempt to obtain future business.

12. Second, in numerous auctions, Wolfe & Hurst through Debany, lowered the bids of the highest bidders to prices closer to the cover bids, thereby allowing the highest bidders to win these auctions at reduced prices and narrowing the spread for these auctions. Wolfe & Hurst and Debany engaged in this practice in order to earn goodwill from the high bidders who they needed to return and create demand in future auctions.

13. Wolfe & Hurst and Debany failed to disclose to the affected sellers that Debany had lowered the prices of these winning bids and that he had artificially narrowed the spreads. This omission may have potentially misled the sellers, who thought they had received the highest bid placed during the auction. This conduct may have also have deprived the sellers of the opportunity to obtain the highest bids received during the auctions and impacted the prices paid for the bonds offered and sold during the auctions.

Violations

14. Section 15(c)(1)(A) of the Exchange Act makes it unlawful for any broker or dealer "to effect any transaction in … any security … by means of any manipulative, deceptive, or fraudulent device or contrivance."

15. Section 15B(c)(1) of the Exchange Act makes it unlawful, while acting as a broker, dealer or municipal securities dealer, using the mails or interstate commerce "to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule" of the MSRB.

16. MSRB Rule G-17 mandates that: "In the conduct of its municipal securities activities, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice."

17. As a result of the conduct described above, Wolfe & Hurst willfully violated Sections 15(c)(1)(A) and 15B(c)(1) of the Exchange Act and MSRB Rule G-17.

18. As a result of the conduct described above, Debany willfully aided and abetted and caused Wolfe & Hurst's violations of Sections 15(c)(1)(A) and 15B(c)(1) of the Exchange Act and MSRB Rule G-17.

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 Sections 15(b)(6), 15B(c) and 21C of the Exchange Act, it is hereby ORDERED that:

1. Wolfe & Hurst and Debany are censured.

2. Wolfe & Hurst shall cease and desist from committing or causing any violations and any future violations of Sections 15(c)(1)(A) and 15B(c)(1) of the Exchange Act and MSRB Rule G-17.

3. Debany shall cease and desist from causing any violations and any future violations of Sections 15(c)(1)(A) and 15B(c)(1) of the Exchange Act and MSRB Rule G-17.

4. Debany be, and hereby is, barred from association with any broker, dealer or municipal securities dealer with the right to reapply for association after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by Debany 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 Debany, 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.

5. Wolfe & Hurst shall, within 30 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 Wolfe & Hurst as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Associate Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

6. Debany shall, within 30 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 Debany as a respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Associate Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

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. 59911 / May 13, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13468

In the Matter of FrontLine Capital Group, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

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

II.

In anticipation of the institution of these proceedings, FrontLine Capital 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, FrontLine Capital consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), and to the findings as set forth below.

III.

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

1. FrontLine Capital (CIK No. 1052743) is a Delaware corporation located in Uniondale, New York with a class of securities registered with the Commission under Exchange Act Section 12(g). As of September 19, 2008, the

company's common stock (symbol "FLCGQ") ceased trading on the over-the-counter markets. On June 12, 2002, the Respondent filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of New York which is still pending.

2. FrontLine Capital has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder while its securities were registered with the Commission in that it has not filed any periodic reports for any fiscal period subsequent to the period ended June 30, 2003.

IV.

Section 12(j) of the Exchange Act provides as follows:

The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

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

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

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. 59909 / May 13, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13467

In the Matter of **Large Scale Biology Corporation,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

In anticipation of the institution of these proceedings, Large Scale Biology 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, Large Scale Biology consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), and to the findings as set forth below.

III.

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

1. Large Scale Biology (CIK No. 1108951) is a Delaware corporation located in Vacaville, California with a class of securities registered with the Commission under Exchange Act Section 12(g).

2. Large Scale Biology has failed to comply with Exchange Act Section 13(a), and Rules 13a-1 and 13a-13 thereunder, while its securities were registered with the Commission in that it has not filed any periodic reports for any fiscal period subsequent to the period ended September 30, 2005.

IV.

Section 12(j) of the Exchange Act provides as follows:

> The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro and Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 13, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13470

In the Matter of CHANDRASHEKHAR GOPINATHAN, 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 AND NOTICE OF HEARING

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 Chandrashekhar Gopinathan ("Respondent" or "Gopinathan").

II.

After an investigation, the Division of Enforcement alleges that:

A. NATURE OF PROCEEDINGS

1. This proceeding arises out of materially misleading statements and omissions in offering documents in connection with a major, private securities offering backed by a portfolio of regional aircraft manufactured by Bombardier, Incorporated ("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

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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.

2. Respondent Gopinathan, a vice-president, and a junior associate served on the Commercial Aviation Team of Wachovia's Structured Asset Finance Group, and were responsible for preparing the cash flow models for the transaction. One of the purposes of the models was to show that the transaction would have sufficient liquidity to pay interest and principal when due. Gopinathan, the junior associate, and a managing director – the three 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, Gopinathan and the junior associate, on the managing director's orders, manipulated certain payment assumptions in order to hide the shortfalls. As a result, the offering memorandum provided materially false and incomplete information about the liquidity of the B Note transaction.

3. By engaging in the acts alleged herein, Respondent Gopinathan violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. RESPONDENT

1. Respondent Gopinathan, age 32, currently resides in London, England. During the relevant time period, Gopinathan was a Vice-President at Wachovia on the Commercial Aviation Team in the Structured Asset Finance Group. Gopinathan assisted in the preparation of the cash flow models and payment assumptions for the RASPRO offering. While at Wachovia, Gopinathan had passed neither the Series 7 nor the Series 63 exams and was not a registered representative. Gopinathan was placed on administrative leave by Wachovia on December 22, 2005, and resigned from Wachovia on March 7, 2006. Gopinathan is currently employed by a securities firm in London, England, but is not a registered representative.

C. OTHER RELEVANT ENTITIES

1. Wachovia Capital Markets, LLC, 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.

2. Bombardier Incorporated 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 Montreal, Québec, Canada, but it has U.S. offices in Vermont and Kansas.

D. FACTS

The RASPRO OFFERING

1. 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.

2. *The Asset Side of the Transaction:* Once Bombardier sold the 70 new passenger airplanes to RASPRO, those aircraft were RASPRO's assets.[1] RASPRO leased the 70 aircraft to four regional airlines in return for regular lease payments. In addition to these regular lease payments, the airlines also made a one-time additional payment, payable at the same time the first regular payment was due. When RASPRO received the airline payments, it placed them into a collections account. The incoming payments remained in this account for 15 days, except for the one-time additional payment which stayed in the collections account for 105 days. While held in the collections account, the lease-payment funds earned interest.

3. *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, including a 1% servicing fee. 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 noteholders. 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.[2] Nineteen investment banks and other sophisticated institutional investors purchased the G Notes. The second tranche consisted of $275 million leveraged lease equity that provided the equity purchaser with a tax benefit. The leveraged lease equity was not guaranteed. Wachovia purchased the leveraged lease equity tranche.

4. 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 cashflows 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.

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

[2] The G Notes were guaranteed for timely payment of interest and principal and rated AAA with a shadow rating of a single A. A shadow rating is a rating performed on an issuer by a credited institution, which is not publicly announced.

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

5. 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.[4]

6. 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 noteholders 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.

GOPINATHAN'S KNOWLEDGE OF THE EARLY DRAW

7. Wachovia was the sole structuring, underwriting and placement agent for the RASPRO offering.

8. The managing director, Gopinathan, and the junior associate, the three 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 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.

9. 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.

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[4] Bombardier hired RISConsulting ("RISC") to perform an analysis under FASB 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.

10. The managing director, Gopinathan and the junior associate knew as early as July 2005 that there would be an early draw on the B Note guarantee in the transaction even in the base case.

11. In July 2005, the junior associate informed the managing director that the transaction models were showing an early draw on the B Note guarantee. The managing director instructed the junior associate that the models could not show such a draw in the base case and told him to consult with Gopinathan.

12. The managing director and the junior associate spoke separately to Gopinathan. Gopinathan 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.

13. During the relevant period, Gopinathan assisted the junior associate with making changes to the liability side of the transaction.

THE CHANGES TO THE PAYMENT ASSUMPTIONS AND TRANSACTION MODEL

14. 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 cashflows. The failure to model the swap agreements had the greatest impact on overstating expected cashflows. 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.

15. Gopinathan was aware that the payment assumptions and cashflow model outputs in the offering memorandum and the cashflow model inaccurately reflected a lower interest rate for the G and B Note coupons and that the change was made to the interest rate to mask the draw on the B Note guarantee, but incorporated this false assumption into the offering memorandum and cashflow models regardless of that knowledge.

16. Cashflows 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 cashflows, overstating

cash flows in the first quarter by $742,000. This accounted for approximately 15.5% of the aggregate overstated cashflows in the first quarter.

17. Gopinathan was aware that the payment assumptions and cashflow model outputs in the offering memorandum and the cashflow model inaccurately reflected a higher reinvestment rate and that the reinvestment rate was raised to mask the draw on the B Note guarantee, but incorporated this false assumption into the offering memorandum and cashflow models regardless of that knowledge.

18. 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. 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 cashflows. 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]

19. Gopinathan was aware that the payment assumptions in the offering memorandum reflected a 15-day reinvestment period, as intended in the transaction, while the cashflow model and those cashflow model outputs used in the offering memorandum inaccurately reflected a 105-day reinvestment period, and that the period was inflated in the modeling to mask the draw on the B Note guarantee. Regardless of this knowledge he decided to incorporate the inflated reinvestment period into the cashflow models and into the cashflow model outputs that were used in the offering memorandum.

20. The cashflow 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.

21. Gopinathan was aware that the payment assumptions and cashflow model outputs in the offering memorandum and the cashflow model inaccurately reflected that no Class B Note acceleration event would occur and that this false assumption was made to mask the draw

[6] The errors in conjunction with each other compound the monetary effect on the cashflows. That is, each of the percentages reflects the effect of the particular false assumption being discussed on the overall cashflows 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%.

on the B Note guarantee, but decided to incorporate this false assumption into the offering memorandum and cashflow models regardless of that knowledge.

22. Gopinathan suggested that changes be made to assumptions on the liability side of the transaction. Gopinathan assisted the junior associate in making the changes to the model. Gopinathan was aware that the changes were made to mask the early draw on the B Note guarantee in the base case, and he made no effort to correct the model or disclose the facts regarding the changes or the early draw in the base case to anyone outside of the Commercial Aviation Team of which he was a part.

THE EARLY DRAW IS DISCOVERED BY BOMBARDIER AFTER CLOSING

23. 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.

24. A few weeks after closing, Bombardier's consulting firm completed its FIN 46 analysis and 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.

WACHOVIA CONDUCTS AN INTERNAL INVESTIGATION, SELF-REPORTS THE TRANSACTION AND TAKES REMEDIAL ACTION

25. On December 22, 2005, Wachovia placed the three members of the Commercial Aviation Team on administrative leave.

26. In January 2006, Wachovia retained outside counsel to conduct an internal investigation.

27. 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.

28. Gopinathan resigned from Wachovia on March 7, 2006.

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

E. **VIOLATIONS**

1. As a result of the conduct described above, Gopinathan 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.

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 Respondent 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 8A of the Securities Act and Section 21C of the Exchange Act, Gopinathan should be ordered to cease-and-desist from committing or causing violations of and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and

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

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

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

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 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
May 14, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13471

In the Matter of **FCF, Inc.,** **FI Liquidating Co., Inc.,** **Fields Aircraft Spares, Inc., and** **First Dynasty Mines, Ltd.** **(n/k/a Sterlite Gold Ltd.),** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents FCF, Inc., FI Liquidating Co., Inc., Fields Aircraft Spares, Inc., and First Dynasty Mines, Ltd. (n/k/a Sterlite Gold Ltd.)

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. FCF, Inc. (CIK No. 1127575) is a permanently revoked Nevada corporation located in Costa Mesa, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FCF 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 $26,784 for the prior twelve months.

2. FI Liquidating Co., Inc. (CIK No. 820095) is a dissolved Delaware corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the

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period ended September 30, 1996. As of May 11, 2009, the company's stock (symbol "FLQD") was traded on the over-the-counter markets.

3. Fields Aircraft Spares, Inc. (CIK No. 1002911) is an expired Utah corporation located in Simi Valley, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Fields 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 July 2, 1999, which reported a net loss of over $1.14 million for the prior three months. On November 9, 1999, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, and a reorganization plan was confirmed on November 8, 2001. As of May 11, 2009, the company's stock (symbol "FASIQ") was traded on the over-the-counter markets.

4. First Dynasty Mines, Ltd. (CIK No. 798291) (n/k/a Sterlite Gold Ltd.) (CIK No. 1374593) is a Yukon corporation located in Whitehorse, Yukon, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). First Dynasty is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 1999, which reported a net loss of $9.9 million for the prior twelve 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. 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.

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

III.

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

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

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

IV.

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

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

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

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

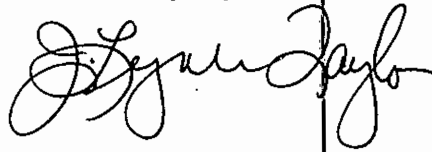
IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment



By: J. Lynn Taylor
Assistant Secretary

Appendix 1

Chart of Delinquent Filings
In the Matter of FCF, Inc., et al.,

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
FCF, Inc.					
	10-QSB	12/31/00	04/03/01	Not filed	97
	10-QSB	03/31/01	05/15/01	Not filed	96
	10-QSB	06/30/01	08/14/01	Not filed	93
	10-KSB	09/30/01	12/31/01	Not filed	89
	10-QSB	12/31/01	02/14/02	Not filed	87
	10-QSB	03/31/02	05/15/02	Not filed	84
	10-QSB	06/30/02	08/14/02	Not filed	81
	10-KSB	09/30/02	12/30/02	Not filed	77
	10-QSB	12/31/02	02/14/03	Not filed	75
	10-QSB	03/31/03	05/15/03	Not filed	72
	10-QSB	06/30/03	08/14/03	Not filed	69
	10-KSB	09/30/03	12/29/03	Not filed	65
	10-QSB	12/31/03	02/17/04	Not filed	63
	10-QSB	03/31/04	05/17/04	Not filed	60
	10-QSB	06/30/04	08/16/04	Not filed	57
	10-KSB	09/30/04	12/29/04	Not filed	53
	10-QSB	12/31/04	02/14/05	Not filed	51
	10-QSB	03/31/05	05/16/05	Not filed	48
	10-QSB	06/30/05	08/15/05	Not filed	45
	10-KSB	09/30/05	12/29/05	Not filed	41
	10-QSB	12/31/05	02/14/06	Not filed	39
	10-QSB	03/31/06	05/15/06	Not filed	36
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-KSB	09/30/06	12/29/06	Not filed	29
	10-QSB	12/31/06	02/14/07	Not filed	27
	10-QSB	03/31/07	05/15/07	Not filed	24
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-KSB	09/30/07	12/29/07	Not filed	17
	10-QSB	12/31/07	02/14/08	Not filed	15

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
FCF, Inc.	*10-QSB*	03/31/08	05/15/08	Not filed	12
(continued)	*10-QSB*	06/30/08	08/14/08	Not filed	9
	10-KSB	09/30/08	12/29/08	Not filed	5
	10-Q[1]	12/31/08	02/17/09	Not filed	3
Total Filings Delinquent	33				
FI Liquidating Co., Inc.					
	10-Q	12/31/96	02/14/97	Not filed	147
	10-K	03/31/97	06/30/97	Not filed	143
	10-Q	06/30/97	08/14/97	Not filed	141
	10-Q	09/30/97	11/14/97	Not filed	138
	10-Q	12/31/97	02/17/98	Not filed	135
	10-K	03/31/98	06/29/98	Not filed	131
	10-Q	06/30/98	08/14/98	Not filed	129
	10-Q	09/30/98	11/16/98	Not filed	126
	10-Q	12/31/98	02/16/99	Not filed	123
	10-K	03/31/99	06/29/99	Not filed	119
	10-Q	06/30/99	08/16/99	Not filed	117
	10-Q	09/30/99	11/15/99	Not filed	114
	10-Q	12/31/99	02/14/00	Not filed	111
	10-K	03/31/00	06/29/00	Not filed	107
	10-Q	06/30/00	08/14/00	Not filed	105
	10-Q	09/30/00	11/14/00	Not filed	102
	10-Q	12/31/00	02/14/01	Not filed	99
	10-K	03/31/01	06/29/01	Not filed	95
	10-Q	06/30/01	08/14/01	Not filed	93
	10-Q	09/30/01	11/14/01	Not filed	90
	10-Q	12/31/01	02/14/02	Not filed	87
	10-K	03/31/02	07/01/02	Not filed	82
	10-Q	06/30/02	08/14/02	Not filed	81
	10-Q	09/30/02	11/14/02	Not filed	78
	10-Q	12/31/02	02/14/03	Not filed	75
	10-K	03/31/03	06/30/03	Not filed	71
	10-Q	06/30/03	08/14/03	Not filed	69
	10-Q	09/30/03	11/14/03	Not filed	66
	10-Q	12/31/03	02/17/04	Not filed	63
	10-K	03/31/04	06/29/04	Not filed	59
	10-Q	06/30/04	08/16/04	Not filed	57
	10-Q	09/30/04	11/15/04	Not filed	54

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
FI Liquidating Co., Inc.	*10-Q*	12/31/04	02/14/05	Not filed	51
(continued)	*10-K*	03/31/05	06/29/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-Q	12/31/05	02/14/06	Not filed	39
	10-K	03/31/06	06/29/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-Q	12/31/06	02/14/07	Not filed	27
	10-K	03/31/07	06/29/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-Q	12/31/07	02/14/08	Not filed	15
	10-K	03/31/08	06/30/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-Q	12/31/08	02/17/09	Not filed	3
Total Filings Delinquent	49				
Fields Aircraft Spares, Inc.					
	10-QSB	10/01/99	11/15/99	Not filed	114
	10-KSB	12/31/99	03/30/00	Not filed	110
	10-QSB	03/31/00	05/15/00	Not filed	108
	10-QSB	06/30/00	08/14/00	Not filed	105
	10-QSB	09/29/00	11/13/00	Not filed	102
	10-KSB	12/29/00	03/29/01	Not filed	98
	10-QSB	03/30/01	05/14/01	Not filed	96
	10-QSB	06/29/01	08/13/01	Not filed	93
	10-QSB	09/28/01	11/13/01	Not filed	90
	10-KSB	01/04/02	04/04/02	Not filed	85
	10-QSB	04/05/02	05/20/02	Not filed	84
	10-QSB	07/05/02	08/19/02	Not filed	81
	10-QSB	10/04/02	11/18/02	Not filed	78
	10-KSB	01/03/03	04/03/03	Not filed	73
	10-QSB	04/04/03	05/19/03	Not filed	72
	10-QSB	07/04/03	08/18/03	Not filed	69
	10-QSB	10/03/03	11/17/03	Not filed	66
	10-KSB	01/02/04	04/01/04	Not filed	61
	10-QSB	04/02/04	05/17/04	Not filed	60

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Fields Aircraft Spares, Inc.	*10-QSB*	07/02/04	08/16/04	Not filed	57
(continued)	*10-QSB*	10/01/04	11/15/04	Not filed	54
	10-KSB	12/31/04	03/31/05	Not filed	50
	10-QSB	04/01/05	05/16/05	Not filed	48
	10-QSB	07/01/05	08/15/05	Not filed	45
	10-QSB	09/30/05	11/14/05	Not filed	42
	10-KSB	12/30/05	03/30/06	Not filed	38
	10-QSB	03/31/06	05/15/06	Not filed	36
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-QSB	09/29/06	11/13/06	Not filed	30
	10-KSB	12/29/06	03/29/07	Not filed	26
	10-QSB	03/30/07	05/14/07	Not filed	24
	10-QSB	06/29/07	08/13/07	Not filed	21
	10-QSB	09/28/07	11/13/07	Not filed	18
	10-KSB	01/04/08	04/03/08	Not filed	13
	10-Q [1]	04/04/08	05/19/08	Not filed	12
	10-Q [1]	07/04/08	08/18/08	Not filed	9
	10-Q [1]	10/03/08	11/17/08	Not filed	6
	10-K [1]	01/02/09	04/02/09	Not filed	1

Total Filings Delinquent 38

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
First Dynasty Mines, Ltd. (n/k/a Sterlite Gold Ltd.)					
	20-F	12/31/00	07/02/01	Not filed	94
	20-F	12/31/01	07/01/02	Not filed	82
	20-F	12/31/02	06/30/03	Not filed	71
	20-F	12/31/03	06/30/04	Not filed	59
	20-F	12/31/04	06/30/05	Not filed	47
	20-F	12/31/05	06/30/06	Not filed	35
	20-F	12/31/06	07/02/07	Not filed	22
	20-F	12/31/07	06/30/08	Not filed	11
Total Filings Delinquent	8				

[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.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2875 / May 15, 2009

Admin. Proc. File No. 3-13008

In the Matter of

MITCHELL M. MAYNARD
and
DORICE A. MAYNARD
3099 West Chapman Ave., Apt. 426
Orange, California 92868

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

State Disciplinary Proceeding

Former associated persons of former registered investment adviser were barred for five years from association with registered broker-dealers and investment advisers and subject to other sanctions imposed by state securities administrator for violating the state's securities laws, including its antifraud provisions. Held, it is in the public interest to bar Respondents from association with any investment adviser.

APPEARANCES:

Mitchell M. Maynard and Dorice A. Maynard, pro se.

James S. Goldman and Bradford E. Ali, for the Division of Enforcement.

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

I.

Mitchell M. Maynard and Dorice A. Maynard (collectively, the "Maynards"), formerly associated with Leveraged Index Management Company ("LIMCO"), a former registered investment adviser, appeal from a decision of an administrative law judge. The law judge barred the Maynards from association with an investment adviser based on a five-year bar from association with registered broker-dealers and investment advisers and other sanctions imposed on the Maynards by the Vermont Department of Banking, Insurance, Securities, and Health Care Administration ("Vermont BISHCA"). 1/ We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Mitchell Maynard has been an investment adviser since 1995. In late 1998, Mitchell Maynard organized a mutual fund based on an investment strategy that he formulated "combining a large investment in government securities with a small investment in futures and options contracts on market indices." In December 1998, he created LIMCO, an investment adviser, to manage a new mutual fund he had established, the Optimal Fund (the "Fund").

In January 1999, the Maynards registered the Fund with the Commission. In February 1999, the Maynards, on behalf of LIMCO, filed a Form ADV to register LIMCO as an investment adviser with the Commission and made a notice filing with the State of Vermont to register it as an investment adviser with the State. In April 1999, the Commission registered LIMCO as an investment adviser pursuant to Section 203(h) of the Investment Advisers Act of 1940. 2/

At all relevant times, Mitchell Maynard served as LIMCO's president, treasurer, and investment adviser representative, while Dorice Maynard, his wife, served as LIMCO's vice president of operations and marketing and corporate secretary. Dorice Maynard was primarily responsible for maintaining LIMCO's books and records. In this capacity, she managed LIMCO's finances, including the payment of all expenses, including salaries and consulting fees. In addition, she worked with her husband in marketing LIMCO and solicited at least one advisory client. She also assisted her husband in developing investment products, prepared correspondence to LIMCO investors and discussed LIMCO's business with them.

1/ Mitchell M. Maynard, Initial Decision Rel. No. 354 (Aug. 18, 2008), 93 SEC Docket 8936.

2/ 15 U.S.C. § 80b-3(h).

Following an examination by the Commission's Pacific Regional Office (the "PRO") 3/ of LIMCO's books and records, the staff of the PRO sent a letter to Mitchell Maynard in December 2000 advising him of numerous regulatory violations and deficiencies it had uncovered. The letter directed these deficiencies "to [his] attention for immediate corrective action, without regard to any other actions(s) that may result from the examination." LIMCO deregistered with the Commission in January 2001. In May 2001, LIMCO's attorney wrote to a PRO Assistant Regional Director, to "confirm that LIMCO is no longer in operation as an investment adviser, either at the federal or state level." The attorney stated that he "hope[d] this resolves any remaining issues with respect to this matter" and "trust[s] that [the matter] is now closed."

The Vermont BISHCA initiated charges against the Maynards over a year later on March 4, 2002. During a seven-day hearing, the Maynards were represented by counsel, had an opportunity to present evidence, and submitted extensive and detailed proposed findings of fact and legal arguments. The Hearing Officer issued a seventy-six page Proposal for Decision. The Maynards appealed to the Commissioner of the Vermont BISHCA, who considered Respondents' written exceptions and oral argument and, on January 3, 2007, issued Findings of Facts and Conclusions that stated it incorporated the Proposal for Decision and accepted, adopted, and affirmed "the Hearing Officer's findings, conclusions and recommendations in part, with the exceptions noted below" (the "Vermont Order"). 4/

The Vermont Order found that, from at least December 1998 through June 2001, LIMCO was a "joint venture" of the Maynards and that Dorice Maynard had a "substantive role in the company." The Vermont Order concluded that the Maynards had (i) misappropriated investor funds, including by diverting large investments in LIMCO to themselves; (ii) made numerous misrepresentations or omissions about LIMCO's performance and financial condition, including giving investors projections of high returns that had no reasonable basis; and (iii) engaged in unethical or dishonest practices, including by failing to disclose a prior bankruptcy to investors. The Vermont Order further found that Mitchell Maynard had falsely "promoted himself [to prospective investors] as a genius with trading systems and had touted designations from highly respected academic institutions."

According to the Vermont Order, Mitchell Maynard created LIMCO's initial business plan in 1998. That business plan projected that: (i) by the end of LIMCO's first year of operation, it would have assets under management of $50 million; (ii) LIMCO would be profitable after the

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3/ The PRO has been redesignated since the examination of LIMCO as the Los Angeles Regional Office ("LARO"). To avoid confusion in our discussion, we shall refer to this office as the PRO in this opinion.

4/ The Commissioner also found that Mitchell Maynard had not been shown to have violated 9 V.S.A. § 4224a(b)(1), and reduced the restitution amount to $400,000 and the bar to five years with the right to reapply after one year.

first three months of operations; and (iii) there would be a twenty-five percent return on investor equity within the first year and a one hundred percent return on investors' equity in the second year. These projections had no reasonable basis in fact.

The Vermont Order found that LIMCO's eleven investors, who had invested a total of $482,293, had little or no experience in equity investing. Many of these investors were at or near retirement age, and had "decided to invest in LIMCO or the Optimal Fund, or both based upon their conviction that Mr. Maynard was an expert in the field and they trusted him to handle their money." The Vermont Order noted that "[n]one of them understood Mr. Maynard's investment theories and many did not understand whether they were investing in LIMCO or the Optimal Fund, or both."

The Vermont Order also found that, even though LIMCO's value declined rapidly from March 1999 until it was closed, and that it had a negative value after June 1999, the Maynards issued stock certificates to LIMCO investors, claiming valuations that had no rational relationship to the actual worth of LIMCO stock. The Vermont Order found that these false valuations caused investors to believe they were investing in something of value when, in fact, they were purchasing worthless stock certificates. Further, Mitchell Maynard sent written and oral communications to LIMCO's investors assuring them "that things were going extremely well with LIMCO" and telling them about "many promising leads for LIMCO business." The Vermont Order determined that these communications were "misleading given the fact that LIMCO had no value beginning in June 1999 and that there is no credible, corroborative evidence to support a finding that LIMCO was positioned to achieve the $50 million minimum required to begin approaching profitability."

The Vermont Order also found that, from January 1999 through January 2001, the Maynards withdrew from LIMCO approximately $150,000 as salary and $45,000 in consulting fees, without disclosing these amounts to LIMCO investors or obtaining their consent. They also withdrew money for their personal expenses, including groceries, housing, car rental, and health insurance, again without disclosing this fact to the LIMCO investors or obtaining their consent. The Vermont Order further found that the Maynards' withdrawals resulted in a lack of operating funds in September 1999, after which the Maynards "obtained over $100,000.00 in credit card and home equity loans, guaranteed personally by Mr. Maynard, from [LIMCO's] initial shareholders." As determined by the Vermont Order, Mitchell Maynard "pressured" these investors to access their home equity and credit lines by advising them that "failure to do so would result in a certain loss of all the money they had invested in LIMCO." In offering his personal guarantee, Mitchell Maynard failed to inform these investors, or any of LIMCO's other investors, that he had filed for bankruptcy in 1994.

The Maynards also "withdrew large sums of cash from LIMCO . . . from ATM machines," sums that were not documented in LIMCO's books and records, which "gives rise to the inference that these amounts may not have been valid business expenses." In December 2000, the Maynards transferred $21,290.76 from LIMCO's bank account to their personal bank

account in California. Again, LIMCO's "books and records contain no entry or support for the $21,290.76 withdrawal." The Vermont Order found that the Maynards' explanation that most of this money was used to pay a LIMCO shareholder as a business expense was not credible.

The Vermont Order further determined that Mitchell Maynard had requested from one LIMCO investor that the investor allow Maynard to show prospective investors the $94,000 remaining in her IRA account "in order to solicit more investment and secure LIMCO's future," assuring the investor "that her money would not be touched" and that "it would be safe and returned to her in full." However, unbeknownst to the investor, Mitchell Maynard "sold her IRA shares and replaced them with worthless shares of LIMCO." As found by the Vermont Order, while the Maynards "earned substantial compensation" from LIMCO's investors, LIMCO itself "never was a going concern, . . . it barely generated any sales, and there were only large losses - about $530,000 worth over a 21-month period."

LIMCO ceased operating in June 2001. As found by the Vermont Order, "[n]one of LIMCO's investors recovered any of the money they had invested in LIMCO." The Maynards filed for bankruptcy in 2002, discharging all their obligations to LIMCO shareholders, including the guarantees that they had given to the aforementioned investors who had made over $100,000 in credit card and home equity loans to LIMCO.

The Vermont Order concluded that the Maynards had violated 9 V.S.A. § 4224a (fraudulent and other prohibited practices), including section 4224a(a)(1) (prohibiting employing a device, scheme, or artifice to defraud in connection with the sale of a security); section 4224a(a)(2) (prohibiting the making or omitting of an untrue statement of material fact in connection with the sale of a security); section 4224a(a)(3) (prohibiting engaging in an act, practice, or course of business that operates as a fraud or deceit upon a person in connection with the sale of a security); and section 4224a(e)(5) (prohibiting engaging in unethical or dishonest practices in providing investment advice). The Commissioner determined that it was not necessary to establish scienter for a violation of 9 V.S.A. § 4224a(a) and therefore did not affirm the Hearing Officer's finding and conclusion that scienter had been proven. The Vermont Order barred the Maynards for five years from any association or employment with a registered broker-dealer or investment adviser, or any "federal covered investment adviser," 5/ subject to their right to petition for reinstatement one year after the final order issued; and ordered that they pay $400,000 in restitution and a $20,000 administrative penalty. The Vermont Order became final on February 2, 2007, by operation of law after the Maynards failed to appeal. 6/ They have not paid any restitution.

5/ As described in the Vermont order, "a federal covered investment adviser is . . . an investment adviser who is registered with the SEC pursuant to Section 203 of the Investment Company Act of 1940. 9 V.S.A. § 4202a(3)."

6/ The Maynards cite their "financial and economic situation" as the reason for their failure to appeal the Vermont Order.

Beginning after LIMCO's termination in 2001, the Maynards operated Premium Producers Group LLC ("PPG"), which they described as a software distributor and education company that offered, among other items, Certified Equity Index Annuity Specialist and Personal Retirement Specialist designations, and advice on equity indexed annuities. According to the Maynards, PPG also pairs investment advisers with insurance agents. According to PPG's current website, effective April 1, 2009, PPG has closed and its customers will "be serviced by MDL Associates, LLC" ("MDL"). 7/

In December 2001, the Maynard made filings with the California Department of Corporations to obtain an investment adviser certificate for Terra Vista Financial Planners ("Terra Vista"), an entity owned and managed by the Maynards. The Maynards answered "no" to several questions that asked whether Terra Vista or any advisory affiliate was currently subject to a regulatory proceeding. 8/ The California Department of Corporations learned of Vermont's investigation of Mitchell Maynard and LIMCO through its review of the Central Registration Depository system and notified the Maynards of its findings in a deficiency letter. In October 2007, following the issuance of the Vermont Order, the Department denied Terra Vista's application and barred the Maynards from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser.

On April 16, 2008, we instituted this administrative proceeding to determine whether sanctions against the Maynards were in the public interest based on the Vermont Order. On June 25, 2008, after a pre-hearing conference and the Division of Enforcement had moved for summary disposition, the Maynards moved to compel the Division to provide them with the PRO examination file of LIMCO, stating that the file "is material to allegations that this follow-on proceeding may be an inappropriate abuse of discretion." The law judge denied the Maynards' motion to compel, ruling that the Maynards' document request "concerns matters that are not relevant to the issues in this administrative proceeding" and that the Maynards' belief that these documents contain exculpatory material has "no rational basis" since "[t]he fact that the Commission examined Respondents' business and did not initiate an action is not relevant to the

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7/ The MDL website, accessed by a link on the PPG website, provides the biographies of both Maynards, and does not mention any other individuals. The products and services offered by MDL, as described on its website, appear very similar to those described on the pages of the PPG website included in the record.

8/ The California Corporations Commissioner found that, in a California filing, Terra Vista answered "no" to whether "any *advisory affiliate*" was then the "subject of a regulatory proceeding" that could lead to a finding of the affiliate's "unethical conduct and/or violations of securities regulations. Terra Vista also answered "no" to Form ADV Item 2.E as to whether any "*advisory affiliate* or any *management person*" was currently the subject of an "administrative proceeding involving [investment-related business or activity, fraud, false statement, or omission, theft, embezzlement, dishonest or unethical practices.]" (emphases in original).

findings in the Vermont Order." The law judge subsequently granted the Division's motion for summary disposition. This appeal followed.

III.

Under Advisers Act Sections 203(e)(9) and (f), 9/ we are authorized to impose sanctions on a person associated with an investment adviser, consistent with the public interest, if, among other things, the associated person is subject to a State securities agency's final order that bars the person from association with an entity regulated by such agency or constitutes a final order based upon violations of laws prohibiting fraudulent, manipulative, or deceptive conduct. The Maynards do not dispute that the Vermont Order found that they committed violations of Vermont's securities laws, including laws prohibiting fraudulent, manipulative, or deceptive conduct, and that they were barred by the Vermont Order from association or employment with a broker-dealer or investment adviser for five years, subject to the right to petition for reinstatement after one year. However, the Maynards challenge this proceeding on numerous grounds.

A. The Maynards suggest that they did not meet the definition of an investment adviser "in the usual sense" because they "did not manage any assets or offer advice to LIMCO investors for compensation at the time they purchased LIMCO stock." The short answer is that LIMCO was a registered investment adviser at the time of the events underlying the Vermont proceeding, and the Maynards were its sole officers, managers and principals. As such, they were "persons associated with an investment adviser" as defined by Advisers Act Section 202(a)(17), 10/ and thus subject to discipline under Advisers Act Sections 203(e) and (f).

B. The Maynards assert that this matter was improperly instituted. They argue that, in its 2000 examination of LIMCO, the PRO staff identified the identical deficiencies that formed the basis of the Vermont Order. They also assert that, after they de-registered LIMCO, a member of the PRO staff informed them that the Commission would keep the LIMCO file "open." They draw two conclusions from these assertions: (1) they are entitled to access to the PRO examination file pursuant to Commission Rule of Practice 230; 11/ and (2) the staff referred this matter to Vermont to circumvent the procedural safeguards of a Commission proceeding to determine the merits of those deficiencies.

Rule 230(a) provides that, with certain limited exceptions, "the Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the

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9/ 15 U.S.C. §§ 80b-3(e)(9) and (f).

10/ 15 U.S.C. § 80b-2(a)(17).

11/ 17 C.F.R. § 201.230.

Division's recommendation to institute proceedings." 12/ Such documents include "any final examination or inspection reports prepared by [other Commission offices and divisions] if the Division of Enforcement intends either to introduce any such report into evidence or to use any such report to refresh the recollection of any witness." 13/ Rule 230(b)(1) expressly provides, as relevant here, that the Division may withhold any privileged documents and any "internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this rule, or is otherwise attorney work product and will not be offered in evidence." 14/

By letter dated June 24, 2008, the Division's Boston Regional Office informed the Maynards that it had not had access to the PRO examination file before the institution of this proceeding and that therefore Rule 230 did not require its production. However, without waiving any objections, the Division provided the Maynards with certain documents from the PRO examination file, including the deficiency letter issued to LIMCO, but excluding documents that it determined were privileged, including the PRO's examination report. 15/ The withheld portion of the PRO examination file was neither introduced into evidence by the Division nor used to refresh the recollection of any witness.

Rule 230(b)(2) provides, however, that, notwithstanding the Division's authority to withhold documents under Rule 230(b)(1), the Division is not permitted to withhold "documents that contain material exculpatory evidence." 16/ The Maynards assert that the PRO examination file "contains exculpatory (or at least, explanatory) evidence and is therefore highly relevant and material." They argue that, as the facts of the PRO's 2000 examination of LIMCO "were materially the same as those of the VT Order," if "the Division's 2000 investigation . . . is still open then the Initial Decision allows for a blatant violation of the [Maynards'] Fifth Amendment due process rights and skirts Commission procedure."

12/ 17 C.F.R. § 201.230(a)(1). Comment (a) to the release adopting Rule 230 states, "[a] respondent's right to inspect and copy documents under this rule is automatic; the respondent does not need to make a formal request for access through the hearing officer." Rules of Practice; Technical Amendments and Corrections, Exchange Act Rel. No. 36174 (Aug. 31, 1995), 60 SEC Docket 245.

13/ 17 C.F.R. § 201.230(a)(1)(vi) (emphasis added).

14/ 17 C.F.R. § 201.230(b)(1)(ii).

15/ The Division offered to make the privileged documents available to the law judge for *in camera* inspection. The law judge declined the offer.

16/ 17 C.F.R. § 201.230(b)(2).

Accepting for the sake of argument that the PRO staff identified the identical conduct that became the basis for the Vermont Order, we do not see why any of the remaining information in the PRO examination file should have been produced pursuant to Rule 230(b)(2). As we have held, "to trigger the obligation to disclose under [Rule 230(b)(2)], the evidence must be 'material either to [the defendant's] guilt or punishment' . . . ." 17/ As discussed infra at E, the Maynards are collaterally estopped from challenging the findings in the Vermont Order so any information in the PRO file concerning the conduct underlying that order is not material to our analysis of the findings in that order as they pertain to our determination of the appropriate sanction in the instant proceeding.

To the extent anything in the PRO file might relate to any determination not to institute a proceeding as a result of the PRO examination, Courts have held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 18/ The Division considers a wide variety of factors in determining whether or not to recommend initiating an enforcement proceeding. 19/

Moreover, Congress granted the Commission a range of administrative remedies to address advisor misconduct. Under the Advisers Act, the Commission may directly institute an

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17/ Elizabeth Bamberg, 50 S.E.C. 201, 205 (1990) (citation omitted). See also Haight & Co., 44 S.E.C. 481, 510-511 (1971) (rejecting respondents' argument that the Division of Enforcement improperly suppressed evidence favorable to their defense) (citation omitted); Orlando Joseph Jett, 52 S.E.C. 830, 830 (1996) (discussing the obligation under Rule 230(b)(2) to produce material consistent with the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), and finding that it "is well established that the Supreme Court's Brady decision does not authorize respondents to engage in 'fishing expeditions' through confidential Government materials in hopes of discovering something useful to their defense") (citation omitted).

18/ Heckler v. Chaney, 470 U.S. 821, 831 (1985). See also Coxon v. SEC, 137 Fed. Appx. 975 at *1 (9th Cir. 2005) (unpublished) (holding that Commission did not abuse its direction in dismissing all proceedings against an original party to the proceeding); Kotakis v. SEC, 238 F.3d 429 (8th Cir. 2006) (unpublished) (holding that "SEC's refusal to prosecute is an unreviewable decision committed to the agency's discretion by law").

19/ See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, 76 SEC Docket 296 (Oct. 23, 2001). See also SEC Enforcement Manual (Oct. 6, 2008) at 14, http://www.sec.gov/divisions/enforce/enforcement manual.pdf (outlining "basic considerations" used by Division when making a determination to open a matter under inquiry).

injunctive or administrative proceeding for violations of the Act. 20/ Congress also authorized the Commission under Advisers Act Sections 203(e) and (f) to institute an administrative proceeding based on the action of another court or administrative forum, such as the Vermont BISHCA. Nothing in the Advisers Act suggests that if the Commission does not pursue one of the available remedies, it is foreclosed from pursuing another. The Maynards' assertion that the Commission may not institute this follow-on proceeding because it did not initiate an administrative proceeding in 2000 would read out of the Act the Congressionally-granted authority to sanction associated persons, consistent with the public interest, who are subject to a state securities agency's final order barring them from association with entities regulated by that state based upon violations of the state's laws prohibiting fraudulent, manipulative, or deceptive conduct.

Contrary to their argument, the Maynards were not thereby deprived of due process. As previously noted, the Vermont BISHCA held a seven-day hearing at which the Maynards were represented by counsel and had an opportunity to present evidence and they were also accorded the opportunity to present legal argument and request specific findings of fact and conclusions of law following the hearing and, indeed, the Maynards submitted extensive and detailed proposed findings of fact. Thus, the matter was "actively litigated" in the prior proceeding and the Maynards had an opportunity to confront the charges brought against them.

Nor did the proceeding before the law judge deprive them of due process. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 21/ The Maynards had notice of the allegations against them, were permitted to introduce relevant evidence on the issue of sanctions and to present arguments in

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20/ See. e.g., Advisers Act Section 203(e)(5), 15 U.S.C. § 80b-3(e)(5) (authorizing administrative proceedings against advisers to violate the securities laws); Section 214, 15 U.S.C. § 80b-14 (injunctive actions).

21/ Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). See also Cryder v. Oxendine, 24 F.3d 175, 177 (11th Cir. 1994) (holding that "[d]ue process entitles an individual to notice and some form of hearing before state action may finally deprive him or her of a property interest"). Three factors are considered to determine the due process that an individual is entitled to when affected by a government action: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

support of their position. They now are exercising their right to appeal the law judge's decision to us. 22/

C. The Maynards also suggest that the Division somehow engaged in unethical conduct by referring the matter to the State of Vermont. The record before us is not clear whether such a referral occurred. However, assuming that it did, such referrals are specifically authorized by Commission rule that provides that, in addition to instituting its own enforcement actions, the Commission "may also, on some occasions, refer the [enforcement] matter to . . . domestic and foreign governmental authorities." 23/

D. In the alternative, the Maynards contend that the Division violated an "implicit" no-action agreement, asserting that their attorney "reached an agreement with [a PRO staff member] in March 2001 that LIMCO's deregistration at State and Federal level would stay any further enforcement action." The Maynards cite the letter their attorney wrote to the PRO in May 2001 in which he confirmed that LIMCO was no longer operating as an investment adviser and expressed his "hope [that] this resolves any remaining issues with respect to this matter and . . . trust that it is now closed." The Maynards do not claim that this letter was based on any express agreement with the PRO, verbal or otherwise. Nor do they claim that they received any response to this letter. The Maynards assert, however, that the seven years that passed between the termination of LIMCO and the commencement of this proceeding is evidence of the Division's "very apparent acceptance of the implicit Agreement with the [Maynards]." Whether the PRO agreed to close its file in 2001, or whether the PRO did, in fact, close its file is irrelevant. This proceeding is not based on the PRO's 2001 examination, but rather on the Vermont Order and the findings contained in that order. As discussed below, the Maynards are collaterally estopped from challenging the Vermont Order.

E. The Maynards argue that summary disposition was inappropriate. We have held that, in follow-on proceedings, summary disposition is appropriate except in certain rare circumstances when "a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct." 24/ As we recently noted, "[n]umerous courts have upheld an

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22/ Cf. Eagletech Communications, Inc., Exchange Act Rel. No. 54095 (July 5, 2006), 88 SEC Docket 1225, 1229 (rejecting argument that revocation of the registration of respondent's securities constituted an unconstitutional taking, noting that "the process that is due to [the respondent] is specified in the Exchange Act and includes the instant review proceeding as a component").

23/ 17 C.F.R. § 202.5(b).

24/ Conrad P. Seghers, Investment Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2300, pet. for rev. den., 548 F.3d 129 (D.C. Cir. 2008) (quotation omitted); John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), aff'd, 66 Fed. Appx. 687 (9th Cir.

(continued...)

administrative agency's decision to grant summary disposition, without holding an in-person hearing, when no material fact is in dispute." 25/ In addition, courts have sustained Commission findings that sanctions were in the public interest following administrative hearings based on summary disposition. 26/

The Maynards argue that an in-person hearing would have produced a fuller and more accurate disclosure of the facts," that the law judge failed "to give any weight to any of the mitigating factors presented by Respondents," and that she "accepted the state order at face value." They assert that the law judge ignored their arguments that there was no applicable precedent in Vermont law interpreting the Vermont fraud statutes, that they were improperly found to be investment advisers under a "loose interpretation of the statute," and that the "Vermont prosecutors improperly alleged securities fraud." They further assert that law judge ignored "an assertion of innocence."

The doctrine of collateral estoppel prevents respondents from relitigating in an administrative proceeding before us factual findings or legal conclusions previously determined in an underlying proceeding that has been fully litigated. 27/ In their brief, the Maynards

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24/ (...continued)
2003). See also Blinder, Robinson, 837 F.2d at 1109-10; Gary M. Kornman, Exchange Act Rel. No. 59403, (Feb. 13, 2009), 95 SEC Docket 14246, 14264 & n.62, pet. for rev. filed, No. 09-1074 (D.C. Cir. Feb. 24, 2009); Jose P. Zollino, Exchange Act Rel. No. 51632 (Apr. 29, 2005), 85 SEC Docket 1292, 1296 & n.10 (discussing Brownson, supra).

25/ Kornman, supra and n.56 (citing to several cases, including Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 606-11 (1st Cir. 1994) (listing agencies that provide for summary disposition and affirming generally the validity of the procedure in administrative proceedings when there is no genuine issue of material fact); and La. Land and Exploration Co. v. FERC, 788 F.2d 1132, 1137-38 (5th Cir. 1986) (finding that "[w]here there are no issues of material fact presented which would require an evidentiary hearing, such a hearing is simply not required"). See also Sierra Ass'n for Env't v. FERC, 744 F.2d 661, 663 (9th Cir. 1984) (holding that "a trial-type hearing" is not always required because such a hearing was not necessary for a "full and true disclosure of the facts").

26/ See Seghers v. SEC, 548 F.3d 129, 134-35 (D.C. Cir. 2008) (upholding use of summary disposition in follow-on proceeding); Brownson v. SEC, 66 Fed. Appx. 687, 688 (9th Cir. 2003) (upholding use of summary disposition during sanctioning) (unpublished); Michael Batterman, 57 S.E.C. 1031 (2004), aff'd, No. 05-0404 (2d Cir. 2005) (unpublished).

27/ See Montana v. United States, 440 U.S. 147, 153-54 (1979) (stating that collateral estoppel "preclude [s] parties from contesting matters that they have had a full and fair
(continued...)

acknowledge the principle of collateral estoppel. The Maynards' complaints about the Vermont Order were properly addressed in the appellate process provided under the laws of the State of Vermont. 28/ The Maynards state that they could not exercise their right of appeal under Vermont law because of their "financial situation." However, their decision does not give them the right now to make a collateral attack here against the Vermont Order.

The Maynards identify other facts that they suggest are mitigative. Those matters were before the law judge, and, as discussed below, we have considered them in our determination of what sanction is in the public interest.

F. The Maynards also allege that the law judge was biased against them. We find no evidence of this on the record. The fact that the law judge did not accept respondents' arguments does not suggest that she was biased. As we have previously observed, "[a]dverse rulings, by themselves, generally do not establish improper bias." 29/

IV.

In determining the appropriate remedial sanction, we are guided by the following factors in determining what sanction, if any, should be imposed in the public interest to protect the investing public:

27/ (...continued)
opportunity to litigate" and thereby "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"). See also Kornman, 95 SEC Docket at 14266 (holding that, in a follow-on proceeding, the petitioner cannot collaterally attack the underlying criminal proceeding); Jose P. Zollino, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2604-05 & n.20 (stating the basis for a follow-on proceeding "is the action of district court -- in convicting and enjoining him -- and its purpose is not to revisit the factual basis for that action"); Robert Sayegh, 54 S.E.C. 46, 51 & n.19 (2007) (rejecting factual and legal challenges to underlying district court case); Michael Batterman, 57 S.E.C. 1031, 1039 & n.18 (2004) (applying the doctrine of collateral estoppel on the basis of an injunction entered after litigation on the merits).

28/ See, e.g., Batterman, 57 S.E.C. at 1039 (holding that, to the extent that respondents wish to challenge the basis of the underlying decision, "those matters properly are addressed to the appellate court").

29/ Scott Epstein, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13860 & n.56.

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations. 30/

The Commission's determination that a remedial, disciplinary sanction is in the public interest is based on the particular circumstances and entire record of the case. An investment adviser is a "fiduciary in whom clients must be able to put their trust." 31/ Further, an investment adviser has an affirmative duty of "utmost good faith, and full and fair disclosure of all material facts," as well as an affirmative obligation "to employ reasonable care to avoid misleading" his or her clients. 32/

The Maynards contend that, because the Vermont Order did not find that they had acted with scienter, it was improper for the law judge to make a contrary finding. The Maynards further assert that any finding of scienter "is primarily mitigated by [their] claim of innocence" and that no other evidence presented by the Division "demonstrated any capacity on the part of the [Maynards] to act deceptively or willfully violate securities laws." However, the Commissioner of the Vermont BISHCA determined that it was not necessary to establish scienter for a violation of Vermont's antifraud provision, so he did not affirm the Hearing Officer's finding and conclusion that scienter had been proven. While the Vermont Order did not make a specific finding of scienter, its detailed findings of the Maynards' misconduct, including the misappropriating of investor funds for their personal use, their numerous misrepresentations or omissions to their customers about LIMCO's performance and financial condition, and the other detailed findings regarding the Maynards' unethical and dishonest practices in the Vermont Order, provides ample support for concluding that they acted at least recklessly if not with

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30/ Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). See also Robert Bruce Lohmann, 56 S.E.C. 573, 581-82 (2003) (citations omitted) (same); and Donald T. Sheldon, 51 S.E.C. 59, 86 (1992)(citations omitted), aff'd, 45 F. 3d 1515 (11th Cir. 1995) (same). See also Marshall E. Melton, 56 S.E.C. 695, 697 (2003) (noting that the Commission has a "responsibility to protect the investing public" in an administrative proceeding).

31/ Robert Radano, Investment Advisers Act Rel. No. 2750 (June 30, 2008), 93 SEC Docket 7495, 7507; Ahmed Mohamed Soliman, 52 S.E.C. 227, 231 (1995).

32/ Radano, 93 SEC Docket at 7507 (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963)). See also Michael Batterman, 57 S.E.C. 1031, 1043 (2004) (noting investment adviser's "affirmative duty" to disclose material facts and "affirmative obligation" to exercise reasonable care to avoid misleading clients), aff'd, No. 05-0404 (2d Cir. 2005) (unpublished).

knowledge. 33/ But even if we accepted the Maynards' contention that they did not act with scienter, we conclude that the remaining Steadman factors independently support a bar.

The Vermont Order found that, from at least December 1998 through June 2001, the Maynards defrauded their customers by misappropriating hundreds of thousands of dollars from LIMCO and its investors, including diverting investments in LIMCO to themselves and otherwise treating LIMCO's bank account as if it were their own personal account. During this period, the Maynards also made numerous misrepresentations or omissions about LIMCO's performance and financial condition, including showing investors high projected rates of return which had no reasonable basis and failing to disclose a prior bankruptcy to certain investors in securing loans from them. They solicited a client to entrust them with the last $94,000 remaining in the client's retirement account, assuring her that her money would not be touched, and then, without the knowledge or consent of the client, sold the shares in the account and replaced them with worthless shares of LIMCO. We note, as did the law judge, that the Vermont Commissioner reduced the proposed duration of the Vermont bar and the amount of restitution. However, as the Maynards admit in their brief, "the findings in the VT Order were egregious." Their misconduct occurred over the course of several years and was not an isolated event. 34/ We accordingly find that the Maynards' misconduct was egregious and recurrent.

Given the egregiousness of the Maynards' conduct in making numerous misrepresentations or omissions to the LIMCO investors over an extended period of time and continually misleading them as to the financial condition of the company, we are unable to give much weight to the sincerity of their assurances against future violations. In this regard, we note that, even after the events covered by the Vermont Order, the Maynards provided false answers in their filings with the California Department of Corporations that inquired as to whether Terra Vista was affiliated with any person that was subject to a regulatory proceeding. We thus do not find their assurances to be mitigative.

The Maynards have shown little appreciation for the responsibilities of an investment adviser and little remorse for the impact of their conduct on their investors. They describe

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33/ See Justin Ficken, Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10890 (finding that former associated person's actions were designed to evade detection by mutual fund managers and thus supported finding that he acted with scienter); Jeffrey L. Gibson, Exchange Act Rel. No, 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2109, appeal filed, No. 08-3377 (6th Cir. Apr. 3, 2008) (finding an associated person's actions to disguise his misconduct from investors was evidence that the person acted with scienter).

34/ See Jeffrey L. Gibson, Exchange Act Rel. No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2108-09 (concluding that conduct was recurrent when it occurred over three years and involved a large number of respondent's clients); Seghers, 91 SEC Docket at 2305 (finding conduct was not isolated when it occurred over a four month period).

LIMCO as a "failed business." They assert to us that they merely engaged in "substandard accounting principles." While the Maynards contend that they have acknowledged deep regret, they nonetheless have written to their PPG customers that they "have always been honest about this matter," i.e. the Vermont Order, and that their regulatory difficulties occurred because they had been "so vocal in standing up against the unseemliness in the insurance industry," causing "some [to feel] . . . bound to try and use this against us." They also have failed to pay any restitution to their customers. 35/

The Maynards suggest that there is no likelihood of future misconduct and that their present employment does not offer opportunities for misconduct. They assert that, because they do not "'offer advice' on any specific security, they do not dictate the inputs or outcomes of any analysis, nor the suitability of a security for a particular client, nor do they have any control over which financial products an advisor may or not recommend to their individual client." However, according to the pages of the PPG website included in the record, 36/ PPG provided information and programs about equity-indexed annuities, offered certified marketing designations for investment advisers, and, as the Maynards describe in their Opposition to the Division's Motion for Summary Disposition, "pairs agents with a registered investment adviser who becomes responsible for overall planning and recommendations for the client's portfolio and investment goals." The Maynards also state in their brief that they "have chosen to remain in step with the analysis and educational needs of the investment advisor community." 37/ We are, therefore, concerned by the close nexus between the Maynards' current business and the investment advisory business, and by the opportunities to rejoin the investment advisory business that may

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35/ See Zollino, 89 SEC Docket at 2608 & n.33 (concluding that former associated person's "failure to acknowledge guilt or show remorse indicates that there is a significant risk that, given the opportunity, [he] would commit further misconduct in the future"); Brownson, 55 S.E.C. at 1030 (finding that former registered representative's "unwilling[ness] to accept responsibility for his actions . . . suggests a troubling lack of appreciation for the responsibilities of a securities professional").

36/ As noted earlier, PPG is now closed and its customers are being serviced by MDL, with which the Maynards are associated and which offers products and services bearing similar descriptions to those described in the pages of the PPG website included in the record.

37/ On PPG's homepage, the Maynards highlighted the benefits "[f]or broker-dealers and RIAs" of a particular program that, they claim, provides "a great way to gather assets and manage them." The website stated that the Maynards' program is designed to assist "advisors [who] need tools to help use them in financial planning" by providing "tools . . . for any marketing organization or financial professional who would like to responsibly offer products such as equity indexed annuities or exchange-traded funds in a compelling yet academically sound manner." Moreover, the website specifically focuses on the benefits their programs and services provides to broker-dealers and registered investment advisers.

arise for the Maynards unless they are permanently barred. As we recently noted, "[t]he securities industry presents continual opportunities for dishonesty and abuse and depends heavily on the integrity of its participants and on investors' confidence." 38/

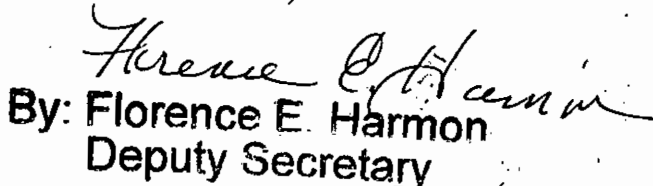
Moreover, the Maynards attempted to register Terra Vista as an investment adviser with the State of California -- an effort that continued until the application was denied following a contested hearing in 2007. The Maynards assert that they had abandoned their interest in the California registration several years before the California Corporation Commissioner issued the order denying their application and barring them from association with an investment adviser, broker-dealer, or commodity adviser. They contend that, in the California proceeding, "Respondents *only* argued to refute misconceptions that their application contained false statements to defend against permanent disbarment, and *did not* argue in an attempt to keep the adviser application alive" (emphasis in original). Nonetheless, Terra Vista's application remained pending until it was denied in 2007 and, during this period, the Maynards neither withdrew the application nor advised the agency of their purported intent to abandon it. Their actions undercut their assertions that they have no further interest in entering the securities industry.

In further mitigation, the Maynards note that they cooperated with the Commission staff in 2000 and voluntarily de-registered. They also note that they have no prior disciplinary history. However, we have stated that the absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws. 39/

Based on a consideration of the Steadman factors, and all of the circumstances in this case, we have determined that barring the Maynards serves the public interest and is remedial.

An appropriate order will issue. 40/

By the Commission (Chairman Schapiro and Commissioners CASEY, WALTER, AGUILAR and PAREDES).



Elizabeth Murphy
Secretary

38/ Kornman, 95 SEC Docket at 14257; Vincent M. Uberti, Exchange Act Rel. No. 58917 (Nov. 7, 2008), 94 SEC Docket at 11406, 11414.

39/ See, e.g., Scott Epstein, 95 SEC Docket at 13865.

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2875 / May 15, 2009

Admin. Proc. File No. 3-13008

In the Matter of

MITCHELL M. MAYNARD
and
DORICE A. MAYNARD
3099 West Chapman Ave., Apt. 426
Orange, California 92868

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Mitchell M. Maynard and Dorice A. Maynard be, and they hereby are, barred from association with an 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

SECURITIES EXCHANGE ACT OF 1934
Release No. 59931 / May 15, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2874 / May 15, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13381

In the Matter of WEALTHWISE, LLC, and JEFFREY A. FORREST, Respondents.	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

On February 25, 2009, the Securities and Exchange Commission ("Commission") entered an Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 and Notice of Hearing against respondents Jeffrey A. Forrest ("Forrest") and WealthWise, LLC ("WealthWise") (collectively, "Respondents").

II.

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, and the findings contained in Section III.3 below, which are admitted, Respondents consent 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 Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Order"), as set forth below.

III.

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

1. WealthWise is a California limited liability company and investment adviser based in San Luis Obispo, California that has been registered with the Commission (File No. 801-44264) since December 15, 1997. WealthWise provides investment advisory services from its main office in San Luis Obispo and branch offices in Ogden, Utah; Westlake Village, California; and San Diego, California. From April 2005 through September 2007, the portion of time in which WealthWise, through Forrest engaged in the conduct underlying the complaint, WealthWise had approximately $80 million in assets under management.

2. Forrest was WealthWise's president, chief executive officer, and chief compliance officer from April 2005 through September 2007, when WealthWise and Forrest engaged in the conduct underlying the complaint. For a portion of the time in which Forrest engaged in the conduct underlying the complaint, he was associated with Associated Securities Corporation, a registered broker-dealer headquartered in El Segundo, California. Forrest, 53 years old, is a resident of San Luis Obispo, California.

3. On February 4, 2009, a final judgment was entered by consents against WealthWise and Forrest, permanently enjoining WealthWise and Forrest from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"), in the civil action entitled Securities and Exchange Commission v. WealthWise, LLC, et al., Civil Action No. 2:08-cv-06278-GAF-SS, in the United States District Court for the Central District of California.

4. The Commission's complaint alleged that, among other things, from April 2005 to October 2006, Forrest recommended that more than 60 WealthWise clients invest $40 million in Apex Equity Options Fund, LP ("Apex"), a hedge fund managed by Thompson Consulting, Inc. ("TCI") in Salt Lake City, Utah. The complaint also alleged that Forrest emphasized to WealthWise clients that Apex would protect their principal while generating 3% monthly returns through a purportedly innovative options trading method. Forrest failed to disclose, however, that WealthWise had a significant conflict of interest: pursuant to a side agreement between WealthWise and the president of TCI, WealthWise received a portion of the performance fee that Apex paid TCI for all WealthWise assets invested in Apex. The complaint further alleged that investments from WealthWise clients comprised over 90% of Apex's assets, and between April 2005 and September 2007, WealthWise received an estimated $388,401.80 in performance fees from TCI. Apex collapsed in August 2007 as a result of TCI's risky trading strategy, and WealthWise clients lost almost their entire investments.

IV.

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

Accordingly, it is hereby ORDERED:

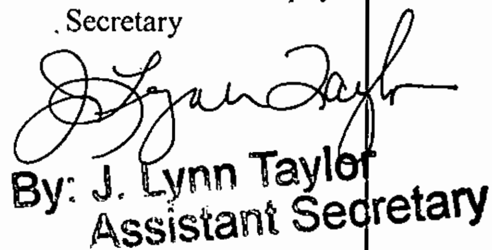
Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Forrest be, and hereby is barred from association with any broker, dealer, or investment adviser with the right to reapply for association after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

Any reapplication for association by Forrest 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 Forrest, 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.

IT IS FURTHER ORDERED that pursuant to Section 203(e) of the Advisers Act, WealthWise's registration as an investment adviser is hereby revoked.

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. 59940 / May 19, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13472

In the Matter of

MICHAEL P. OWENS,

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 Michael P. Owens. ("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. Owens is the president of Network Real Estate Corporation and controlled Pine Mountain Capital Corporation. From approximately April 2003 to August 2006, these entities were consultants retained by Real Estate Partners, Inc. ("REP") to implement and oversee REP's fundraising efforts by offering and selling REP securities through a boiler room in Santa Ana, California. Respondent was not registered in any capacity with the Commission. Owens, 45 years old, is a resident of Newport Coast, California.

2. On April 20, 2009, a final judgment was entered by consent against Owens, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Real Estate Partners, Inc. et al., Civil Action Number SACV 07-1022 AG (RNBx), in the United States District Court for the Central District of California.

3. The Commission's Complaint alleged that Respondent made fraudulent misrepresentations in the unregistered offer and sale of REP's securities and acted as an unregistered broker-dealer.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act that Respondent Owens 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

DEPARTMENT OF LABOR

Employee Benefits Security Administration

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-28725; File No. 4-582]

Hearing on Target Date Funds and Similar Investment Options

AGENCIES: Employee Benefits Security Administration, U.S. Department of Labor ("Department") and Securities and Exchange Commission ("Commission") (each, an "Agency," collectively, the "Agencies").

ACTION: Notice of hearing.

SUMMARY: Notice is hereby given that the Department of Labor and the Securities and Exchange Commission will hold a joint one-day hearing on issues relating to investments in target date funds and similar investment options by 401(k) plan participants and other investors.

DATES: The one-day hearing will be held on June 18, 2009, beginning at 9 a.m., EST.

ADDRESSES: The hearing will be held at the U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Fred J. Wong, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, at (202) 693-8500, or Tara R. Buckley, Office of Chief Counsel, Division of Investment Management, U.S. Securities and Exchange Commission, at (202) 551-6825. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: "Target date" or "lifecycle" funds and other similar investment options ("TDFs") are investment products that allocate their investments among various asset classes and automatically shift that allocation to more conservative investments as a "target" date approaches. This shift in asset allocation, often referred to as a fund's "glide path,"

may differ significantly among funds with the same target date. Recent studies suggest that TDFs are becoming more common as investment options in participant-directed retirement plans, such as 401(k) plans.[1] The growing popularity of TDFs has focused attention on issues relating to the design, operation and selection of TDFs as investment options. The designation of investment options to be made available under a private-sector retirement plan is governed by the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). Persons with this responsibility must prudently select and monitor those investment options.

The Department's 2008 ERISA Advisory Council studied several aspects of TDFs as 401(k) plan investment options, including the challenges and risks they may pose to plan fiduciaries and to participants who invest in TDFs, the different types of TDFs, and appropriate criteria for adopting and monitoring them. In its 2008 report to the Secretary of Labor, the Advisory Council recommended that the Department provide additional guidance to plan fiduciaries on the selection and monitoring of TDFs. The Advisory Council also called for the development of participant education materials and illustrations to enhance awareness of the value and the risks associated with these investments.[2]

The U.S. Senate Special Committee on Aging recently began an investigation of certain TDFs marketed to 401(k) plans. In preliminary findings shared with the Agencies, the Committee found a wide range of objectives, portfolio compositions, and risks among same-year TDFs. The Committee expressed concern that, given these variations, some investors may be

[1] Employee Benefits Research Institute Issue Brief #327, March, 2009.
[2] See 2008 ERISA Advisory Council Working Group Report on Hard to Value Assets and Target Date Funds, found at: http://www.dol.gov/ebsa/publications/2008ACreport1.html.

investing in TDFs without being aware of the financial risk. The Committee therefore urged the Agencies to commence a review of TDFs.[3]

In view of the importance of these issues for the retirement savings of investors, the Department and the Commission have decided to hold a public hearing. The primary purpose of this hearing is to determine if additional guidance by either Agency would be helpful. The Agencies are specifically interested in obtaining information on:

- how TDF managers determine asset allocations and changes to asset allocations (including glide paths) over the course of a TDF's operation;
- how they select and monitor underlying investments;
- how the foregoing, and related risks, are disclosed to investors; and
- the approaches or factors for comparing and evaluating TDFs.

The hearing will be held on June 18, 2009, beginning at 9 a.m. and ending at 5 p.m., EST, in the plaza auditorium of the U.S. Department of Labor, Francis Perkins Building, at 200 Constitution Avenue, NW, Washington, DC 20210.

Persons interested in presenting testimony and answering questions at this public hearing must submit, by 3:30 p.m., EST, June 5, 2009, the following information: (1) A written request to be heard; and (2) An outline of the topics to be discussed, indicating the time allocated to each topic. It should be noted that, while reasonable efforts will be made to accommodate all requests to testify, it may be necessary to limit the number of those testifying in order to adhere to the hearing's one-day format. Any persons not afforded an opportunity to testify will nonetheless have an opportunity to submit a written statement for the record. The hearing will be open to the general public.

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[3] The Committee held a related hearing on February 25, 2009. See: http://aging.senate.gov/hearing_detail.cfm?id=309027&.

Because the Agencies will jointly review all responses submitted, interested parties may send requests and outlines to either Agency and need not submit responses to both Agencies. Respondents are encouraged to use the title "Target Date Fund Joint Hearing" to facilitate the organization and distribution of responses between the Agencies. Interested parties are invited to submit responses to:

Employee Benefits Security Administration, U.S. Department of Labor: To facilitate the receipt and processing of responses, the Department encourages interested persons to submit their requests and outlines electronically by e-mail to e-ORI@dol.gov. Persons submitting requests and outlines electronically should not submit paper copies. Persons submitting requests and outlines on paper should send or deliver their requests and outlines (preferably at least three copies) to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: Target Date Fund Joint Hearing, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. All requests and outlines submitted will be available to the public, without charge, online at http://www.dol.gov/ebsa and at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Securities and Exchange Commission: Responses may be submitted by any of the following methods:

Electronic Responses:

- Use the Commission's Internet comment form (www.sec.gov/news/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-582 Target Date Joint Hearing on the subject line.

Paper Responses:

- Send paper requests and outlines 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 4-582 Target Date Fund Joint Hearing. This file number should be included on the subject line if e-mail is used. To help us process and review your requests and outlines more efficiently, please use only one method. The Commission will post all requests and outlines on the Commission's Internet Web site (http://www.sec.gov). Requests and outlines 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 requests and outlines 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.

The Agencies will prepare an agenda indicating the order of presentation of oral comments and testimony. In the absence of special circumstances, each presenter will be allotted ten (10) minutes in which to complete his or her presentation.

Information about the agenda will be posted on http://www.dol.gov/ebsa and http://www.sec.gov on or after June 10, 2009, or may be obtained by contacting Fred Wong, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693-8500, or Tara R. Buckley, Office of Chief Counsel, Division of Investment Management, U.S. Securities and Exchange Commission, at (202) 551-6825.

Those individuals who make oral comments and testimonies at the hearing should be prepared to answer questions regarding their information and/or comments. The hearing will be

transcribed. The hearing also will be available via webcast on the Department's Web site at http://www.dol.gov/ebsa and on the Commission's Web site at www.sec.gov.

Any individuals with disabilities who may need special accommodations should notify Fred Wong on or before June 10, 2009.

Notice of Public Hearing

Notice is hereby given that a one-day public hearing will be held on June 18, 2009, concerning issues related to investments in TDFs. The hearing will be held beginning at 9 a.m. in the plaza auditorium of the U.S. Department of Labor, Francis Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210.

By the U.S. Department of Labor.

Alan D. Lebowitz,

Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration,

U.S. Department of Labor

Dated: May 19, 2009

By the Securities and Exchange Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy

Secretary

May 19, 2009

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA-2876; File No. S7-09-09]

RIN 3235-AK32

Custody of Funds or Securities of Clients by Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing amendments to the custody rule under the Investment Advisers Act of 1940 and related forms. The amendments, among other things, would require registered investment advisers that have custody of client funds or securities to undergo an annual surprise examination by an independent public accountant to verify client funds and securities. In addition, unless client accounts are maintained by an independent qualified custodian (i.e., a custodian other than the adviser or a related person), the adviser or related person must obtain a written report from an independent public accountant that includes an opinion regarding the qualified custodian's controls relating to custody of client assets. Finally, the amendments would provide the Commission with better information about the custodial practices of registered investment advisers. The amendments are designed to provide additional safeguards under the Advisers Act when an adviser has custody of client funds or securities.

DATES: Comments must be received on or before July 28, 2009.

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

Electronic comments:

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

FOR FURTHER INFORMATION CONTACT: Vivien Liu, Senior Counsel, Daniel S. Kahl, Branch Chief, or Sarah A. Bessin, Assistant Director, at (202) 551-6787 or

<IArules@sec.gov>, Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") is requesting public comment on proposed amendments to rule 206(4)-2 [17 CFR 275.206(4)-2], rule 204-2 [17 CFR 275.204-2] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] (the "Advisers Act" or "Act"), to Form ADV [17 CFR 279.1], and to Form ADV-E [17 CFR 279.8].

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I. BACKGROUND

Rule 206(4)-2 regulates the custody practices of investment advisers registered under the Advisers Act.[1] Unlike banks and broker-dealers, investment advisers typically do not maintain physical custody of client funds or securities but rather may have custody because they have the authority to obtain client assets, such as by deducting advisory fees

[1] Unless otherwise noted, when we refer to rule 206(4)-2 or any paragraph of the rule, we are referring to 17 CFR 275.206(4)-2 of the Code of Federal Regulations in which the rule is published. See also Custody of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act Release No. 2176 (Sept. 25, 2003) [68 FR 56692 (Oct. 1, 2003)] ("2003 Adopting Release"). From time to time for convenience, this release refers to rule 206(4)-2 as the "custody rule."

from a client account, writing checks or withdrawing funds on behalf of a client, or by acting in a capacity, such as general partner of a limited partnership, that gives an adviser or its supervised person the authority to withdraw funds or securities from the limited partnership's account. Rule 206(4)-2 requires advisers that have custody of client funds or securities to implement controls designed to protect those client assets from being lost, misused, misappropriated or subject to the advisers' financial reverses, such as insolvency. The rule contains two primary protections.

First, the rule requires advisers that have custody, with certain limited exceptions, to maintain client funds or securities with a "qualified custodian."[2] Qualified custodians under the rule include the types of financial institutions to which clients and advisers customarily turn for custodial services, including banks, registered broker-dealers, and registered futures commission merchants.[3] These institutions' custodial activities are subject to extensive regulation and oversight.[4]

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[2] Rule 206(4)-2(a)(1).

[3] Rule 206(4)-2(c)(3) (defining "qualified custodian"). In addition, "qualified custodian" includes a foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps advisory clients' assets in customer accounts segregated from its proprietary assets. Foreign custody arrangements may be necessary to permit clients to trade in securities traded in foreign markets, or to accommodate clients with existing relationships with foreign institutions. When we amended the custody rule in 2003, we explained that when an adviser selects a foreign financial institution to hold clients' assets, the adviser's fiduciary obligations require it either to have a reasonable basis for believing that the foreign institution will provide a level of safety for client assets similar to that which would be provided by a "qualified custodian" in the United States or to fully disclose to clients any material risks attendant to maintaining the assets with the foreign custodian. See 2003 Adopting Release, at n. 22.

[4] See Custody of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act Release No. 2044 (Jul. 18, 2002) [67 FR 48579 (Jul. 25, 2002)] ("2002 Proposing Release"), at n. 30 (regulatory agencies or self-regulatory organizations require these financial institutions to carry fidelity bonds to cover possible losses caused by their employees' fraudulent activities). In addition, rule 15c3-3 [17 CFR 240.15c3-3] under

Second, the rule requires that an adviser with custody of client assets have a reasonable belief that the qualified custodian holding the assets provides account statements directly to clients, or investors in pooled investment vehicles, at least quarterly.[5] Clients can use the statements they receive from the qualified custodians to compare them with the statements (or other information) they receive from their advisers to determine whether account transactions, including deductions to pay advisory fees, are proper. An adviser to a pooled investment vehicle is not required to comply with the rule's account statement delivery requirement if the pooled investment vehicle is audited at least annually and distributes its audited financial statements to investors in the pool within 120 days of the end of its fiscal year.[6]

If, however, clients do not receive account statements directly from their qualified custodians, the adviser must itself deliver quarterly account statements to clients and engage an independent public accountant to verify the client assets in a surprise

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the Securities Exchange Act of 1934 (the "Exchange Act"), requires a broker-dealer to segregate customer funds held by the broker-dealer for the accounts of customers and to take certain steps to protect customer assets. Under rules 17a-3 and 17a-4 under the Exchange Act [17 CFR 240.17a-3 and 17a-4] a broker-dealer must create and maintain current, specified books and records to allow the broker-dealer to easily identify what assets belong to each customer. Similarly, national banks, federal savings associations, and other U.S. banking institutions are subject to extensive regulation and oversight. See 12 U.S.C. 92a. (national banks must have authorization from the Comptroller of the Currency before establishing a trust department and taking custody of customer assets); 12 U.S.C. 1464(n) (federal savings associations shall segregate all assets held in any fiduciary capacity and shall keep a separate set of books and records showing all transactions in the accounts); Comptroller's Handbook, Custody Services at 6, 15 (Jan. 2002) (a bank should have adequate systems in place to identify, measure, monitor, and control risks in the custody services area and a custodian's accounting records and internal controls should ensure that assets of each custody account are kept separate from the assets of the custodian).

5 Rule 206(4)-2(a)(3)(i).

6 Rule 206(4)-2(b)(3).

examination that must occur at least once during each calendar year.[7] During a surprise examination, an independent public accountant generally must (i) confirm with the custodian all cash and securities held by the custodian, including physical examination of securities if applicable, and will reconcile all such cash and securities to the books and records of client accounts maintained by the adviser, (ii) verify the books and records of client accounts maintained by the adviser by examining the security records and transactions since the last examination and by confirming with clients all funds and securities in client accounts, and (iii) confirm with clients, on a test basis, closed accounts or securities or funds that have been returned since the last examination.[8] The results of the examination must be reported by the accountant to the Commission.[9]

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7 Rule 206(4)-2(a)(3)(ii). Under the rule, an adviser is not required to obtain a surprise examination if the qualified custodian delivers account statements directly to the adviser's clients. An adviser to a pooled investment vehicle that is unable, or chooses not to, rely on the exception for audited financial statements and that does not have a qualified custodian send the required account statements to pool investors must provide account statements to pool investors and the adviser must obtain a surprise examination of pool assets.

8 As stated in note 33 of the 2003 Adopting Release, the accountant must perform the examination in accordance with U.S. Generally Accepted Auditing or Attestation Standards and the standards established by the Commission, except that the accountant must verify all or substantiate all client funds and securities covered by the examination. The examination should include confirmation of all client cash and securities of which an adviser has custody, regardless of whether they are held by qualified custodians, and reconciliation of all such cash and securities to the books and records of client accounts maintained by the adviser, as well as confirmation of such information with the adviser's clients. See Nature of Examination Required to be Made of All Funds and Securities Held in Custody of Investment Advisers and Related Accountant's Certificate, Investment Advisers Act Release No. 201 and Accounting Series Release No. 103 (May 26, 1966) [31 FR 7821 (Jun. 2, 1966)]. Section 404.01.b. of the Commission's Codification of Financial Reporting Policies. The examination must be performed at a time chosen by the accountant without prior notice or announcement to the adviser, and the timing of the examination must be irregular from year to year, so that the adviser will be unaware of the date on which it will take place. Rule 206(4)-2(a)(3)(ii)(B).

9 Id.

The surprise examination may uncover problems indicating that client assets may be at risk. Accordingly, we have designed the surprise examination requirement to provide timely information to the Commission staff in the event that the accountant uncovers a problem during the examination. Under the existing rule, the accountant must notify our Office of Compliance Inspections and Examinations within one business day of finding any material discrepancies during an examination.[10]

II. DISCUSSION

In recent months, the Commission has brought several enforcement actions against investment advisers and broker-dealers alleging fraudulent conduct, including misappropriation or other misuse of investor assets.[11] The Commission is intensively

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10 Rule 206(4)-2(a)(3)(ii)(C). As we stated in note 34 of the 2003 Adopting Release, the independent public accountant may first take reasonable steps to establish the basis for believing a material discrepancy exists. The obligation to notify the Commission arises once the accountant has a basis for believing there is a material discrepancy. Ordinarily, an accountant should be able to determine promptly whether it has a basis for believing there is a material discrepancy.

11 See, e.g., SEC v. Donald Anthony Walker Young, et al., Litigation Release No. 21006 (Apr. 20, 2009) (complaint alleges registered investment adviser and its principal misappropriated in excess of $23 million, provided false account statements to investors in limited partnership, and provided false custodial statements to limited partnership's introducing broker); SEC v. Isaac I. Ovid, et al., Litigation Release No. 20998 (Apr. 14, 2009) (complaint alleges that defendants, including registered investment adviser and manager of purported hedge funds, misappropriated in excess of $12 million); SEC v. The Nutmeg Group, LLC, et al., Litigation Release No. 20972 (Mar. 25, 2009) (complaint alleges that registered investment adviser misappropriated in excess of $4 million of client assets, failed to maintain client assets with a qualified custodian, and failed to obtain a surprise examination); SEC v. WG Trading Investors, L.P., et al., Litigation Release No. 20912 (Feb. 25, 2009) (complaint alleges that registered broker-dealer and affiliated registered adviser orchestrated fraudulent investment scheme, including misappropriating as much as $554 million of the $667 million invested by clients and sending clients misleading account information); SEC v. Stanford International Bank, et al., Litigation Release No. 20901 (Feb. 17, 2009) (complaint alleges that the affiliated bank, broker-dealer, and advisers colluded with each other in carrying out an $8 billion fraud); SEC v. Bernard L. Madoff, et al., Litigation Release No. 20889 (Feb. 9, 2009) (complaint alleges that Madoff and Bernard L. Madoff Investment Securities LLC (a registered investment adviser and registered broker-dealer) committed a $50 billion fraud).

investigating this conduct, including the role of the investment advisers, broker-dealers, and individuals that may have participated in the conduct. We continue to work with criminal authorities and other federal and state regulators to see that the full weight of the law is brought to bear on any advisers and broker-dealers that are found to have betrayed investor trust and confidence. In addition, our staff is conducting examinations of broker-dealer and adviser custodial practices designed to evaluate whether the assets entrusted to these firms are appropriately accounted for and that the firms have in place controls reasonably designed to prevent the theft, misappropriation or other misuse of investor assets.

We also are undertaking a comprehensive review of the rules regarding the safekeeping of investor assets in order to determine changes we might make that would decrease the likelihood that client assets are misused, or would increase the likelihood that fraudulent activities are discovered earlier and client losses are thereby reduced. We are proposing today for comment several revisions to rule 206(4)-2 under the Advisers Act that are designed to improve the safekeeping of client assets.

A. Annual Surprise Examination of Client Assets

1. Application to All Advisers with Custody

The Commission proposes to require that all registered investment advisers with custody of client assets engage an independent public accountant to conduct an annual surprise examination of client assets.[12] When we adopted the custody rule in 1962, each

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[12] Proposed rule 206(4)-2(a)(4). Proposed rule 206(4)-2(c)(3) would define independent public accountant as a public accountant that meets the standards for independence described in rule 2-01(b) and (c) of Regulation S-X. As discussed further below, the annual surprise examination requirement would be in addition to the requirement that the

adviser with custody of client securities or funds was required by rule 206(4)-2 to engage an independent public accountant to conduct an annual surprise examination.[13] In 2003, we amended the rule to eliminate the annual surprise examination with respect to client accounts for which the adviser has a reasonable belief that "qualified custodians" provide account statements directly to clients.[14] We believed that direct delivery of account statements by qualified custodians would provide clients confidence that any erroneous or unauthorized transactions would be reflected and, as a result, would be sufficient to deter advisers from fraudulent activities.[15]

We have decided to revisit the 2003 rulemaking in light of the significant enforcement actions we have recently brought alleging misappropriation of client assets.[16] We believe that a surprise examination by an independent public accountant would provide "another set of eyes" on client assets, and thus additional protection against their misuse. Moreover, an independent public accountant may identify misuse that clients have not, which would result in the earlier detection of fraudulent activities

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adviser have a reasonable belief that qualified custodians deliver account statements directly to clients.

13 Adoption of Rule 206(4)-2 under the Investment Advisers Act of 1940, Investment Advisers Act Release No. 123 (Feb. 27, 1962) [27 FR 2149 (Mar. 6, 1962)]. In 1997, we amended the rule to make it applicable only to advisers who are registered, or required to be registered, with the Commission. Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1633 (May 15, 1997) [62 FR 28112 (May 22, 1997)] at Section II.I.5.

14 See 2003 Adopting Release, at Section II.C.

15 The custody rule provides a limited exception to the requirement of maintaining client assets with a qualified custodian with respect to mutual fund shares and certain privately offered securities. Rule 206(4)-2(b)(1) and (2). As a result, these securities may not be reflected on the qualified custodian's account statements.

16 See supra note 11.

and reduce resulting client losses.[17] Therefore, we propose to require all registered investment advisers with custody of client assets to obtain an annual surprise examination regardless of whether a qualified custodian directly provides statements to clients or, in the case of a pooled investment vehicle, the pool is audited at least annually and distributes its audited financial statements to its limited partners (or other investors) within 120 days of the end of its fiscal year. We are proposing a number of additional enhancements to the rule, discussed below, including additional adviser and accountant reporting requirements and independent review of custody controls in certain circumstances, that we believe would improve the utility of the surprise examination requirement and address some of the concerns we had in 2003.

We request comment on our proposal to require investment advisers with custody of client assets to undergo an annual surprise examination. Would an annual surprise examination increase protections afforded to advisory clients, including pooled investment vehicles (and the investors in those vehicles)? Should we except from the surprise examination requirement advisers that have custody of client funds or securities solely as a result of their authority to withdraw advisory fees from client accounts?[18] Is this form of custody, which is common to advisers with discretionary authority, less

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17 The independent public accountant conducting a surprise examination would independently verify all client funds and securities of which an adviser has custody, including those maintained with a qualified custodian and those that are not maintained with a qualified custodian, such as certain privately offered securities and mutual fund shares. See supra note 15.

18 Advisers registered with the Commission that have authority to deduct advisory fees from client assets have custody and are subject to rule 206(4)-2, but are not required to report that they have custody on Form ADV. See Item 9 of Part 1 of Form ADV ("If you are registering or registered with the SEC and you deduct your advisory fees directly from your clients' accounts but you do not otherwise have custody of your clients' funds or securities, you may answer "no" to Item 9A.(1) and 9A.(2)."). This would not change under the proposed rule.

likely to be subject to abuse? Should we instead specify requirements or restrictions regarding withdrawing fees from client accounts? If so, what should they be? Are there alternatives to the surprise examination that might provide similar protections, or are there additional requirements that we should also consider? For example, should we instead (or also) amend rule 206(4)-7, which requires advisers to adopt compliance policies and procedures administered by a chief compliance officer, to require that the chief compliance officer submit a certification to us on a periodic basis that all client assets are properly protected and accounted for on behalf of clients?[19] Should we specify certain minimum procedures that each chief compliance officer should implement to assure herself that all client assets are properly protected and accounted for? Given the variety of custodial arrangements, is it feasible for us to specify minimum requirements? Should the rule require surprise examinations to be conducted more frequently than annually or, alternatively, on a regular periodic basis, e.g., semi-annually?

Many advisers have custody as a result of serving as a general partner (or in some other capacity) of a limited partnership or other form of pooled investment vehicle. The proposed rule would continue to except advisers from the requirement to have a qualified custodian send account statements with respect to a pooled investment vehicle that is audited at least annually and distributes its audited financial statements to its limited partners (or other investors) within 120 days of the end of its fiscal year.[20] It would not,

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19 Rule 206(4)-7 (17 CFR 275.206(4)-7). When we adopted rule 206(4)-7 in 2003, we stated that an adviser's compliance policies and procedures adopted and implemented under the rule should address "safeguarding of client assets from conversion or inappropriate use by advisory personnel." See Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release 2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)], at Section II.A.1.

20 Proposed rule 206(4)-2(b)(3).

however, except such advisers from the surprise examination requirement. The annual audit serves a similar purpose as the surprise examination because it involves a verification process, although it is not required to cover all funds or securities.[21] Should we continue to except advisers from the surprise examination requirement with respect to client assets held in pooled vehicles that are audited at least annually?

As explained above, the proposed rule would require all registered advisers that have custody of client assets, including advisers that are also registered as broker-dealers and thus are permitted to act as qualified custodians for their clients' assets, to obtain an annual surprise examination. Under the Exchange Act, a broker-dealer's financial statements must be audited annually by a registered public accounting firm.[22] This audit must include a review of the broker-dealer's procedures for safeguarding securities.[23] The scope of this review must be sufficient for the auditor to provide reasonable assurance that material inadequacies do not exist in a broker-dealer's procedures for safeguarding securities.[24] Would the surprise examination's "verification" of client assets provide additional protection for clients of advisers that are also broker-dealers? Do the custody obligations for banks present the same issues if an adviser is also a bank and maintains custody of client assets? Instead of requiring a surprise examination for advisers that also act as the qualified custodian for their clients' assets, should we instead consider a different approach, such as requiring these advisers to segregate custodial

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21 See AICPA Investment Company Audit and Accounting Guide, May 1, 2008.

22 Section 17(e)(1)(A) [15 U.S.C. 78q(e)(1)(A)] of the Exchange Act.

23 Exchange Act Rule 17a-5(g) [17 CFR 240.17a-5(g)].

24 Id.

duties from advisory duties and implement additional internal controls to protect client assets?

We also request comment on whether we should revise or expand the guidance we have provided regarding the surprise examination.[25] For example, are there other procedures an accountant should perform as part of a surprise examination? Should we require an accountant to perform testing on the valuation of securities, including privately offered securities, as part of a surprise examination? Should we require an adviser to certify a listing of funds and securities and client accounts that were examined by the accountant as part of the surprise examination? Are there any procedures currently required to be performed as part of a surprise examination that are no longer necessary? If so, what procedures and why are they no longer necessary? For example, is confirming all client balances necessary to adequately protect investors? If not, what extent of confirmation would be appropriate? Are there any procedures currently required to be performed as part of a surprise examination that should be clarified? If so, how should they be clarified? Have investment advisers' custodial practices or operations changed such that we should revise our existing guidance on performing the surprise examination?[26] If so, what revisions should we make? If the proposed rule is adopted and a greater variety of advisers become subject to the rule's surprise examination requirement, should we provide additional guidance to assist different types of advisers and their accountants in complying with the surprise examination requirement? If so, what additional guidance should we provide?

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25 See supra note 8.

26 See Nature of Examination Required to be Made of All Funds and Securities Held in Custody of Investment Advisers and Related Accountant's Certificate, supra note 8.

2. Commission Reporting

We propose to amend rule 206(4)-2 to require investment advisers subject to the rule to enter into a written agreement with an independent public accountant to conduct the surprise examination requiring the accountant, among other things, to notify the Commission within one business day of finding material discrepancies, and to submit Form ADV-E to the Commission accompanied by a certificate within 120 days of the time chosen by the accountant for the surprise examination, stating that it has examined the funds and securities and describing the nature and extent of the examination.[27] The accountant's certificate describing the nature and extent of the examination assists the Commission's examination staff in identifying and assessing risks raised by the investment adviser's custodial practices and in determining the scope of the Commission staff's examination of an investment adviser. The reporting by the independent public accountant of a material discrepancy provides the Commission's examination staff with notice of a possible problem with the investment adviser's custodial practices. Should we require additional information be included in the accountant's certificate? Although we are not proposing to change the requirement, is the term "material discrepancy," as used in the context of a surprise examination, widely understood by independent public accountants? If not, should we define the term or provide guidance as to the

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[27] Proposed rule 206(4)-2(a)(4). The written agreement would also require, in accordance with the current requirements of rule 206(4)-2, the independent public accountant to perform the surprise examination. The current rule does not specifically require that the adviser enter into a written agreement with the independent public accountant. Rule 206(4)-2(a)(3)(ii)(B) and (C). Advisers would have to keep these written agreements under rule 204-2(a)(10) [17 CFR 275.204-2(a)(10)] as they would be written agreements that an adviser enters into in its business as such. The obligation to maintain the records would apply for five years from the end of the fiscal year during which the last entry was made, the first two years in an appropriate office of the investment adviser.

requirement? Should we require the accountant's certificate to be provided to clients or investors in pooled investment vehicles?

Currently, the custody rule requires that the accountant that performs the surprise examination file Form ADV-E with the Commission within 30 days of the completion of the examination stating that it has examined the funds and securities and describing the nature and extent of the examination. Our examination staff has found that an adviser's surprise examination may sometimes continue for an extended period of time. We propose to amend the rule to require that the accountant instead file Form ADV-E within 120 days of the time chosen by the accountant for the surprise examination. As described above, 120 days is the period of time in which a pooled investment vehicle managed by an adviser relying on the rule's annual audit exception must distribute its audited financial statements to investors in the pool.[28] Accordingly, we believe 120 days should be sufficient time for an accountant to complete a surprise examination and file Form ADV-E. Would this change create any difficulties for the accountant or the adviser to comply with the filing requirement? Is 120 days reasonable for all types of advisers? If not, what time limit should we require for the surprise examination?

In addition, we propose that the written agreement require the independent public accountant to submit Form ADV-E to the Commission within four business days of its resignation, dismissal from, or other termination, of the engagement, or upon removing itself or being removed from consideration for being reappointed, accompanied by a statement that includes (i) the date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the accountant, and (ii) an

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[28] Rule 206(4)-2(b)(3).

explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination ("termination statement").[29] This information would permit our staff to compare information provided by the adviser with the perspective of the accountant, and to further evaluate the need for an examination of the adviser to determine whether client assets are at risk. We request comment on this proposed filing requirement. Is this the right standard for notification of potential problems or disagreements between an adviser and its independent public accountant performing the surprise examination? Is it too broad? Too narrow? Is there more information that should be required in this notification? If so, what additional information should be required? Is the required explanation of the reason for the withdrawal sufficient? Should this notification requirement provide for more detailed standards such as those included in Item 304(a)(1) of Regulation S-K with respect to a change in an issuer's independent public accountant?

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29 Proposed rule 206(4)-2(a)(4)(iii). Similarly, we require companies registered under Section 12 or 15(d) of the Exchange Act to file with us, within four business days of the dismissal or resignation of their auditors, a Form 8-K containing information relating to the circumstances under which the auditor was terminated, whether the auditor had issued any adverse reports about the company, whether there had been any disagreements between the company and the auditor and certain other information. The former auditor must respond in a publicly available document whether it agrees with the company's statement. Form 8-K, Current Report, Item 4.01, 17 CFR 249.308; Changes In and Disagreements With Accountants on Accounting and Financial Disclosure, Regulation S-K, Item 304, [17 CFR 229.304]. We also require broker-dealers registered with us to file a notice with us within 15 business days of the dismissal or resignation of their auditors. In the notice, the broker-dealer must, among other things, disclose any problem in the past two years of which, if not resolved, the former auditor would have to make reference in its report and state whether the former auditor's report of the past two years contained any adverse or qualified opinion or any disclaimer of opinion. The broker-dealer must attach to its notice the former auditor's statement as to whether it agrees with the broker-dealer's disclosure. See rule 17a-5(f)(4) under the Exchange Act. We have chosen the four business day standard to provide us with notice of potential problems with an investment adviser's custody of client funds or securities at an earlier time to allow our staff to take prompt action if necessary.

We propose to have accountants file Form ADV-E with us electronically, through the Investment Adviser Registration Depository ("IARD"), which would enhance our ability to use the information by, for example, comparing information provided by advisers and their independent public accountants and thus to identify potential custodial risks. We currently are working with our contractor to develop changes to the IARD system that would permit it to accept Form ADV-E and allow us to make the filings available through our web site.[30] We request comment on whether we should require that Form ADV-E be filed electronically, and whether we should make the accountant's termination statement publicly available.

3. Privately Offered Securities

We also propose to amend the rule to make privately offered securities that investment advisers hold on behalf of their clients subject to the surprise examination requirement.[31] Currently, privately offered securities are excluded from all aspects of the custody rule.[32] While it may not be practical to require that these securities in all cases be

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30 The IARD system will not be able to accept electronic filings of Form ADV-E until it is upgraded with this function. If the proposed amendments are adopted, it is possible that accountants performing surprise examinations may have to continue paper filing of Form ADV-E for a period of time until the IARD system has been upgraded. Public access to these filings would be made available on our web site through the Investment Adviser Public Disclosure system (IAPD).

31 "Privately offered securities" are defined by rule 206(4)-2(b)(2) as securities that are (i) acquired from the issuer in a transaction or chain of transactions not involving any public offering, (ii) uncertificated, and ownership thereof is recorded only on the books of the issuer or its transfer agent in the name of the client, and (iii) transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer. The proposed rule would retain this definition.

32 Id.

held by a qualified custodian,[33] we believe subjecting these securities to the surprise examination would provide greater assurance that such securities are properly safeguarded in furtherance of the purposes of the rule. We request comment on the feasibility of requiring that advisers obtain a surprise examination with respect to privately offered securities.

B. Custody by Adviser and its Related Persons

1. Custody by Related Persons

The Commission proposes to amend rule 206(4)-2 to provide that an adviser has custody of any client securities or funds that are directly or indirectly held by a "related person" in connection with advisory services provided by the adviser to its clients.[34] A "related person" would be a person directly or indirectly controlling or controlled by the adviser and any person under common control with the adviser.[35] For purposes of this definition we would define "control" as the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise.[36] As a result, the protections of the rule would be afforded to clients when their funds and securities are not held with an independent custodian, but rather with the adviser itself or indirectly through a related person.[37]

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33 Ownership of private securities is recorded only on the books of the issuer, which poses difficulties to maintain them in accounts with qualified custodians. See 2003 Adopting Release, at Section II.B.

34 Proposed rule 206(4)-2(c)(2) (defining "custody").

35 Proposed rule 206(4)-2(c)(6) (defining "related person").

36 Proposed rule 206(4)-2(c)(1) (defining "control"). Form ADV [17 CFR 297.1] also uses the same definition.

37 Today, an adviser may, for example, have custody if its related person holds assets of the adviser's clients and the adviser either controls the related person's operations or has

Under rule 206(4)-2, an adviser has custody of client assets if it holds, directly or indirectly, client funds or securities or has any authority to obtain possession of them.[38] In our release adopting the 2003 amendments to rule 206(4)-2, we explained that an adviser may have custody of client assets under circumstances in which the adviser or its personnel have access to those client assets through a related person, and cited one of our staff interpretive letters that set forth factors the staff will consider in determining whether an adviser has "indirect" custody of client assets.[39] The proposed amendments would simply deem advisers whose "related persons" hold client assets to have custody under the rule if those assets are held by the related person in connection with the advisory services provided by the adviser. We believe that the risks to advisory clients that arise as a result of a related person's ability to obtain client assets, regardless of the separation between the adviser and a related person, may be substantial enough to require the adviser to comply with the custody rule. The "in connection with" limitation of the proposed rule is designed to prevent an adviser from being deemed to have custody of client assets held by a related person broker-dealer (or other qualified custodian) with respect to which the adviser does not provide advice.

Should we deem an adviser to have custody if its related persons hold assets in connection with the adviser's advisory services? Are there circumstances where a related

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access to the client assets through the related person. See section 208(d) of the Advisers Act [15 U.S.C. 80b-8(d)] (an adviser may not, indirectly or through or by any other person, do any act or thing that would be unlawful for the adviser to do directly).

38 Rule 206(4)-2(c)(1) (defining "custody").

39 See 2003 Adopting Release at n.4 (citing Crocker Investment Management Corp., SEC Staff No-Action Letter (Apr. 14, 1978)). Our staff would withdraw this no-action letter if we adopt the proposed amendment.

person's custody of client assets should not be imputed to the adviser? If so, should the rule contain a rebuttable presumption that an adviser has custody if any of its related persons have custody of advisory client assets?[40] What factors, if any, should we identify for advisers to consider when assessing whether the presumption can be rebutted?[41]

2. Internal Control Report and PCAOB Registration and Inspection

The Commission also proposes to amend rule 206(4)-2 to require that, if an independent custodian does not maintain client assets but the adviser or a related person instead serves as a qualified custodian for client funds or securities under the rule in connection with advisory services the adviser provides to clients, the adviser must obtain, or receive from the related person, no less frequently than once each calendar year a written report ("internal control report"), which includes an opinion from an independent public accountant registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board ("PCAOB"), with respect to the adviser's or related person's controls relating to custody of client assets.[42] The adviser would be

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40 Cf. Rule 206(4)-4(b) (establishing a rebuttable presumption that certain legal or disciplinary events are material and therefore must be disclosed to clients).

41 See, e.g., Financial and Disciplinary Information That Investment Advisers Must Disclose to Clients, Investment Advisers Act Release No. 1083 (Sept. 25, 1987) [52 FR 36915 (Oct. 2, 1987)] (discussing factors an adviser should consider in assessing the presumption that certain disciplinary information is material and therefore should be disclosed to clients).

42 Proposed rule 206(4)-2(a)(6). A report on the description of controls placed in operation and tests of operating effectiveness (commonly referred to as a "Type II SAS 70 Report") conducted in accordance with PCAOB standards would be sufficient for purposes of satisfying the requirements of the internal control report. See AU 324 Service Organizations of the PCAOB interim standards.

required to maintain the internal control report in its records and make it available to the Commission or its staff upon request.[43]

We are proposing this addition to the rule because we believe maintaining client assets with the adviser or a related person instead of with an independent custodian can present higher risks to advisory clients. Indeed, several of the recent enforcement actions we have brought alleging misappropriation of client assets by investment advisers have involved advisers or related persons that maintained client assets.[44] While advisers that are themselves, or use related persons that are, qualified custodians would be required to obtain a surprise examination, the utility of the surprise examination may be limited because the independent public accountant seeking to verify client assets may have to rely on custodial reports issued by the adviser or its related person. Because of the relationship between the adviser and the custodian, we believe that there is a greater risk that the custodian could be a party to any fraud and therefore the custodian's reports could be compromised. Requiring these advisers to also obtain an internal control report would provide an additional check on the safeguards relating to client assets held by the adviser or the related person qualified custodian.

An internal control report could also significantly strengthen the utility of the surprise examination when the adviser or a related person custodian maintains client assets because the independent public accountant performing the surprise examination could obtain additional comfort that confirmations received from the qualified custodian in the course of the surprise examination are reliable and, where a broker-dealer is the

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[43] Proposed rule 204-2(a)(17)(iii). See 17 CFR 275.204-2.

[44] See supra note 11.

qualified custodian, may be able to leverage existing tests performed in compliance with broker-dealer auditing and internal control requirements. The internal control report may also reveal control problems, which could be significant.[45] Thus, the requirement to obtain an internal control report informs the surprise examination process and may itself act as a deterrent to advisers that may consider misappropriating client assets directly or through a related person in the guise of providing custodial services as a qualified custodian.

The proposed amendments would require that the internal control report include an opinion of an independent public accountant registered with, and subject to regular inspection by, the PCAOB, that is issued in accordance with the standards of the PCAOB, with respect to the description of controls placed in operation relating to custodial services, including the safeguarding of cash and securities held by either the adviser or a related person on behalf of the adviser's clients, and tests of operating effectiveness.[46] In addition, the internal control report would also contain a description of the relevant controls, the control objectives and related controls, and the independent public accountant's tests of operating effectiveness that were performed and the results of those tests.[47]

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45 In addition to the specific procedures an independent public accountant must follow during a surprise examination, the accountant should perform any additional audit procedures it deems necessary under the circumstances. See Nature of Examination Required to be Made of All Funds and Securities Held in Custody of Investment Advisers and Related Accountant's Certificate, supra note 8.

46 Proposed rule 206(4)-2(a)(6).

47 See supra note 42.

Opinions provided in reports on controls over custodial services conducted in accordance with PCAOB standards address control objectives relevant to the custodial operations, as well as the general control environment and information systems. Control objectives relevant to custodial operations might include:

- Physical securities are safeguarded from loss or misappropriation;
- Cash and security positions are reconciled accurately and on a timely basis between the custodian and depositories, and between the custodian and accounting systems;
- Client-initiated trades are properly authorized and recorded completely and accurately in the client account;
- Securities income and corporate action transactions are processed to client accounts in an accurate and timely manner;
- Net settlement procedures for delivery and receive transactions are performed accurately;
- Documentation for the opening of accounts is received and authenticated, and established completely and accurately on the applicable system; and
- Market values of securities obtained from various outside pricing sources have been recorded accurately in client accounts.

We are proposing that the independent public accountant issuing the internal control report be registered with, and subject to regular inspection by, the PCAOB, in accordance with the rules of the PCAOB.[48] We believe that registration and the periodic

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48 Proposed rule 206(4)-2(a)(6). The PCAOB performs regular inspections with respect to any registered public accounting firm that, during any of the three prior calendar years, issued an audit report with respect to at least one issuer. Under the proposed rule, an

inspection of an independent public accountant's overall quality control system by the PCAOB will provide us greater confidence in the quality of the internal control report.

We request comment on whether we should require advisers that serve, or have related persons that serve, as qualified custodians for client funds and securities to obtain or receive an internal control report. Would this requirement provide additional protections for clients? How would the timing of the internal control report relate to the timing of the surprise examination? Does it make sense to require both an internal control report and a surprise examination? Would these requirements be duplicative? If so, in which respects? Should we require that the independent public accountant that performs the surprise examination be a different accountant than the accountant that prepares the internal control report? Should we require that the independent public accountant that prepares the internal control report be registered with the PCAOB? If so, should we require that the independent public accountant also be subject to regular inspection by the PCAOB? Would the requirement of using independent public accountants registered with, and subject to regular inspection by, the PCAOB increase the costs to obtain these reports or make it too difficult to obtain a qualified accounting firm to provide an internal control report? Have we provided sufficient guidance for the independent public accountants that will produce these reports? Should we require that specific control objectives be addressed within the internal control report? If so, what control objectives? Would obtaining or receiving an internal control report present

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adviser's use of an independent public accountant that is registered with the PCAOB but not subject to regular inspection would not satisfy the rule's requirements. See Rule 4003 of the PCAOB's Bylaws and Rules, effective pursuant to Exchange Act Release No. 56738, File No. PCAOB-2006-03 (Nov. 2, 2007) and Exchange Act Release No. 49787, File No. PCAOB-2003-08 (Jun. 1, 2004).

additional issues if an adviser, or its related person, that acts as qualified custodian for client assets is located outside of the United States? Would the requirement that the independent public accountant be registered with, and subject to regular inspection by, the PCAOB make it more difficult for such advisers or their related persons to engage an accountant to prepare the internal control report?

3. Surprise Examination and PCAOB Registration

We also are proposing to require that when an adviser or a related person serves as a qualified custodian for the adviser's clients' funds or securities, the surprise examination discussed above be performed by an independent public accountant registered with, and subject to regular inspection by, the PCAOB, in accordance with the rules of the PCAOB.[49] We are proposing this requirement because, as discussed above, we believe PCAOB registration and inspection will provide us greater confidence in the quality of the examination performed by the independent public accountant, which is even more important when an adviser or its related person, rather than an independent custodian, maintains client funds or securities.[50]

We request comment on this proposed amendment to the rule. Should we require that the independent public accountant performing the surprise examination of an adviser that serves, or whose related person serves, as a qualified custodian be registered with the

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49 Proposed rule 206(4)-2(a)(6)(i).

50 C.f. SEC v. David G. Friehling, C.P.A., et al., Litigation Release No. 20959 (Mar. 18, 2009) (Commission charged auditors with fraud alleging, among other things, that auditors misrepresented that the financial statements of Bernard L. Madoff Investment Securities LLC (BMIS) were audited pursuant to Generally Accepted Auditing Standards, including the requirements to maintain auditor independence and perform audit procedures regarding custody of securities; did not perform a meaningful audit of the BMIS; and did not perform procedures to confirm that the securities BMIS purportedly held on behalf of its customers even existed).

PCAOB and subject to its inspection? Should we instead require all surprise examinations under the rule to be conducted by independent public accountants registered with, and subject to regular inspection by, the PCAOB? Does requiring the independent public accountant to be PCAOB-registered and inspected provide meaningful quality assurance for surprise examinations? Would the requirement of using a PCAOB-registered and inspected independent public accountant increase the costs to obtain these examinations or make it difficult to obtain a qualified accounting firm to conduct the examination? Would the requirement of using a PCAOB-registered and inspected independent public accountant disproportionally impact small accounting firms or small investment advisers?

If we require the independent public accountants that prepare the internal control report and perform the surprise examination to be registered with, and subject to regular inspection by, the PCAOB, should we also consider a similar revision to the current rule's audit exception for certain pooled investment vehicles? Specifically, should we require, as a condition of the adviser's reliance on the audit exception when the adviser or its related person serves as qualified custodian for funds or securities of the pool, that the independent public accountant that performs the audit of the pooled investment vehicle's financial statements be registered with, and subject to regular inspection by, the PCAOB? Would advisers to offshore pools find it too difficult to engage an auditor that is PCAOB-registered and inspected? Should we instead, or in addition, require the independent public accountant, as part of the surprise examination, to confirm security holdings with the highest-level unaffiliated subcustodian (e.g., Depository Trust Company) in addition to confirming the security holdings with the qualified custodian, similar to the

requirements for auditors performing examinations for advisers to registered investment companies that are deemed to have custody pursuant to rule 17f-2 of the Investment Company Act of 1940?[51]

4. Independent Qualified Custodians

We request comment on whether, as an alternative to our proposal to impose additional conditions on advisers that serve as, or have related persons that serve as, qualified custodians for client assets, we should simply amend rule 206(4)-2 to require that an independent qualified custodian hold client assets. The use of a custodian not affiliated with the adviser would address the conflict, and potentially greater risks to client assets, that may be presented when an adviser or its related person acts as custodian for client assets.

When we amended rule 206(4)-2 in 2003 to require that advisers with custody of client funds or securities maintain those assets with a qualified custodian, we acknowledged that the rule would permit advisers that are also qualified custodians to hold their clients' assets or to maintain them with related persons that are qualified custodians.[52] Most qualified custodians are banks and broker-dealers, which are subject to extensive regulation and oversight of their custodial practices, and we did not believe

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[51] See American Institute of Certified Public Accountants, Audit and Accounting Guide: Investment Companies §2.160 Footnote 47 (May 1, 2008), which requires confirmation of security holdings with the highest-level of unaffiliated subcustodian in connection with examinations performed pursuant to rule 17f-2 of the Investment Company Act of 1940 [17 CFR 270.17f-2].

[52] See 2003 Adopting Release at Section II.B.

that permitting advisers to maintain securities with them presented additional custodial risk.[53]

We are interested in exploring the practical aspects of requiring, as an alternative to some or all of the amendments we are today proposing, an independent qualified custodian. For example, such a requirement could preclude a broker-dealer that is subject to rule 206(4)-2, i.e., is also a registered investment adviser, from providing advisory services to a brokerage customer unless the customer held securities over which the adviser had discretionary authority in a brokerage account at another brokerage firm, or in a custodial account at a bank or other qualified custodian. While institutional investors such as mutual funds often hold securities and cash in custodial accounts,[54] would the use of custodial accounts be too costly for small advisory clients? Would they be consistent with the operation of certain types of combined advisory and brokerage accounts, such as wrap fee programs?

We request comment on the practical aspects of requiring advisers that have custody to maintain client assets with an independent qualified custodian. Would the requirement of using an independent qualified custodian result in greater costs? If yes, would the additional custodial protections for client assets afforded by an independent qualified custodian warrant the additional costs? Would the requirement result in greater burdens on advisory clients of firms that are registered both as investment advisers and broker-dealers or cause them to lose access to services or other efficiencies they currently

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53 See 2002 Proposing Release at Section II.

54 According to Lipper's LANA Database, more than 95 percent of registered open-end investment company assets are held in custody at a bank or trust company (based on Dec. 31, 2008 data).

receive? Is there any reason why the custodial protections afforded by the banking laws and our rules under the Exchange Act (and the rules of the self-regulatory organizations) are sufficient to protect bank and brokerage customers, but may not be sufficient to protect custodial accounts of advisory clients?

C. Delivery of Account Statements and Notice to Clients

The Commission proposes to amend rule 206(4)-2 to require registered advisers with custody of client funds or securities to have a reasonable basis for believing that the qualified custodian sends an account statement, at least quarterly, to each client for which the qualified custodian maintains funds or securities.[55] The amendment would eliminate the alternative, currently provided in the rule, under which an adviser can send reports to clients if it undergoes a surprise examination by an independent public accountant at least annually.[56] We permitted the latter alternative delivery option because some advisers did not wish to disclose the names of their clients to custodians to prevent a potential competitor from having access to their lists of clients, or to protect the privacy of some well-known clients.[57]

We are proposing to eliminate the alternative delivery option and require all advisers with custody of client assets to have a reasonable belief that the qualified custodian delivers account statements to advisory clients or their representatives (and not

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55 Proposed rule 206(4)-2(a)(3). An adviser to a limited partnership or other pooled investment vehicle that is subject to an annual audit and that distributes its financial statements to investors would remain excepted from the account statement delivery requirement with respect to assets held by the pool. Proposed rule 206(4)-2(b)(3).

56 Rule 206(4)-2(a)(3)(ii).

57 See 2002 Proposing Release at Section II.C. See also 2003 Adopting Release at Section II.C. (recognizing that certain advisers had presented reasons for allowing a direct delivery exception, and citing Section II.C. of the 2002 Proposing Release).

through the investment adviser).[58] We believe that direct delivery will provide greater assurance of the integrity of those account statements, which we now believe, in light of recent frauds, is of substantially greater value than the concerns that led us in 2003 to accommodate those advisers that wished not to share client names with custodians.[59] The confidentiality concern, we believe, could also be addressed in custodial contracts or agreements outside of the contract that would restrict the custodian's use of the information.[60]

We are also proposing to amend rule 206(4)-2 to state that advisers relying on the qualified custodian to send account statements directly to clients must form their reasonable belief that such account statements are sent after "due inquiry." Because the effectiveness of the rule depends significantly on direct delivery of account statements by

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58 An "independent representative" is a person that (i) acts as agent for an advisory client and by law or contract is obligated to act in the best interest of the advisory client; (ii) does not control, is not controlled by, and is not under common control with the adviser; and (iii) does not have, and has not had within the past two years a material business relationship with the adviser. Rule 206(4)-2(c)(2) [unchanged as proposed rule 206(4)-2(c)(4)].

59 See Section II.C. of the 2003 Adopting Release. Qualified custodians may use service providers to deliver their account statements. The rule does not prohibit this practice, so long as the statements are sent to the client directly and not through the adviser. See 2003 Adopting Release at n.30.

60 We also note that with respect to individual clients who obtain custodial services for their personal, family or household purposes, a U.S. qualified custodian would be subject to the limitations on information sharing in the privacy rules adopted pursuant to Title V of the Gramm-Leach-Bliley Act. See, e.g., 12 CFR Parts 40, 216, 332, 573 (privacy rules adopted by the Office of the Comptroller of the Currency, the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration); 17 CFR Parts 160, 248 (privacy rules adopted by the Commodity Futures Trading Commission and the SEC). Under these privacy rules, a qualified custodian would be prohibited from sharing the advisory client's personal information with nonaffiliated third parties (other than under an exception) unless the custodian first provides the client with a notice explaining its information sharing practices and the opportunity to opt out of the information sharing and the client does not opt out. See, e.g., 17 CFR 248.10(a)(1).

the qualified custodian, we are making it explicit that the adviser is obligated under the rule to conduct some inquiry to form a reasonable belief.[61]

We request comment on these proposed changes to the rule. Should we eliminate the alternative delivery option in rule 206(4)-2? We understand that most advisers do not currently take advantage of the alternative delivery option, and that this proposal will not have a significant effect on a substantial number of advisers or clients.[62] We request comment on our understanding. Are there securities for which a qualified custodian would not send account statements? If so, is this due to legal, tax, or practical limitations? Are there other alternatives that would provide greater assurance of the integrity of client account statements? Should we include the due inquiry requirement in the rule? Should we instead specify particular steps an adviser must take to seek to determine that the qualified custodian sends account statements directly to clients?

We also propose to revise the content of the notice advisers are currently required to send to clients upon opening a custodial account on their behalf. Specifically, we propose to require advisers to include a statement in the notice urging clients to compare the account statements they receive from the custodian with those they receive from the

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61 There are a number of ways advisers could satisfy the "due inquiry" requirement. For example, in the 2003 Adopting Release, we explained that an adviser could form this reasonable belief if the qualified custodian provides the adviser with a copy of the account statement that was delivered to the client. See the 2003 Adopting Release at n. 29. The receipt of these statements would satisfy the "due inquiry" requirement. As another example, an adviser could satisfy the due inquiry requirement if the qualified custodian confirms in writing, including sending a fax or an email to the adviser, that it has sent account statements to the adviser's clients; such confirmation would need to cover each quarter during which the qualified custodian is expected to send account statements to the clients.

62 Based on the number of Form ADV-Es filed with us during 2008, we estimate 190 advisers relied on the exception.

adviser.[63] Client review of periodic account statements from the qualified custodian can enable clients to discover improper account transactions or other fraudulent activity. Raising client awareness of this safeguard at account opening could enhance its effectiveness. We request comment on this notice requirement. Advisers are not required by the Advisers Act or rules to send their own account statements to clients. Should we require advisers that have custody and elect to send account statements to include a legend urging clients to compare the information the adviser sends to clients with the information reflected in the qualified custodian's account statements? Should we require all advisers that have custody to deliver account statements and include such a legend? If so, should we provide specific language for the legend? Are there other disclosure requirements we should consider?

D. Liquidation Audit

We are proposing an amendment to clarify the provision of the rule that exempts advisers from the account statement provisions with respect to those limited partnerships or other pooled investment vehicles that are subject to an annual audit and that distribute financial statements to investors. The proposed amendment would clarify the availability of the annual audit exception to pooled investment vehicles that liquidate and make final distributions other than at year end.[64] This amendment is designed to assure that the proceeds of the liquidation are appropriately accounted for so that investors can take timely steps to protect their rights. Do commenters agree with us that this clarification

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[63] Proposed rule 206(4)-2(a)(2).

[64] Proposed rule 206(4)-2(b)(3)(ii).

would provide additional protection to the investors in the pool? Are there alternatives to a liquidation audit that we should consider that would also protect pool investors?

E. Amendments to Form ADV

We are proposing several amendments to Part 1A and Schedule D of Form ADV. The amendments are designed to provide more complete information about the custody practices of advisers registered with the Commission, and to provide us with additional data to improve our ability to identify compliance risks.

Item 7. Item 7 of Part 1A requires advisers to report certain financial industry affiliations, including whether the adviser has a related person that is an investment adviser or a broker-dealer. The item requires an adviser to identify on Schedule D of Form ADV each related person that is an investment adviser, and permits advisers to report the names of related person broker-dealers. We propose to modify Item 7 to require an adviser to report all related persons who are broker-dealers and to identify which, if any, serve as qualified custodians with respect to the adviser's clients' funds or securities.[65]

Item 9. Item 9 of Part 1A requires advisers to report to us whether they or a related person have custody of client funds or securities. We propose to amend the item to require advisers that have custody (or whose related persons have custody) of client funds or securities to provide additional information about their custodial practices under rule 206(4)-2.

Specifically, we propose to amend Item 9 of Part 1A to require an adviser to report the amount in U.S. dollars of client assets and number of clients of which it or its

65 Proposed Section 7.A. of Schedule D of Form ADV.

related person has custody,[66] and whether it or its related person serves as qualified custodian with respect to the adviser's clients' funds or securities.[67] We would also add a new subsection that would require an adviser with custody to report (i) whether a qualified custodian sends quarterly account statements to investors in pooled investment vehicles the adviser manages, (ii) whether the financial statements of the pooled investment vehicles the adviser manages are audited, (iii) whether the adviser's clients' funds or securities are subject to a surprise examination, and (iv) whether an independent public accountant registered with, and subject to regular inspection by, the PCAOB prepares an internal control report with respect to the adviser or its related persons' custodial services when acting as a qualified custodian for advisory client funds or securities.[68] We also propose to amend Item 9 to require advisers that are subject to the surprise examination to report the month in which the last examination commenced.[69] Last, we propose to amend Form ADV: General Instruction number 4 to make conforming changes to reflect that certain of the proposed questions are only required to be updated in an adviser's annual amendment. The information we propose to collect would improve our ability to monitor compliance with the custody rule.

We also propose to amend Schedule D of Form ADV by adding items to require additional details relevant to an adviser's response to the proposed amendments to Item 9

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66 Proposed Item 9.A.(2) and B(2) of Part 1A of Form ADV. This information would only be required to be updated when the adviser prepares its annual updating amendment.

67 Proposed Item 9.D. of Part 1A of Form ADV.

68 Proposed Item 9.C. of Part 1A of Form ADV.

69 Proposed Item 9.E. of Part 1A of Form ADV. This information would only be required to be updated when the adviser prepares its annual updating amendment.

discussed above. With respect to accountants, these amendments would require advisers to: (i) identify the accountants that perform audits or surprise examinations and that prepare internal control reports; (ii) provide information about the accountants, including address and PCAOB registration and inspection status; (iii) indicate the type of engagement (audit, surprise examination, internal control report); and (iv) indicate whether the accountant's report was unqualified.[70] With respect to qualified custodians, these amendments would require advisers to identify any related person that serves as a qualified custodian for its clients by reporting the related person's name and address, and indicate whether the related person qualified custodian is a bank, futures commission merchant or foreign financial institution.[71] This information would allow our staff to better monitor compliance with the requirements of rule 206(4)-2, and, together with other data reported on Form ADV, would allow our staff to better assess the compliance risks of an adviser.[72]

We request comment on the amended items. We understand that the additional information we would require is readily available to investment advisers and should not be burdensome to provide. Is our understanding correct? Are the new questions clear?

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70 Proposed Section 9.C. of Schedule D of Form ADV.

71 Proposed Section 9.D. of Schedule D of Form ADV. Proposed Item 7 of Form ADV and Section 7.A. of Schedule D of Form ADV would require advisers to report the same information for an affiliated broker-dealer that is a qualified custodian for the adviser. See supra note 65 and accompanying text.

72 These proposed revisions respond in part to concerns raised by the Government Accountability Office in its August 2007 report on our examination program, which concluded that our examination staff should continue to assess and refine the risk algorithm to enhance the risk assessment process, which would include the identification and collection of additional data through Form ADV. See United States Government Accountability Office, Securities and Exchange Commission: Steps Being Taken to Make Examination Program More Risk-Based and Transparent (August 2007), available at http://www.gao.gov/new.items/d071053.pdf.

If not, what changes should we make to make them clearer? We do not believe that the information we propose to require is proprietary information the disclosure of which would have adverse consequences to the adviser or its clients. Are we correct in this belief?

F. Amendments to Form ADV-E

We are proposing three amendments to the instructions to Form ADV-E. First, we propose to amend the instructions to require that the form and the accountant's examination certificate that accompanies it be filed electronically with the Commission.[73] Second, we propose to amend the instructions to reflect the proposed requirement that Form ADV-E and the examination certificate must be filed within 120 days of the time chosen by the accountant for the surprise examination.[74] Third, we propose to add an instruction that would implement the proposed rule change regarding the accountant's obligation under the written agreement with the adviser to file Form ADV-E accompanied by the termination statement, described above, within four business days of the accountant's resignation, dismissal, or removal. We request comment on these proposed amendments. Are there additional changes to Form ADV-E that we should consider?

G. Required Records

We also are proposing to amend rule 204-2 to require the adviser to maintain a copy of the internal control report that an adviser would be required to obtain or receive

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73 Currently accountants submit Form ADV-E and the attached examination certificates to the Commission by mail. Electronic filing of Form ADV-E would be through the IARD system and would begin only when the system is upgraded for this function.

74 Proposed rule 206(4)-2(a)(4).

from its related person, pursuant to proposed rule 206(4)-2(a)(6) for five years from the end of the fiscal year in which the internal control report is finalized. Requiring an adviser to retain a copy of the internal control report would provide our examiners with important information about the safeguards in place at an adviser or related person that maintains client assets. Information from these reports would also assist our staff in assessing custody-related risks at a particular adviser. We request comment on this proposal. Is there any additional documentation relating to the internal control report that should be maintained under rule 204-2?

III. GENERAL REQUEST FOR COMMENT

The Commission requests comment on the rule amendments proposed in this Release, suggestions for additional changes to the existing rules and comment on other matters that might have an effect on the proposals contained in this Release. Commenters should provide empirical data to support their views.

IV. PAPERWORK REDUCTION ACT

The proposed amendments contain several "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995,[75] and the Commission has submitted the amendments to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for the collections of information are "Rule 206(4)-2, Custody of Funds or Securities of Clients by Investment Advisers," "Form ADV," and "Form ADV-E, cover sheet for each certificate of accounting of client securities and funds in the custody of an investment adviser," under the Advisers Act. The rule and the forms contain currently

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[75] 44 U.S.C. 3501 to 3520.

approved collection of information numbers under OMB control numbers 3235-0241, 3235-0049, and 3235-0361, respectively. 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 control number.

The collections of information under rule 206(4)-2 are necessary to ensure that clients' funds and securities in the custody of advisers are safeguarded, and information contained in the collections is used by staff of the Commission in its enforcement, regulatory, and examination programs. The respondents are investment advisers registered with us that have custody of clients' funds or securities. The collections of information under Form ADV are necessary for use by staff of the Commission in its examination and oversight program, and some advisory clients also may find them useful. The respondents are investment advisers seeking to register with the Commission or to update their registrations. The collections of information under Form ADV-E are necessary for use by staff of the Commission in its examination and oversight program. The respondents are investment advisers registered with us that have custody of client assets and are subject to an annual surprise examination requirement under rule 206(4)-2. With the exception of an accountant's notification of any material discrepancies identified in a surprise examination, responses provided to the Commission are not kept confidential.

A. Rule 206(4)-2

Currently approved burdens. The current annual collection of information burden approved by OMB for rule 206(4)-2 is 415,303 hours. Rule 206(4)-2 currently requires each registered investment adviser that has custody of client funds or securities to maintain those client assets with a qualified custodian. The rule also requires that an

adviser with custody of client assets send quarterly account statements to its clients and undergo an annual surprise examination unless the adviser has a reasonable belief that the qualified custodian sends account statements directly to its clients at least quarterly. In the case of an adviser to a pooled investment vehicle, the adviser does not have to obtain an annual surprise examination and deliver account statements to investors if the pooled investment vehicle is audited at least annually by an independent public accountant and distributes its audited financials to investors in the pool within 120 days of the end of the pool's fiscal year.

The current approved annual burden relating to the requirement to obtain a surprise examination and the delivery of quarterly account statements by the adviser is 21,803 hours. We estimated that 204 advisers were subject to the two requirements. We estimated that each adviser had 670 clients on average and that 193 of the 204 advisers were subject to the two requirements only with respect to 1 percent of their clients and the remainder (11 advisers) were subject to the two requirements with respect to 100 percent of their clients. We further estimated that each adviser would spend 2.5 hours per client in connection with delivering quarterly account statements to clients and undergoing an annual surprise examination pursuant to the rule.

Annual surprise examination. The proposed amendments would eliminate the option for an adviser that has custody of client assets to choose not to have a qualified custodian deliver quarterly account statements directly to clients if the adviser arranges for an annual surprise examination verifying client assets. The proposed rule also would reinstate the requirement for an annual surprise examination for (i) advisers with custody that currently rely on qualified custodians to send account statements directly to advisory

clients, (ii) advisers that custody client assets themselves as qualified custodians or advisers with client assets held at a qualified custodian that is a related person,[76] and (iii) advisers to audited pooled investment vehicles. Thus the proposed rule would require all advisers that have custody of client funds or securities to be subject to an annual surprise examination. The proposed amendments are designed to enhance protections afforded to advisory clients by the custody rule. We estimate that 9,575 out of the 11,272 advisers registered with the Commission fall into this category.[77]

We have categorized the estimated 9,575 advisers that report that they have custody of client assets into 4 subgroups for purposes of estimating the collection of information burden. First, we estimate that 7,126 of the 9,575 advisers do not have pooled investment vehicles as their clients.[78] Based on our records and staff's

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[76] The proposed amended rule would deem an adviser to have custody if its related persons have custody of its client assets in connection with the adviser's advisory services. Proposed rule 206(4)-2(c)(2). A related person would be defined as a person directly or indirectly controlling or controlled by the adviser, and any person under common control with the adviser. Proposed rule 206(4)-2(c)(6). The proposed amended rule would require that the surprise examination be performed by an independent public accountant registered with, and subject to regular inspection by, the PCAOB when an adviser or a related person serves as a qualified custodian for the adviser's clients.

[77] Based on information filed through the IARD as of February 2009. The 9,575 advisers include both advisers that have custody of their client assets and advisers whose related persons have custody of the adviser's client assets (including advisers that answered "yes" to Item 9.A. or B. of Part 1A of Form ADV). The number also includes those advisers that have discretionary authority over client accounts, which we understand predominantly reflects arrangements with clients to withdraw fees from client accounts. The 9,575 advisers, however, do not include 42 advisers that provide advisory services exclusively to registered investment companies (advisers that checked only (4) under Item 5.D). Under rule 206(4)-2(b)(4) and proposed rule 206(4)-2(b)(4) advisers are not, and would not be, subject to the custody rule with respect to a client that is a registered investment company.

[78] Based on the number of advisers that answered "yes" to Item 9.A. or B. of Part 1A of Form ADV (having custody) and checked "none" under Item 5.D.(6) (clients that are pooled investment vehicles) as of February 2009, excluding 42 advisers that provide advisory services only to registered investment companies (see supra note 77), and those advisers that are also registered broker-dealers, banks or futures commission merchants

examination experiences, we estimate that these advisers would be subject to surprise examinations with respect to 85 percent of their client accounts (or 928 clients per adviser).[79] A second group of advisers that have custody, totaling 372, are also broker-dealers, banks or futures commission merchants,[80] or have a related person that serves as a qualified custodian for advisory clients' funds or securities.[81] We estimate that these advisers would be subject to an annual surprise examination with respect to 100 percent of their clients (or 1,092 clients per adviser) based on the assumption that all of their clients maintain custodial accounts with the adviser or related person. A third group of

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or have a related person broker-dealer, bank or futures commission merchant that serves as qualified custodian, which are accounted for separately in the second group. See infra notes 80 and 81 and accompanying text.

79 Based on data collected from the IARD (Item 5.F.(2)(d) and (e) of Form ADV), we estimate that on average 85 percent of the client accounts managed by these advisers are discretionary accounts and the remaining 15 percent are non-discretionary accounts. We believe that advisers have custody due to withdrawal of fees only with respect to the discretionary accounts that they manage.

We estimate that each adviser has, on average, 1,092 clients. This average is based on advisers' responses to Item 5.C. of Part 1A of Form ADV as of November 2008, excluding the two advisers that reported the largest number of clients. Those advisers account for over 51 percent of all advisory clients of SEC registrants and not excluding them would raise the average client count to 2,265 clients. These two firms provide advisory services primarily over the Internet and we believe that it is appropriate to exclude these firms from our calculations.

80 There are 139 of these investment advisers based on the number of advisers that answered "yes" to Item 9.A. of Part 1A of Form ADV (having custody) and checked Item 6.A.(1), (3), or (6) (indicating that the adviser is also a broker-dealer, futures commission merchant, commodity pool operator, commodity trading advisor, or bank). We eliminated advisers that are commodity pool operators or commodity trading advisors, by a firm by firm search of the National Futures Association registration database.

81 We estimate that there are 233 of these investment advisers based on a percentage of the number of advisers that answered "yes" to Item 9.B. of Part 1A of Form ADV (related person custody) and checked Item 7.A.(4) or (5) (indicating that the adviser has a related person bank or futures commission merchant), and answered "yes" to Item 9.C. of Part 1A of Form ADV that the related person that has custody is a registered broker-dealer.

advisers, totaling 1,281,[82] advise both pooled investment vehicles and other clients, and would be subject to the surprise examination with respect to 85 percent of their non-pooled investment vehicle clients (or 928 clients per adviser)[83] and 100 percent of their pooled investment vehicle clients (or 2 funds with 100 investors per adviser).[84] A fourth group of advisers, totaling 796,[85] provide advice exclusively to pooled investment vehicles and would be subject to the surprise examination with respect to 100 percent of their pooled investment vehicle clients (or 5 funds and 250 investors per adviser).[86] We estimate that each adviser would spend an average of 0.02 hours for each client that is not a pooled investment vehicle to create a client contact list for the independent public accountant. We further estimate that the advisers to pooled investment vehicles would spend 1 hour for the pool and 0.02 hours for each investor in the pool to create a contact

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82 Based on the number of advisers that answered "yes" to Item 9.A. or B. of Part 1A of Form ADV (having custody) and checked Item 5 D.(6) (indicating that they have pooled investment vehicles as clients) as of February 2009, excluding those that checked only (6) under Item 5 D. and those advisers that are also broker-dealers, banks, or futures commission merchants and custody client assets or have a related person broker-dealer, bank or futures commission merchant that serves as qualified custodian, which are accounted for separately in the second group.

83 See supra note 79.

84 We estimate that each of these advisers would advise, on average, 2 pooled investment vehicles with 50 investors in each of the pools.

85 Based on the number of advisers that answered "yes" to Item 9 A. or B. of Part 1A of (having custody) and checked Item 5 D.(6) only (indicating that all their clients are pooled investment vehicles) as of February 2009 less those advisers that are also broker-dealers, banks, or futures commission merchants and custody client assets or have a related person broker-dealer, bank or futures commission merchant that serves as qualified custodian, which are accounted for separately in the second group.

86 The number of funds per adviser is estimated based on the information we collected from Item 5 C. of Form ADV filed by advisers that provide advisory services only to pooled investment vehicles (checked only (6) under Item 5 D.) as of February 2009. We found that 77 percent of these advisers had clients in the range of 1-10. We picked the middle point of the range for our estimate. The estimate of 250 investors per adviser is based on the calculation we submitted for the currently approved hour burden.

list for the independent public accountant. These estimates would bring the total annual aggregate burden in connection with the surprise examination to 177,242 hours.[87] This does not include the collection of information discussed below, relating to the written agreement required by paragraph (a)(4) of the custody rule, as proposed to be amended.

Written agreement with accountant. Requiring the agreement with the independent public accountant that performs the surprise examination to be in writing and to specify certain duties to be performed by the accountant should not significantly increase the paperwork burden on advisers. We believe that written agreements are commonplace and reflect industry practice when a person retains the services of a professional such as an accountant, and they are typically prepared by the accountant in advance. We therefore estimate that each adviser would spend 0.25 hour to add the required provisions to the written agreement, with an aggregate of 2,394 hours for all advisers subject to surprise examinations.[88] Therefore the total annual burden in connection with the surprise examination would be 179,636 hours under the proposed amendments.[89]

Exception for audited pooled investment vehicles. The rule currently excepts, and the proposed rule would continue to except, advisers to pooled investment vehicles from having a qualified custodian send quarterly account statements to the investors in a pool if it is audited annually by an independent public accountant and the audited financial statements are distributed to the investors in the pool. The currently approved annual

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87 (7,126 x 928 x 0.02) + (372 x 1092 x 0.02) + [(1,281 x 928 x 0.02) + (1,281 x 100 x 0.02) + (1,281 x 2 x 1)] + [(796 x 250 x 0.02) + (796 x 5 x 1)] = 177,242.

88 9,575 x 0.25 = 2,394.

89 177,242 + 2,394 = 179,636.

burden in connection with the required distribution of audited financial statements is 393,500 hours.[90] According to data we obtained from the IARD, 2,112 advisers with custody of client assets provided advice to pooled investment vehicles as of February 2009.[91] Of these 2,112 advisers, we estimate that 796 advisers would each on average provide advice to five pooled investment vehicles that have a total of 250 investors.[92] We further estimate that the remaining advisers, 1,316 advisers, would on average each provide advice to two pooled investment vehicles that have a total of 100 investors. The hour burden imposed on the adviser relating to the mailing of the audited financial statements with respect to each investor in the pool should be minimal, and could be included with account statements or other mailings. We overestimated the burden for this delivery requirement in the past,[93] and are now revising it to an estimated 1 minute per investor for mailing audited financial statements. The aggregate annual hour burden in connection with the distribution of audited financial statements would therefore be 5,510 hours.[94]

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90 We estimated that 3,148 advisers to pooled investment vehicles were subject to this information collection under the current rule. We further estimated that each adviser had, on average, 250 investors in the funds it advises, and that each adviser spent 0.5 hours per investor annually for delivering audited financial statements to its 250 investors. 3,148 x 250 x 0.5 = 393,500.

91 Based on the number of advisers that answered "yes" to Item 9 A. or B. of Part 1A of Form ADV (having custody) and checked Item 5 D.(6) (indicating that they have clients that are pooled investment vehicles) as of February 2009.

92 <u>See supra</u> note 90.

93 We previously estimated that an adviser would spend 0.5 hour per investor sending investors audited financial statements. This estimate incorrectly included time for preparation of the audited financial statements, which after the audit should have been readily available to the adviser for distribution.

94 [(796 x 250 x 1 minute) + (1,316 x 100 x 1 minute)]/60 = 5,510 hours.

Under the proposed amendments, the rule would clarify that an adviser to a pooled investment vehicle that is relying on the annual audit exception must have the pool audited and distribute the audited financial statements to the investors in the pool promptly after completion of the audit if the fund liquidates at a time other than its fiscal year-end. Based on an assumption that 5 percent of pooled investment vehicles are liquidated annually at a time other than their fiscal year-end, this amendment would impose an additional burden of 276 hours per year.[95] As a result, the total annual hour burden in connection with the distribution of audited financial statements under the proposed amendments would be 5,786 hours.[96] This represents a decrease of 387,714 hours in our estimated burden.[97] This decrease in burden is primarily due to the reduction in the estimated hour burden regarding the delivery of audited financial statements to each investor and the reduction of the total number of the advisers subject to the requirement from an estimated 3,148 to 2,112.[98]

Notice to clients. Under the proposed amendments, the rule would also require each adviser to add a statement in its notification to clients upon opening a custodial account on their behalf, urging them to compare the account statements from the qualified custodian to those from the adviser if the adviser sends statements to clients. Although the statement requirement is new, it would be placed in a notification that is currently required to be sent to clients at specified times. We believe that the increase in

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[95] 5,510 x 0.05 = 276.

[96] 5,510 + 276 = 5,786.

[97] 393,500 – 5,786 = 387,714.

[98] See supra note 90.

this collection of information burden, if any, would be negligible. We estimate that 3,617 advisers would be subject to this collection of information,[99] and that each adviser would on average open a new custodial account for 5% of its clients per year, either because the adviser has new clients that request that the adviser open an account on their behalf, or because the adviser selects a new custodian and moves its existing clients' accounts to that custodian. We further estimate that the adviser would spend 10 minutes per client drafting and sending the notice. The total hour burden relating to this requirement would be 33,156 hours per year.[100] Based on the analysis above, we estimate that the total hour collection of information burden for advisers subject to rule 206(4)-2, as proposed to be amended, would be 216,184 hours per year.[101]

Annual aggregate cost. The currently approved collection of information for the custody rule includes an aggregate cost estimate of $281,000. We estimated that the accounting fees for 11 advisers that are subject to the surprise examination with respect to 100 percent of their clients would be $8,000 each annually, on average, and 193 advisers would be subject to the surprise examination with respect to only to 1 percent of their clients and therefore have accounting fees of $1,000 annually, on average. Based on the proposed rule changes we now estimate total annual aggregate costs of $170,557,500. The increase in estimated aggregated costs is attributable to an increase in the number of

99 We assume that advisers have custody solely because of deducting fees do not typically open custodial accounts on behalf of their clients. Excluding those advisers we have 3,617 advisers that may be subject to this information collection (advisers that answered "yes" to Item 9A. or B. of Part 1A. of Form ADV).

100 [3,617 x (1,092 x 0.05) x 10 minutes]/60 = (3,617 x 55 (rounded up from 54.60) x 10 minutes)/60 = 33,156 hours.

101 177,242 + 5,786 + 33,156 = 216,184.

advisers that would be subject to the surprise examination and the requirement that an adviser obtain, or receive from related persons, an internal control report with respect to the description of controls placed in operation relating to custodial services when the adviser or related person serves as qualified custodian for the adviser's clients' funds or securities.

Based on the subcategories of advisers with custody as described above, we now estimate that all 9,575 advisers that would be subject to the surprise examination requirement and pay an accounting fee, on average, of $8,100.[102] The estimated total accounting fees for all surprise examinations would therefore be $77,557,500.[103] This would represent an increase of $77,276,500 in the cost estimate,[104] primarily resulting from an increase in the number of advisers that would be subject to the surprise examination.

If an adviser or a related person serves as a qualified custodian for client funds or securities under the proposed rule in connection with advisory services the adviser provides to clients, the adviser must obtain, or receive from the related person, no less frequently than once each calendar year a written internal control report that provides an opinion from an independent public accountant with respect to the adviser's or related

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102 We believe that the average accounting fee for advisers with 85 percent of client accounts subject to the surprise examination would not be materially different from that for advisers with 100 percent of client accounts subject to the surprise examination. We consulted with a few accounting firms before reaching these estimates, which include the costs of the surprise examination and any filing and reporting obligations the accountant has with respect to the surprise examination. The estimates are consistent with the estimates we made in 2002 and 2003 when last revising rule 206(4)-2. See the 2002 Proposing Release, at nn.72 and 73, and Section VI.A of the 2003 Adopting Release. The revised estimate reflects requirements under the proposed rule.

103 $8,100 x 9,575 = $77,557,500.

104 $77,557,500 – $281,000 = $77,276,500.

person's controls relating to custody of client assets. We are proposing that the independent public accountant issuing the internal control report be registered with, and subject to regular inspection by, the PCAOB. We estimate that approximately 372 investment advisers would have to obtain, or receive from a related person, an internal control report relating to custodial services, and would have to maintain the report as a required record.[105] We anticipate the cost of maintaining these records will be minimal. Based on discussions with accounting professionals, we understand that the cost to prepare an internal control report relating to custody would vary based on the size and services offered by the qualified custodian, but that on average an internal control report would cost approximately $250,000 per year,[106] for total costs attributable to this element of the proposed rule to be $93,000,000.[107]

B. Form ADV

The currently approved collection of information for all advisers completing and amending Form ADV is 109,678 hours. Based on the proposed amendments, we estimate an increase to this collection of information, to 132,599 hours.[108] The increased

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105 See infra note 163 for explanation of our estimate.

106 We consulted accounting firms that issue these reports to prepare this estimate.

107 $250,000 x 372 = $93,000,000. See infra notes 165-166 and accompanying text for additional discussion on this estimate.

108 This number also includes a burden of 26,753 hours associated with the requirement of delivering to clients copies of the adviser's code of ethics upon clients' request. The currently approved hour burden associated with this requirement is 78,973 hours, based on the estimates that there were 11,787 advisers subject to this burden (10,787 currently registered advisers + 1,000 new advisers). We estimated that each adviser had 670 clients and that 10 percent of those clients would request the adviser's code of ethics. We further estimated that satisfying each delivery request would impose a burden of 0.10 hour. (10,787 + 1,000) x (670 x 0.10) x 0.10 = 78,973.

burden would result from the shortening of the amortization period currently in use for the approved collection of information, increases to our estimates of the number of advisers and advisory clients, and the proposed amendments to Part 1A and Schedule D of Form ADV.

We are proposing several amendments to Part 1A of Form ADV that are designed to provide us with additional details regarding the custody practices of advisers registered with the Commission, and to provide additional data to assist in our risk-based examination program. The proposed amendments would revise Item 7 of Form ADV, under which advisers report certain financial industry affiliates, to require an adviser to report all related persons who are broker-dealers and to identify which, if any, serve as qualified custodians with respect to the advisers' client assets.[109] We also propose to amend Item 9 to require advisers that have custody (or whose related persons have custody) of client assets to provide additional information about their custodial practices under proposed rule 206(4)-2. In addition, the proposed amendments to Schedule D of Form ADV would require an adviser, depending on the adviser's response to Item 9, to provide additional details including information about the accountants that perform annual audits or surprise examinations or that prepare internal control reports,[110] whether

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We now estimate that 12,272 advisers (11,272 currently registered advisers + 1,000 new advisers) are subject to this burden and that each adviser has 1,092 clients. See supra note 79 for calculation of average client number. We further estimate that 10 percent of the clients would request their adviser's code of ethics and that satisfying each delivery request would impose a burden of 0.02 hour. The total burden under the new estimates would be 26,753 hours. (11,272 currently registered advisers + 1,000 new advisers) x (1,092 clients x 0.10) x 0.02 hours = 12,272 x 109 x 0.02 = 26,753 hours.

109 Proposed Section 7 A. of Schedule D of Form ADV.

110 Proposed Section 9 C. of Schedule D of Form ADV.

a report prepared by an independent public accountant contains an unqualified opinion,[111] and information about any related person that serves as a qualified custodian for the adviser's clients.[112]

Investment advisers should already have the information that we would require them to report on Form ADV, so the increased collection of information burden should not be significant. We estimate that these amendments would increase the average collection of information burden for the initial application and annual amendment of Form ADV from the currently approved 22.25 hours per adviser to 22.50 hours per adviser. We also estimate that there would be 12,272 advisers subject to this information collection.[113] The total annual burden for initial filing and annual amendments would therefore be 276,120.[114] For the currently approved hour burden, the Commission staff chose a fifteen-year amortization, however, for purposes of our proposal, we are amortizing the estimated burden over a shorter period of time – three years.[115] Therefore the annual burden, after amortizing it over the three year period, would be 92,040 hours or 7.5 hours per adviser.[116]

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[111] Id.

[112] Proposed Section 9 D. of Schedule D of Form ADV.

[113] Based on the information collected from the IARD as of February 2009, 11,272 advisers were registered with us. In addition, based on historical data of the IARD, we estimate that there are approximately 1,000 new applicants for registration with the Commission each year. 11,272 + 1,000 = 12,272.

[114] 22.5 x 12,272 = 276,120.

[115] Every three years, we must submit for approval by the OMB collections of information imposed by our rules and thus the three-year period reflects the effective period of OMB's approval of this collection of information.

[116] 276,120 / 3 = 92,040; 92,040 / 12,272 = 7.5.

In addition to the burden associated with the initial filing and annual amendments to Form ADV, we estimated for the currently approved collection of information that, on average, each adviser filing Form ADV through the IARD system would likely amend its form 1.5 times during the year.[117] We estimated that the collection of information burden for such amendments would be 0.75 hours per amendment. We believe our proposal would not increase the hour burden per adviser in connection with such amendments. The total hour burden in connection with such amendments would therefore be 13,806 hours.[118] Adding the annual burden of 26,753 hours associated with the requirement of delivering to clients the advisers' code of ethics upon clients' request,[119] the total annual hour burden for Form ADV under the proposed amendments would be 132,599 hours.[120] This represents an increase of 22,921 hours from the currently approved annual hour burden, primarily due to the shortening of the amortization period from 15 year to three years, the increase in our estimates of the numbers of advisers and advisory clients, and the proposed amendments to Part 1A of Form ADV.[121]

C. Form ADV-E

The currently approved collection of information for Form ADV-E is 12 hours. We estimate that this collection of information would increase to 575 hours based on the

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117 In addition to the required annual update of their Form ADV, advisers must amend their Form ADV by filing additional amendments promptly if information they provided in response to certain items of Form ADV becomes inaccurate in any way. See General Instructions to Form ADV.

118 12,272 x 1.5 x 0.75 = 13,806.

119 See supra note 108.

120 92,040 + 13,806 + 26,753 = 132,599 hours.

121 132,599 – 109,678 = 22,921 hours.

proposed rule amendments. This increase results primarily from an increase in the estimated number of advisers that would be subject to the requirement of completing Form ADV-E under the proposed amendments to rule 206(4)-2 and the additional collections of information proposed by the amendments to the rule.

For the currently approved annual hour burden for Form ADV-E, we estimated that there would be 231 advisers subject to the annual surprise examination requirement, including the requirement to complete Form ADV-E, and that each of the advisers would spend approximately 0.05 hour to complete Form ADV-E.[122] We now estimate that there would be 9,575 advisers required to undergo an annual surprise examination and complete Form ADV-E, and that the total annual hour burden for Form ADV-E in connection with the surprise examination requirement would thus be increased to 479 hours.[123]

In addition, under the proposed amendments, rule 206(4)-2 would require an adviser subject to the surprise examination to enter into a written agreement with the independent public accountant that specifies the accountant's duties, including filing Form ADV-E upon the termination of its engagement. Based on an assumption that advisers change their independent public accountants every five years on average, 1,915 advisers would, under our proposal, be required each year to complete Form ADV-E with respect to an accountant's termination.[124] The total annual hour burden in connection

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122 231 x 0.05 = 11.55 hours.

123 9,575 x 0.05 = 479.

124 9,575 / 5 = 1,915.

with this proposal would be 96 hours,[125] and the total annual hour burden for advisers to complete Form ADV-E in connection with the surprise examination and the termination statement would be 575 hours.[126]

D. Request for Comment

We request comment whether these estimates are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

- evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information;
- determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
- determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit 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, Room 3208, Washington, DC 20503, and also should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street,

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125 1,915 x 0.05 = 96.

126 479 + 96 = 575.

NE, Washington, DC 20549-1090 with reference to File No. S7-09-09. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives the comment within 30 days after publication of this release. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-09-09, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE, Washington, DC 20549-0213.

V. COST-BENEFIT ANALYSIS

A. Background

The Commission is sensitive to the costs and benefits resulting from its rules. Rule 206(4)-2, the custody rule, seeks to protect clients' funds and securities in the custody of registered advisers from misuse or misappropriation by requiring advisers to maintain their clients' assets with a qualified custodian, such as a broker-dealer or a bank.[127] Advisers may comply with the current custody rule by either having the qualified custodian send account statements directly to their clients at least quarterly or by sending their own quarterly account statements to their clients and undergoing an annual surprise examination.[128]

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[127] Under rule 206(4)-2(c)(3), a qualified custodian means a bank, a savings association, a registered broker-dealer, a registered futures commission merchant, and in certain instances a foreign custodial institution.

[128] Rule 206(4)-2(a)(3)(i) and (ii). In the case of a pooled investment vehicle, the account statements and surprise examination requirements can be satisfied if the pooled investment vehicle is audited at least annually and distributes its audited financial statements to the investors in the pool within 120 days of the end of the pool's fiscal year. Rule 206(4)-2(a)(3)(iii) and (b)(3).

The rule, as proposed to be amended, would retain the requirement that advisers maintain clients' assets with a qualified custodian, but would require all registered advisers that have custody of client assets to have a reasonable belief after due inquiry that the qualified custodian sends an account statement directly to each client or its representative for which the qualified custodian maintains assets.[129] The proposed rule would also require all advisers that have custody of client assets to undergo an annual surprise examination.[130] In addition, we propose to amend the rule to provide that an adviser has custody if any of its related persons has custody of the adviser's client assets in connection with the adviser's advisory services.[131] In situations where an adviser or a related person serves as a qualified custodian for client funds or securities under the proposed rule in connection with advisory services the adviser provides to clients, the adviser must obtain, or receive from the related person, no less frequently than once each calendar year a written internal control report that provides an opinion from an independent public accountant with respect to the adviser's or related person's controls relating to custody of client assets.[132] We are proposing that the independent public accountant issuing the internal control report be registered with, and subject to regular inspection by, the PCAOB.[133] We also are proposing to require that when an adviser or a

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[129] Proposed rule 206(4)-2(a)(3). We would retain the exemption from the account statement delivery requirement, described above in supra note 128 for an adviser to a pooled investment vehicle.

[130] Proposed rule 206(4)-2(a)(4).

[131] Proposed rule 206(4)-2(c)(2). Currently, an adviser may, depending on the circumstances, be deemed to have custody of client assets held by an affiliate. See supra note 76 and accompanying text.

[132] Proposed rule 206(4)-2(a)(6)(ii).

[133] Proposed rule 206(4)-2(a)(6)(ii)(B).

related person serves as a qualified custodian for the adviser's clients' funds or securities, the surprise examination would have to be performed by an independent public accountant registered with, and subject to regular inspection by, the PCAOB.[134]

These proposed amendments are designed to improve the safekeeping of advisory client assets. We have identified, below, certain costs and benefits that may result from the proposed rule amendments. We request comment on the costs and benefits of the proposed rule amendments, and encourage commenters to identify, discuss, analyze, and supply relevant data regarding these or any additional costs and benefits.

B. Benefits

Improved protection for advisory clients. We have designed the proposed amended rule to provide greater protection for advisory clients' assets. The potential benefits to investors, however, are difficult to quantify. The proposed rule would require all registered advisers with custody of client assets to undergo an annual surprise examination by an independent public accountant that would provide "another set of eyes" on client assets, and thus additional protection against their misuse. In addition, the independent public accountant may identify mishandling of client assets, which may result in the earlier detection of fraudulent activities and reduce resulting client losses. We estimate that the rule, if amended to make this change, would require 9,575 advisers to obtain an annual surprise examination with respect to 8,214,462 clients' accounts.[135]

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[134] Proposed Rule 206(4)-2(a)(6)(i).

[135] For purposes of Paperwork Reduction Act analysis, we estimate that there would be 9,575 advisers subject to the surprise examination with respect to 8,214,462 advisory clients' accounts: (i) 928 clients for each of the 7,126 advisers that would have non-pool clients only, (ii) 1,092 clients for each of the 372 advisers that are themselves qualified custodians, (iii) 930 clients (928 individual clients and 2 fund clients) for each of the 1,281 advisers that provide advice to both individual clients and pooled investment

These benefits would also extend to investors in pooled investment vehicles managed by a registered adviser, because the amended rule would require the adviser to obtain an annual surprise examination with respect to those assets. The annual surprise examination would be in addition to any annual audit of the pool (required if the qualified custodian is not sending account statements directly to investors), which is performed at the end of each fiscal year. The surprise examination requirement therefore would provide an additional deterrent to fraudulent activity by advisers that are relying on the audit exception. Based on IARD data, we estimate that 327,100 investors would benefit from the additional protection afforded by the proposal.[136]

Amending the rule to state that advisers have custody if their "related persons" hold client assets in connection with advisory services provided by the adviser, would extend the protections of the custody rule to these clients. This amendment to the rule would result in client assets held by the adviser or its related persons becoming subject to a surprise examination performed by an independent public accountant registered with, and subject to regular inspection by, the PCAOB and other requirements of the rule, which may deter fraudulent activity perpetrated by an adviser through its related persons, and provide an independent check on the adviser's ability to convert client assets to its own use.

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vehicles; and (iv) 5 fund clients for each of the 796 advisers that provide advice to pooled investment vehicles only. See supra notes 77-86 and accompanying text.

136 As stated above in supra notes 77-86 and accompanying text, for purposes of the Paperwork Reduction Act analysis, we estimated that 1,281 advisers that provide advice to both individual clients and pooled investment vehicles would each be subject to the surprise examination with respect to two pooled investment vehicles with 50 investors in each pool and 796 advisers that provide advice exclusively to pooled investment vehicles would be subject to the surprise examination with respect to five pooled investment vehicles with 50 investors in each pool. [(1,281 x 100) + (796 x 250) = 327,100].

The proposed rule would require an adviser to obtain, or receive from a related person, no less frequently than once each calendar year a written internal control report from an independent public accountant registered with, and subject to regular inspection by, the PCAOB with respect to controls relating to custody when the adviser or a related person serves as a qualified custodian for client funds or securities in connection with advisory services the adviser provides to clients. This requirement would provide important safeguards to advisory clients in these higher risk situations. Requiring these advisers to also obtain an internal control report would provide an additional check on the safeguards relating to client assets held at a related person qualified custodian. An internal control report could also significantly strengthen the utility of the surprise examination when the adviser or a related person custodian maintains client assets because the independent public accountant performing the surprise examination could obtain additional comfort that confirmations received from the qualified custodian in the course of the surprise examination are reliable and, where a broker-dealer is the qualified custodian, may be able to leverage existing tests performed in compliance with broker-dealer auditing and internal control requirements. The internal control report may also reveal control problems, which could be significant.[137] Thus, the requirement to obtain an internal control report informs the surprise examination process and may itself act as a deterrent to advisers that may consider misappropriating client assets directly or through a related person in the guise of providing custodial services as a qualified custodian. We

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137 In addition to the specific procedures an independent public accountant must follow during a surprise examination, the accountant should perform any additional audit procedures deemed necessary under the circumstances. See Nature of Examination Required to be Made of All Funds and Securities Held in Custody of Investment Advisers and Related Accountant's Certificate, supra note 8.

also propose to require advisers to maintain the internal control report as a required record to provide our staff access to the accountant's report. Based on IARD data, we estimate clients of 372 advisers would benefit from the protections provided by the internal control report requirement.[138]

The proposed amendments would eliminate the alternative, currently provided in the rule, under which an adviser with custody can send its own account statements to clients if the adviser is subject to an annual surprise examination. Instead, all advisers with custody would be required to have a reasonable belief, after due inquiry, that the qualified custodian sends account statements directly to clients. As a result, we expect that clients of approximately 190 advisory firms that currently send their own account statements to clients would, under the proposed amendments, receive account statements directly from qualified custodians.[139] This change would provide clients confidence that any erroneous or unauthorized transactions would be reflected and, as a result, deter advisers from fraudulent activities. Based on IARD data, we estimate that 176,320 clients would benefit from this proposal and would receive account statements directly from qualified custodians.[140]

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[138] We estimate that 139 investment advisers that are also banks, registered broker-dealers or futures commission merchants would custody client assets as a qualified custodian under the rule. Based on IARD data, we also estimate that 233 investment advisers have a related person bank, registered broker-dealer or futures commission merchant that is a qualified custodian for advisory client assets. 139 + 233 = 372.

[139] Based on ADV-E filings, there were 190 advisers that underwent surprise examinations during 2008.

[140] We estimate that approximately 190 advisers would be subject to the surprise examination with respect to 928 clients each under the current custody rule. The proposed elimination of the option for advisers to send account statements would result in approximately 176,320 clients receiving account statements directly from the qualified custodian. (190 x 928 = 176,320).

As proposed to be amended, the rule would require each adviser that is required to undergo an annual surprise examination to enter into a written agreement with an independent public accountant to perform the surprise examination. The written agreement would require the independent public accountant to, among other things, (i) file Form ADV-E accompanied by a certificate within 120 days of the time chosen by the accountant for the surprise examination stating that it has examined the client assets and describing the nature and extent of the examination, (ii) report to the Commission any material discrepancies discovered in the examination within one business day, and (iii) upon the accountant's termination of engagement, file Form ADV-E within 4 business days accompanied by a statement explaining the reasons for such termination if related to examination scope or procedure. These filings and reports would provide our staff additional information to prioritize examinations and would assist in establishing advisers' risk profiles. As proposed, the rule would result in the electronic filing of Form ADV-E and the accountant statement on the Internet-based IARD system. Clients would benefit from electronic filing of the Form ADV-E because it would allow them to easily access important information about the surprise examinations performed on their advisers. We estimate that 8,214,462 advisory clients and 327,100 investors in pooled investment vehicles would benefit from the proposed change.[141] Furthermore, the availability to the general public of Form ADV-E information on the Commission's web site may result in additional benefits, including to potential clients deciding which investment adviser to select.

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[141] See supra notes 135 and 136 and accompanying text for further information.

We are proposing to require advisers to include a statement in the notice that they are currently required to send to their clients upon opening a custodial account on their clients' behalf.[142] The statement would urge clients to compare the account statements they receive from the custodian with those they receive from the adviser. As discussed above, client review of periodic account statements from the qualified custodian is an important measure that can enable clients to discover improper account transactions or other fraudulent activity. Raising clients' awareness of this safeguard under the custody rule at account opening could enhance the rule's effectiveness. We estimate that 198,935 clients would receive notices containing this additional information.[143]

Finally, we propose to amend Form ADV in connection with the amendments to the custody rule. We would modify Item 7 of Part 1A under which advisers report certain financial industry affiliates, to require an adviser to report all related persons that are broker-dealers and to identify which, if any, serve as qualified custodians with respect to the adviser's client assets.[144] We also would amend Item 9 to require advisers that have custody (or whose related persons have custody) of client assets to provide additional information about their custodial practices under the custody rule. In addition, the proposed amendments to Schedule D of Form ADV would require an adviser, depending on the adviser's response to Item 9, to provide additional details including information about the accountants that perform annual audits, surprise examinations or

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142 Rule 206(4)-2(a)(2).

143 We estimated that approximately 3,617 advisers open accounts on behalf of their clients and each year on average open accounts for about 5% of their 1,092 clients who are either new clients or whose accounts have been transferred to new qualified custodians. (3,617 x (1,092 x 0.05) = 3,617 x 55 (rounded up from 54.60) = 198,935).

144 Proposed Section 7.A. of Schedule D of Form ADV.

that prepare internal control reports,[145] whether a report prepared by an accountant contains an unqualified opinion,[146] and about any related person that serves as a qualified custodian for the adviser's clients.[147] These disclosures would provide our staff more information to determine advisers' risk profiles and prepare for examinations. Moreover, this information would be filed electronically under the proposed amended rule and would be available to the public on the Commission's web site. Clients would therefore benefit by obtaining more information about their advisers' custodial practices.

Improved clarity of the rule. We anticipate that investment advisers would find it easier to understand and comply with the rule as a result of the proposed amendments, which may result in cost savings for advisers. The proposed amendments would improve the clarity of the rule by adding several definitions, including amending the definition of "custody" to address related person custodian situations, and adding definitions of "control," and "related person."[148]

C. Costs

Surprise Examination. As discussed above, the proposed amended rule would require all advisers with custody of client assets to undergo an annual surprise examination. This amendment would result in a new requirement to obtain a surprise examination for (i) advisers with custody that rely on qualified custodians to send account statements directly to advisory clients, (ii) advisers that custody client assets

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145 Proposed Section 9.C. of Schedule D of Form ADV.

146 Id.

147 Proposed Section 9.D of Schedule D of Form ADV.

148 Rule 206(4)-2(c).

themselves as qualified custodians or advisers with client assets held at a qualified custodian that is a related person,[149] and (iii) advisers to pooled investment vehicles that are subject to an annual audit and deliver the audited financial statements to investors in the pool.[150] Based on the data we collected from Form ADV as of February 2009, we estimate that the proposed amended rule would subject 9,575 advisers to an annual surprise examination.[151] Reducing that number by the 190 advisers that already undergo an annual surprise examination under the current rule,[152] we estimate that the proposed amendments would result in approximately 9,385 additional advisers being required to obtain a surprise examination.[153] For purposes of the Paperwork Reduction Act analysis, we estimate a total annual collection of information burden in connection with the surprise examination of 179,636 hours.[154] Based on this estimate we anticipate that

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149 Under the current custody rule, depending on circumstances, an adviser may or may not have custody if a related person has custody of its clients' assets. See supra note 76.

150 We also have proposed to amend the rule to make privately offered securities that investment advisers hold on behalf of their clients subject to the surprise examination requirement. It is unlikely that an adviser would be subject to the surprise examination requirement solely based on this rule change, but rather the amendment would subject these positions to the surprise examination requirement.

151 Based on responses to Item 9.A. or Item 9.B. and Item 5 of Part 1A, Form ADV as of February 2009. We reduced this number by the 42 advisers that provide advisory services exclusively to registered investment companies (advisers that checked only (4) under Item 5 D.). Under rule 206(4)-2(b)(4) and proposed rule 206(4)-2(b)(5), advisers are not subject to the custody rule with respect to the account of a registered investment company.

152 See supra note 139 and 140.

153 9,575 -190 = 9,385.

154 See supra note 89 and accompanying text for further information. We estimate that of the 179,636 hours, 177,242 would be spent on providing clients lists and other information to the independent public accountant performing the examination and 2,394 hours would be spent on adding to the written agreement with the accountant the specified duties the rule would require the accountant perform.

advisers would incur an aggregate cost of approximately $11,783,898 per year for the total hours their employees spend in complying with the surprise examination requirement.[155]

In addition, advisers subject to the surprise examination requirement would incur accounting fees to comply with the requirement. We previously estimated that there were 204 advisers subject to the surprise examination requirement under the current custody rule.[156] Of the 204 advisers, 11 advisers were subject to the surprise examination with respect to 100 percent of their clients and spent $8,000 each annually, on average, and 193 advisers were subject to the surprise examination with respect to only 1 percent of their clients and spent $1,000 each annually, on average. The total estimated accounting fees were therefore $281,000.[157]

We now estimate that there would be 9,575 advisers subject to the surprise examination and they would each pay, on average, an annual accounting fee of $8,100 for

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[155] We expect that the function of providing lists of clients and other information to the independent public accountant in assisting its examination, totaling 177,242 hours, would be performed by compliance clerks. Data from the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that cost for this position is $63 per hour. We expect that the function of adding certain duties of the accountant to the written agreement with the accountant, totaling 2,394 hours, would be performed by compliance managers. Data from the Securities Industry and Financial Markets Association'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, suggest that the cost for this position is $258 per hour. Therefore the total costs would be $11,783,898 ((177,242 x $63) + (2,394 x $258)).

[156] We did the estimate in connection with our 2007 application for hour burden approval from the OMB under the Paperwork Reduction Act with respect to information collection required by the current custody rule.

[157] (11 x $8,000) + (193 x $1,000) = $281,000.

the surprise examination.[158] The estimated total accounting fees for all surprise examinations would therefore be \$77,557,500.[159] This represents an increase of \$77,276,500 in estimated costs attributable to this rulemaking, resulting primarily from the increase in the estimated number of advisers that would be subject to the surprise examination.[160]

Under the proposed amended rule each adviser that is required to undergo an annual surprise examination must enter into a written agreement with the independent public accountant that performs the surprise examination, specifying certain duties that the accountant would perform under the rule.[161] We believe that the requirement of a written agreement reflects current industry practice and that advisers therefore would have a written agreement with their accountants regardless of whether it is required by the custody rule. Requiring certain additional items to be included in the written agreement would not significantly increase costs for advisers.[162] Moreover, we do not believe that the new requirements placed on the independent public accountant by the written agreement (electronic filing of Form ADV-E and termination statement) would materially increase the accounting fees for the surprise examination discussed above.

Internal Control Report. As discussed above, in situations where an adviser or a related person serves as a qualified custodian for client funds or securities under the

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158 See supra note 102 and accompanying text.

159 9,575 x \$8,100 = \$77,557,500.

160 \$77,557,500 - \$281,000 = \$77,276,500.

161 Proposed rule 206(4)-2(a)(4).

162 We estimate that it would take each adviser about 0.25 hour to add the required specifications. See supra note 88 and accompanying text. Converting the hour burden to costs, each adviser would spend \$64.50. See supra note 155.

proposed rule in connection with advisory services the adviser provides to clients, the adviser must obtain, or receive from the related person, no less frequently than once each calendar year a written internal control report that provides an opinion from an independent public accountant with respect to the adviser's or related person's controls relating to custody of client assets. We are proposing that the independent public accountant issuing the internal control report be registered with, and subject to regular inspection by, the PCAOB. We estimate that approximately 372 investment advisers would have to obtain, or receive from a related person, an internal control report relating to custodial services, and would have to maintain the report as a required record.[163] We anticipate the cost of maintaining these records will be minimal. Based on discussions with accounting professionals, we understand that the cost to prepare an internal control report relating to custody would vary based on the size and services offered by the qualified custodian, but that on average an internal control report would cost approximately $250,000 per year, for total costs attributable to this section of the proposed rule to be $93,000,000.[164]

Our estimated cost of implementing the internal control report requirement is based on information available to us. We believe, however, that actual costs may be lower than estimated because (i) some qualified custodians already obtain an internal

[163] Some advisers may have client assets that are in custody with more than one related person qualified custodian, but a related person qualified custodian also may provide custody services to more than one related person investment adviser. For purposes of this analysis we assume that these alternatives offset one another since those advisers that have more than one related person that is a qualified custodian is likely part of a large financial service provider and the custodian is more likely to be providing custody services to more than one adviser. The same internal control report would satisfy the rule's obligations for related person advisers that use a common related qualified custodian.

control report on their custody practices,[165] (ii) advisers that have more than one related person qualified custodian may concentrate these custody arrangements with a single related person qualified custodian, and (iii) that to the extent advisers have accommodated certain client arrangements that result in a related person maintaining client funds or securities on an infrequent basis, they may discontinue these accommodations.[166]

Liquidation Audit. The proposed amended rule would specifically require an adviser to a pooled investment vehicle that is relying on the annual audit exception to obtain a final audit if the pool is liquidated at a time other than the end of a fiscal year.[167] This clarification would assure that the proceeds of the liquidation are appropriately accounted for. We believe this clarification would not materially increase the costs for advisers to pooled investment vehicles because we believe most of these pooled investment vehicles are subject to contractual obligations with their investors to obtain a liquidation audit.

Due Inquiry. The proposed rule would require all registered advisers that have custody of client assets to have a reasonable belief, after due inquiry, that the qualified custodian sends account statements directly to their clients at least quarterly, with the

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164 $250,000 x 372 = $93,000,000.

165 For instance, it is our understanding after discussions with several large accounting firms that mutual fund custodians obtain internal control reports to assist funds in meeting their obligations under the Investment Company Act compliance program rule (rule 38a-1) [17 CFR 270.38a-1].

166 For instance, an advisory client may be referred to the adviser by a related person broker-dealer that would continue to maintain custody of the client assets even though the adviser is managing the assets.

167 Proposed rule 206(4)-2(b)(3)(ii).

exception for certain pooled investment vehicles, described above. Most advisers subject to the rule have qualified custodians that deliver account statements directly to clients and already conduct an inquiry of whether the qualified custodian sends account statements to clients, so we believe few advisers would have to change their practices.[168] For those advisers that previously had sent account statements directly to clients instead of having the qualified custodian send account statements to clients, the costs should not be significant because qualified custodians send account statements to clients in their normal course of business. The requirement that advisers form their reasonable belief after due inquiry similarly should not have significant costs, as we understand that today most advisers receive duplicate copies of client account statements from custodians.

Form ADV. As discussed above, we are proposing several amendments to Part 1A of Form ADV that are designed to provide us with additional details regarding the custody practices of advisers registered with the Commission, and to provide additional data to assist in our risk-based examination program. For purposes of the Paperwork Reduction Act analysis, we estimate that these amendments would increase the annual information collection burden in connection with Form ADV from 22.25 hours to 22.50 hour for each adviser.[169] The total information collection burden resulting from the proposed amendments would be 3,068 hours.[170] Based on this estimate we anticipate that

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168 Filing data indicates that 190 advisers (other than those that have custody but only have pooled investment vehicle clients that are subject to an annual audit) did not have the qualified custodian send account statements directly to their clients; see supra notes 139 and 140.

169 See supra notes 113-121 and accompanying text.

170 As stated above we estimate that there would be 12,272 advisers subject to the Form ADV filing requirement. See supra note 113 ((22.50-22.25) x 12,272 = 3,068).

advisers would incur an aggregate cost of approximately $193,284 per year for the total hours their employees spend in connection with the proposed provisions of Form ADV.[171]

Form ADV-E. For purposes of the Paperwork Reduction Act analysis, we estimate that the collection of information in connection with Form ADV-E would increase from the currently approved 12 hours to 575 hours based on the proposed rule amendments. This increase results from an increase in the estimated number of advisers that would be subject to the requirement of completing Form ADV-E under the proposed amendments to rule 206(4)-2 and the additional collections of information proposed by the amendments relating to filing Form ADV-E when an independent public accountant performing the surprise examination terminates its engagement. This represents an increase of 563 hours[172] with an estimated aggregated annual cost of approximately $35,469.[173]

D. Request for Comment

- The Commission requests comments on all aspects of the cost-benefit analysis, including the accuracy of the potential costs and benefits identified and assessed in this release, as well as any other costs or benefits that may result from the proposals.

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171 We expect that the function of completing Form ADV would be performed by compliance clerks at a cost of $63 per hour. The total cost would be $193,284 (3,068 x $63 = $193,284). See supra note 155 for explanation of the hourly compliance clerk cost estimate.

172 575-12 = 563.

173 We expect that the function of completing Form ADV-E would be performed by compliance clerks at a cost of $63 per hour. The total cost would therefore be $35,469. See supra note 155 for explanation of the hourly compliance clerk cost estimate.

- We encourage commenters to identify, discuss, analyze, and supply relevant data regarding these or additional costs and benefits.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

The Commission has prepared the following Initial Regulatory Flexibility Analysis ("IRFA") regarding proposed rule 206(4)-2 in accordance with section 3(a) of the Regulatory Flexibility Act.[174]

A. Reasons for Proposed Action

Rule 206(4)-2, the custody rule, requires registered advisers to maintain their clients' assets with a qualified custodian, such as a broker-dealer or a bank. Advisers may comply with the current custody rule either by having a reasonable belief that the qualified custodian sends periodic account statements directly to the advisory clients or by the adviser sending its own quarterly account statements to its clients and undergoes an annual surprise examination.[175] An adviser to a pooled investment vehicle may comply with the rule by having the pool audited annually by an independent public accountant and distributing the audited financials to the investors in the pool within 120 days of the end of the pool's fiscal year.[176]

To enhance the protections afforded to clients' assets, we are proposing to require all registered advisers that have custody of client assets to have a reasonable belief that the qualified custodian that holds advisory client assets sends account statements directly

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174 5 U.S.C. 603(a).

175 Rule 206(4)-2(a)(3)(i) and (ii).

176 Rule 206(4)-2(a)(3)(iii) and (b)(3).

to advisory clients at least quarterly.[177] Under the proposed amendments, the rule would require all advisers having custody of client assets to undergo an annual surprise examination.[178] In addition, the rule would explicitly state that an adviser has custody if any of its related persons has custody of the adviser's client assets in connection with the adviser's advisory services.[179] The rule would also require the adviser and the accountant, under the terms of its agreement with the adviser, to report information to the Commission that would assist the Commission in protecting advisory client assets. Together, these revisions to the rule are designed to strengthen the controls relating to advisers' custody of client assets and deter advisers from fraudulent activities.

B. Objectives and Legal Basis

We have designed the proposed amendments to enhance the protections afforded to clients when their advisers have custody of client assets. The surprise examination requirement of the rule may deter fraudulent activities by advisers. Moreover, an independent public accountant may identify misuse that clients have not, which would result in the earlier detection of fraudulent activities and reduce resulting client losses. The proposed amendments would eliminate the exemption from the requirement of an annual surprise examination provided under the current rule for advisers to audited pooled investment vehicles. Annual surprise examinations of pooled investment vehicles would provide the investors in the pool additional protection. Unlike an annual audit of

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177 Proposed rule 206(4)-2(a)(3) and (b)(3). As described above, the rule would continue to contain a limited exception to this requirement for audited pooled investment vehicles.

178 Proposed rule 206(4)-2(a)(4).

179 Proposed rule 206(4)-2(c)(2). Under the current custody rule, an adviser may or may not have custody if a related person has custody of its clients' assets.

the pool, which is performed at the end of each fiscal year, the accountant could choose to conduct the surprise examination at any time during the year. The possibility of an unscheduled examination at any time would act as an additional deterrent to fraudulent activity by advisers, and would provide an independent check on the safety of pooled investment vehicle assets.

The proposed amendments would provide that an adviser is deemed to have custody of client assets held by related persons. These amendments would result in the rule being easier to understand for advisers. Similarly, the proposed amendments would add to the rule definitions of "control" and "related person" to assist advisers in understanding the rule.

The Commission is proposing to amend rule 206(4)-2 pursuant to the authority set forth in sections 206(4) and 211(a) of the Advisers Act [15 U.S.C. 80b-6(4) and 80b-11(a)]; to amend rule 204-2 pursuant to the authority set forth in sections 204 and 211 of the Advisers Act [15 U.S.C. 80b-4 and 80b-11]; to amend Form ADV pursuant to the authority set forth in sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b-3(c)(1), 80b-4 and 80b-11(a)]; and to amend Form ADV-E pursuant to our authority set forth in sections 204, 206(4), and 211(a) of the Advisers Act [15 U.S.C. 80b-4, 80b-6(4), and 80b-11(a)]. Section 206(4) gives us authority to issue rules designed to prevent fraudulent, deceptive, or manipulative acts or practices. Section 211 gives us authority to classify, by rule, persons and matters within our jurisdiction and to prescribe different requirements for different classes of persons, as necessary or appropriate to the exercise of our authority under the Act. Section 203(c)(1) gives us authority to prescribe registration forms, by rule, to collect information and documents,

as necessary or appropriate in the public interest or for the protection of investors. Section 204 gives us authority to prescribe, by rule, such records and reports that an adviser must make, keep for prescribed periods, or disseminate, as necessary or appropriate in the public interest or for the protection of investors.

C. Small Entities Subject to Rule

Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year.[180]

The Commission estimates that as of February 2009 approximately 177 SEC-registered investment advisers that have custody of client assets were small entities, and that no more than 8 of these advisers or their related persons would serve as a qualified custodian for client funds or securities under the proposed rule in connection with advisory services the advisers provides to their clients.[181]

D. Reporting, Recordkeeping, and other Compliance Requirements

The proposed rule amendments would impose certain reporting, recordkeeping and compliance requirements on advisers, including small advisers. The rule would

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180 17 CFR 275.0-7(a).

181 This estimate is based on the information submitted by SEC-registered advisers on Form ADV, Part 1A [17 CFR 279.1].

require advisers that are subject to the surprise examination to complete Form ADV-E and to maintain internal control reports in certain instances. In addition, under the proposed amendments, each adviser that is required to undergo an annual surprise examination must enter into a written agreement with the independent public accountant that performs the surprise examination that would specify certain duties the accountant would have to perform as part of the surprise examination engagement. Investment advisers, under the proposed rule amendments, would have to maintain a copy of an internal control report that an adviser would be required to obtain or receive from its related person for five years from the end of the fiscal year in which the internal control report is finalized.

We estimated that the average annual accounting fee for such surprise examination would be $8,100 for each of the advisers subject to the surprise examination.[182] This is based on our estimate that each adviser, on average, would be subject to the surprise examination with respect to 928 client accounts. Most small advisers that would be subject to the surprise examination have less than 6 accounts that would be included in the surprise examination.[183] Thus the accounting fees for surprise examination conducted on small advisers would likely be much lower than our estimated average cost. As a result, the potential impact of the amendments on small entities due to the proposed surprise examination requirement should not be significant.

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182 See supra note 102.

183 Based on data collected from the IARD as of February 2009, more than half of the 177 small advisers would be subject to the surprise examination with respect to no more than 6 accounts.

We also estimated that on average an internal control report would cost approximately $250,000 per year, but would vary based on the size and services offered by the qualified custodian. As stated above, we estimate that no more than eight advisers would have to obtain these reports, half of which would have to obtain the report and the other half would have to receive the report from a related person.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with the proposed rule amendments.

F. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed rule amendments, the Commission considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for such small entities.

Regarding the first and fourth alternatives, we do not believe that differing compliance or reporting requirements or an exemption from coverage of the rule amendments, or any part thereof, for small entities, would be appropriate or consistent with investor protection. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small advisory firms, it would be inconsistent

with the purposes of the Act to specify different requirements for small entities under the proposed amendments.

Regarding the second alternative, the proposed amendments would clarify when an investment adviser, including a small adviser, has custody. We also have endeavored to consolidate and simplify the rule, by adding new definitions to the rule.

Regarding the third alternative, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection with respect to custody of client assets by investment advisers.

G. Solicitation of Comments

We encourage written comments on matters discussed in this IRFA. In particular, the Commission seeks comment on:

- the number of small entities that would be affected by the proposed rule; and
- whether the effect of the proposed rule on small entities would be economically significant.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of the effect.

VII. EFFECTS ON COMPETITION, EFFICIENCY AND CAPITAL FORMATION

Section 202(c)(1)of the Advisers Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[184] Today the Commission is proposing amendments to rule 204-2, Part 1A of Form ADV and

[184] 15 U.S.C. 80b-2(c).

Form ADV-E in connection with proposing amendments to rule 206(4)-2, the rule governing registered investment adviser custodial practices.[185]

The proposed amendments to Part 1A of Form ADV are designed to provide us with additional details concerning the custody practices of advisers registered with the Commission, and to provide additional data to assist in our risk-based examination program. Under the proposed amendments to Form ADV-E, the form and attached accountant's certificate would be filed electronically on the IARD system. In addition, the rule would require the accountant performing an annual surprise examination to, upon termination of its engagement, file a Form ADV-E and a termination statement to explain the reasons for such termination. Both Part 1A of From ADV and Form ADV-E would be available to the public on the Commission's web site.

Public availability of more detailed disclosure of advisers' custodial practices will permit investors to use this information together with other information they obtain from Form ADV in making more informed decisions about whether to hire or retain a particular adviser. A more informed investing public will create a more efficient marketplace and strengthen competition among advisers. Moreover, the electronic filing requirements are expected to expedite and simplify the process of filing Form ADV-E and attached accountant's certificate with the Commission, thus further improving efficiency. We believe, however, that the proposed amendments are unrelated to, and will have little or no effect on, capital formation.

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185 We are proposing amendments to rule 206(4)-2 pursuant to our authority set forth in sections 206(4) and 211(a) of the Advisers Act. Analysis of the effects of these proposed amendments is contained in section IV, V, and VI above.

We are proposing to amend rule 204-2 to require that, if an independent custodian does not maintain client assets but the adviser or a related person instead serves as a qualified custodian for client funds or securities under the rule in connection with advisory services the adviser provides to clients, the adviser must maintain a copy of any internal control report obtained or received pursuant to rule 206(4)-2(a)(6) for five years from the end of the fiscal year in which the internal control report is finalized.[186] The proposed amendment is designed to provide our examiners important information about the safeguards in place at an adviser or a related person that maintains client assets. We believe that the proposed amendment would not materially increase the compliance burden on advisers under rule 204-2 and thus would not affect competition, efficiency and capital formation.

The Commission requests comment whether the above proposals, if adopted, would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data to support their views.

VIII. CONSIDERATION OF IMPACT ON THE ECONOMY

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"[187] the Commission must advise OMB whether a proposed

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186 Proposed rule 206(4)-2 would require that if an independent custodian does not maintain client assets but the adviser or a related person instead serves as a qualified custodian for client funds or securities under the rule in connection with advisory services the adviser provides to clients, the adviser must obtain, or receive from the related person, no less frequently than once each calendar year an internal control report, which includes an opinion from an independent public accountant with respect to the adviser's or related person's controls relating to custody of client assets. See proposed rule 206(4)-2(a)(6)(ii).

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

regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results in or is likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effects on competition, investment or innovation.

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

IX. STATUTORY AUTHORITY

We are proposing amendments to rule 206(4)-2 (17 CFR 275.206(4)-2) pursuant to our authority set forth in sections 206(4) and 211(a) of the Advisers Act (15 U.S.C. 80b-6(4) and 80b-11(a)). We are proposing amendments to rule 204-2 pursuant to the authority set forth in sections 204 and 211 of the Advisers Act (15 U.S.C. 80b-4 and 80b-11). We are proposing amendments to Part 1 of Form ADV (17 CFR 279.1) pursuant to our authority set forth in sections 203(c)(1), 204, and 211(a) of the Advisers Act (15 U.S.C. 80b-3(c)(1), 80b-4 and 80b-11(a)). We are proposing amendment to Form ADV-E (17 CFR 279.8) pursuant to our authority set forth in sections 204, 206(4), and 211(a) of the Advisers Act (15 U.S.C. 80b-4, 80b-6(4), and 80b-11(a)).

LIST OF SUBJECTS IN 17 CFR PARTS 275 AND 279

Reporting and recordkeeping requirements, Securities.

TEXT OF PROPOSED RULE AND FORM AMENDMENTS

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows.

PART 275 – RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

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2. Section 275.204-2 is amended by:

a. Removing "in effect, and" at the end of paragraph (a)(17)(1) and adding in its place "in effect;" ;

b. Removing the period at the end of paragraph (a)(17(ii) and adding in its place a semicolon; and

c. Adding paragraph (a)(17)(iii).

The addition reads as follows:

§ 275.204-2 Books and records to be maintained by investment advisers.

(a) * * *

(17) * * *

(iii) A copy of any internal control report obtained or received pursuant to § 275. 206(4)-2(a)(6)(ii).

* * * * *

3. Section 275.206(4)-2 is revised to read as follows:

§ 275.206(4)-2 Custody of funds or securities of clients by investment advisers.

(a) Safekeeping required. If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3), it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of

section 206(4) of the Act (15 U.S.C. 80b-6(4)) for you to have custody of client funds or securities unless:

(1) Qualified custodian. A qualified custodian maintains those funds and securities:

(i) In a separate account for each client under that client's name; or

(ii) In accounts that contain only your clients' funds and securities, under your name as agent or trustee for the clients.

(2) Notice to clients. If you open an account with a qualified custodian on your client's behalf, either under the client's name or under your name as agent, you notify the client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained, promptly when the account is opened and following any changes to this information. Include in the notification a statement urging the client to compare the account statements he or she shall receive from the custodian with those from the adviser.

(3) Account statements to clients. You have a reasonable basis, after due inquiry, for believing that the qualified custodian sends an account statement, at least quarterly, to each of your clients for which it maintains funds or securities, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period.

(4) Independent verification. The client funds and securities for which you have custody are verified by actual examination at least once during each calendar year by an independent public accountant, pursuant to a written agreement between you and the accountant, at a time that is chosen by the accountant without prior notice or

announcement to you and that is irregular from year to year. The written agreement must also require the accountant to:

(i) File a certificate on Form ADV-E (17 CFR 279.8) with the Commission within 120 days of the time chosen by the accountant in paragraph (a)(4) of this section, stating that it has examined the funds and securities and describing the nature and extent of the examination;

(ii) Upon finding any material discrepancies during the course of the examination, notify the Commission within one business day of the finding, by means of a facsimile transmission or electronic mail, followed by first class mail, directed to the attention of the Director of the Office of Compliance Inspections and Examinations; and

(iii) Upon resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed, file within four business days Form ADV-E accompanied by a statement that includes:

(A) The date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the accountant; and

(B) An explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination.

(5) Special rule for limited partnerships and limited liability companies. If you or a related person is a general partner of a limited partnership (or managing member of a limited liability company, or hold a comparable position for another type of pooled investment vehicle), the account statements required under paragraphs (a)(3) of this section must be sent to each limited partner (or member or other beneficial owner).

(6) Investment advisers acting as qualified custodians. If you or a related person maintains client funds or securities pursuant to this section as a qualified custodian in connection with advisory services you provide to clients:

(i) The independent public accountant you retain to perform the independent verification required by paragraph (a)(4) of this section must be a member registered with, and that is subject to regular inspection as of the commencement of the professional engagement period by, the Public Company Accounting Oversight Board in accordance with its rules; and

(ii) You must obtain, or receive from your related person, no less frequently than once each calendar year, a written internal control report prepared by an independent public accountant:

(A) The internal control report must include an opinion of an independent public accountant, issued in accordance with the standards of the Public Company Accounting Oversight Board, with respect to the description of controls placed in operation relating to custodial services, including the safeguarding of funds and securities held by either you or a related person on behalf of your advisory clients, and tests of operating effectiveness; and

(B) The independent public accountant must be a member registered with, and that is subject to regular inspection as of the commencement of the professional engagement period by, the Public Company Accounting Oversight Board in accordance with its rules.

(7) Independent representatives. A client may designate an independent representative to receive, on his behalf, notices and account statements as required under paragraphs (a)(2) and (a)(3) of this section.

(b) Exceptions. (1) Shares of mutual funds. With respect to shares of an open-end company as defined in section 5(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-5(a)(1)) ("mutual fund"), you may use the mutual fund's transfer agent in lieu of a qualified custodian for purposes of complying with paragraph (a) of this section.

(2) Certain privately offered securities. (i) You are not required to comply with paragraph (a)(1) of this section with respect to securities that are:

(A) Acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(B) Uncertificated, and ownership thereof is recorded only on books of the issuer or its transfer agent in the name of the client; and

(C) Transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(ii) Notwithstanding paragraph (b)(2)(i) of this section, the provisions of this paragraph (b)(2) are available with respect to securities held for the account of a limited partnership (or limited liability company, or other type of pooled investment vehicle) only if the limited partnership is audited, and the audited financial statements are distributed, as described in paragraph (b)(3) of this section.

(3) Limited partnerships subject to annual audit. You are not required to comply with paragraph (a)(3) of this section with respect to the account of a limited partnership

(or limited liability company, or another type of pooled investment vehicle) that is subject to audit (as defined in section 2(d) of Article 1 of Regulation S-X (17 CFR 210.1-02(d)):

(i) At least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of its fiscal year; and

(ii) Upon liquidation and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) promptly after the completion of such audit.

(4) Registered investment companies. You are not required to comply with this section (17 CFR 275.206(4)-2) with respect to the account of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 to 80a-64).

(c) Definitions. For the purposes of this section:

(1) Control means the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise. Control includes:

(i) Each of your firm's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control your firm;

(ii) A person is presumed to control a corporation if the person:

(A) Directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or

(B) Has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities;

(iii) A person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership;

(iv) A person is presumed to control a limited liability company ("LLC") if the person:

(A) Directly or indirectly has the right to vote 25 percent or more of a class of the interests of the LLC;

(B) Has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the LLC; or

(C) Is an elected manager of the LLC; or

(v) A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

(2) Custody means holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them. You have custody if a related person holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services you provide to clients. Custody includes:

(i) Possession of client funds or securities, (but not of checks drawn by clients and made payable to third parties,) unless you receive them inadvertently and you return them to the sender promptly but in any case within three business days of receiving them;

(ii) Any arrangement (including a general power of attorney) under which you are authorized or permitted to withdraw client funds or securities maintained with a custodian upon your instruction to the custodian; and

(iii) Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives you or your supervised person legal ownership of or access to client funds or securities.

(3) Independent public accountant means a public accountant that meets the standards of independence described in rule 2-01(b) and (c) of Regulation S-X (17 CFR 210.2-01(b) and (c)).

(4) Independent representative means a person that:

(i) Acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership (or members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle) and by law or contract is obliged to act in the best interest of the advisory client or the limited partners (or members, or other beneficial owners);

(ii) Does not control, is not controlled by, and is not under common control with you; and

(iii) Does not have, and has not had within the past two years, a material business relationship with you.

(5) Qualified custodian means:

(i) A bank as defined in section 202(a)(2) of the Advisers Act (15 U.S.C. 80b-2(a)(2)) or a savings association as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)) that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (12 U.S.C. 1811);

(ii) A broker-dealer registered under section 15(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(1)), holding the client assets in customer accounts;

(iii) A futures commission merchant registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C. 6f(a)), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

(iv) A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

(6) Related person means any person, directly or indirectly, controlling or controlled by you, and any person that is under common control with you.

PART 279 – FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

4. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b-1, et seq.

5. Form ADV (referenced in § 279.1) is amended by:

a. In the General Instructions, revising the first bullet and last paragraph of instruction 4;

b. In Part 1A, revising the last paragraph of Item 7.A. and revising Item 9; and

c. In Schedule D, revising Sections 7.A., 9.C. and 9.D.

The revisions read as follows:

Note: The text of Form ADV does not and this amendment will not appear in the Code of Federal Regulations.

Form ADV

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Form ADV: General Instructions

* * * * *

4. * * *

- information you provided in response to Items 1, 3, 9 (except 9.A.(2), 9.B.(2), and 9.(E)), or 11 of Part 1A or Items 1, 2.A. through 2.F., or 2.I. of Part 1B becomes inaccurate in any way;

* * * * *

If you are submitting an other-than-annual amendment, you are not required to update your responses to Items 2, 5, 6, 7, 9.A.(2), 9.B.(2), 9.E., or 12 of Part 1A or Items 2.H. or 2.J. of Part 1B even if your responses to those items have become inaccurate. If you are amending Part II, do not file the amendment with the SEC.

* * * * *

Part 1A

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Item 7 Financial Industry Affiliates

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A. * * *

If you checked Items 7.A.(1) or (3), you must list on Section 7.A. of Schedule D all your related persons that are investment advisers, broker-dealers, municipal securities dealers, or government securities broker or dealers.

* * * * *

Item 9 Custody

In this Item, we ask you whether you or a related person has custody of client assets and about your custodial practices.

A. (1) Do you have custody of any advisory clients':

		Yes	No
(a)	cash or bank accounts?	☐	☐
(b)	securities?	☐	☐

If you are registering or registered with the SEC, answer "No" to Item 9.A.(1)(a) and (b) if you deduct your advisory fees directly from your clients' accounts but you do not otherwise have custody of your clients' funds or securities.

(2) If you checked "yes" to Item 9.A.(1)(a) or (b), what is the amount of client funds and securities and total number of clients for which you have custody:

U.S. Dollar Amount	Total Number of Clients
(a) $_______________	(b) _____________

B. (1) Do any of your related persons have custody of any of your advisory clients':

		Yes	No
(a)	cash or bank accounts?	☐	☐
(b)	securities?	☐	☐

(2) If you checked "yes" to Item 9.B.(1)(a) or (b), what is the amount of client funds and securities and total number of clients for which your related persons have custody:

U.S. Dollar Amount	Total Number of Clients
(a) $_______________	(b) _____________

C. If you or your related persons have custody of client funds or securities, check all the following that apply:

☐ (1) A qualified custodian(s) sends account statements at least quarterly to the investors in the pooled investment vehicle(s) you manage.

☐ (2) An independent public accountant audits annually the pooled investment vehicle(s) that you manage and the audited financial statements are distributed to the investors in the pools.

☐ (3) An independent public accountant conducts an annual surprise examination of client funds and securities.

☐ (4) An independent public accountant prepares an internal control report with respect to custodial services when you or your related persons are qualified custodians for client funds and securities.

The instruction to Item 9.A.(1)(a) and (b) above regarding fee deductions does not apply to this Item 9.C.

If you checked Item 9.C.(2), C.(3) or C.(4), list in Section 9.C. of Schedule D the accountants that are engaged to perform the audit or examination or prepare an internal control report.

D. Do you or your related persons act as qualified custodians for your clients in connection with advisory services you provide to clients?

		Yes	No
(1)	you act as a qualified custodian	☐	☐
(2)	your related persons act as qualified custodians	☐	☐

If you responded "yes" to Item 9.D.(2), list in Section 9.D. of Schedule D all your related persons that act as qualified custodians for your clients in connection with advisory services you provide to clients (you do not have to list broker-dealers already identified as qualified custodians in Section 7.A. of Schedule D).

E. If you are filing your annual updating amendment and you were subject to a surprise examination by an independent public accountant during your last fiscal year, provide the date (MM/YYYY) the examination commenced: ___________

* * * * *

Schedule D

* * * * *

SECTION 7.A. Affiliated Investment Advisers and Broker-Dealers

You must complete the following information for each related person investment adviser and broker-dealer. You must complete a separate Schedule D Page 3 for each listed related person.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Legal Name of Related Person:

____

Primary Business Name of Related Person:

____

Related person is (check only one box): ☐ Investment Adviser ☐ Broker-Dealer ☐ Dual (Investment Adviser and Broker-Dealer)

If the related person is a broker-dealer, is it a qualified custodian for your clients in connection with advisory services you provide to clients? Yes ☐ No ☐

Related Person Adviser's SEC File Number (if any) 801- ____________
Related Person's CRD Number (if any): ____________

* * * * *

SECTION 9.C. Independent Public Accountant

You must complete the following information for each independent public accountant engaged to perform a surprise examination, perform an audit of a pooled investment vehicle that you manage, or prepare an internal control report. You must complete a separate Schedule D Page 4 for each independent public accountant.

Check only one box: ☐ Add ☐ Delete ☐ Amend

(1) Name of the independent public accountant:

____

(2) The location of the independent public accountant's office responsible for the services provided:

____
(number and street)

____
(city) (state/country) (zip+4/postal code)

(3) Is the independent public accountant registered with the Public Company Accounting Oversight Board? Yes ☐ No ☐

(4) If yes to (3) above, is the independent public accountant subject to regular inspection by the Public Company Accounting Oversight Board in accordance with its rules? Yes ☐ No ☐

(5) The independent public accountant is engaged to:

A. ☐ audit a pooled investment vehicle
B. ☐ perform a surprise examination of client assets
C. ☐ prepare an internal control report

(6) Does the report prepared by the independent public accountant that audited the pooled investment vehicle or that examined internal controls contain an unqualified opinion?

Yes ☐ No ☐

SECTION 9.D. Related Person Qualified Custodian

You must complete the following information for each of your related persons that acts as a qualified custodian for your clients in connection with advisory services you provide to clients (you do not have to list broker-dealers already identified as qualified custodians in Section 7.A. of Schedule D). You must complete a separate Schedule D Page 5 for each listed related person.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Legal Name of Related Person:

____

Primary Business Name of Related Person:

____

The location of the related person's office responsible for custody of your clients' assets:

____

(number and street)

____

(city) (state/country) (zip+4/postal code)

Related Person is (check only one box):

☐ U.S. Bank or Savings Association
☐ Futures Commission Merchant
☐ Foreign Financial Institution

* * * * *

6. Form ADV-E (referenced in § 279.8) is amended by revising the instructions to the Form.

The revisions read as follows:

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

Form ADV-E

* * * * *

INSTRUCTIONS

This Form must be completed by investment advisers that have custody of client funds or securities and that are subject to an annual surprise examination. This Form may not be used to amend any information included in an investment adviser's registration statement (e.g., business address).

Investment Adviser

1. All items must be completed by the investment adviser.

2. Give this Form to the independent public accountant that, in compliance with rule 206(4)-2 under the Investment Advisers Act of 1940 (the "Act") or applicable state law, examines client funds and securities in the custody of the investment adviser within 120 days of the time chosen by the accountant for the surprise examination and upon such accountant's resignation or dismissal from, or other termination of, the engagement, or if the accountant removes itself or is removed from consideration for being reappointed.

Accountant

3. The independent public accountant performing the surprise examination must submit (i) this Form and a certificate of accounting required by rule 206(4)-2 under the Act or applicable state law within 120 days of the time chosen by the accountant for the surprise examination, and (ii) this Form and a statement, within four business days of its resignation or dismissal from, or other termination of, the engagement, or removing itself or being removed from consideration for being reappointed, that includes (A) the date of such resignation, dismissal, removal, or other termination, and the name, address, and

contact information of the accountant, and (B) an explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination:

(a) By mail, until the Investment Adviser Registration Depository ("IARD") accepts electronic filing of the Form, to the Securities and Exchange Commission or appropriate state securities administrators. File the original and one copy with the Securities and Exchange Commission's principal office in Washington, DC at the address on the top of this Form, one copy with the regional office for the region in which the investment adviser's principal business operations are conducted, or one copy with the appropriate state administrator(s), if applicable; or

(b) By electronic filing of the certificate of accounting and statement regarding resignation, dismissal, other termination, or removal from consideration for reappointment on the IARD, when the IARD accepts electronic filing of the Form.

* * * * *

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

May 20, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13475

In the Matter of

Advanced Monitoring Systems, Inc.,
AFC Low Income Housing Credit Partners-I,
Air L.A., Inc. (n/k/a Clean Energy, Inc.),
Alexander International, Ltd.,
All the Way, Inc.,
Alliance Northwest Industries, Inc., and
Alpha Centari, Inc.,

Respondents.

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

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Advanced Monitoring Systems, Inc., AFC Low Income Housing Credit Partners-I, Air L.A., Inc. (n/k/a Clean Energy, Inc.), Alexander International, Ltd., All the Way, Inc., Alliance Northwest Industries, Inc., and Alpha Centari, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Advanced Monitoring Systems, Inc. (CIK No. 315698) is a delinquent Colorado corporation located in The Woodlands, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Advanced Monitoring 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, 1994, which reported a net loss of $323,269 for the prior nine months. As of May 13, 2009, the company's stock ("ADNM") was traded on the over-the-counter markets.

2. AFC Low Income Housing Credit Partners-I (CIK No. 823170) is a California limited partnership located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AFC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 1997, which reported a net loss of $938,503 for the prior twelve months.

3. Air L.A., Inc. (n/k/a Clean Energy, Inc.) (CIK No. 886969) is a void Delaware corporation located in Austin, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Air L.A. 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, 1995, which reported a net loss of $760,647 for the prior three months.

4. Alexander International, Ltd. (CIK No. 1215747) is a void Delaware corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Alexander is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004, which reported a net loss of $21,357 since inception on July 20, 1998.

5. All the Way, Inc. (CIK No. 1120826) is a dissolved Colorado corporation located in Colorado Springs, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). All the Way is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on August 4, 2000.

6. Alliance Northwest Industries, Inc. (CIK No. 745452) is a Washington corporation located in Seattle, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Alliance is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1995, which reported a net loss of over $2.1 million for the prior nine months. On June 27, 1996, the company filed a Chapter 7 petition with the U.S. Bankruptcy Court for the Western District of Washington, which terminated on May 26, 1999. As of May 13, 2009, the company's stock (symbol "ALNI") was traded on the over-the-counter markets.

7. Alpha Centari, Inc. (CIK No. 1122155) is a Texas corporation located in Cedar Hill, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Alpha Centari 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 $6,000 since its inception on March 27, 2000.

B. DELINQUENT PERIODIC FILINGS

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

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

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

Appendix 1

Chart of Delinquent Filings
In the Matter of Advanced Monitoring Systems, Inc. et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Advanced Monitoring Systems, Inc.					
	10-Q	03/31/94	05/16/94	Not filed	180
	10-Q	06/30/94	08/15/94	Not filed	177
	10-Q	09/30/94	11/14/94	Not filed	174
	10-K	12/31/94	03/31/95	Not filed	170
	10-Q	03/31/95	05/15/95	Not filed	168
	10-Q	06/30/95	08/14/95	Not filed	165
	10-Q	09/30/95	11/14/95	Not filed	162
	10-K	12/31/95	04/01/96	Not filed	157
	10-Q	03/31/96	05/15/96	Not filed	156
	10-Q	06/30/96	08/14/96	Not filed	153
	10-Q	09/30/96	11/14/96	Not filed	150
	10-K	12/31/96	03/31/97	Not filed	146
	10-Q	03/31/97	05/15/97	Not filed	144
	10-Q	06/30/97	08/14/97	Not filed	141
	10-Q	09/30/97	11/14/97	Not filed	138
	10-K	12/31/97	03/31/98	Not filed	134
	10-Q	03/31/98	05/15/98	Not filed	132
	10-Q	06/30/98	08/14/98	Not filed	129
	10-Q	09/30/98	11/16/98	Not filed	126
	10-K	12/31/98	03/31/99	Not filed	122
	10-Q	03/31/99	05/17/99	Not filed	120
	10-Q	06/30/99	08/16/99	Not filed	117
	10-Q	09/30/99	11/15/99	Not filed	114
	10-K	12/31/99	03/30/00	Not filed	110
	10-Q	03/31/00	05/15/00	Not filed	108
	10-Q	06/30/00	08/14/00	Not filed	105
	10-Q	09/30/00	11/14/00	Not filed	102
	10-K	12/31/00	04/02/01	Not filed	97
	10-Q	03/31/01	05/15/01	Not filed	96
	10-Q	06/30/01	08/14/01	Not filed	93

Advanced Monitoring Systems, Inc.

10-Q	09/30/01	11/14/01	Not filed	90
10-K	12/31/01	04/01/02	Not filed	85
10-Q	03/31/02	05/15/02	Not filed	84
10-Q	06/30/02	08/14/02	Not filed	81
10-Q	09/30/02	11/14/02	Not filed	78
10-K	12/31/02	03/31/03	Not filed	74
10-Q	03/31/03	05/15/03	Not filed	72
10-Q	06/30/03	08/14/03	Not filed	69
10-Q	09/30/03	11/14/03	Not filed	66
10-K	12/31/03	03/30/04	Not filed	62
10-Q	03/31/04	05/17/04	Not filed	60
10-Q	06/30/04	08/16/04	Not filed	57
10-Q	09/30/04	11/15/04	Not filed	54
10-K	12/31/04	03/31/05	Not filed	50
10-Q	03/31/05	05/16/05	Not filed	48
10-Q	06/30/05	08/15/05	Not filed	45
10-Q	09/30/05	11/14/05	Not filed	42
10-K	12/31/05	03/31/06	Not filed	38
10-Q	03/31/06	05/15/06	Not filed	36
10-Q	06/30/06	08/14/06	Not filed	33
10-Q	09/30/06	11/14/06	Not filed	30
10-K	12/31/06	04/02/07	Not filed	25
10-Q	03/31/07	05/15/07	Not filed	24
10-Q	06/30/07	08/14/07	Not filed	21
10-Q	09/30/07	11/14/07	Not filed	18
10-K	12/31/07	03/31/08	Not filed	14
10-Q	03/31/08	05/15/08	Not filed	12
10-Q	06/30/08	08/14/08	Not filed	9
10-Q	09/30/08	11/14/08	Not filed	6
10-K	12/31/08	03/31/09	Not filed	2
10-Q	03/31/09	05/15/09	Not filed	0

Total Filings Delinquent **42**

AFC Low Income Housing Credit Partners-I

10-Q	03/31/98	05/15/98	Not filed	132
10-Q	06/30/98	08/14/98	Not filed	129
10-Q	09/30/98	11/16/98	Not filed	126
10-K	12/31/98	03/31/99	Not filed	122
10-Q	03/31/99	05/17/99	Not filed	120
10-Q	06/30/99	08/16/99	Not filed	117
10-Q	09/30/99	11/15/99	Not filed	114
10-K	12/31/99	03/30/00	Not filed	110
10-Q	03/31/00	05/15/00	Not filed	108
10-Q	06/30/00	08/14/00	Not filed	105
10-Q	09/30/00	11/14/00	Not filed	102
10-K	12/31/00	04/02/01	Not filed	97
10-Q	03/31/01	05/15/01	Not filed	96
10-Q	06/30/01	08/14/01	Not filed	93
10-Q	09/30/01	11/14/01	Not filed	90
10-K	12/31/01	04/01/02	Not filed	85
10-Q	03/31/02	05/15/02	Not filed	84
10-Q	06/30/02	08/14/02	Not filed	81
10-Q	09/30/02	11/14/02	Not filed	78
10-K	12/31/02	03/31/03	Not filed	74
10-Q	03/31/03	05/15/03	Not filed	72
10-Q	06/30/03	08/14/03	Not filed	69
10-Q	09/30/03	11/14/03	Not filed	66
10-K	12/31/03	03/30/04	Not filed	62
10-Q	03/31/04	05/17/04	Not filed	60
10-Q	06/30/04	08/16/04	Not filed	57
10-Q	09/30/04	11/15/04	Not filed	54
10-K	12/31/04	03/31/05	Not filed	50
10-Q	03/31/05	05/16/05	Not filed	48
10-Q	06/30/05	08/15/05	Not filed	45
10-Q	09/30/05	11/14/05	Not filed	42
10-K	12/31/05	03/31/06	Not filed	38

AFC Low Income Housing Credit Partners-I

10-Q	03/31/06	05/15/06	Not filed	36
10-Q	06/30/06	08/14/06	Not filed	33
10-Q	09/30/06	11/14/06	Not filed	30
10-K	12/31/06	04/02/07	Not filed	25
10-Q	03/31/07	05/15/07	Not filed	24
10-Q	06/30/07	08/14/07	Not filed	21
10-Q	09/30/07	11/14/07	Not filed	18
10-K	12/31/07	03/31/08	Not filed	14
10-Q	03/31/08	05/15/08	Not filed	12
10-Q	06/30/08	08/14/08	Not filed	9
10-Q	09/30/08	11/14/08	Not filed	6
10-K	12/31/08	03/31/09	Not filed	2
10-Q	03/31/09	05/15/09	Not filed	0

Total Filings Delinquent **44**

Air L.A., Inc. (n/k/a Clean Energy, Inc.)

10-QSB	12/31/95	02/14/96	Not filed	159
10-QSB	03/31/96	05/15/96	Not filed	156
10-KSB	06/30/96	09/30/96	Not filed	152
10-QSB	09/30/96	11/14/96	Not filed	150
10-QSB	12/31/96	02/14/97	Not filed	147
10-QSB	03/31/97	05/15/97	Not filed	144
10-KSB	06/30/97	09/29/97	Not filed	140
10-QSB	09/30/97	11/14/97	Not filed	138
10-QSB	12/31/97	02/17/98	Not filed	135
10-QSB	03/31/98	05/15/98	Not filed	132
10-KSB	06/30/98	09/28/98	Not filed	128
10-QSB	09/30/98	11/16/98	Not filed	126
10-QSB	12/31/98	02/16/99	Not filed	123
10-QSB	03/31/99	05/17/99	Not filed	120
10-KSB	06/30/99	09/28/99	Not filed	116

Air L.A., Inc. (n/k/a Clean Energy, Inc.)

10-QSB	09/30/99	11/15/99	Not filed	114
10-QSB	12/31/99	02/14/00	Not filed	111
10-QSB	03/31/00	05/15/00	Not filed	108
10-KSB	06/30/00	09/28/00	Not filed	104
10-QSB	09/30/00	11/14/00	Not filed	102
10-QSB	12/31/00	02/14/01	Not filed	99
10-QSB	03/31/01	05/15/01	Not filed	96
10-KSB	06/30/01	09/28/01	Not filed	92
10-QSB	09/30/01	11/14/01	Not filed	90
10-QSB	12/31/01	02/14/02	Not filed	87
10-QSB	03/31/02	05/15/02	Not filed	84
10-KSB	06/30/02	09/30/02	Not filed	80
10-QSB	09/30/02	11/14/02	Not filed	78
10-QSB	12/31/02	02/14/03	Not filed	75
10-QSB	03/31/03	05/15/03	Not filed	72
10-KSB	06/30/03	09/29/03	Not filed	68
10-QSB	09/30/03	11/14/03	Not filed	66
10-QSB	12/31/03	02/17/04	Not filed	63
10-QSB	03/31/04	05/17/04	Not filed	60
10-KSB	06/30/04	09/28/04	Not filed	56
10-QSB	09/30/04	11/15/04	Not filed	54
10-QSB	12/31/04	02/14/05	Not filed	51
10-QSB	03/31/05	05/16/05	Not filed	48
10-KSB	06/30/05	09/28/05	Not filed	44
10-QSB	09/30/05	11/14/05	Not filed	42
10-QSB	12/31/05	02/14/06	Not filed	39
10-QSB	03/31/06	05/15/06	Not filed	36
10-KSB	06/30/06	09/28/06	Not filed	32
10-QSB	09/30/06	11/14/06	Not filed	30
10-QSB	12/31/06	02/14/07	Not filed	27
10-QSB	03/31/07	05/15/07	Not filed	24
10-KSB	06/30/07	09/28/07	Not filed	20

Air L.A., Inc. (n/k/a Clean Energy, Inc.)

10-QSB	09/30/07	11/14/07	Not filed	18
10-QSB	12/31/07	02/14/08	Not filed	15
10-Q [1]	03/31/08	05/15/08	Not filed	12
10-K [1]	06/30/08	09/29/08	Not filed	8
10-Q [1]	09/30/08	11/14/08	Not filed	6
10-Q [1]	12/31/08	02/16/09	Not filed	3
10-Q [1]	03/31/09	05/15/09	Not filed	0

Total Filings Delinquent **54**

Alexander International, Ltd.

10-KSB	12/31/04	03/31/05	Not filed	50
10-QSB	03/31/05	05/16/05	Not filed	48
10-QSB	06/30/05	08/15/05	Not filed	45
10-QSB	09/30/05	11/14/05	Not filed	42
10-KSB	12/31/05	03/31/06	Not filed	38
10-QSB	03/31/06	05/15/06	Not filed	36
10-QSB	06/30/06	08/14/06	Not filed	33
10-QSB	09/30/06	11/14/06	Not filed	30
10-KSB	12/31/06	04/02/07	Not filed	25
10-QSB	03/31/07	05/15/07	Not filed	24
10-QSB	06/30/07	08/14/07	Not filed	21
10-QSB	09/30/07	11/14/07	Not filed	18
10-KSB	12/31/07	03/31/08	Not filed	14
10-Q [1]	03/31/08	05/15/08	Not filed	12
10-Q [1]	06/30/08	08/14/08	Not filed	9
10-Q [1]	09/30/08	11/14/08	Not filed	6
10-K [1]	12/31/08	03/31/09	Not filed	2
10-Q [1]	03/31/09	05/15/09	Not filed	0

Total Filings Delinquent **18**

All the Way, Inc.

10-QSB	09/30/00	11/27/00	Not filed	102
10-KSB	12/31/00	04/02/01	Not filed	97
10-QSB	03/31/01	05/15/01	Not filed	96
10-QSB	06/30/01	08/14/01	Not filed	93
10-QSB	09/30/01	11/14/01	Not filed	90
10-KSB	12/31/01	04/01/02	Not filed	85
10-QSB	03/31/02	05/15/02	Not filed	84
10-QSB	06/30/02	08/14/02	Not filed	81
10-QSB	09/30/02	11/14/02	Not filed	78
10-KSB	12/31/02	03/31/03	Not filed	74
10-QSB	03/31/03	05/15/03	Not filed	72
10-QSB	06/30/03	08/14/03	Not filed	69
10-QSB	09/30/03	11/14/03	Not filed	66
10-KSB	12/31/03	03/30/04	Not filed	62
10-QSB	03/31/04	05/17/04	Not filed	60
10-QSB	06/30/04	08/16/04	Not filed	57
10-QSB	09/30/04	11/15/04	Not filed	54
10-KSB	12/31/04	03/31/05	Not filed	50
10-QSB	03/31/05	05/16/05	Not filed	48
10-QSB	06/30/05	08/15/05	Not filed	45
10-QSB	09/30/05	11/14/05	Not filed	42
10-KSB	12/31/05	03/31/06	Not filed	38
10-QSB	03/31/06	05/15/06	Not filed	36
10-QSB	06/30/06	08/14/06	Not filed	33
10-QSB	09/30/06	11/14/06	Not filed	30
10-KSB	12/31/06	04/02/07	Not filed	25
10-QSB	03/31/07	05/15/07	Not filed	24
10-QSB	06/30/07	08/14/07	Not filed	21
10-QSB	09/30/07	11/14/07	Not filed	18
10-KSB	12/31/07	03/31/08	Not filed	14
10-Q[1]	03/31/08	05/15/08	Not filed	12
10-Q[1]	06/30/08	08/14/08	Not filed	9
10-Q[1]	09/30/08	11/14/08	Not filed	6
10-K[1]	12/31/08	03/31/09	Not filed	2
10-Q[1]	03/31/09	05/15/09	Not filed	0

Total Filings Delinquent **34**

Alliance Northwest Industries, Inc.

10-K	12/31/95	04/01/96	Not filed	157
10-Q	03/31/96	05/15/96	Not filed	156
10-Q	06/30/96	08/14/96	Not filed	153
10-Q	09/30/96	11/14/96	Not filed	150
10-K	12/31/96	03/31/97	Not filed	146
10-Q	03/31/97	05/15/97	Not filed	144
10-Q	06/30/97	08/14/97	Not filed	141
10-Q	09/30/97	11/14/97	Not filed	138
10-K	12/31/97	03/31/98	Not filed	134
10-Q	03/31/98	05/15/98	Not filed	132
10-Q	06/30/98	08/14/98	Not filed	129
10-Q	09/30/98	11/16/98	Not filed	126
10-K	12/31/98	03/31/99	Not filed	122
10-Q	03/31/99	05/17/99	Not filed	120
10-Q	06/30/99	08/16/99	Not filed	117
10-Q	09/30/99	11/15/99	Not filed	114
10-K	12/31/99	03/30/00	Not filed	110
10-Q	03/31/00	05/15/00	Not filed	108
10-Q	06/30/00	08/14/00	Not filed	105
10-Q	09/30/00	11/14/00	Not filed	102
10-K	12/31/00	04/02/01	Not filed	97
10-Q	03/31/01	05/15/01	Not filed	96
10-Q	06/30/01	08/14/01	Not filed	93
10-Q	09/30/01	11/14/01	Not filed	90
10-K	12/31/01	04/01/02	Not filed	85
10-Q	03/31/02	05/15/02	Not filed	84
10-Q	06/30/02	08/14/02	Not filed	81
10-Q	09/30/02	11/14/02	Not filed	78
10-K	12/31/02	03/31/03	Not filed	74
10-Q	03/31/03	05/15/03	Not filed	72

Alliance Northwest Industries, Inc.

10-Q	06/30/03	08/14/03	Not filed	69
10-Q	09/30/03	11/14/03	Not filed	66
10-K	12/31/03	03/30/04	Not filed	62
10-Q	03/31/04	05/17/04	Not filed	60
10-Q	06/30/04	08/16/04	Not filed	57
10-Q	09/30/04	11/15/04	Not filed	54
10-K	12/31/04	03/31/05	Not filed	50
10-Q	03/31/05	05/16/05	Not filed	48
10-Q	06/30/05	08/15/05	Not filed	45
10-Q	09/30/05	11/14/05	Not filed	42
10-K	12/31/05	03/31/06	Not filed	38
10-Q	03/31/06	05/15/06	Not filed	36
10-Q	06/30/06	08/14/06	Not filed	33
10-Q	09/30/06	11/14/06	Not filed	30
10-K	12/31/06	04/02/07	Not filed	25
10-Q	03/31/07	05/15/07	Not filed	24
10-Q	06/30/07	08/14/07	Not filed	21
10-Q	09/30/07	11/14/07	Not filed	18
10-K	12/31/07	03/31/08	Not filed	14
10-Q	03/31/08	05/15/08	Not filed	12
10-Q	06/30/08	08/14/08	Not filed	9
10-Q	09/30/08	11/14/08	Not filed	6
10-K	12/31/08	03/31/09	Not filed	2
10-Q	03/31/09	05/15/09	Not filed	0

Total Filings Delinquent **52**

Alpha Centari, Inc.

10-QSB	06/30/01	08/14/01	Not filed	93
10-QSB	09/30/01	11/14/01	Not filed	90
10-KSB	12/31/01	04/01/02	Not filed	85
10-QSB	03/31/02	05/15/02	Not filed	84
10-QSB	06/30/02	08/14/02	Not filed	81
10-QSB	09/30/02	11/14/02	Not filed	78
10-KSB	12/31/02	03/31/03	Not filed	74
10-QSB	03/31/03	05/15/03	Not filed	72
10-QSB	06/30/03	08/14/03	Not filed	69
10-QSB	09/30/03	11/14/03	Not filed	66
10-KSB	12/31/03	03/30/04	Not filed	62
10-QSB	03/31/04	05/17/04	Not filed	60
10-QSB	06/30/04	08/16/04	Not filed	57
10-QSB	09/30/04	11/15/04	Not filed	54
10-KSB	12/31/04	03/31/05	Not filed	50
10-QSB	03/31/05	05/16/05	Not filed	48
10-QSB	06/30/05	08/15/05	Not filed	45
10-QSB	09/30/05	11/14/05	Not filed	42
10-KSB	12/31/05	03/31/06	Not filed	38
10-QSB	03/31/06	05/15/06	Not filed	36
10-QSB	06/30/06	08/14/06	Not filed	33
10-QSB	09/30/06	11/14/06	Not filed	30
10-KSB	12/31/06	04/02/07	Not filed	25
10-QSB	03/31/07	05/15/07	Not filed	24
10-QSB	06/30/07	08/14/07	Not filed	21
10-QSB	09/30/07	11/14/07	Not filed	18
10-KSB	12/31/07	03/31/08	Not filed	14
10-Q[1]	03/31/08	05/15/08	Not filed	12

Alpha Centari, Inc.

10-Q[1]	06/30/08	08/14/08	Not filed	9
10-Q[1]	09/30/08	11/14/08	Not filed	6
10-K[1]	12/31/08	03/31/09	Not filed	2
10-Q[1]	03/31/09	05/15/09	Not filed	0

Total Filings Delinquent **32**

[1]Regulation S-B and its accompanying forms, including Forms 10-Q and 10-K, 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-Q and 10-K will be required to use Forms 10-Q and 10-K instead. Forms 10-Q and 10-K 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
May 20, 2009

In the Matter of Today's Man, Inc., Tokheim Corp., Total Film Group, Inc., Toth Aluminum Corp., Tower Air, Inc., TPC Liquidation, Inc., The Translation Group, Ltd., Track 'n Trail, Inc., TransAxis, Inc., Transmedia Europe, Inc., Treasury International, Inc., Trend-Lines, Inc., and Tri Lite, 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 Today's Man, Inc. because it has not filed any periodic reports since the period ended November 2, 2002.

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Total Film Group, 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 Toth Aluminum Corp. because it has not filed any periodic reports since the period ended February 29, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Tower Air, Inc. because it has not filed any periodic reports since the period ended September 30, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of TPC Liquidation, Inc. because it has not filed any periodic reports since the period ended September 30, 2003.

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Track 'n Trail, Inc. because it has not filed any periodic reports since the period ended December 30, 2000.

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Transmedia Europe, Inc. because it has not filed any periodic reports since the period ended June 30, 2000.

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

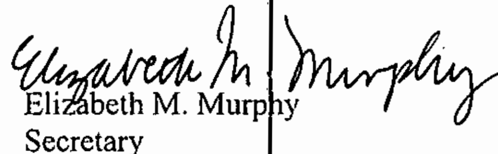
It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Trend-Lines, Inc. because it has not filed any periodic reports since the period ended August 24, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Tri Lite, Inc. because it has not filed any periodic reports since the period ended June 30, 1999.

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 May 20, 2009, through 11:59 p.m. EDT on June 3, 2009.

By the Commission.



Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13473

In the Matter of Today's Man, Inc., Tokheim Corp., The Topaz Group, Inc., Toth Aluminum Corp., Tower Air, Inc., TPC Liquidation, Inc., The Translation Group, Ltd., Trend-Lines, Inc., and Tri Lite, Inc., Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Today's Man, Inc., Tokheim Corp., The Topaz Group, Inc., Toth Aluminum Corp., Tower Air, Inc., TPC Liquidation, Inc., The Translation Group, Ltd., Trend-Lines, Inc., and Tri Lite, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Today's Man, Inc. (CIK No. 885546) is a Pennsylvania corporation located in Moorestown, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Today's Man is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended November 2, 2002, which reported a net loss of over $2.9

million for the prior thirteen weeks. On March 4, 2003, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey, a reorganization plan was confirmed on May 6, 2004, and the case was terminated on March 27, 2007. As of May 18, 2009, the company's stock (symbol "TMANQ") was quoted on the Pink Sheets of the Pink OTC Markets, Inc. ("Pink Sheets"), had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Tokheim Corp. (CIK No. 98559) is a dissolved Indiana corporation located in Fort Wayne, Indiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tokheim 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 August 31, 2002, which reported a net loss of over $207 million for the prior nine months. On November 21, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was terminated on September 20, 2006. As of May 18, 2009, the company's stock (symbol "THMC") 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).

3. The Topaz Group, Inc. (CIK No. 1059280) is a revoked Nevada corporation located in Bangkok, Thailand with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Topaz 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, 2003, which reported a net loss of over $5.1 million for the prior six months.

4. Toth Aluminum Corp. (CIK No. 98788) is an inactive Louisiana corporation located in Vacherie, Louisiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Toth 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 February 29, 2004, which reported a net loss of over $3 million for the prior six months. As of May 18, 2009, the company's stock (symbol "TOTH") 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. Tower Air, Inc. (CIK No. 778718) is a void Delaware corporation located in Jamaica, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tower Air is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1999, which reported a net loss of over $5.6 million for the prior nine months. As of May 18, 2009, the company's stock (symbol "TOWRQ") 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).

6. TPC Liquidation, Inc. (CIK No. 944310) 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). TPC 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, 2003, which reported a net loss of over $8

million for the prior nine months. As of May 18, 2009, the company's stock (symbol "TPLQ") 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).

7. The Translation Group, Ltd. (CIK No. 1019356) is a void Delaware corporation located in Haddonfield, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). The Translation Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2003, which reported a net loss of over $195,392 for the prior nine months. As of May 18, 2009, the company's stock (symbol "THEO") 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).

8. Trend-Lines, Inc. (CIK No. 922978) is a dissolved Massachusetts corporation located in Lynn, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Trend-Lines 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 August 24, 2001, which reported a net loss of $5.9 million for the prior six months. On August 11, 2000, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts, and the case was terminated on June 9, 2004. As of May 18, 2009, the company's stock (symbol "TRNDQ") 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).

9. Tri Lite, Inc. (CIK No. 910350) is a Pennsylvania corporation located in Garden Grove, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tri Lite 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, 1999. As of May 18, 2009, the company's stock (symbol "NRGG") was quoted on the Pink Sheets, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

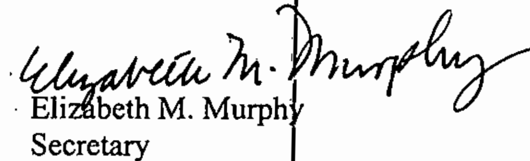
If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules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

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

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

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

By the Commission.



Elizabeth M. Murphy
Secretary

Attachment

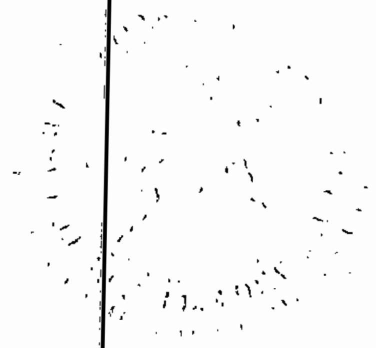


Chart of Delinquent Filings
Today's Man, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Today's Man, Inc.					
	10-K	02/01/03	5/2/03	Not filed	72
	10-Q	05/03/03	6/17/03	Not filed	71
	10-Q	08/02/03	9/16/03	Not filed	68
	10-Q	11/01/03	12/16/03	Not filed	65
	10-K	01/31/04	4/30/04	Not filed	61
	10-Q	05/01/04	6/15/04	Not filed	59
	10-Q	07/31/04	9/14/04	Not filed	56
	10-Q	10/30/04	12/14/04	Not filed	53
	10-K	01/29/05	4/29/05	Not filed	49
	10-Q	04/30/05	6/14/05	Not filed	47
	10-Q	07/30/05	9/13/05	Not filed	44
	10-Q	10/29/05	12/13/05	Not filed	41
	10-K	01/28/06	4/28/06	Not filed	37
	10-Q	04/29/06	6/13/06	Not filed	35
	10-Q	07/29/06	9/12/06	Not filed	32
	10-Q	10/28/06	12/12/06	Not filed	29
	10-K	02/03/07	5/4/07	Not filed	24
	10-Q	04/28/07	6/12/07	Not filed	23
	10-Q	07/28/07	9/11/07	Not filed	20
	10-Q	11/03/07	12/18/07	Not filed	17
	10-K	02/02/08	5/2/08	Not filed	12
	10-Q	05/03/08	6/17/08	Not filed	11
	10-Q	08/02/08	9/16/08	Not filed	8
	10-Q	11/29/08	1/13/09	Not filed	4
	10-K	01/31/09	5/1/09	Not filed	0
Total Filings Delinquent	25				
Tokheim Corp.					
	10-KSB	11/30/02	02/28/03	Not filed	75
	10-QSB	2/28/03	04/14/03	Not filed	73
	10-QSB	5/31/03	07/15/03	Not filed	70
	10-QSB	8/31/03	10/15/03	Not filed	67
	10-KSB	11/30/03	03/01/04	Not filed	62
	10-QSB	2/29/04	04/14/04	Not filed	61
	10-QSB	5/31/04	07/15/04	Not filed	58

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Tokheim Corp.					
	10-QSB	8/31/04	10/15/04	Not filed	55
	10-KSB	11/30/04	02/28/05	Not filed	51
	10-QSB	2/28/05	04/14/05	Not filed	49
	10-QSB	5/31/05	07/15/05	Not filed	46
	10-QSB	8/31/05	10/17/05	Not filed	43
	10-KSB	11/30/05	02/28/06	Not filed	39
	10-QSB	2/28/06	04/14/06	Not filed	37
	10-QSB	5/31/06	07/17/06	Not filed	34
	10-QSB	8/31/06	10/16/06	Not filed	31
	10-KSB	11/30/06	02/28/07	Not filed	27
	10-QSB	2/28/07	04/16/07	Not filed	25
	10-QSB	5/31/07	07/16/07	Not filed	22
	10-QSB	8/31/07	10/15/07	Not filed	19
	10-KSB	11/30/07	02/28/08	Not filed	15
	10-QSB	2/28/08	04/14/08	Not filed	13
	10-Q [1]	5/31/08	07/15/08	Not filed	10
	10-Q [1]	8/31/08	10/15/08	Not filed	7
	10-K [1]	11/30/08	03/02/09	Not filed	2
	10-Q [1]	02/28/09	04/14/09	Not filed	1
Total Filings Delinquent	**26**				
The Topaz Group, Inc.					
	10-QSB	09/30/03	11/14/03	Not filed	66
	10-KSB	12/31/03	03/30/04	Not filed	62
	10-QSB	03/31/04	05/17/04	Not filed	60
	10-QSB	06/30/04	08/16/04	Not filed	57
	10-QSB	09/30/04	11/15/04	Not filed	54
	10-KSB	12/31/04	03/31/05	Not filed	50
	10-QSB	03/31/05	05/16/05	Not filed	48
	10-QSB	06/30/05	08/15/05	Not filed	45
	10-QSB	09/30/05	11/14/05	Not filed	42
	10-KSB	12/31/05	03/31/06	Not filed	38
	10-QSB	03/31/06	05/15/06	Not filed	36
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-QSB	09/30/06	11/14/06	Not filed	30
	10-KSB	12/31/06	04/02/07	Not filed	25

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
The Topaz Group, Inc.					
	10-QSB	03/31/07	05/15/07	Not filed	24
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-QSB	09/30/07	11/14/07	Not filed	18
	10-KSB	12/31/07	03/31/08	Not filed	14
	10-Q [1]	03/31/08	05/15/08	Not filed	12
	10-Q [1]	06/30/08	08/14/08	Not filed	9
	10-Q [1]	09/30/08	11/14/08	Not filed	6
	10-K [1]	12/31/08	03/31/09	Not filed	2
Total Filings Delinquent	**22**				
Toth Aluminum Corp.					
	10-Q	05/31/04	07/15/04	Not filed	58
	10-K	08/31/04	11/29/04	Not filed	54
	10-Q	11/30/04	01/14/05	Not filed	52
	10-Q	02/28/05	04/14/05	Not filed	49
	10-Q	05/31/05	07/15/05	Not filed	46
	10-K	08/31/05	11/29/05	Not filed	42
	10-Q	11/30/05	01/16/06	Not filed	40
	10-Q	02/28/06	04/14/06	Not filed	37
	10-Q	05/31/06	07/17/06	Not filed	34
	10-K	08/31/06	11/29/06	Not filed	30
	10-Q	11/30/06	01/16/07	Not filed	28
	10-Q	02/28/07	04/16/07	Not filed	25
	10-Q	05/31/07	07/16/07	Not filed	22
	10-K	08/31/07	11/29/07	Not filed	18
	10-Q	11/30/07	01/14/08	Not filed	16
	10-Q	02/28/08	04/14/08	Not filed	13
	10-Q	05/31/08	07/15/08	Not filed	10
	10-K	08/31/08	12/01/08	Not filed	5
	10-Q	11/30/08	01/14/09	Not filed	4
	10-Q	02/28/09	04/14/09	Not filed	1
Total Filings Delinquent	**20**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Tower Air, Inc.					
	10-K	12/31/99	03/30/00	Not filed	110
	10-Q	03/31/00	05/15/00	Not filed	108
	10-Q	06/30/00	08/14/00	Not filed	105
	10-Q	09/30/00	11/14/00	Not filed	102
	10-K	12/31/00	04/02/01	Not filed	97
	10-Q	03/31/01	05/15/01	Not filed	96
	10-Q	06/30/01	08/14/01	Not filed	93
	10-Q	09/30/01	11/14/01	Not filed	90
	10-K	12/31/01	04/01/02	Not filed	85
	10-Q	03/31/02	05/15/02	Not filed	84
	10-Q	06/30/02	08/14/02	Not filed	81
	10-Q	09/30/02	11/14/02	Not filed	78
	10-K	12/31/02	03/31/03	Not filed	74
	10-Q	03/31/03	05/15/03	Not filed	72
	10-Q	06/30/03	08/14/03	Not filed	69
	10-Q	09/30/03	11/14/03	Not filed	66
	10-K	12/31/03	03/30/04	Not filed	62
	10-Q	03/31/04	05/17/04	Not filed	60
	10-Q	06/30/04	08/16/04	Not filed	57
	10-Q	09/30/04	11/15/04	Not filed	54
	10-K	12/31/04	03/31/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/31/06	04/02/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-K	12/31/07	03/31/08	Not filed	14
	10-Q	03/31/08	05/15/08	Not filed	12
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-K	12/31/08	03/31/09	Not filed	2
	10-Q	03/31/09	05/15/09	Not filed	0

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Tower Air, Inc.					
Total Filings Delinquent	38				
TPC Liquidation, Inc.					
	10-K	12/31/03	03/30/04	Not filed	62
	10-Q	03/31/04	05/17/04	Not filed	60
	10-Q	06/30/04	08/16/04	Not filed	57
	10-Q	09/30/04	11/15/04	Not filed	54
	10-K	12/31/04	03/31/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/31/06	04/02/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-K	12/31/07	03/31/08	Not filed	14
	10-Q	03/31/08	05/15/08	Not filed	12
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-K	12/31/08	03/31/09	Not filed	2
	10-Q	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	20				
The Translation Group, Ltd.					
	10-KSB	03/31/04	06/29/04	Not filed	59
	10-QSB	06/30/04	08/16/04	Not filed	57
	10-QSB	09/30/04	11/15/04	Not filed	54
	10-QSB	12/31/04	02/14/05	Not filed	51
	10-KSB	03/31/05	06/29/05	Not filed	47
	10-QSB	06/30/05	08/15/05	Not filed	45
	10-QSB	09/30/05	11/14/05	Not filed	42
	10-QSB	12/31/05	02/14/06	Not filed	39

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
The Translation Group, Ltd.					
	10-KSB	03/31/06	06/29/06	Not filed	35
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-QSB	09/30/06	11/14/06	Not filed	30
	10-QSB	12/31/06	02/14/07	Not filed	27
	10-KSB	03/31/07	06/29/07	Not filed	23
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-QSB	09/30/07	11/14/07	Not filed	18
	10-QSB	12/31/07	02/14/08	Not filed	15
	10-KSB	03/31/08	06/30/08	Not filed	11
	10-Q [1]	06/30/08	08/14/08	Not filed	9
	10-Q [1]	09/30/08	11/14/08	Not filed	6
	10-Q [1]	12/31/08	02/17/09	Not filed	3
Total Filings Delinquent	20				
Trend-Lines, Inc.					
	10-Q	12/01/01	01/15/02	Not filed	88
	10-K	03/02/02	05/31/02	Not filed	84
	10-Q	06/01/02	07/16/02	Not filed	82
	10-Q	08/31/02	10/15/02	Not filed	79
	10-Q	11/30/02	01/14/03	Not filed	76
	10-K	03/01/03	05/30/03	Not filed	72
	10-Q	05/31/03	07/15/03	Not filed	70
	10-Q	08/30/03	10/14/03	Not filed	67
	10-Q	11/29/03	01/13/04	Not filed	64
	10-K	02/28/04	05/31/04	Not filed	60
	10-Q	05/29/04	07/13/04	Not filed	58
	10-Q	08/28/04	10/12/04	Not filed	55
	10-Q	11/27/04	01/11/05	Not filed	52
	10-K	02/26/05	05/29/05	Not filed	48
	10-Q	05/28/05	07/12/05	Not filed	46
	10-Q	09/03/05	10/20/05	Not filed	43
	10-Q	12/03/05	01/20/06	Not filed	40
	10-K	02/25/06	05/27/06	Not filed	36
	10-Q	06/03/06	07/20/06	Not filed	34
	10-Q	09/02/06	10/18/06	Not filed	31
	10-Q	12/02/06	01/18/07	Not filed	28
	10-K	03/03/07	06/01/07	Not filed	23

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Trend-Lines, Inc.					
	10-Q	06/02/07	07/18/07	Not filed	22
	10-Q	09/01/07	10/16/07	Not filed	19
	10-Q	12/01/07	01/15/08	Not filed	16
	10-K	03/01/08	05/30/08	Not filed	12
	10-Q	05/31/08	07/15/08	Not filed	10
	10-Q	08/30/08	10/14/08	Not filed	7
	10-Q	11/29/08	01/13/09	Not filed	4
Total Filings Delinquent	29				
Tri Lite, Inc.					
	10-Q	09/30/99	11/15/99	Not filed	114
	10-K	12/31/99	03/30/00	Not filed	110
	10-Q	03/31/00	05/15/00	Not filed	108
	10-Q	06/30/00	08/14/00	Not filed	105
	10-Q	09/30/00	11/14/00	Not filed	102
	10-K	12/31/00	04/02/01	Not filed	97
	10-Q	03/31/01	05/15/01	Not filed	96
	10-Q	06/30/01	08/14/01	Not filed	93
	10-Q	09/30/01	11/14/01	Not filed	90
	10-K	12/31/01	04/01/02	Not filed	85
	10-Q	03/31/02	05/15/02	Not filed	84
	10-Q	06/30/02	08/14/02	Not filed	81
	10-Q	09/30/02	11/14/02	Not filed	78
	10-K	12/31/02	03/31/03	Not filed	74
	10-Q	03/31/03	05/15/03	Not filed	72
	10-Q	06/30/03	08/14/03	Not filed	69
	10-Q	09/30/03	11/14/03	Not filed	66
	10-K	12/31/03	03/30/04	Not filed	62
	10-Q	03/31/04	05/17/04	Not filed	60
	10-Q	06/30/04	08/16/04	Not filed	57
	10-Q	09/30/04	11/15/04	Not filed	54
	10-K	12/31/04	03/31/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38

Company Name	Form Type[1]	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Tri Lite, Inc.					
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/31/06	04/02/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-K	12/31/07	03/31/08	Not filed	14
	10-Q	03/31/08	05/15/08	Not filed	12
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-K	12/31/08	03/31/09	Not filed	2
	10-Q	03/31/09	05/15/09	Not filed	0

Total Filings Delinquent 39

[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
May 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13474

In the Matter of **Total Film Group, Inc.,** **Track 'n Trail, Inc.,** **Trade Wind Communications, Ltd.,** **TransAxis, Inc.,** **Transmedia Europe, Inc.,** **Treasury International, Inc., and** **Tri National Development Corp.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Total Film Group, Inc., Track 'n Trail, Inc., Trade Wind Communications, Ltd., TransAxis, Inc., Transmedia Europe, Inc., Treasury International, Inc., and Tri National Development Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Total Film Group, Inc. (CIK No. 1038777) is a Delaware corporation located in Beverly Hills, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Total Film 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 over $8.9 million for the prior nine months. As of May 18, 2009, the company's stock (symbol "TFGP") was quoted on the Pink Sheets of the Pink OTC Markets, Inc. ("Pink Sheets"), had five

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

2. Track 'n Trail, Inc. (CIK No. 1029932) is a void Delaware corporation located in El Dorado Hills, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Track 'n Trail is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 30, 2000, which reported a net loss of over $9.8 million for the prior twelve months. On April 13, 2001, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of California, and the case was terminated on August 13, 2003. As of May 18, 2009, the company's stock (symbol "TKTL") 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).

3. Trade Wind Communications, Ltd. (CIK No. 1133916) is a Bermuda corporation located in Sydney, Australia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Trade Wind is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the year ended June 30, 2003, which reported a net loss of over $2.7 million (Australian) for the prior twelve months.

4. TransAxis, Inc. (CIK No. 774055) is a void Delaware corporation located in Salt Lake City, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TransAxis 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, 2003, which reported a net loss of $498,824 for the prior three months. As of May 18, 2009, the company's stock (symbol "TNXS") 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. Transmedia Europe, Inc. (CIK No. 906908) is a void Delaware corporation located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Transmedia is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2000, which reported a net loss of over $7.2 million for the prior nine months. As of May 18, 2009, the company's stock (symbol "MBTE") 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).

6. Treasury International, Inc. (CIK No. 1003007) is a void Delaware corporation located in Libby, Montana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Treasury International is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended October 31, 2003, which reported a net loss of $560,935 for the prior nine months. As of May 18, 2009, the company's stock (symbol "TRUY") 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).

7. Tri National Development Corp. (CIK No. 1034415) is a dissolved Wyoming corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tri National 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 April 30, 2002, which reported a net loss of over $3.9 million for the prior twelve months. On October 23, 2001, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of California, which is still pending.

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 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

Chart of Delinquent Filings
Total Film Group, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Total Film Group, Inc.					
	10-KSB	06/30/01	9/28/01	Not filed	92
	10-QSB	09/30/01	11/14/01	Not filed	90
	10-QSB	12/31/01	2/14/02	Not filed	87
	10-QSB	03/31/02	5/15/02	Not filed	84
	10-KSB	06/30/02	9/30/02	Not filed	80
	10-QSB	09/30/02	11/14/02	Not filed	78
	10-QSB	12/31/02	2/14/03	Not filed	75
	10-QSB	03/31/03	5/15/03	Not filed	72
	10-KSB	06/30/03	9/29/03	Not filed	68
	10-QSB	09/30/03	11/14/03	Not filed	66
	10-QSB	12/31/03	2/17/04	Not filed	63
	10-QSB	03/31/04	5/17/04	Not filed	60
	10-KSB	06/30/04	9/28/04	Not filed	56
	10-QSB	09/30/04	11/15/04	Not filed	54
	10-QSB	12/31/04	2/14/05	Not filed	51
	10-QSB	03/31/05	5/16/05	Not filed	48
	10-KSB	06/30/05	9/28/05	Not filed	44
	10-QSB	09/30/05	11/14/05	Not filed	42
	10-QSB	12/31/05	2/14/06	Not filed	39
	10-QSB	03/31/06	5/15/06	Not filed	36
	10-KSB	06/30/06	9/28/06	Not filed	32
	10-QSB	09/30/06	11/14/06	Not filed	30
	10-QSB	12/31/06	2/14/07	Not filed	27
	10-QSB	03/31/07	5/15/07	Not filed	24
	10-KSB	06/30/07	9/28/07	Not filed	20
	10-QSB	09/30/07	11/14/07	Not filed	18
	10-QSB	12/31/07	2/14/08	Not filed	15
	10-QSB	03/31/08	5/15/08	Not filed	12
	10-K [1]	06/30/08	9/29/08	Not filed	8
	10-Q [1]	09/30/08	11/14/08	Not filed	6
	10-Q [1]	12/31/08	2/17/09	Not filed	3
	10-Q [1]	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	32				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Track 'n Trail, Inc.					
	10-Q	03/31/01	05/15/01	Not filed	96
	10-Q	06/30/01	08/14/01	Not filed	93
	10-Q	09/29/01	11/13/01	Not filed	90
	10-K	12/29/01	03/29/02	Not filed	86
	10-Q	03/30/02	05/14/02	Not filed	84
	10-Q	06/29/02	08/13/02	Not filed	81
	10-Q	09/28/02	11/12/02	Not filed	78
	10-K	12/28/02	03/28/03	Not filed	74
	10-Q	03/29/03	05/13/03	Not filed	72
	10-Q	06/28/03	08/12/03	Not filed	69
	10-Q	09/27/03	11/11/03	Not filed	66
	10-K	12/27/03	03/26/04	Not filed	62
	10-Q	03/27/04	05/11/04	Not filed	60
	10-Q	06/26/04	08/10/04	Not filed	57
	10-Q	09/25/04	11/09/04	Not filed	54
	10-K	12/25/04	03/25/05	Not filed	50
	10-Q	03/26/05	05/10/05	Not filed	48
	10-Q	06/25/05	08/09/05	Not filed	45
	10-Q	09/24/05	11/08/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38
	10-Q	03/25/06	05/09/06	Not filed	36
	10-Q	06/24/06	08/08/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/30/06	03/30/07	Not filed	26
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/29/07	11/13/07	Not filed	18
	10-K	12/29/07	03/28/08	Not filed	14
	10-Q	03/29/08	05/13/08	Not filed	12
	10-Q	06/28/08	08/12/08	Not filed	9
	10-Q	09/27/08	11/11/08	Not filed	6
	10-K	12/27/08	03/27/09	Not filed	2
	10-Q	03/28/09	05/12/09	Not filed	0
Total Filings Delinquent	32				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Trade Wind Communications, Ltd.					
	20-F	06/30/04	12/30/04	Not filed	53
	20-F	06/30/05	12/30/05	Not filed	41
	20-F	06/30/06	01/02/07	Not filed	28
	20-F	06/30/07	12/31/07	Not filed	17
	20-F	06/30/08	12/30/08	Not filed	5
Total Filings Delinquent	5				
TransAxis, Inc.					
	10-K	06/30/03	9/29/03	Not filed	68
	10-Q	09/30/03	11/14/03	Not filed	66
	10-Q	12/31/03	2/17/04	Not filed	63
	10-Q	03/31/04	5/17/04	Not filed	60
	10-K	06/30/04	9/28/04	Not filed	56
	10-Q	09/30/04	11/15/04	Not filed	54
	10-Q	12/31/04	2/14/05	Not filed	51
	10-Q	03/31/05	5/16/05	Not filed	48
	10-K	06/30/05	9/28/05	Not filed	44
	10-Q	09/30/05	11/14/05	Not filed	42
	10-Q	12/31/05	2/14/06	Not filed	39
	10-Q	03/31/06	5/15/06	Not filed	36
	10-K	06/30/06	9/28/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	30
	10-Q	12/31/06	2/14/07	Not filed	27
	10-Q	03/31/07	5/15/07	Not filed	24
	10-K	06/30/07	9/28/07	Not filed	20
	10-Q	09/30/07	11/14/07	Not filed	18
	10-Q	12/31/07	2/14/08	Not filed	15
	10-Q	03/31/08	5/15/08	Not filed	12
	10-K	06/30/08	9/29/08	Not filed	8
	10-Q	09/30/08	11/14/08	Not filed	6
	10-Q	12/31/08	02/17/09	Not filed	3
	10-Q	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	24				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Transmedia Europe, Inc.					
	10-K	09/30/00	12/29/00	Not filed	101
	10-Q	12/31/00	02/14/01	Not filed	99
	10-Q	03/31/01	05/15/01	Not filed	96
	10-Q	06/30/01	08/14/01	Not filed	93
	10-K	09/30/01	12/31/01	Not filed	89
	10-Q	12/31/01	02/14/02	Not filed	87
	10-Q	03/31/02	05/15/02	Not filed	84
	10-Q	06/30/02	08/14/02	Not filed	81
	10-K	09/30/02	12/30/02	Not filed	77
	10-Q	12/31/02	02/14/03	Not filed	75
	10-Q	03/31/03	05/15/03	Not filed	72
	10-Q	06/30/03	08/14/03	Not filed	69
	10-K	09/30/03	12/29/03	Not filed	65
	10-Q	12/31/03	02/17/04	Not filed	63
	10-Q	03/31/04	05/17/04	Not filed	60
	10-Q	06/30/04	08/16/04	Not filed	57
	10-K	09/30/04	12/29/04	Not filed	53
	10-Q	12/31/04	02/14/05	Not filed	51
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-K	09/30/05	12/29/05	Not filed	41
	10-Q	12/31/05	02/14/06	Not filed	39
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-K	09/30/06	12/29/06	Not filed	29
	10-Q	12/31/06	02/14/07	Not filed	27
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-K	09/30/07	12/29/07	Not filed	17
	10-Q	12/31/07	02/14/08	Not filed	15
	10-Q	03/31/08	05/15/08	Not filed	12
	10-Q	06/30/08	08/14/08	Not filed	9
	10-K	09/30/08	12/29/08	Not filed	5
	10-Q	12/31/08	02/17/09	Not filed	3
	10-Q	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	35				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Treasury International, Inc.					
	10-KSB	01/31/04	04/30/04	Not filed	61
	10-QSB	04/30/04	06/14/04	Not filed	59
	10-QSB	07/31/04	09/14/04	Not filed	56
	10-QSB	10/31/04	12/15/04	Not filed	53
	10-KSB	01/31/05	05/02/05	Not filed	48
	10-QSB	04/30/05	06/14/05	Not filed	47
	10-QSB	07/31/05	09/14/05	Not filed	44
	10-QSB	10/31/05	12/15/05	Not filed	41
	10-KSB	01/31/06	05/01/06	Not filed	36
	10-QSB	04/30/06	06/14/06	Not filed	35
	10-QSB	07/31/06	09/14/06	Not filed	32
	10-QSB	10/31/06	12/15/06	Not filed	29
	10-KSB	01/31/07	05/01/07	Not filed	24
	10-QSB	04/30/07	06/14/07	Not filed	23
	10-QSB	07/31/07	09/14/07	Not filed	20
	10-QSB	10/31/07	12/17/07	Not filed	17
	10-KSB	01/31/08	04/30/08	Not filed	13
	10-Q [1]	04/30/08	06/16/08	Not filed	11
	10-Q [1]	07/31/08	09/15/08	Not filed	8
	10-Q [1]	10/31/08	12/15/08	Not filed	5
	10-K [1]	01/31/09	05/01/09	Not filed	0
Total Filings Delinquent	**21**				
Tri National Development Corp.					
	10-QSB	07/31/02	09/16/02	Not filed	75
	10-QSB	10/31/02	12/16/02	Not filed	72
	10-QSB	01/31/03	03/17/03	Not filed	69
	10-KSB	04/30/03	07/29/03	Not filed	65
	10-QSB	07/31/03	09/15/03	Not filed	63
	10-QSB	10/31/03	12/15/03	Not filed	60
	10-QSB	01/31/04	03/16/04	Not filed	57
	10-KSB	04/30/04	07/29/04	Not filed	53
	10-QSB	07/31/04	09/14/04	Not filed	51
	10-QSB	10/31/04	12/15/04	Not filed	48
	10-QSB	01/31/05	03/17/05	Not filed	45

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Tri National Development Corp.					
	10-KSB	04/30/05	07/29/05	Not filed	41
	10-QSB	07/31/05	09/14/05	Not filed	39
	10-QSB	10/31/05	12/15/05	Not filed	36
	10-QSB	01/31/06	03/17/06	Not filed	33
	10-KSB	04/30/06	07/31/06	Not filed	29
	10-QSB	07/31/06	09/14/06	Not filed	27
	10-QSB	10/31/06	12/15/06	Not filed	24
	10-QSB	01/31/07	03/19/07	Not filed	21
	10-KSB	04/30/07	07/30/07	Not filed	17
	10-QSB	07/31/07	09/14/07	Not filed	15
	10-QSB	10/31/07	12/17/07	Not filed	12
	10-QSB	01/31/08	03/17/08	Not filed	9
	10-KSB	04/30/08	07/29/08	Not filed	7
	10-Q[1]	07/31/08	09/15/08	Not filed	4
	10-Q[1]	10/31/08	12/15/08	Not filed	2
	10-Q[1]	01/31/09	03/17/09	Not filed	2

Total Filings Delinquent **26**

[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
May 21, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13477

In the Matter of National Micronetics, Inc., Network Access Solutions Corp., Network Plus Corp., New York Regional Rail Corp., NexGen Vision, Inc., and Noel Group, Inc. Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents National Micronetics, Inc., Network Access Solutions Corp., Network Plus Corp., New York Regional Rail Corp., NexGen Vision, Inc., and Noel Group, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. National Micronetics, Inc. (CIK No. 70333) is a dissolved Delaware corporation located in Kingston, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). National Micronetics 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 $595,000 for the prior five months ended December 1, 1998. As of May 18, 2009, the company's stock (symbol "NMIC") 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).

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to Exchange Act Section 12(g). Network is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2002, which reported a net loss of over $7.7 million for the prior three months. On June 4, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, a reorganization plan was confirmed on September 11, 2003, and the case is still pending. As of May 18, 2009, the company's stock (symbol "NASC") 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).

3. Network Plus Corp. (CIK No. 1065633) is a void Delaware corporation located in Randolph, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Network Plus 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 $87,855 for the prior nine months. On February 4, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which is still pending. As of May 18, 2009, the company's stock (symbol "NPLSQ") 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).

4. New York Regional Rail Corp. (CIK No. 1020173) is a void Delaware corporation located in West Seneca, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). New York Regional Rail 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 over $1.9 million for the prior nine months. On February 7, 2008, the company adopted a plan of complete liquidation and dissolution. As of May 18, 2009, the company's stock (symbol "NYRR") was quoted on the Pink Sheets, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. NexGen Vision, Inc. (CIK No. 1124111) is a void Delaware corporation located in Oldsmar, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Nexgen 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, 2003, which reported a net loss of over $6.4 million for the prior nine months. As of May 18, 2009, the company's stock (symbol "NXGV") 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).

6. Noel Group, Inc. (CIK No. 829269) 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). Noel Group 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, 1999, which reported that on March 19, 1997, the company's shareholders agreed to liquidate the company. As of May 18, 2009, the company's stock (symbol "NOEL") was quoted on the Pink Sheets, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

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 National Micronetics, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
National Micronetics, Inc.					
	10-K	06/24/00	09/22/00	Not filed	104
	10-Q	09/30/00	11/14/00	Not filed	102
	10-Q	12/30/00	02/13/01	Not filed	99
	10-Q	03/31/01	05/15/01	Not filed	96
	10-K	06/30/01	09/28/01	Not filed	92
	10-Q	09/29/01	11/13/01	Not filed	90
	10-Q	12/29/01	02/12/02	Not filed	87
	10-Q	03/30/02	05/14/02	Not filed	84
	10-K	06/29/02	09/27/02	Not filed	80
	10-Q	09/28/02	11/12/02	Not filed	78
	10-Q	12/28/02	02/11/03	Not filed	75
	10-Q	03/29/03	05/13/03	Not filed	72
	10-K	06/28/03	09/26/03	Not filed	68
	10-Q	09/27/03	11/12/03	Not filed	66
	10-Q	12/27/03	02/10/04	Not filed	63
	10-Q	03/27/04	05/11/04	Not filed	60
	10-K	06/26/04	09/24/04	Not filed	56
	10-Q	09/25/04	11/09/04	Not filed	54
	10-Q	12/25/04	02/08/05	Not filed	51
	10-Q	03/26/05	05/10/05	Not filed	48
	10-K	06/25/05	09/23/05	Not filed	44
	10-Q	09/24/05	11/08/05	Not filed	42
	10-Q	12/31/05	02/14/06	Not filed	39
	10-Q	03/25/06	05/09/06	Not filed	36
	10-K	06/24/06	09/22/06	Not filed	32
	10-Q	09/30/06	11/14/06	Not filed	30
	10-Q	12/30/06	02/13/07	Not filed	27
	10-Q	03/31/07	05/15/07	Not filed	24
	10-K	06/30/07	09/28/07	Not filed	20
	10-Q	09/29/07	11/13/07	Not filed	18
	10-Q	12/29/07	02/12/08	Not filed	15
	10-Q	03/29/08	05/13/08	Not filed	12

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
National Micronetics, Inc.	*10-K*	06/28/08	09/26/08	Not filed	8
(continued)	*10-Q*	09/27/08	11/12/08	Not filed	6
	10-Q	12/27/08	02/10/09	Not filed	3
	10-Q	03/28/09	05/12/09	Not filed	0
Total Filings Delinquent	36				
Network Access Solutions Corp.					
	10-Q	06/30/02	08/14/02	Not filed	81
	10-Q	09/30/02	11/14/02	Not filed	78
	10-K	12/31/02	03/31/03	Not filed	74
	10-Q	03/31/03	05/15/03	Not filed	72
	10-Q	06/30/03	08/14/03	Not filed	69
	10-Q	09/30/03	11/14/03	Not filed	66
	10-K	12/31/03	03/30/04	Not filed	62
	10-Q	03/31/04	05/17/04	Not filed	60
	10-Q	06/30/04	08/16/04	Not filed	57
	10-Q	09/30/04	11/15/04	Not filed	54
	10-K	12/31/04	03/31/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/31/06	04/02/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-K	12/31/07	03/31/08	Not filed	14
	10-Q	03/31/08	05/15/08	Not filed	12
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-K	12/31/08	03/31/09	Not filed	2
	10-Q	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	28				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Network Plus Corp.					
	10-K	12/31/01	04/01/02	Not filed	85
	10-Q	03/31/02	05/15/02	Not filed	84
	10-Q	06/30/02	08/14/02	Not filed	81
	10-Q	09/30/02	11/14/02	Not filed	78
	10-K	12/31/02	03/31/03	Not filed	74
	10-Q	03/31/03	05/15/03	Not filed	72
	10-Q	06/30/03	08/14/03	Not filed	69
	10-Q	09/30/03	11/14/03	Not filed	66
	10-K	12/31/03	03/30/04	Not filed	62
	10-Q	03/31/04	05/17/04	Not filed	60
	10-Q	06/30/04	08/16/04	Not filed	57
	10-Q	09/30/04	11/15/04	Not filed	54
	10-K	12/31/04	03/31/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/31/06	04/02/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-K	12/31/07	03/31/08	Not filed	14
	10-Q	03/31/08	05/15/08	Not filed	12
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-K	12/31/08	03/31/09	Not filed	2
	10-Q	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	**30**				
New York Regional Rail Corp.					
	10-KSB	12/31/05	03/31/06	Not filed	38
	10-QSB	03/31/06	05/15/06	Not filed	36
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-QSB	09/30/06	11/14/06	Not filed	30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
New York Regional Rail Corp.	*10-KSB*	12/31/06	04/02/07	Not filed	25
(continued)	*10-QSB*	03/31/07	05/15/07	Not filed	24
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-QSB	09/30/07	11/14/07	Not filed	18
	10-KSB	12/31/07	03/31/08	Not filed	14
	*10-Q**	03/31/08	05/15/08	Not filed	12
	*10-Q**	06/30/08	08/14/08	Not filed	9
	*10-Q**	09/30/08	11/14/08	Not filed	6
	*10-K**	12/31/08	03/31/09	Not filed	2
	*10-Q**	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	**14**				
NexGen Vision, Inc.					
	10-KSB	09/30/03	12/29/03	Not filed	65
	10-QSB	12/31/03	02/17/04	Not filed	63
	10-QSB	03/31/04	05/17/04	Not filed	60
	10-QSB	06/30/04	08/16/04	Not filed	57
	10-KSB	09/30/04	12/29/04	Not filed	53
	10-QSB	12/31/04	02/14/05	Not filed	51
	10-QSB	03/31/05	05/16/05	Not filed	48
	10-QSB	06/30/05	08/15/05	Not filed	45
	10-KSB	09/30/05	12/29/05	Not filed	41
	10-QSB	12/31/05	02/14/06	Not filed	39
	10-QSB	03/31/06	05/15/06	Not filed	36
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-KSB	09/30/06	12/29/06	Not filed	29
	10-QSB	12/31/06	02/14/07	Not filed	27
	10-QSB	03/31/07	05/15/07	Not filed	24
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-KSB	09/30/07	12/31/07	Not filed	17
	10-QSB	12/31/07	02/14/08	Not filed	15
	10-QSB	03/31/08	05/15/08	Not filed	12
	10-QSB	06/30/08	08/14/08	Not filed	9
	10-KSB	09/30/08	12/29/08	Not filed	5
	*10-Q**	12/31/08	02/17/09	Not filed	3
	*10-Q**	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	**23**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Noel Group, Inc.					
	10-Q	09/30/99	11/15/99	Not filed	114
	10-K	12/31/99	03/30/00	Not filed	110
	10-Q	03/31/00	05/15/00	Not filed	108
	10-Q	06/30/00	08/14/00	Not filed	105
	10-Q	09/30/00	11/14/00	Not filed	102
	10-K	12/31/00	04/02/01	Not filed	97
	10-Q	03/31/01	05/15/01	Not filed	96
	10-Q	06/30/01	08/14/01	Not filed	93
	10-Q	09/30/01	11/14/01	Not filed	90
	10-K	12/31/01	04/01/02	Not filed	85
	10-Q	03/31/02	05/15/02	Not filed	84
	10-Q	06/30/02	08/14/02	Not filed	81
	10-Q	09/30/02	11/14/02	Not filed	78
	10-K	12/31/02	03/31/03	Not filed	74
	10-Q	03/31/03	05/15/03	Not filed	72
	10-Q	06/30/03	08/14/03	Not filed	69
	10-Q	09/30/03	11/14/03	Not filed	66
	10-K	12/31/03	03/30/04	Not filed	62
	10-Q	03/31/04	05/17/04	Not filed	60
	10-Q	06/30/04	08/16/04	Not filed	57
	10-Q	09/30/04	11/15/04	Not filed	54
	10-K	12/31/04	03/31/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/31/06	04/02/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-K	12/31/07	03/31/08	Not filed	14
	10-Q	03/31/08	05/15/08	Not filed	12

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Noel Group, Inc.	*10-Q*	06/30/08	08/14/08	Not filed	9
(continued)	*10-Q*	09/30/08	11/14/08	Not filed	6
	10-K	12/31/08	03/31/09	Not filed	2
	10-Q	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	**39**				

* 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
May 21, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13476

In the Matter of **Nanosignal Corp., Inc.** **(n/k/a Nano Global, Inc.),** **NetVoice Technologies Corp.,** **The New Anaconda Co.,** **NewCom International, Inc.** **(n/k/a Sino Express Travel Ltd.), and** **NewKidCo International, Inc.** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Nanosignal Corp., Inc. (n/k/a Nano Global, Inc.), NetVoice Technologies Corp., The New Anaconda Co., NewCom International, Inc. (n/k/a Sino Express Travel Ltd.), and NewKidCo International, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Nanosignal Corp., Inc. (n/k/a Nano Global, Inc.) (CIK No. 1116677) is a defaulted Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Nanosignal is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004, which reported a net loss of over $29 million since its August 21, 1987 inception. As of May 18, 2009, the company's stock (symbol "NNGB") was quoted on the Pink Sheets, had

2. NetVoice Technologies Corp. (CIK No. 1103062) is a permanently revoked Nevada corporation located in Irving, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NetVoice is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2001, which reported a net loss of over $15.5 million for the prior six months. As of May 18, 2009, the company's stock (symbol "NTVTQ") 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. The New Anaconda Co. (CIK No. 1106250) is an expired Utah corporation located in Salt Lake City, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). New Anaconda is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2000, which reported a net loss of over $41 million since its January 1, 1993 inception. As of May 18, 2009, the company's stock (symbol "NANA") 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).

4. NewCom International, Inc. (n/k/a Sino Express Travel Ltd.) (CIK No. 1058553) is a Nevada corporation located in Newport Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NewCom is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2003, which reported a net loss of over $1.8 million from the company's September 12, 1996 inception. As of May 18, 2009, the company's stock (symbol "SXPT") 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. NewKidCo International, Inc. (CIK No. 1005690) is a New Brunswick, Canada corporation located in Saint Johns, New Brunswick, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NewKidCo is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2001, which reported a net loss of over $11 million for the prior twelve months. As of May 18, 2009, the company's stock (symbol "NKCIF") 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

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

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

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

III.

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

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

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

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the

Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings

In the Matter of Nanosignal Corp., Inc. (n/k/a Nano Global, Inc.), et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Nanosignal Corp., Inc. (n/k/a Nano Global, Inc.)					
	10-K	12/31/04	03/31/05	Not filed	50
	10-Q	03/31/05	05/16/05	Not filed	48
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-K	12/31/05	03/31/06	Not filed	38
	10-Q	03/31/06	05/15/06	Not filed	36
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-K	12/31/06	04/02/07	Not filed	25
	10-Q	03/31/07	05/15/07	Not filed	24
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-K	12/31/07	03/31/08	Not filed	14
	10-Q	03/31/08	05/15/08	Not filed	12
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-K	12/31/08	03/31/09	Not filed	2
	10-Q	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	**18**				
NetVoice Technologies Corp.					
	10-QSB	09/30/01	11/14/01	Not filed	90
	10-KSB	12/31/01	04/01/02	Not filed	85
	10-QSB	03/31/02	05/15/02	Not filed	84
	10-QSB	06/30/02	08/14/02	Not filed	81
	10-QSB	09/30/02	11/14/02	Not filed	78
	10-KSB	12/31/02	03/31/03	Not filed	74
	10-QSB	03/31/03	05/15/03	Not filed	72
	10-QSB	06/30/03	08/14/03	Not filed	69
	10-QSB	09/30/03	11/14/03	Not filed	66
	10-KSB	12/31/03	03/30/04	Not filed	62
	10-QSB	03/31/04	05/17/04	Not filed	60
NetVoice Technologies Corp.	*10-QSB*	06/30/04	08/16/04	Not filed	57

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
(continued)	*10-QSB*	09/30/04	11/15/04	Not filed	54
	10-KSB	12/31/04	03/31/05	Not filed	50
	10-QSB	03/31/05	05/16/05	Not filed	48
	10-QSB	06/30/05	08/15/05	Not filed	45
	10-QSB	09/30/05	11/14/05	Not filed	42
	10-KSB	12/31/05	03/31/06	Not filed	38
	10-QSB	03/31/06	05/15/06	Not filed	36
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-QSB	09/30/06	11/14/06	Not filed	30
	10-KSB	12/31/06	04/02/07	Not filed	25
	10-QSB	03/31/07	05/15/07	Not filed	24
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-QSB	09/30/07	11/14/07	Not filed	18
	10-KSB	12/31/07	03/31/08	Not filed	14
	*10-Q**	03/31/08	05/15/08	Not filed	12
	*10-Q**	06/30/08	08/14/08	Not filed	9
	*10-Q**	09/30/08	11/14/08	Not filed	6
	*10-K**	12/31/08	03/31/09	Not filed	2
	*10-Q**	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	**31**				
The New Anaconda Co.					
	10-K	03/31/05	06/29/05	Not filed	47
	10-Q	06/30/05	08/15/05	Not filed	45
	10-Q	09/30/05	11/14/05	Not filed	42
	10-Q	12/31/05	02/14/06	Not filed	39
	10-K	03/31/06	06/29/06	Not filed	35
	10-Q	06/30/06	08/14/06	Not filed	33
	10-Q	09/30/06	11/14/06	Not filed	30
	10-Q	12/31/06	02/14/07	Not filed	27
	10-K	03/31/07	06/29/07	Not filed	23
	10-Q	06/30/07	08/14/07	Not filed	21
	10-Q	09/30/07	11/14/07	Not filed	18
	10-Q	12/31/07	02/14/08	Not filed	15

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
The New Anaconda Co. *(continued)*	*10-K*	03/31/08	06/30/08	Not filed	11
	10-Q	06/30/08	08/14/08	Not filed	9
	10-Q	09/30/08	11/14/08	Not filed	6
	10-Q	12/31/08	02/17/09	Not filed	3
Total Filings Delinquent	16				
NewCom International, Inc. (n/k/a (n/k/a Sino Express Travel Ltd.)					
	10-KSB	12/31/03	03/30/04	Not filed	62
	10-QSB	03/31/04	05/17/04	Not filed	60
	10-QSB	06/30/04	08/16/04	Not filed	57
	10-QSB	09/30/04	11/15/04	Not filed	54
	10-KSB	12/31/04	03/31/05	Not filed	50
	10-QSB	03/31/05	05/16/05	Not filed	48
	10-QSB	06/30/05	08/15/05	Not filed	45
	10-QSB	09/30/05	11/14/05	Not filed	42
	10-KSB	12/31/05	03/31/06	Not filed	38
	10-QSB	03/31/06	05/15/06	Not filed	36
	10-QSB	06/30/06	08/14/06	Not filed	33
	10-QSB	09/30/06	11/14/06	Not filed	30
	10-KSB	12/31/06	04/02/07	Not filed	25
	10-QSB	03/31/07	05/15/07	Not filed	24
	10-QSB	06/30/07	08/14/07	Not filed	21
	10-QSB	09/30/07	11/14/07	Not filed	18
	10-KSB	12/31/07	03/31/08	Not filed	14
	*10-Q**	03/31/08	05/15/08	Not filed	12
	*10-Q**	06/30/08	08/14/08	Not filed	9
	*10-Q**	09/30/08	11/14/08	Not filed	6
	*10-K**	12/31/08	03/31/09	Not filed	2
	*10-Q**	03/31/09	05/15/09	Not filed	0
Total Filings Delinquent	21				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
NewKidCo International, Inc.					
	20-F	12/31/02	06/30/03	Not filed	71
	20-F	12/31/03	06/30/04	Not filed	59
	20-F	12/31/04	06/30/05	Not filed	47
	20-F	12/31/05	06/30/06	Not filed	35
	20-F	12/31/06	07/02/07	Not filed	22
	20-F	12/31/07	06/30/08	Not filed	11
Total Filings Delinquent	**6**				

* 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

May 21, 2009

IN THE MATTER OF	ORDER OF SUSPENSION OF TRADING
Nanosignal Corp., Inc. (n/k/a Nano Global, Inc.), National Micronetics, Inc., NetVoice Technologies Corp., Network Access Solutions Corp., Network Plus Corp., The New Anaconda Co., New York Regional Rail Corp., NewCom International, Inc. (n/k/a Sino Express Travel Ltd.), NewKidCo International, Inc., NexGen Vision, Inc., and Noel Group, Inc.,	
File No. 500-1	

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

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

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

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Network Plus Corp. 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 The New Anaconda Co. because it has not filed any periodic reports since the period ended December 31, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of New York Regional Rail Corp. because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of NewCom International, Inc. (n/k/a Sino Express Travel Ltd.) because it has not filed any periodic reports since the period ended September 30, 2003.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of NewKidCo International,

Inc. because it has not filed any periodic reports since the period ended December 31, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of NexGen Vision, Inc. because it has not filed any periodic reports since the period ended June 30, 2003.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Noel Group, Inc. because it has not filed any periodic reports since the period ended June 30, 1999.

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 May 21, 2009, through 11:59 p.m. EDT on June 4, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59960 / May 21, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13480

In the Matter of **MATTHEW J. BROWNE, Attorney,** **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 Matthew J. Browne ("Respondent" or "Browne") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . attorney . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

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., paragraph 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. Browne, age 56, is a banking and oil and gas attorney admitted to the Oklahoma State Bar. Browne was employed by a law firm in Tulsa, Oklahoma (the "law firm") from 2000 until his termination on October 31, 2008.

2. SemGroup Energy Partners ("SGLP") is a Tulsa-based limited partnership that owns and operates a portfolio of energy assets and provides midstream oil services, such as transportation and storage. SGLP is a reporting company under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"). Its common units representing limited partnership interests trade on the NASDAQ National Market.

3. On April 28, 2009, the Commission filed a complaint against Browne in *SEC v. Browne* (Civil Action No. 4:09-cv-00248), in the United States District Court for the Northern District of Oklahoma. On May 6, 2009, the court entered an order permanently enjoining Browne, by consent, from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Browne was also ordered to pay $81,773 in disgorgement of ill-gotten gains from insider trading and $1,505.98 in prejudgment interest, and a civil money penalty in the amount of $81,773.

4. The Commission's Complaint alleged that, among other things, on July 14, 2008, Browne, an attorney at the law firm, learned through his representation of a longstanding law firm client who was a large, SemGroup, LP lender ("the bank"), that SGLP's privately-held parent company and largest customer, SemGroup, LP, was experiencing liquidity issues. Specifically, the Complaint alleges Browne learned that: (1) the bank had made a $50 million margin call on SemGroup, LP in connection with certain derivatives trading transactions; (2) SemGroup, LP failed to satisfy the margin demand; (3) the bank was seeking to setoff amounts owed by SemGroup, LP against other SemGroup, LP accounts maintained at the bank; and (4) the bank was looking to exercise its right to terminate its International Swaps and Derivatives Association Master Agreement with SemGroup, LP, which would result in closing out all open swap and derivatives transactions between the parties, thereby making $110 million owed to the bank by SemGroup, LP immediately due and payable. The Complaint alleges that shortly after learning this information, Browne directed the sale of his entire SGLP position. On July 17, 2008, SGLP announced that SemGroup, LP was "experiencing liquidity issues" and was considering

bankruptcy. On July 18, SGLP's unit price closed at $8.30 per share, 65.5% lower than Browne's July 14 average sale price. According to the Complaint, by liquidating his SGLP holdings before the negative news announcement, Browne avoided losses of $81,773.

IV.

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

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

A. Browne is suspended from appearing or practicing before the Commission as an attorney.

B. After 5 years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the General Counsel) to resume appearing or practicing before the Commission as an attorney.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state law license is current and he has resolved all other disciplinary issues with the applicable state boards. 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59959 / May 21, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2973 / May 21, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13479

In the Matter of TMT Capital Corporation, Respondent.	ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against TMT Capital Corporation ("TMT" 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. TMT is a Florida corporation based in Winter Park, Florida. TMT is a holding company with two subsidiaries, Freedom Wireless Corporation ("Freedom") and Bootie Beer Company "Bootie Beer." Bootie Beer marketed beer produced under contract by City Brewing Company in La Crosse, Wisconsin, and has filed for Chaper 7 bankruptcy. Freedom is a wireless reseller of cellular service and branded cellular phones. TMT stock is registered under Section 12(g) of the Exchange Act. TMT stock is quoted on the Pink Sheets operated by Pink OTC Markets Inc.

2. TMT failed to comply with Items 307 and 308T of Regulation S-B in its Form 10-KSB/A reports for the fiscal year ended December 31, 2007, which were filed with the Commission on June 18, 2008 and November 13, 2008, respectively, as a result of which the Respondent violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-15 thereunder.

3. TMT failed to comply with Item 601(b)(31) of Regulation S-B in its Form 10-KSB/A reports for the fiscal year ended December 31, 2007, which were filed with the Commission on June 18, 2008 and November 13, 2008, respectively, as a result of which the Respondent violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-14 thereunder.

IV.

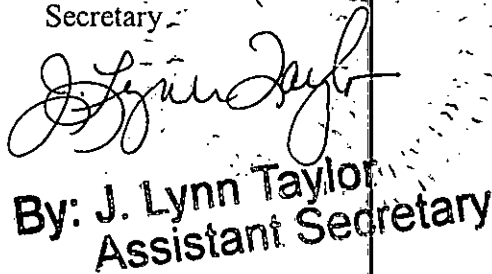
In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent TMT's Offer.

Accordingly, it is hereby ORDERED that:

Pursuant to Section 21C of the Exchange Act, Respondent TMT 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, 13a-14, and 13a-15 thereunder.

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. 59958 / May 21, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2878 / May 21, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13478

In the Matter of DARYL L. BATTS, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Daryl L. Batts ("Respondent" or "Batts").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From at least October 2000 through June 27, 2008, Batts was a registered representative associated with three registered broker dealers. Batts was associated with: W.C. Smith & Co., Inc. from October 2000 through December 2003; Aura Financial Services, Inc. from January 2004 until April 2004; and MML Investors Services, Inc. from April 2004 until June 27, 2008. During the period Batts was associated with MML Investors Services, it also was a registered investment adviser. On June 27, 2008, MML Investors Services terminated Batts' employment. Batts, 46 years old, currently is incarcerated in federal prison.

2. On July 16, 2008, Batts pleaded guilty to one count of securities fraud in violation of Title 15, United States Code, Section 78b(j), and one count of mail fraud in violation of Title 18, United States Code, Section 1341 before the United States District Court for the District of South Carolina, in United States of America v. Daryl Batts, Case No. 8:08-00716 (D. SC). On December 10, 2008, the United States District Court for the District of South Carolina entered a judgment of conviction against Batts and sentenced him to serve 10 years in federal prison, followed by five years of supervised release, and to pay full restitution in an amount to be determined and a $200 special assessment. The Court also appointed a receiver over all of Batts' assets.

3. The criminal information to which Batts pleaded guilty alleged, inter alia, that from November 2002 to July 2008, Batts defrauded numerous of his brokerage customers of at least $5 million by making various misrepresentations regarding securities he purportedly purchased on their behalf. In fact, he misappropriated his customers' money and concealed his wrongdoing by preparing false monthly statements for each customer that set forth the securities the customer purportedly owned, and indicated that the customer was earning substantial returns.

IV.

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

Accordingly, it is hereby ORDERED:

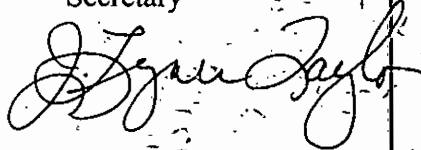
Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent be, and hereby is barred from association with any broker, dealer, or investment adviser.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of

factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

Chairman Schapiro and Commissioner Walter not participating

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59955; File No. SR-FINRA-2009-012)

May 22, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, to Implement an Interim Pilot Program with Respect to Margin Requirements for Certain Transactions in Credit Default Swaps

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on March 11, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items substantially have been prepared by FINRA. On May 19, 2009, FINRA submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is simultaneously approving the proposed rule change as amended on an accelerated basis to establish an interim pilot program.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt FINRA Rule 4240 (Margin Requirements for Credit Default Swaps). The proposed rule would implement an interim pilot program (the "Interim Pilot Program") with respect to margin requirements for transactions in credit default swaps ("CDS") executed by a member (regardless of the type of account in which the transaction is booked), including those in which the offsetting matching hedging

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

transactions ("matching transactions") are effected by the member in CDS contracts that are cleared through the central counterparty clearing services of the Chicago Mercantile Exchange (the "CME"). The proposed rule would expire on September 25, 2009.

The text of the proposed rule change is available on FINRA's Web site at http://www.finra.org, at the principal office of FINRA and at the Commission's Public Reference Room. In addition, the text of the proposed rule change is set forth below. New language is underlined.

* * * * *

4000. FINANCIAL AND OPERATIONAL RULES

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4200. MARGIN

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4240. Margin Requirements for Credit Default Swaps

(a) Effective Period of Interim Pilot Program

This Rule establishes an interim pilot program ("Interim Pilot Program") with respect to margin requirements for any transactions in credit default swaps executed by a member (regardless of the type of account in which the transaction is booked), including those in which the offsetting matching hedging transactions ("matching transactions") are effected by the member in contracts that are cleared through the central counterparty clearing services of the Chicago Mercantile Exchange ("CME"). The Interim Pilot Program shall automatically expire on September 25, 2009. For purposes of this Rule, the term "credit default swap" ("CDS") shall mean any "eligible credit default swap" as defined in Securities Act Rule 239T(d), as well as any other CDS that would otherwise

meet such definition but for being subject to individual negotiation, and the term "transaction" shall include any ongoing CDS position.

(b) Central Counterparty Clearing Arrangements

Any member, prior to establishing any clearing arrangement with respect to CDS transactions that makes use of any central counterparty clearing services provided by any clearing agency, pursuant to Securities Act Rule 239T(a)(1), must notify FINRA in advance in writing, in such manner as may be specified by FINRA in a Regulatory Notice.

(c) Margin Requirements

(1) CDS Cleared on the Chicago Mercantile Exchange

Members shall require as a minimum for computing customer or broker-dealer margin, with respect to any customer or broker-dealer transaction in CDS with a member in which the member executes a matching transaction that makes use of the central counterparty clearing facilities of the CME ("CME matching customer-side transaction"), the applicable margin pursuant to CME rules (sometimes referred to in such rules as a "performance bond") regardless of the type of account in which the transaction in CDS is booked. Members shall, based on the risk monitoring procedures and guidelines set forth in paragraph (d) of this Rule, determine whether the applicable CME requirements are adequate with respect to their customer and broker-dealer accounts and the positions in those accounts and, where appropriate, increase such margin in excess of such minimum margin. For this purpose, members are permitted to use the margin requirements set forth in Supplementary Material .01 of this Rule.

The aggregate amount of margin the member collects from customers and broker-dealers for transactions in CDS must equal or exceed the aggregate amount of margin the member is required to post at CME with respect to those customer and broker-dealer transactions.

CME matching customer-side transactions are not subject to the provisions of paragraph (c)(2) of this Rule.

(2) CDS That Are Cleared on Central Counterparty Clearing Facilities Other Than the CME or That Settle Over-the-Counter ("OTC")

Members shall require, with respect to any transaction in CDS that makes use of central counterparty clearing facilities other than the CME or that settle OTC, the applicable minimum margin as set forth in Supplementary Material .01 of this Rule regardless of the type of account in which the transaction in CDS is booked. However, members shall, based on the risk monitoring procedures and guidelines set forth in paragraph (d) of this Rule, determine whether such margin is adequate with respect to their customer and broker-dealer accounts and, where appropriate, increase such requirements.

(d) Risk Monitoring Procedures and Guidelines

Members shall monitor the risk of any customer or broker-dealer accounts with exposure to CDS and shall maintain a comprehensive written risk analysis methodology for assessing the potential risk to the member's capital over a specified range of possible market movements over a specified time period. For purposes of this Rule, members must employ the risk monitoring procedures and guidelines set forth in paragraphs (d)(1) through (8) of this Rule. The member must review, in accordance with the member's

written procedures, at reasonable periodic intervals, the member's credit extension activities for consistency with the risk monitoring procedures and guidelines set forth in this Rule, and must determine whether the data necessary to apply the risk monitoring procedures and guidelines is accessible on a timely basis and information systems are available to adequately capture, monitor, analyze and report relevant data, including:

(1) obtaining and reviewing the required account documentation and financial information necessary for assessing the amount of credit to be extended to customers and broker-dealers;

(2) assessing the determination, review and approval of credit limits to each customer and broker-dealer, and across all customers and broker-dealers, engaging in CDS transactions;

(3) monitoring credit risk exposure to the member from CDS, including the type, scope and frequency of reporting to senior management;

(4) the use of stress testing of accounts containing CDS contracts in order to monitor market risk exposure from individual accounts and in the aggregate;

(5) managing the impact of credit extended related to CDS contracts on the member's overall risk exposure;

(6) determining the need to collect additional margin from a particular customer or broker-dealer, including whether that determination was based upon the creditworthiness of the customer or broker-dealer and/or the risk of the specific contracts;

(7) monitoring the credit exposure resulting from concentrated positions within both individual accounts and across all accounts containing CDS contracts; and

(8) maintaining sufficient margin in each customer and broker-dealer account to protect against the default of the largest individual exposure in the account as measured by computing the largest maximum possible loss.

(e) Concentrations

Where the maximum current and potential exposure with respect to the largest single name CDS across all accounts exceeds the member's tentative net capital, the member must take a capital charge equal to the aggregate margin requirement for such accounts on the positions in such single name CDS in accordance with the tables set forth in Supplementary Material .01 of this Rule. This capital charge may be reduced by the amount of excess margin held in all customer and broker-dealer accounts.

• • • Supplementary Material: ------------------

.01 Margin Requirements for CDS. The following customer and broker-dealer margin requirements shall apply, as appropriate, pursuant to paragraph (c) of this Rule.

(a) Customer and Broker-Dealer Accounts That Are Short a CDS

The following table shall be used to determine the margin that a member must collect from a customer or broker-dealer that is short a single name debt security CDS contract (sold protection). The margin is to be collected based upon the basis point spread over LIBOR of the CDS contract as well as the maturity of that contract as a percentage of the notional amount, shall be as follows:

Basis Point Spread	Length of Time to Maturity of CDS Contract 1 year	3 years	5 years	7 years & longer
0-100	1%	2%	4%	7%
100-300	2%	5%	7%	10%
300-500	5%	10%	15%	20%
500-700	10%	15%	20%	25%
700 and above	15%	20%	25%	30%

For those CDS contracts where the underlying obligation is a debt index, rather than a single name bond, the margin requirement as a percentage of the notional amount shall be as follows:

Index	Length of Time to Maturity of CDS Contract 1 year	3 years	5 years	7 years	10 years
CDX.IG	1%	1%	2%	4%	5%
CDX.HY	3%	5%	10%	12%	15%
CDX.HVOL	2%	3%	4%	5%	7%

(b) Accounts That Are Long a CDS

For customer or broker-dealer accounts that are long the CDS contracts (purchased protection), the margin to be collected shall be 50% of the above amounts.

(c) Accounts That Maintain Both Long and Short CDS

In instances where the customer or broker-dealer maintains both long and short CDS, the member may elect to collect 50% of the above margin requirements on the greater of the long or short position within the same Bloomberg CDS sector, provided those long and short positions are in the same spread and maturity bucket.

If a customer or broker-dealer is long the bond and long a CDS contract on the same underlying obligor, margin needs to be collected only on the long bond position, provided that bond can be delivered against the long CDS contract, as prescribed pursuant to applicable FINRA margin rules.

In instances where the customer or broker-dealer is short the bond and short the CDS on the same underlying obligor, margin need only be collected on the short bond, as prescribed pursuant to applicable FINRA margin rules.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is proposing to adopt FINRA Rule 4240 (Margin Requirements for Credit Default Swaps). The proposed rule would implement an Interim Pilot Program with respect to margin requirements for transactions in CDS executed by a member (regardless of the type of account in which the transaction is booked), including those in which matching transactions are effected by the member in CDS contracts that are cleared

through the central counterparty clearing services of the CME. The proposed rule would expire on September 25, 2009.

(A) Background

On March 13, 2009, the Commission issued an Order granting temporary exemptions under the Exchange Act in response to a request by CME and Citadel Investment Group, LLC with respect to their proposal for CME to provide clearance and settlement services as a central counterparty for certain transactions in CDS.[3] The Commission issued similar Orders to LCH.Clearnet Ltd[4] and ICE U.S. Trust LLC.[5] The Commission also recently enacted interim final temporary rules providing enumerated exemptions under the federal securities laws for certain CDS to facilitate the operation of one or more central clearing counterparties in such CDS.[6] Finally, the Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Exchange Act

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3 See Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009).

4 See Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009).

5 See Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009).

6 See Securities Act Release No. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (Temporary Exemptions for Eligible Credit Default Swaps To Facilitate Operation of Central Counterparties To Clear and Settle Credit Default Swaps). Generally, as noted by the Commission, a CDS is a bilateral contract between two parties, known as counterparties. The value of this contract is based on underlying obligations of a single entity or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities.

for transactions in non-excluded CDS[7] (these Commission actions are hereinafter referred to collectively as the "Commission's CDS Relief"). The Commission noted that these measures were intended to address concerns arising from systemic risk posed by CDS, including, among others, risks to the financial system arising from the lack of a central clearing counterparty to clear and settle CDS.[8]

Historically, in the absence of a central clearing counterparty, CDS transactions entered into by U.S. investment banks have not been booked in the member, but rather in the affiliated entities. In light of the rapid growth of the CDS market, and the potential inability of parties to meet their obligations as counterparties, the lack of a central clearing counterparty poses risks not only to the two parties to a CDS transaction, but also to the financial system overall because of the resulting chain of significant economic loss when one or more parties default on their obligations under a CDS transaction.

As discussed above, the Commission has issued exemptive Orders to allow three entities to act as CDS central clearing counterparties. Of these, the CME has requested that FINRA adopt customer margin rules for CDS and suggested a specific customer margin methodology that could be employed.[9] FINRA performed an analysis of the margin methodology suggested by CME, as well as the alternative methodology for CDS[10] prior to proposing Rule 4240. FINRA believes it is appropriate to adopt the

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7 See Securities Exchange Act Release No. 59165 (Dec. 24, 2008), 74 FR 133 (Jan. 2, 2009).

8 See supra, notes 3, 4, 5, 6, and 7.

9 The methodology CME proposed was amended based on FINRA's analysis. FINRA's proposed rule sets forth additional requirements. See Proposed FINRA Rule 4240(c)(1).

10 See Proposed FINRA Rule 4240(c)(2).

proposed customer margin rule for CDS transactions during a limited pilot period for the reasons described below; however, FINRA represents that it will consider proposals it receives from other CDS central clearing counterparties to amend its customer margin rules for CDS and, if appropriate, will propose changes to its customer margin rules for CDS.[11]

Accordingly, FINRA proposes to adopt Proposed FINRA Rule 4240, which would impose margin rules for certain CDS transactions. The Interim Pilot Program is intended to be coterminous with the Commission's CDS Relief and would expire on September 25, 2009.

FINRA requests comment on the proposed rule during the period of the Interim Pilot Program. Among other matters that commenters may wish to address, FINRA is particularly interested in the following questions:

1. Since historically CDS transactions have not been undertaken in broker-dealers and therefore have not exposed broker-dealers to the risks of such transactions, is the advent of broker-dealer participation in these transactions, which entails greater individual risks to broker-dealers but which fosters less systemic risk because of the existence of a central clearing party for the matching transaction, a correct balancing of risks as a matter of public policy?
2. Do commenters believe that different or amended margin provisions would be superior to those set forth in the proposed rule?

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[11] Based on communications on or about April 22, 2009 between Bonnie Gauch of the Commission's Division of Trading and Markets and Grace Vogel of FINRA.

(B) Proposal

(1) Scope of the Proposed Rule

Proposed FINRA Rule 4240(a) provides that the Interim Pilot Program would apply to margin requirements for any transactions in CDS executed by a member (regardless of the type of account in which the transaction is booked), including those in which the matching transactions are effected by the member in contracts that are cleared through the central clearing counterparty clearing services of the CME. FINRA notes that matching transactions that are cleared through the CME as the central clearing counterparty would be subject to margin requirements pursuant to CME rules (sometimes referred to in such rules as "performance bond"). Accordingly, with respect to these matching transactions, the proposed rule is intended to apply to the side of the CDS transaction – executed between a member and a customer or other broker-dealer[12] – that is not cleared through the CME.[13]

Proposed FINRA Rule 4240(a) would define the term "CDS" for purposes of the rule. Specifically, CDS would include any "eligible credit default swap" as defined in Securities Act Rule 239T(d),[14] as well as any other CDS that would otherwise meet such

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12 NASD Rule 0120(g) states that the term "customer" shall not include a broker or dealer. For purposes of the proposed rule, the terms "customer or broker-dealer" and "customer and broker-dealer" are intended to include any party with which a member executes a CDS transaction.

13 Under Proposed FINRA Rule 4240(c)(1), such transactions are defined as "CME matching customer-side transactions." See Section (B)(3) under this Item. Under Proposed FINRA Rule 4240(c)(1), the term "CME matching customer-side transaction" would include any party, including a broker-dealer.

14 17 CFR 230.239T(d).

definition but for being subject to individual negotiation.[15] In addition, the proposed rule provides that, for purposes of the rule, the term "transaction" includes any ongoing CDS position.

Proposed FINRA Rule 4240(a) provides that the Interim Pilot Program would automatically expire on September 25, 2009.

(2) Central Counterparty Clearing Arrangements

Proposed FINRA Rule 4240(b) would provide that any member, prior to establishing any clearing arrangement with respect to CDS transactions that makes use of any central counterparty clearing services provided by any clearing agency, pursuant to Securities Act Rule 239T(a)(1),[16] must notify FINRA in advance in writing, in such manner as may be specified by FINRA in a Regulatory Notice.

(3) Margin Requirements: CDS Cleared on the CME

Proposed FINRA Rule 4240(c)(1) provides that a member, as a minimum for computing customer or broker-dealer margin, with respect to any customer or broker-dealer transaction in CDS with a member in which the member executes a CME matching customer-side transaction, must require the applicable margin pursuant to CME rules regardless of the type of account in which the transaction in CDS is booked. The proposed rule would require that members must, based on the risk monitoring procedures and guidelines set forth in paragraph (d) of the proposed rule,[17] determine whether the

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15 FINRA notes that Rule 239T(d) excludes contracts that are "subject to individual negotiation." The proposed FINRA rule would reach CDS contracts subject to the other criteria set forth in Rule 239T(d), without regard to whether they are individually negotiated.

16 17 CFR 230.239T(a)(1).

17 See Proposed FINRA Rule 4240(d).

applicable CME requirements are adequate with respect to their customer and broker-dealer accounts and the positions in those accounts and, where appropriate, increase such margin in excess of the minimum margin. For this purpose, the proposed rule would permit members to use the margin requirements set forth in the proposed rule's Supplementary Material.[18]

It is FINRA's understanding that, after calculating margin on an account-specific basis, CME performs stress tests to assess concentration risk across a member's customer and house portfolios.[19] Further, CME may require that a member post additional margin based on the results of those concentration risk stress tests. Accordingly, Proposed FINRA Rule 4240(c)(1) would require that the aggregate amount of margin the member collects from customers and broker-dealers for transactions in CDS must equal or exceed the aggregate amount of margin the member is required to post at CME with respect to those customer and broker-dealer transactions.

CME matching customer-side transactions, being subject to the margin guidelines set forth in Proposed FINRA Rule 4240(c)(1), are not subject to the margin guidelines as set forth in paragraph (c)(2) of the proposed rule. However, members are encouraged to apply higher margin requirements where appropriate.

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18 See Proposed FINRA Rule 4240.01.

19 See Letter from Adam Cooper, Senior Managing Director and General Counsel, Citadel Investment Group, L.L.C., and Ann K. Shulman, Managing Director and Deputy General Counsel, Chicago Merchantile Exchange Inc., to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated March 12, 2009 (available at http://www.sec.gov/rules/exorders/2009/cme-citadel-exreq.pdf). Letter from Lisa A. Dunsky, Director & Associate General Counsel, CME Group, to David Stawick, Secretary, Commodity Futures Trading Commission, dated December 19, 2008, (available at: http://www.cftc.gov).

(4) Margin Requirements: CDS That Are Cleared on Central Counterparty Clearing Facilities Other Than the CME or That Settle Over-the-Counter ("OTC")

Proposed FINRA Rule 4240(c)(2) would provide that a member, with respect to any transaction in CDS that makes use of central counterparty clearing facilities other than the CME or that settle OTC, must require the applicable minimum margin as set forth in the proposed rule's Supplementary Material regardless of the type of account in which the transaction in CDS is booked.[20] However, the proposed rule provides that a member must, based on the risk monitoring procedures and guidelines set forth in paragraph (d) of the proposed rule, determine whether such margin is adequate with respect to their customer and broker-dealer accounts and, where appropriate, increase the requirements.

(5) Risk Monitoring Procedures and Guidelines

Proposed FINRA Rule 4240(d) provides that members must monitor the risk of any customer or broker-dealer accounts with exposure to CDS and must maintain a comprehensive written risk analysis methodology for assessing the potential risk to the member's capital over a specified range of possible market movements over a specified time period. The proposed rule would require that members must employ the risk monitoring procedures and guidelines set forth in Proposed FINRA Rule 4240(d)(1) through (8).[21] Further, the rule would require the member to review, in accordance with the member's written procedures, at reasonable periodic intervals, the member's credit extension activities for consistency with the risk monitoring procedures and guidelines set

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20 See Proposed FINRA Rule 4240.01.

21 See Proposed FINRA Rule 4240(d)(1) through (8).

forth in the rule, and to determine whether the data necessary to apply the risk monitoring procedures and guidelines is accessible on a timely basis and information systems are available to adequately capture, monitor, analyze and report relevant data (i.e., the data relevant for purposes of the risk monitoring procedures and guidelines set forth in Proposed FINRA Rule 4240(d)(1) through (8)).

(6) Concentrations

Proposed FINRA Rule 4240(e) would require that, where the maximum current and potential exposure with respect to the largest single name CDS across all accounts exceeds the member's tentative net capital, the member must take a capital charge equal to the aggregate margin requirement for such accounts on the positions in such single name CDS in accordance with the tables set forth in the proposed rule's Supplementary Material.[22] This additional requirement for concentrated positions reflects FINRA's concern for the possibility of a sudden default in the largest single name CDS across all accounts in respect of which a member has current or potential exposure. However, the proposed rule would allow a member to reduce this capital charge by the amount of the excess margin held in all customer and broker-dealer accounts.

(7) Proposed FINRA Rule 4240.01

Proposed FINRA Rule 4240.01, a Supplementary Material, sets forth the customer and broker-dealer margin requirements that would apply with respect to CDS, as appropriate, pursuant to paragraph (c) of the proposed rule. The proposed rule addresses

22 See Proposed FINRA Rule 4240.01.

customer and broker-dealer accounts that are short a CDS, accounts that are long a CDS and accounts that maintain both long and short CDS. Paragraph (c) of the Supplementary Material provides, with respect to accounts that maintain both long and short CDS, that if a customer or broker-dealer is long the bond and long a CDS contract on the same underlying obligor, margin would need to be collected only on the long bond position, provided that bond can be delivered against the long CDS contract, as prescribed pursuant to applicable FINRA margin rules.[23] In instances where the customer or broker-dealer is short the bond and short the CDS on the same underlying obligor, margin need only be collected on the short bond, again as prescribed pursuant to applicable FINRA margin rules.[24] FINRA notes that, for purposes of the proposed rule, the term "applicable FINRA margin rules" refers to requirements pursuant to NASD Rule 2520 or Incorporated NYSE Rule 431, as applicable to the member.[25] FINRA plans to address NASD Rule 2520 and Incorporated NYSE Rule 431 later as part of FINRA's rulebook consolidation process,

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23 As originally proposed, the rule change would have stated, "If a customer or broker-dealer is long the bond and long a CDS contract on the same underlying obligor, margin needs to be collected only on the long bond position, provided that bond can be delivered against the short CDS contract, as prescribed pursuant to applicable FINRA margin rules." Amendment No. 1 corrected this sentence by changing the word "short" directly preceding the second "CDS" to "long."

24 As originally proposed, the rule change would have stated, "In instances where the customer or broker-dealer is short the bond and short the CDS, margin need only be collected on the short bond, as prescribed pursuant to applicable FINRA margin rules." Amendment No. 1 clarified this sentence by adding the phrase "on the same underlying obligor" directly following the word "CDS."

25 The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms.

and, accordingly, will amend Proposed FINRA Rule 4240.01(c) as appropriate to refer to the new, consolidated FINRA margin rule.[26]

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval, but FINRA does intend to issue such Regulatory Notice as soon as practicable in the event of SEC approval of the proposed rule change given the limited time period of the proposed Interim Pilot Program.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[27] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change would further the purposes of the Act because, consistent with goals set forth by the Commission when it provided the Commission's CDS Relief with respect to the operation of central counterparties to clear and settle CDS, the margin requirements set forth by the proposed rule change will help to stabilize the financial markets.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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[26] For more information about the rulebook consolidation process, see FINRA Information Notice, March 12, 2008 (Rulebook Consolidation Process).

[27] 15 U.S.C. 78o–3(b)(6).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

Pursuant to Section 19(b)(2) of the Act,[28] the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. FINRA also has requested that the Commission find good cause for approving the proposed rule change prior to the 30th day after publication in the Federal Register. For the Commission to approve rule changes proposed by a registered securities association (e.g., FINRA) the proposed rule changes must be consistent with the requirements of the Exchange Act, including Section 15A(b)(6) of the Act,[29] and the rules and regulations thereunder. Section 15A(b)(6) requires that the rules of a registered securities association be, "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions,

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28 15 U.S.C. 78s(b)(2).

29 15 U.S.C. 78o-3(b)(6).

allowances, discounts, or other fees to be charged by its members, or to regulate by virtue of any authority conferred by [Section 15A] matters not related to the purposes of [Section 15A] or the administration of the association."

The over-the-counter ("OTC") market for CDS has been a source of concerns to the Commission and other financial regulators.[30] These concerns include the systemic risk posed by CDS, highlighted by the possible inability of parties to meet their obligations as counterparties and the potential resulting adverse effects on other markets and the financial system.[31] Recent credit market events have demonstrated the seriousness of these risks in a CDS market operating without meaningful regulation, transparency,[32] or central clearing counterparties.[33] These events have emphasized the need for central clearing counterparties as mechanisms to help control such risks.[34] Establishment of central clearing counterparties for CDS is expected to reduce the counterparty risks inherent in the CDS market, and thereby help mitigate potential

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30 See Securities Exchange Act Releases Nos. 59164, p. 1 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009), 59165, p. 1 (Dec. 24, 2008), 74 FR 133 (Jan. 2, 2009), 59527, p. 1 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 59578, p. 1 (Mar 13, 2009), 74 FR 11781, at 11782 (Mar. 19, 2009), and Securities Act Release No. 8999, p. 4 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009).

31 Id. In addition to the potential systemic risks that CDS pose to financial stability, we are concerned about other potential risks in this market, including operational risks, risks relating to manipulation and fraud, and regulatory arbitrage risks.

32 See Policy Objectives for the OTC Derivatives Market, The President's Working Group on Financial Markets, November 14, 2008, available at http://www.ustreas.gov/press/releases/reports/ policyobjectives.pdf ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public.").

33 See The Role of Credit Derivatives in the U.S. Economy Before the H. Agric. Comm., 110th Cong. (2008) (Statement of Erik Sirri, Director of the Division of Trading and Markets, Commission).

34 See id.

systemic impacts. As we have stated previously,[35] given the continued uncertainty in this market, taking action to help foster the prompt development of central clearing counterparties is in the public interest.

The Commission believes that using well-regulated central clearing counterparties to clear transactions in CDS helps promote efficiency and reduce risk in the CDS market and among its participants.[36] These benefits can be particularly significant in times of market stress, as central clearing counterparties can mitigate the potential for a market participant's failure to destabilize other market participants, and reduce the effects of misinformation and rumors.[37] Central clearing counterparty-maintained records of CDS transactions may also aid the Commission's efforts to prevent and detect fraud and other abusive market practices.[38]

Well-regulated central clearing counterparties also are expected to address concerns about counterparty risk by substituting the creditworthiness and liquidity of the central clearing counterparties for the creditworthiness and liquidity of the counterparties to a CDS.[39] In the absence of central clearing counterparties, participants in the OTC CDS market must carefully manage their counterparty risks because a default by a counterparty can render worthless, and payment delay can reduce the usefulness of, the

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35 See Securities Exchange Act Release Nos. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009), 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), and 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009).

36 See Securities Exchange Act Releases Nos. 59164, p. 4 (Dec. 24, 2008), 74 FR 139, at 140 (Jan. 2, 2009), 59527, p. 4 (Mar. 6, 2009), 74 FR 10791, at 10792 (Mar. 12, 2009), and 59578, p. 4 (Mar. 13, 2009), 74 FR 11781, at 11782 (Mar. 19, 2009).

37 Id.

38 Id.

39 Id.

credit protection that has been bought by a CDS purchaser.[40] Firms that trade CDS OTC attempt to manage counterparty risk by carefully selecting and monitoring their counterparties, entering into legal agreements that permit them to net gains and losses across contracts with a defaulting counterparty, and often requiring counterparty exposures to be collateralized.[41] Central clearing counterparties are expected to allow participants to avoid the risks specific to individual counterparties because central clearing counterparties generally "novate" bilateral trades by entering into separate contractual arrangements with both counterparties - becoming buyer to one and seller to the other.[42] Through novation, it is the central clearing counterparty that assumes the counterparty risks. For this reason, central clearing counterparties for CDS are expected to contribute generally to the goal of market stability.[43] As part of its risk management, a central clearing counterparty may subject novated contracts to initial and variation margin

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[40] Id.

[41] See generally R. Bliss and C. Papathanassiou, "Derivatives clearing, central counterparties and novation: The economic implications," http://www.ecb.int/events/pdf/conferences/ccp/BlissPapathanassiou_final.pdf (Mar. 8, 2006), at 6. See also "New Developments in Clearing and Settlement Arrangements for OTC Derivatives," Committee on Payment and Settlement Systems, BIS, at 25 (Mar. 2007), available at http://www.bis.org/pub/cpss77.pdf; "Reducing Risks and Improving Oversight in the OTC Credit Derivatives Market," Before the Sen. Subcomm. On Secs., Ins. and Investments, 110th Cong. (2008) (Statement of Patrick Parkinson, Deputy Director, Division of Research and Statistics, FRB).

[42] See Securities Exchange Act Releases Nos. 59164, p. 4 (Dec. 24, 2008), 74 FR 139, at 140 (Jan. 2, 2009), 59527, p. 4 (Mar. 6, 2009), 74 FR 10791, at 10792 (Mar. 12, 2009), and 59578, p. 4 (Mar. 13, 2009), 74 FR 11781, at 11782 (Mar. 19, 2009). "Novation" is a "process through which the original obligation between a buyer and seller is discharged through the substitution of the central clearing counterparty as seller to buyer and buyer to seller, creating two new contracts." Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, Recommendations for Central Counterparties (November 2004) at 66.

[43] See Securities Exchange Act Releases Nos. 59164, p. 5 (Dec. 24, 2008), 74 FR 139, at 140 (Jan. 2, 2009), 59527, p. 5 (Mar. 6, 2009), 74 FR 10791, at 10792 (Mar. 12, 2009), and 59578, p. 5 (Mar. 13, 2009), 74 FR 11781, at 11782 (Mar. 19, 2009).

requirements and establish a clearing fund.[44] A central clearing counterparty also may implement a loss-sharing arrangement among its participants to respond to a participant insolvency or default.[45]

Central clearing counterparties also are expected to reduce CDS risks through multilateral netting of trades.[46] Trades cleared through a central clearing counterparty would limit a participant's exposure to an OTC market dealer, permitting the participant to accept the best bid or offer in the OTC market regardless of the creditworthiness of the dealer.[47] In addition, by allowing netting of positions in similar instruments, and netting of gains and losses across different instruments, central clearing counterparties are expected to reduce redundant notional exposures and promote the more efficient use of resources for monitoring and managing CDS positions.[48] Through risk controls, including controls on market-wide concentrations that cannot be implemented effectively when counterparty risk management is decentralized, central clearing counterparties are

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44 Id.

45 Id.

46 See Securities Exchange Act Releases Nos. 59164, p. 5 (Dec. 24, 2008), 74 FR 139, at 140 (Jan. 2, 2009), 59527, p. 5 (Mar. 6, 2009), 74 FR 10791, at 10792 (Mar. 12, 2009), and 59578, p. 5 (Mar. 13, 2009), 74 FR 11781, at 11782 (Mar. 19, 2009). See also, "New Developments in Clearing and Settlement Arrangements for OTC Derivatives," supra note 11, at 25. Multilateral netting of trades would permit multiple counterparties to offset their open transaction exposure through the central clearing counterparty, spreading credit risk across all participants in the clearing system and more effectively diffusing the risk of a counterparty's default than could be accomplished by bilateral netting alone.

47 Id.

48 Id.

expected to help prevent a single market participant's failure from destabilizing other market participants and, ultimately, the broader financial system.[49]

After careful consideration, the Commission finds that FINRA's proposed rule change to establish a pilot program implementing minimum customer margin requirements for transactions in CDS is consistent with the requirements of the Exchange Act,[50] including Section 15A(b)(6) of the Act.[51] In particular, the Commission finds that FINRA's proposed rule is consistent with Section 15A(b)(6) of the Act[52] in that it is designed to perfect the mechanism of a free and open market and to protect investors and the public interest. The Commission notes that the proposed rule is intended to promote greater accuracy and efficiency with respect to Exchange margin requirements. The proposed rule is intended to align a customer's total margin requirement for CDS positions with the actual risk associated with those positions taken as a whole. FINRA's proposed rule also is consistent with 15A(b)(6) of the Act[53] because it is designed to limit the amount of leverage a customer can obtain though CDS positions and decreases the risk that a broker-dealer will fail because its customers are unable to fulfill their obligations to the firm.

The Commission also finds that accelerated approval is appropriate. More specifically, accelerated approval will allow the pilot program, which will expire on

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49 Id.

50 In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

51 15 U.S.C. 78o-3(b)(6).

52 Id.

53 Id.

September 25, 2009, to be in effect for a sufficient period of time to permit FINRA to properly evaluate the performance of the margin rule so that it can propose suitable permanent margin rules for CDS. Further, accelerated approval is appropriate because it will enable the CME to immediately begin clearing customer, in addition to proprietary, CDS positions, and therefore, enable market participants to receive more quickly the benefits described above, such as increased market stability, arising from the existence of a well-regulated central clearing counterparty.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2009-012 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 SR-FINRA-2009-012. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The

Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2009-012 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

For the foregoing reasons, pursuant to Section 19(b)(2) of the Act,[54] the Commission finds good cause to approve the proposed rule change on an accelerated basis.

[54] 15 U.S.C. 78s(b)(2).

IT IS HEREBY ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-FINRA-2009-012) be, and it hereby is, approved on an accelerated basis to establish an interim pilot program expiring on September 25, 2009.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 26, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13484

In the Matter of

JOSE DANIEL IRIARTE, JR.,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Jose Daniel Iriarte, Jr. ("Respondent" or "Iriarte").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. At all relevant times in which he engaged in the misappropriation of customer funds, which is the conduct underlying the indictment and criminal conviction described below, Iriarte was a registered broker-dealer representative at a company that is registered with the Commission as a broker-dealer and an investment adviser. Respondent, 37 years old, is currently incarcerated at the Federal Correctional Institute in Cumberland, Maryland.

B. ENTRY OF THE RESPONDENT'S CRIMINAL CONVICTION

2. On August 19, 2008, Iriarte pled guilty to the sole count of an indictment charging him with wire fraud involving the misappropriation of customer funds. *U.S. v. Jose*

Daniel Iriarte, Criminal No. RWT-08-0294 (D. Md. 2008). On January 23, 2009, Iriarte was sentenced to a prison term of eighteen months to be followed by three years of supervised release, and was ordered, among other things, to make restitution in the amount of $130,000.

3. The indictment alleged, and the Respondent in his plea agreement admitted, that in April 2007, while employed as a financial adviser for a registered broker-dealer and investment adviser, Iriarte committed wire fraud by knowingly transmitting and causing to be transmitted in interstate commerce, by means of a wire communication, a wire transfer of $130,000. The $130,000 was given to Iriarte by one of his brokerage customers for purposes of investment. However, instead of depositing the funds in that customer's account, Iriarte deposited the funds into the account of another of his brokerage customers in order to repay a personal debt.

4. Respondent's federal convictions are offenses specified in Section 15(b)(6)(A)(ii), incorporating by reference Section 15(b)(4)(B)(iii) of the Exchange Act and Section 203(f), incorporating by reference Section 203(e)(2)(C) of the Advisers Act.

III.

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

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

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

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act; and

IV.

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

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9032 / May 26, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59973 / May 26, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2974 / May 26, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13485

In the Matter of

CSK AUTO CORPORATION,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND 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 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against CSK Auto Corporation ("CSK" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and 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[1] that:

Summary

This case involves a financial reporting fraud at CSK during the company's fiscal years 2002, 2003, and 2004. Specifically, CSK, through its former chief operating officer, former chief financial officer, former controller, and former director of credits and receivables (all of whom left CSK in 2006), materially overstated the company's income by (i) failing to write off vendor allowance receivables when they knew, or should have known, the receivables were uncollectible, and (ii) improperly recognizing certain vendor allowances during fiscal year 2003. CSK's failure to write off vendor allowances and improper recognition of vendor allowances in 2003 were contrary to Generally Accepted Accounting Principles ("GAAP"). As a result of its failure to write off uncollectible vendor allowance receivables and over recognition of vendor allowances, CSK filed false financial statements materially overstating its pre-tax income for fiscal year 2002 by approximately 47%, or $11 million, fiscal year 2003 by approximately $34 million, thereby reporting pre-tax income instead of a pre-tax loss, and fiscal year 2004 by approximately 65%, or $21 million.

Respondent

1. **CSK Auto Corporation** is a Delaware corporation with its principal executive offices in Phoenix, Arizona. CSK's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange. On July 11, 2008, CSK was acquired by another publicly traded company, O'Reilly Automotive Inc. On July 15, 2008, the NYSE filed a Form 25 delisting and deregistering from Section 12(b) CSK's common stock. On July 31, 2008, CSK filed a Form 15 deregistering its common stock from Section 12(g) of the Securities Act. CSK is currently a wholly owned subsidiary of O'Reilly.[2]

Background

2. As a retailer of automotive products, CSK purchased products from vendors that manufacture automotive parts and accessories. During CSK's fiscal years 2002, 2003, and 2004, CSK received vendor allowances from most of its vendors. Vendor allowances are a form of financial support that a vendor provides CSK, either by paying CSK or allowing CSK to deduct vendor allowance amounts from amounts CSK pays the vendor for goods, to support CSK's efforts to promote and advertise the vendor's products. Although CSK had various vendor allowance

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

[2] All of the conduct that gave rise to this proceeding took place before O'Reilly acquired CSK. The conduct described in this Order occurred before 2006. O'Reilly acquired CSK in 2008.

programs, its largest and most important was its Let's Work Together program ("LWT"). Typically, the LWT allowance agreements covered a one-year period, which CSK referred to as the "program year." The LWT allowance agreements varied from vendor to vendor, but in general CSK earned allowances as a (i) set dollar amount, (ii) percentage of the amount CSK spent to purchase the vendor's product, or (iii) certain number of cents per item CSK purchased from the vendor.

3. CSK recognized LWT allowances ratably, on a monthly basis, based on its estimate of the total allowances it expected to receive for the entire program year. CSK purported to base its estimate on the LWT agreement's terms and CSK's expected total purchases from each vendor during the program year.

4. Each LWT program year had its own account receivable. When CSK recognized LWT allowances during a program year, it increased the corresponding program year's account receivable. In general, CSK recognized vendor allowances as a reduction to cost of sales, thereby increasing the company's pre-tax income. When CSK collected vendor allowances for a particular program year, GAAP required that CSK reduce the outstanding receivable for that same program year.

5. During fiscal years 2002, 2003, and 2004, CSK knew that it could not collect all of the vendor allowances it had previously recognized. GAAP required CSK to write off an outstanding receivable once it is probable it will not be collected and the amount of the loss can be reasonably estimated. Statement of Financial Accounting Standards No. 5 ("SFAS No. 5"), Accounting for Contingencies Paragraph 8. Contrary to GAAP, CSK failed to write off its uncollectible vendor allowances receivables.

6. As a result, large unpaid amounts, or accounts receivable, built up on CSK's books. Instead of writing off these uncollectible amounts and taking the requisite reduction to earnings as required by GAAP, CSK hid the deficiencies by (i) improperly moving vendor allowances earned and collected for later program years to the prior program year's accounts receivable, referred to within CSK as "filling the bucket," and (ii) incorrectly accounting for amounts paid back to vendors. Through this conduct, CSK avoided writing off tens of millions of dollars in uncollectible receivables. CSK "filled the bucket" by (i) making baseless journal entries reducing the account receivable for the earlier LWT program year with an offsetting increase to the account receivable for a later program year, and (ii) applying vendor allowances earned and collected during a later LWT program year to an earlier LWT program year's receivable.

7. CSK also failed to write off vendor allowances it had to pay back to its vendors because the company had over-collected for prior periods. Instead of writing off amounts CSK had to pay back, which would reduce its pre-tax income, the company increased a later LWT program year's account receivable, making it appear to have collected an older account receivable when all CSK had done was move the outstanding receivable balance to a more recent year.

8. CSK failed to write off approximately $11 million of uncollectible receivables during fiscal 2002, approximately $24 million of uncollectible receivables during fiscal year 2003, and approximately $21 million of uncollectible receivables during fiscal year 2004.

9. In addition, during fiscal year 2003, CSK improperly recognized approximately $10 million in vendor allowances that either had not been earned or should have been applied to an outstanding account receivable.

10. During the summer of 2005, CSK issued approximately $15 million in debit memos to its vendors to collect LWT allowances that CSK knew it had already collected. When the vendors complained and CSK had to pay them back, some of the credit memos CSK issued intentionally misrepresented the reasons for the paybacks.

11. Throughout this time, CSK failed to implement internal accounting controls relating to its inventory, cost of sales, and revenue accounts that were sufficient to provide reasonable assurances that these accounts were accurately stated in accordance with GAAP.

12. Because of the vendor allowance scheme, CSK filed false financial statements materially overstating its pre-tax income for fiscal year 2002 by approximately 47%, or $11 million, fiscal year 2003 by approximately $34 million, thereby reporting pre-tax income instead of a pre-tax loss, and fiscal year 2004 by approximately 65%, or $21 million.

13. While the false financial statements were outstanding, CSK engaged in several private debt offerings. In January 2004, CSK issued $225 million of 7% Senior Subordinated Notes. In August 2005, CSK completed a $125 million issuance of 3 3/8% senior exchangeable notes. In December 2005, CSK issued $100 million of 4 5/8% senior exchangeable notes. CSK's materially false financial statements filed with its Forms 10-K for fiscal years 2003 and 2004 were incorporated by reference in the Form S-3 and Form S-4 Registration Statements filed with the Commission during fiscal years 2004 and 2005.

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

15. As a result of the conduct described above, CSK also violated Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20 thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act file with the Commission information, documents, and annual reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading.

16. As a result of the conduct described above, CSK also violated Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records, and

accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

17. Lastly, as a result of the conduct described above, CSK also violated Section 13(b)(2)(B), which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles.

CSK's Remedial Efforts

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

IV.

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

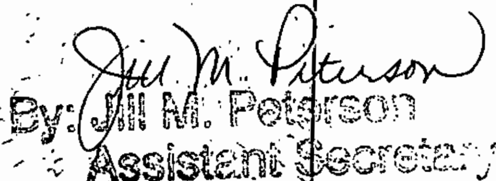
Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondent cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act.

B. Pursuant to Section 21C of the Exchange Act, Respondent cease and desist from committing or causing any violations and any future violations of Sections 10(b), 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 10b-5, 12b-20, and 13a-1 thereunder.

By the Commission.

Elizabeth M. Murphy
Secretary



UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59977 / May 27, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2975 / May 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13486

In the Matter of JOHN T. McDONALD (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 John T. McDonald ("McDonald") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

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[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, McDonald 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, McDonald 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. McDonald, age 44, is and has been a certified public accountant licensed to practice by the Commonwealth of Massachusetts. McDonald was Vice President and Treasurer of Kmart Corporation at all relevant times through November 9, 2001, when he was promoted to Chief Financial Officer ("CFO"). McDonald remained CFO through March 11, 2002, when he was terminated. McDonald is currently CFO of a private scrap metal company.

2. Kmart Corporation ("Kmart" or the "company") was a Michigan Corporation headquartered in Troy, Michigan, during the relevant period. On January 22, 2002, Kmart filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy code. The company's common stock was registered with the Commission pursuant to 12(b) of the Exchange Act [15 U.S.C. § 78l(b)] and traded on the New York Stock Exchange until December 19, 2002, when trading was suspended.

3. On May 1, 2009, a final judgment was entered against McDonald, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and aiding and abetting violations of Sections 13(a) and Rules 12b-20 and 13a-13 thereunder, in the civil action entitled <u>Securities and Exchange Commission v. Charles C. Conaway and John T. McDonald</u>, Case No. 2:05-CV-40263 in the United States District Court for the Eastern District of Michigan. McDonald was ordered to pay a $120,000 civil penalty and barred from serving as an officer or director of a publicly traded company for five years.

4. The Commission's complaint alleged, among other things, that McDonald was responsible for materially false and misleading disclosure about the financial condition of Kmart in the Management's Discussion and Analysis section of the company's Form 10-Q for the quarter and nine months ended October 31, 2001 and in a conference call with analysts and investors on November 27, 2001.

IV.

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

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

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

B. After three (3) years from the date of this order, McDonald 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 McDonald'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) McDonald, 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) McDonald, 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 he will not receive appropriate supervision;

(c) McDonald 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) McDonald acknowledges his responsibility, as long as he 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 McDonald to resume appearing or practicing before the Commission provided that his CPA license is current and he has resolved all other disciplinary issues with the applicable boards of accountancy.

However, if licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to McDonald'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 EXCHANGE ACT OF 1934
Release No. 59980 / May 27, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2976 / May 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-12810

In the Matter of Brian R. Spires, 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 September 19, 2007, Brian R. Spires ("Spires") 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 Spires pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[1] This order is issued in response to Spires' application for reinstatement to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

The Commission found that, as the engagement manager, Spires participated in the planning and execution of Deloitte & Touche LLP's audit of National Century Financial Enterprises, Inc.'s ("NCFE") 2000 consolidated financial statements. Spires failed to plan and execute the 2000 audit in accordance with generally accepted auditing standards ("GAAS"). He failed to obtain sufficient competent evidential matter to corroborate that NCFE's receivables portfolio consisted of permitted receivables or to properly evaluate the adequacy of NCFE's allowance for losses relating to those receivables. Spires also did not properly evaluate red flags during the audit which should have alerted him to NCFE's non-permitted advances and its borrowers' inability to repay those advances. Additionally, Spires failed to obtain sufficient competent evidential matter with regard to the nature and substance of material related party transactions. Many of these transactions with related parties were non-permitted advances.

[1] *See* Accounting and Auditing Enforcement Release No. 2720 dated September 19, 2007. Spires was permitted, pursuant to the order, to apply for reinstatement after one year upon making certain showings.

In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Spires 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. Spires 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, Spires' 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 Spires, it appears that he has complied with the terms of the September 19, 2007 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 Spires, 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 Brian R. Spires, CPA is hereby reinstated to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
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. 59989 / May 27, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2979 / May 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13491

In the Matter of

Frank P. Sinopoli, CPA,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Frank P. Sinopoli, CPA ("Respondent" or "Sinopoli") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[1]

[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 ... improper professional conduct.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[2] that:

A. SUMMARY

These proceedings concern Frank P. Sinopoli, a partner with Perkins, Dexter, Sinopoli & Hamm, P.C. ("PDSH"), who audited the financial statements of Geo Securities, Inc. ("GSI") for the fiscal year ended July 31, 2005. GSI's financial statements were not prepared in conformity with generally accepted accounting principles ("GAAP") because they failed to include a material liability, a $949,688 arbitrator's award, for which GSI was jointly and severally liable. Sinopoli engaged in improper professional conduct by failing to conduct PDSH's audit of GSI's financial statements in accordance with generally accepted auditing standards ("GAAS").

B. RESPONDENT AND RELATED ENTITIES

Frank P. Sinopoli, age 56, is a Dallas-based certified public accountant licensed in Texas. In 1980, Sinopoli joined the accounting firm of Perkins, Dexter, Sinopoli & Hamm, P.C., and became an owner in 1984. During the period relevant to this proceeding, Sinopoli supervised the services performed by Perkins, Dexter, Sinopoli & Hamm, P.C. for Geo Securities, Inc. These services included annual audits of the financial statements of Geo Securities, Inc.

Perkins, Dexter, Sinopoli & Hamm, P.C. is a Dallas-based public accounting firm licensed to practice in Texas. PDSH is not registered with the Public Accounting Oversight Board and audits no public companies.

Geo Securities, Inc. has been a broker-dealer registered with the Commission since September 24, 1998 (File No. 8-50862). GSI's sole business has been to the offer and sale of offerings sponsored by its parent, Geo Companies of North America, Inc. ("GCNA"). On

[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.

January 10, 2006, after the FWRO Examination staff notified GSI of its net capital deficiency, GSI filed a Rule 17a-11 notice disclosing its violation of Rule 15(c)(3) of the Exchange Act and voluntarily terminated its securities business. On March 13, 2006, the NASD suspended GSI's registration for failure to file a financial report.

C. FACTS

1. GSI Failed to Prepare its Financial Statements in Accordance with GAAP and Failed to Comply with Certain Broker-Dealer Net Capital and Books and Records Requirements

a. GSI Found Liable for Damages, Legal Fees and Costs by Arbitrator

In June 2000, GSI, GCNA, and certain individuals were named as defendants in civil litigation alleging that they fraudulently offered and sold, without registration, joint venture partnership interests (the "Atlanta litigation").[3] On January 9, 2004, the court in the Atlanta litigation issued an order enforcing a settlement agreement in which the defendants, including GSI, agreed to pay damages totaling $217,220 (the "2004 Settlement") and required the parties to submit to binding arbitration to determine the amount of attorney's fees, if any, to be awarded to the plaintiffs. In the subsequent arbitration proceeding, the arbitrator, on April 27, 2005, entered an award in favor of the plaintiffs and against GSI, jointly and severally with the other defendants, in the amount of $949,688 for legal fees and litigation costs (the "Arbitrator's award"). On July 15, 2005, the Arbitrator's award was entered as a judgment in the United States District Court for the Northern District of Georgia, Atlanta Division.

b. GSI Failed to Record Liability Arising from Arbitrator's Award

GSI's financial statements for the fiscal year ended July 31, 2005 were not prepared in conformity with GAAP because they failed to include a material liability for the Arbitrator's award. Statement of Financial Accounting Standards No. 5, *Accounting for Contingencies* ("FAS 5") required GSI to accrue the Arbitrator's award as a liability. Paragraph 8 of FAS 5 requires that an estimated loss from a contingent liability be recorded when it is "probable that ... a liability has been incurred at the date of the financial statements" and the "amount of the loss can be reasonably estimated." Both of these conditions existed with respect to the Arbitrator's award by April 27, 2005, at the very latest. On that date, GSI's liability arising from the Atlanta litigation was probable. Similarly, GSI's loss could be reasonably estimated, as the Arbitrator's award quantified the exact dollar amount of litigation costs owed. Accordingly, GSI should have accrued the entire amount of the Arbitrator's award in its financial statements for periods ended

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3 See *T.C. Woodworth, et al. v. Geo Securities, Inc., et al.*, No. 1:00-CV-1495-WBH (N.D. Ga. filed June 14, 2000)), which was subsequently consolidated with *Leipman, et al. v. Geo Securities, Inc., et al.*, No. 1:02-CV-369-WBH (N.D. Ga. filed February 8, 2002).

after April 27, 2005, but failed to do so. Instead, GSI merely disclosed the existence and amount of the Arbitrator's award.

c. GSI Failed to Properly Maintain Books and Records and Required Net Capital and Failed to Make Required Notifications

As stated in the NASD Notice to Members No. 00-63, *Arbitration Awards*, an arbitration award, even if appealed, should be treated as an actual liability for the purposes of calculating net capital pursuant to Rule 15c3-1 under the Exchange Act. Contrary to this guidance, however, GSI elected to treat the Arbitrator's award as a contingent, rather than actual, liability for the purposes of computing its net capital. Had GSI properly recorded the Arbitrator's award as an actual liability, combined with its other liabilities, GSI's financial statements would have revealed a net capital deficiency of approximately $1 million, placing GSI in violation of Rule 15c3-1 under the Exchange Act.

In addition, Section 17(a) of the Exchange Act and Rule 17a-3 thereunder require that every registered broker-dealer make and keep current books and records reflecting, among other things, the firm's liabilities and net capital computations. Rule 17a-5 under the Exchange Act also requires that broker-dealers registered with the Commission, such as GSI, file quarterly Financial and Operational Combined Uniform Single Report ("FOCUS") reports and annual audited financial statements. Implicit in these provisions is the requirement that information contained in required books, records, or filings be accurate. Rule 17a-11(b)(1) requires broker-dealers whose net capital declines below the minimum required pursuant to Rule 15c3-1 to give same-day notice to the Commission of this fact. Rule 17a-11(d) further requires broker-dealers who fail to make or keep current books and records required by Rule 17a-3 to give same-day notice to the Commission of this fact. Based on the conduct described above, GSI violated Section 17(a) of the Exchange Act and Rules 17a-3, 17a-5, and 17a-11 thereunder.

d. GSI Failed to Appropriately Record Expense Sharing Agreement With Its Parent Company

NASD Notice to Members No. 00-63 ("NASD Notice 00-63") states, "[p]ursuant to Exchange Act Rule 17(a)-3(a)(1) and (a)(2), a broker-dealer must make a record reflecting each expense incurred relating to its business and any corresponding liability, regardless of whether the liability is joint or several with any person and regardless of whether a third party has agreed to assume the expense or liability…One proper method is to record the expense in an amount that is determined according to an allocation made by the third party on a reasonable basis." Alternatively, NASD Notice 00-63 indicates a broker-dealer may maintain a separate schedule of allocated expenses and liabilities if such amounts are not recorded as a part of its general ledger. GSI had an expense sharing arrangement with its parent, GCNA. Under this agreement, GCNA agreed to pay rent, utilities, and certain other shared expenses. Neither GCNA nor GSI made any record allocating such expenses between GCNA and GSI. Moreover, GSI made no record of its share of costs related to the Atlanta litigation.

2. **Sinopoli Engaged in Improper Professional Conduct**

Sinopoli was the engagement partner responsible for planning and conducting PDSH's audit of GSI's financial statements for the years ended July 31, 2000 through 2005. GSI's financial statements for the year ended July 31, 2005, as filed with the Commission, contained an unqualified audit report representing that PDSH had conducted an audit in accordance with GAAS and that GSI's financial statements were presented in conformity with GAAP. Additionally, the 2005 GSI audit report states that PDSH had examined the supplemental information provided in Schedule 1 to the financial statements, *Computation of Net Capital Pursuant to Rule 15c3-1* ("Schedule 1") and that Schedule 1 was "fairly stated in all material respects in relation to the basic financial statements taken as a whole." In fact, Sinopoli did not conduct PDSH's audit of GSI's 2005 financial statements (the "2005 GSI audit") in accordance with GAAS, GSI's financial statements were not presented in conformity with GAAP, and Schedule 1 materially overstated GSI's net capital by approximately $900,000.

Sinopoli failed to conduct the 2005 GSI audit in accordance with GAAS. Among other things, he failed to exercise professional skepticism and failed to obtain sufficient competent evidential matter to evaluate adequately and report properly the Arbitrator's award in GSI's financial statements. Furthermore, Sinopoli's work papers fail to evaluate GSI's ability to continue as a going concern. Nonetheless, Sinopoli signed, on behalf of PDSH, an audit report dated September 30, 2005 containing an unqualified opinion incorrectly claiming that PDSH's audit of GSI's July 31, 2005 financial statements had been conducted in accordance with GAAS. The opinion also incorrectly claims that GSI's audited financial statements present fairly, in all material respects, the financial position of GSI in conformity with GAAP.

As discussed in more detail below, Sinopoli engaged in improper professional conduct within the meaning of Rule 102(e)(1) by failing, in repeated instances, to comply with GAAS in performing PDSH's audit of GSI's financial statements for the year ended July 31, 2005.

a. **Sinopoli Failed to Evaluate Adequately Litigation, Claims and Assessments**

Sinopoli knew about the status of the Atlanta litigation and the existence of the Arbitrator's award at the time he planned and conducted the 2005 GSI audit. He also knew that a court order had been issued in 2004 enforcing a settlement agreement requiring the defendants, including GSI, to pay $217,220 and requiring the parties to submit proposed legal fees and litigation costs to binding arbitration. Additionally, Sinopoli regularly assisted GSI in preparing its quarterly FOCUS reports (including reports due for the periods ended March 31, June 30, and July 31, 2005). Furthermore, Sinopoli learned in early May 2005 that the Arbitrator's award had been entered against GSI and assisted GSI's management at the time it concluded it should disclose, but not record, the Arbitration award as a liability on its balance sheet.

Sinopoli's planning work papers do not identify litigation, claims, and assessments as an area of significant audit risk. In fact, the Atlanta litigation represented a significant area of audit risk

that GSI's financial statements could be misstated. Sinopoli, however, neither identified the attorneys handling the Atlanta litigation nor requested that GSI send an audit inquiry letter to the law firm handling the Atlanta litigation. Instead, Sinopoli relied upon representations by GSI management regarding GSI's liability arising from the Arbitrator's award. By not corresponding with GSI's outside counsel, Sinopoli failed to obtain sufficient evidential matter, as required by GAAS, to corroborate management's representations regarding its ability to appeal the Arbitrator's award and the likelihood that the appeal would be successful, if made.[4]

Sinopoli also did not evaluate objectively whether GSI's disclosure of the Arbitrator's award conformed with GAAP. After the entry of the Arbitrator's award, GSI should have recorded the award as a liability pursuant to paragraph 8 of FAS 5. Sinopoli did not document any justification for not following FAS 5, other than GSI management's representations that it intended to appeal the Arbitrator's award. Sinopoli's reliance on GSI management's representations, however, was not sufficient for several reasons. First, the written representation repeated language from the prior year's representations without reference to the 2004 Settlement or the Arbitrator's award. Second, Sinopoli did not request written representations from either GSI's in-house counsel or GCNA's sole stockholder, who were both more knowledgeable and better situated than GSI's president to provide competent, reliable representations regarding the Atlanta litigation. Furthermore, Sinopoli knew or should have known that GSI's president did not have a basis to state, in management's letter of representation to PDSH, that "the loss, if any, resulting from the suits will be paid by our parent [GCNA], and therefore, will not have a material impact on the Company's financial position, results of operations, or cash flows in future years." Nonetheless, Sinopoli relied upon this representation without further inquiry. As both GCNA and its sole stockholder were also clients of PDSH, Sinopoli could have easily requested written representations.

b. Sinopoli Failed to Evaluate GSI as a Going Concern

Sinopoli also did not recognize that the Arbitration award raised substantial doubt about GSI's ability to continue as a going concern. He, thereby, failed to evaluate GSI's ability to continue as a going concern, failed to obtain additional information about the conditions raising the concerns and failed to evaluate management's plans for dealing with the adverse effects of the conditions raising the concerns, as required by GAAS.[5] Sinopoli did not determine if GCNA or

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[4] AU§ 337, Inquiry of a Client's Lawyer Concerning Litigation, Claims and Assessments, paragraph .08 states:

> A letter of audit inquiry to the client's legal counsel is the auditor's primary means of obtaining corroboration of the information furnished by management concerning litigation, claims, and assessments. Evidential matter obtained from the client's inside general counsel or legal department may provide the auditor with the necessary corroboration. However, evidential matter obtained from inside legal counsel is not a substitute for information outside counsel refuses to furnish.

[5] AU § 341, *The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern.*

GCNA's sole stockholder (who were both, jointly and severally liable with GSI for the Arbitrator's award) was able or willing to fund GSI's liability. In fact, when GSI reported its net capital violation in January 2006, neither GCNA nor its sole stockholder intervened to cure the deficiency, causing GSI to cease operating its securities business.

c. Sinopoli Failed to Identify that GSI Did Not Make or Maintain Records Allocating Expenses under its Expense Sharing Arrangement

Sinopoli's planning work papers indicate that the AICPA's Audit and Accounting Guide for Brokers and Dealers in Securities (the "Audit Guide") was relevant to the 2005 GSI audit. Chapter 3 of the Audit Guide, *Regulatory Considerations*, in paragraphs 3.55 to 3.57 refers the auditor to NASD Notice 03-63, which addresses a broker-dealer's record keeping requirements when the broker-dealer has an expense sharing agreement, such as the arrangement between GSI and GCNA.[6] Sinopoli, however, failed to identify that GSI did not make or maintain records showing reasonable allocations of rent, utilities, litigation and other expenses.

d. Sinopoli Failed to Identify GSI's Net Capital Deficiency

Finally, Sinopoli failed to identify GSI's net capital deficiency of approximately $900,000 as of July 31, 2005. In planning the 2005 GSI audit, Sinopoli properly identified GSI's net capital requirements as a significant audit area. He was also familiar with Rule 15c3-1 of the Exchange Act and referred to this rule during the 2005 GSI audit. Additionally, Sinopoli examined the supplemental information provided in Schedule 1 to GSI's financial statements, *Computation of Net Capital Pursuant to Rule 15c3-1,* as a part of the 2005 GSI audit. Nonetheless, Sinopoli signed PDSH's audit report stating that the computation of net capital requirements was "fairly stated in all material respects in relation to the basic financial statements taken as a whole," when, in fact, it was not. Because Sinopoli failed to identify GSI's improper accounting, Sinopoli failed to identify that GSI's 2005 net capital computation was materially misstated.

3. <u>Violations</u>

a. Sinopoli Caused GSI's Violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1

Section 15(c)(3) of the Exchange Act prohibits brokers or dealers from inducing the purchase or sale of securities while in contravention of Rule 15c3-1, which requires that every broker or dealer shall at all times have and maintain certain minimum net capital requirements. Rule 15c3-1 requires a broker-dealer to maintain a certain minimum ratio of net capital to

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[6] NASD Notice 03-63 also reiterates the guidance contained in NASD Notice 00-63 that and adverse arbitration awards must be booked as an actual liability at the time of the award regardless if appealed. Sinopoli, however, was unaware of guidance published by the NASD in its Notice to Members No. 00-63 regarding arbitration awards.

aggregate indebtedness so that the broker-dealer's assets will be sufficiently liquid to enable it to meet all of its current obligations.

As a result of its conduct as described above, GSI violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder. As a result of his conduct described above, Sinopoli caused, under Section 21C of the Exchange Act, GSI's violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

b. Sinopoli Caused GSI's Violations of Section 17(a) of the Exchange Act and Rules 17a-3, 17a-5 and 17a-11 thereunder

Section 17(a) of the Exchange Act and Rule 17a-3 thereunder require that every registered broker-dealer make and keep current books and records reflecting, among other things, the firm's liabilities and net capital computations. Rule 17a-5 requires that a broker-dealer registered with the Commission, such as GSI, file quarterly FOCUS reports with its designated examining authority and annual audited financial statements with the Commission. Implicit in these provisions is the requirement that information contained in required books, records, or filings be accurate. Rule 17a-11(b)(1) requires such broker-dealers whose net capital declines below the minimum required pursuant to Rule 15c3-1 to give notice to the Commission of this fact that day. Rule 17a-11(d) further requires broker-dealers who fail to make or keep current books and records required by Rules 17a-3 to give notice to the Commission of this fact the same day, specifying the books and records which have not been made or which are not current.

As a result of its conduct described above, GSI violated Section 17(a) of the Exchange Act and Rules 17a-3, 17a-5, and 17a-11 thereunder. As a result of his conduct described above, Sinopoli caused, under Section 21C of the Exchange Act, GSI's violations of Section 17(a) of the Exchange Act and Rules 17a-3, 17a-5 and 17a-11 thereunder.

4. Findings

a. Based on the foregoing, the Commission finds that Sinopoli engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

b. Based on the foregoing, the Commission finds that Sinopoli caused GSI's violations of Sections 15(c)(3) and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3, 17a-5, and 17a-11 promulgated 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 Sinopoli's Offer.

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

A. Sinopoli shall cease and desist from causing any violations and any future violations of Sections 15(c)(3) and 17(a) of the Exchange Act, and Rules 15c3-1, 17a-3 , 17a-5, and 17a-11 promulgated thereunder;

B. Sinopoli is denied the privilege of appearing or practicing before the Commission as an accountant.

C. After one year from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

D. 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

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. 59988 / May 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13490

In the Matter of BRADLEY E. MORGAN, 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 Bradley E. Morgan ("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 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[1] that

Summary

These proceedings arise out of Respondent's failure reasonably to supervise James Patrick Reedy ("Reedy") with a view to preventing and detecting his violations of the federal securities laws. During the period that Respondent supervised Reedy, a registered representative at Geo Securities, Inc. ("GSI"), a broker-dealer registered with the Commission, Respondent failed reasonably to supervise Reedy in connection with his misrepresentations and omissions to investors in the offer and sale of oil and gas joint venture interests. Respondent also knew or was reckless in not knowing that Reedy sent investors false and misleading written communications relating to the status of their joint venture interests. Finally, Respondent caused GSI's violations of the Commission's net capital, books and records, and reporting requirements, as well as GSI's failure to notify the Commission of such violations by failing to properly account for an arbitration award for which GSI was jointly and severally liable.

Respondent

1. Bradley E. Morgan, age 44, resides in Fort Worth, Texas. Between January 2004 and January 2006, Morgan was the president, the compliance officer and the financial operations principal ("FINOP") for GSI, a Dallas, Texas registered broker-dealer. Prior to becoming GSI's principal, from January to December 2003, Morgan was associated with GSI as a registered representative. Although he is not currently associated with any broker or dealer, Morgan holds Series 6, 7, 9, 10, 24, 27, 31, 63 and 65 securities licenses.

Other Relevant Entities and Persons

2. GSI (File No. 8-50862) has been a broker-dealer registered with the Commission since 1998. On January 10, 2006, GSI filed a Rule 17a-11 notice and voluntarily ceased conducting its securities business based on net capital deficiency resulting from its failure to record liabilities totaling $949,688 associated with a civil lawsuit.

3. Geo Companies of North America, Inc. ("GCNA") is a Texas corporation with its principal place of business in Dallas. GCNA issued securities in the form of oil and gas joint ventures and offered and sold them through its wholly-owned and captive broker-dealer, GSI. GCNA also wholly owns Geo Natural Resources, Inc. ("GNR"), a company that operated the wells for GCNA's oil and gas projects.

4. Reedy, age 48, resides in Dallas Texas. From 1998 through January 2006, Reedy was associated with GSI as a registered representative and vice president of sales. Reedy was also vice president of GNR. Reedy held Series 22 and Series 63 securities licenses, but is not currently associated with any broker or dealer.

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

Morgan's Failure to Supervise Reedy

5. From January 2004 through August 2005 (the "relevant period"), Reedy, as GSI's vice president of sales, conducted meetings in which he introduced GCNA's offerings and instructed the sales staff on how to "spin" the drilling projects. The sales staff followed Reedy's direction and parroted his statements to prospective investors, including false and misleading representations about GCNA's and GNR's (collectively "Geo") track record, inflated oil and gas production from previous projects and the status of current projects. In many cases, however, Reedy personally closed sales with prospective investors.

6. When closing a sale, Reedy typically engaged in high-pressure sales tactics. For example, he routinely stressed to prospective investors, without basis in fact, that there were immediate, but limited opportunities to invest with Geo and encouraged them to act quickly. Reedy also made claims to investors alluding to great returns with minimal risk. Other GSI representatives often overheard Reedy making statements to investors such as, "A year from now we will be on a cruise drinking champagne" and "Geo hasn't stayed in business over 15 years by drilling dry holes." In reality, Geo had drilled numerous dry holes and enjoyed only limited success; indeed, only a few of its investors received any returns.

7. Throughout the relevant period, Reedy sent GSI's customers "updates" and "reports to partners." Reedy issued these documents to convince GSI's customers that their current investment would soon see oil and/or gas revenues and to promote the next project based on the purported success or imminent success of the on-going projects. Morgan typed the updates or reports to partners composed by Reedy.

8. During the relevant period, Morgan was the president and compliance officer for GSI. Morgan had sole supervisory responsibility for four registered representatives, including Reedy.

9. During the relevant period, Morgan ignored several "red flags" that should have alerted him to Reedy's misleading oral sales presentations. In January 2004, when Morgan became GSI's compliance officer, one GSI registered representative told Morgan that she had witnessed Reedy, on numerous occasions, during his telephone solicitations with prospective investors, overstate production from previous wells and downplay the risks associated with the oil and gas investments. Morgan disregarded her complaint because he believed it was based solely on her personal dislike of Reedy. On or about September 2004, another GSI registered representative raised similar concerns with Morgan about Reedy's false and misleading statements during his telephone solicitations.

10. Morgan neither spoke with Reedy nor conducted any investigation of the complaints. Additionally, contrary to GSI's written supervisory procedures, Morgan did not monitor Reedy's telephone calls.

11. Morgan further failed to discharge his supervisory responsibilities by not reviewing and approving the updates Reedy sent to investors. GSI's written supervisory procedures required Morgan to review and approve all outgoing GSI correspondence. Morgan knew that Reedy authored the updates, because Morgan typed them as Reedy dictated the contents, which contained numerous false and misleading statements. Morgan, as the president

of GSI, knew or should have known that Reedy's updates could entice current investors (all of whom were current GSI customers) to purchase interests in upcoming projects by exaggerating the success of prior projects. Morgan should have reviewed the updates and determined whether they contained any false or misleading information.

Morgan Caused GSI to Violate the Net Capital, Books and Records, and Notice Provisions

12. During the relevant period, Morgan, as GSI's FINOP, was responsible for calculating its net capital computations, preparing its quarterly FOCUS reports and maintaining its books and records. In January 2004, when Morgan became GSI's FINOP, he was aware that GSI was a defendant in two lawsuits.[2] On January 9, 2004, the court issued an order in the consolidated lawsuit enforcing a disputed settlement agreement in which the defendants had agreed to pay $217,220. The order also required the parties to submit to binding arbitration to determine the amount of attorney's fees. On April 27, 2005, the arbitrator determined that the defendants, including GSI, were jointly and severally obligated to pay $949,688 in legal fees (the "Arbitrator's award").

13. Morgan failed to properly account for the Arbitrator's award in calculating GSI's net capital. In early May 2005, Morgan contacted outside counsel about the appropriate treatment of the Arbitrator's award in computing GSI's net capital requirements. Outside counsel provided Morgan with NASD materials, which clearly stated that an arbitration award, even if appealed, should be recorded as an actual liability.[3] Ignoring the NASD's guidance, Morgan did not record the Arbitrator's award on GSI's balance sheet and incorrectly treated it as a contingent liability for the purposes of computing GSI's net capital. As a result, combined with GSI's other liabilities, the Arbitrator's award resulted in a net capital deficiency on GSI's part of approximately $1 million, which placed GSI in violation of Rule 15c3-1 under the Exchange Act.

14. From May 2005 through January 2006, when GSI ceased its securities business, Morgan caused GSI to fail to record properly the Arbitrator's award of $949,688 as a liability on its books and records. As a result of Morgan's failure to record properly the Arbitrator's award, GSI did not maintain accurate books and records throughout this period as required by Rule 17a-3 under the Exchange Act.

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[2] The complaints in *T.C. Woodworth, et al. v. Geo Securities, Inc., et al.*, No. 1:00-CV-1495-WBH (N.D. Ga. filed June 14, 2000) and *Leipman, et al. v. Geo Securities, Inc., et al.*, No. 1:02-CV-369-WBH (N.D. Ga. filed February 8, 2002), which were ultimately consolidated, alleged that GSI, GCNA, GNR, Reedy and others fraudulently offered and sold, without registration, joint venture partnership interests.

[3] Counsel provided Morgan with NASD Notice to Members No. 00-63, *Arbitration Awards*, which states that for the purposes of the Commission's net capital rule, "A broker/dealer that is the subject of an adverse award in an arbitration proceeding should book said award as an actual liability at the time the award is made, even though the appeal process has not been exhausted and no judgment has been rendered, because grounds for revision on appear are very limited." *See also In the matter of the Application of Fox & Company Investments, Inc. and James W. Moldermaker* (October 28, 2005). Counsel also provided Morgan with an example NASD judgment sanctioning a broker-dealer and its compliance officer, in part, for failing to record an arbitration award for net capital purposes. *See, In the Matter of Monterey Bay Securities and Kenneth Mark Doolittle* (July 9, 1998).

15. Also, as a result of Morgan's failure to record properly the Arbitrator's award, GSI's FOCUS reports were inaccurate for the quarters ending June, September and December 2005 and for its year ending July 31, 2005, thus placing GSI in violation of Rule 17a-5 under the Exchange Act.

16. Had Morgan properly recorded the Arbitrator's award as a liability, combined with its other liabilities, GSI's financial statements would have revealed a net capital deficiency of approximately $1 million.[4] As a result, pursuant to Rule 17a-11 under the Exchange Act, GSI should have provided the Commission with same-day notice of the existence of a net capital deficiency as a result of the Arbitrator's award.

Violations

17. As a result of the conduct described above, Morgan failed reasonably to supervise Reedy with a view toward preventing his violations of the federal securities laws. Section 15(b)(6)(A) of the Exchange Act, which incorporates by reference Section 15(b)(4)(E) of the Exchange Act, provides for the imposition of sanctions against persons associated with a broker or dealer who have failed reasonably to supervise, with a view to preventing violations of the federal securities laws, another person who commits such a violation, if such other person is subject to his supervision.

18. As a result of the conduct described above, Morgan caused GSI to violate Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

19. As a result of the conduct described above, Morgan caused GSI to violate Section 17(a) of the Exchange Act and Rules 17a-3, 17a-5 and 17a-11 thereunder.

Civil Penalty

20. Respondent has submitted a sworn Statement of Financial Condition dated November 25, 2008 and other evidence and has asserted his inability to pay a civil penalty.

IV.

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

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

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[4] GSI's required minimum net capital, during the relevant period, was the greater of $5,000 or 6.7 percent of its aggregate indebtedness. After properly recording the Arbitrator's award, GSI's required minimum net capital was $5,000 (March 31, 2005); $65,729 (June 30, 2005); $64,142 (July 31, 2005); and $63,823 (September 30, 2005).

A. Respondent Morgan cease and desist from causing any violations and any future violations of Sections 15(c) and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3, 17a-5 and 17a-11 thereunder;

B. Respondent Morgan be, and hereby is barred from association in a supervisory capacity with any broker or dealer with the right to reapply for association after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

C. 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. Based upon the Respondent's sworn representations in his State of Financial Condition dated November 25, 2008 and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent.

E. The Division of Enforcement may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

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
May 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13488

In the Matter of PEGASUS WIRELESS CORPORATION Respondent.	ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

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

II.

As a result of an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Pegasus is a Nevada corporation formed in 2000. After several failed enterprises, it became a shell company by 2003. In June 2005, through a series of reverse mergers, it acquired OTC Wireless, Inc., a private company incorporated in California that designs wireless networking devices. Pegasus had headquarters in Fremont, California, until about January 2007. It currently maintains a mailbox in Palm Beach, Florida. Since April 11, 2001, Pegasus has had a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Its shares currently trade on the OTC Bulletin Board and briefly traded on NASDAQ between April and October 2006. Pegasus filed for bankruptcy in January 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. Since November 19, 2007, when it filed a Form 10-QSB for the quarter ending September 30, 2007, and while its securities have been registered with the Commission, Pegasus has failed to make any of its periodic reports required by Section 13(a) and Rules 13a-1 and 13a-13 under the Exchange Act.

4. As a result, Pegasus has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 under the Exchange Act.

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 in Section II are true and to afford Respondent an opportunity to establish any defenses; 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 Pegasus' securities identified in Section II 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 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, 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 upon Respondent in accordance with the provisions of Rule 141 of the Commission's Rules of Practice, 17 C.F.R. § 201.141.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2883 / May 27, 2009

INVESTMENT COMPANY ACT OF 1940
Release No. 28747 / May 27, 2009

ADMINISTRATIVE PROCEEDING
File No.3-13487

In The Matter Of NEW YORK LIFE INVESTMENT MANAGEMENT LLC Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY 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 proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and to Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against New York Life Investment Management LLC ("Respondent" or "NYLIM").

II

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act, 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 matter concerns multiple violations of Section 206(2) of the Advisers Act and Sections 15(c) and 34(b) of the Investment Company Act by NYLIM in connection with a mutual fund it advised, the MainStay Equity Index Fund ("Equity Index Fund"), during the period from early 2002 through June 30, 2004 (the "relevant period"). The Equity Index Fund is an open-end investment company that seeks to replicate the movements of the S&P 500 index before expenses.

During the relevant period, the disinterested members of the Board of Trustees and the Board of Trustees of The MainStay Funds, approved the renewal of three investment advisory contracts between NYLIM and the Equity Index Fund. For each contract renewal process, commonly known as the "15(c) process," the Board of Trustees received information showing that the management fees NYLIM charged to the Equity Index Fund were among the highest of the Equity Index Fund's peer-group of mutual funds. NYLIM urged the Board of Trustees to consider the "Guarantee" feature of the Equity Index Fund in evaluating the management fees NYLIM proposed, but, in violation of Section 206(2) of the Advisers Act and Section 15(c) of the Investment Company Act, failed to provide the Board of Trustees information reasonably necessary to evaluate the cost of the Guarantee.[2] Moreover, at the same time that NYLIM was claiming that the Guarantee should be considered to justify the Equity Index Fund's management fees, it was filing with the Commission, in violation of Section 34(b) of the Investment Company Act, prospectuses, annual reports, and registration statements in which it misrepresented that there was "no charge" to the Equity Index Fund or its shareholders for the Guarantee.

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

[2] Pursuant to the Guarantee, a NYLIM affiliate, NYLIFE LLC, agreed to make up any shortfall if the value of a shareholder's investment in the Equity Index Fund on the tenth anniversary of his or her investment was less than his or her original investment, provided the shareholder remained in the Equity Index Fund for the entire period and reinvested all distributions. The only payouts under the Guarantee have occurred recently. As a result of the recent stock market decline, since October 2008, NYLIFE LLC has paid approximately $8,920,751 to shareholders of the Equity Index Fund under the terms of the Guarantee.

Respondent

1. NYLIM is a registered investment adviser and an indirect wholly-owned subsidiary of New York Life Insurance Company. It is the investment adviser to the Equity Index Fund, which is a series of The MainStay funds, a load family of open-end investment companies, which was, during the relevant period, primarily distributed by registered representatives of NYLIFE Securities, Inc., an affiliate of NYLIM.

Other Relevant Parties

2. New York Life Insurance Company is the largest mutual life-insurance company in the United States and one of the largest life insurers in the world. New York Life affiliates provide an array of securities products and services including institutional and retail mutual funds.

3. The Equity Index Fund is an open-end investment company that seeks to replicate the movements of the S&P 500 index before expenses. The Equity Index Fund was closed to new share purchases and new investors effective January 1, 2002.

4. NYLIFE LLC is a wholly-owned subsidiary of New York Life Insurance Company.

5. The Board of Trustees of The MainStay Funds was comprised of up to eleven members, consisting of four affiliated trustees and at least six independent trustees during the relevant period.

6. Independent Trustees (also referred to as the "disinterested members of the Board of Trustees") are the members of the Board of Trustees of The MainStay Funds who are not affiliated with NYLIM.

Facts

7. The Equity Index Fund was opened in 1990, when NYLIM proposed to the Board of Trustees of The MainStay Funds (the "Board") that NYLIM offer an S&P 500 index fund to investors as part of the MainStay family of funds.

8. According to the Equity Index Fund's initial prospectus, the Equity Index Fund came with an unconditional guarantee (the "Guarantee") from NYLIFE LLC (originally NYLIFE Inc., until its merger with NYLIFE LLC on September 30, 1999) stating that: "If on the business day immediately after ten years from your date of purchase (the 'Guarantee Date'), the net asset value of a Fund share, plus the value of all cumulative reinvested dividends and distributions paid on the share during the ten-year period, is less than the price you initially paid for the Fund share, NYLIFE will pay you the difference between the price you paid and the net asset value of a Fund share as of the close of business on the Guarantee Date."

9. From the Equity Index Fund's inception through June 30, 2004, every prospectus, registration statement, and annual report NYLIM filed with the Commission included a statement that, "[t]here is no charge to the [Equity Index] Fund or its shareholders for the Guarantee."

10. Section 15(c) of the Investment Company Act requires the investment adviser to a mutual fund "to furnish, such information as may reasonably be necessary to evaluate the terms of any contract whereby [it] undertakes regularly to serve or act as investment adviser ...." to the fund. Section 15(c) of the Investment Company Act requires, among other things, that a majority of a fund's disinterested directors/trustees approve the advisory contract between the investment adviser and the fund.

11. Before the 2000 advisory contract renewal process, NYLIM was the Board's sole source of information in the 15(c) process concerning the Equity Index Fund's costs of operation, profitability, and peer-group fee comparisons. For the 15(c) process for the years from 2000 through 2003, however, the Independent Trustees of the Board also engaged a series of outside consultants to provide information about peer-group fee comparisons for The MainStay Funds, including the Equity Index Fund. The Independent Trustees also were advised by their own independent legal counsel at all times relevant to this matter.

12. The Board met on March 13, 2000 to consider the Equity Index Fund's advisory contract renewal for its 2000 contract period. For the meeting, the Board was provided with an independent consultant's report, which showed the Equity Index Fund's management fees were the highest in its peer-group. The Board was also provided with information that showed that NYLIM generated a 91% profit margin from the Equity Index Fund. The Board approved the contract as NYLIM proposed.

13. The Board met on March 12 and 13, 2001, to consider the Equity Index Fund's advisory contract renewal for the one-year period beginning on May 1, 2001. By then a new independent consultant had been hired to provide a peer-group fee comparison report for the 15(c) process. However, this report was not completed by the March 2001 meeting but was instead provided for a June 11, 2001 Board meeting after the Equity Index Fund's advisory contract had been renewed for 2001. At the March meeting, NYLIM presented information showing that the Equity Index Fund's management fees were the highest in its peer-group. NYLIM also provided the Board with information showing that NYLIM generated a 9% profit margin from the Equity Index Fund. At the June 11, 2001 meeting, the new consultant's report was provided to the Board. That report showed that the Equity Index Fund's total expense ratio (total expenses for the fund as a percentage of average net assets) was the highest in its peer-group. Again, the contract was approved as proposed.

14. During the spring and summer of 2001, in light of changing market conditions, New York Life Insurance Company for the first time began to analyze the financial exposure of providing the Guarantee.

15. The Board met on September 10, 2001. At the meeting, the Board voted to close the Equity Index Fund on or about January 1, 2002. The Equity Index Fund was then closed to new share purchases and new investors effective January 1, 2002.

16. On January 14, 2002, as a result of the risk analysis done in 2001, NYLIFE LLC established for the first time a reserve of $2 million related to the Guarantee on its 2001 year-end financial statements.

17. The Board met on March 12, 2002 to consider the Equity Index Fund's advisory contract renewal for the one-year period beginning on May 1, 2002. For the meeting, in addition to an internal NYLIM profitability analysis, which reflected a 7% profit margin, the Board obtained a report from a third independent consultant. The report showed that the Equity Index Fund had the highest management fees in its peer-group. As part of the 15(c) process, NYLIM urged the Board to consider the Guarantee in evaluating the management fees NYLIM proposed to charge the Equity Index Fund, but failed to provide the Board information reasonably necessary to evaluate the proper level of such fees. No information was given to the Board regarding either the estimated financial cost or value of the Guarantee or the fact that NYLIFE LLC had established a reserve for the Guarantee. The Board approved the contract as NYLIM proposed.

18. On June 10 and 11, 2002, the Board met again to consider the renewal of the Equity Index Fund advisory contract (the contract renewal period having been changed to begin August 1 each year). The reports provided to the Board at the June 2002 meeting, including the report of the third independent consultant, were substantially the same as the March 2002 reports. Again, no information was given to the Board regarding the estimated cost or value associated with the Guarantee or the fact that NYLIFE LLC had established a reserve for the Guarantee. The Board again approved the contract as NYLIM proposed.

19. In January 2003, NYLIFE LLC recorded a reserve of $11.9 million related to the Guarantee in its 2002 year-end financial statements.

20. The Board met on June 9 and 10, 2003 to consider the Equity Index Fund's advisory contract renewal for the one-year period beginning on August 1, 2003. As part of the 15(c) process, NYLIM presented the Equity Index Fund's management fees as being 28 basis points higher than the selected peer-group median and the second most "unfavorable" of its funds. The explanation NYLIM gave to the Board for the unfavorable comparison was the Equity Index Fund's "unique guarantee." As part of the 15(c) materials, the Board was provided an independent consultant's report and a profitability analysis. The independent consultant's report showed the Equity Index Fund's management fees and total fees were both the highest in its peer-group. The independent consultant concluded: (1) "[h]igh expenses are the main reason this fund ranks worst among its index-fund peers for the one-, three-, and five-year periods;" (2) the "main culprit" for the Equity Index Fund's poor peer-group comparison was a management fee "that is more than twice the peer-group average;" and (3) the Guarantee, although "unique," was "of somewhat limited value." The report also questioned if the Guarantee had any cost associated with it at all "given how unusual it would be for the S&P 500 to lose money over such a long period (and the guarantee is good only on one specific day, the 10-year anniversary of the investor's purchase date) . . . and [n]ow that the fund is closed to new investors, it would seem the liability for the guarantee would be shrinking."

21. NYLIM's profitability analysis for the Equity Index Fund included in the 2003 15(c) materials reflected a negative 103% profit margin, due to the inclusion of a $9.9 million expense for a reserve for the Guarantee. NYLIM however did not explain the expense represented an increase in the estimate of the reserve for the Guarantee, that the reserve for the Guarantee represented the present value of all future payments related to the Guarantee, or that the cost of the Guarantee to NLYIM could have been spread over future years. Moreover, NYLIM did not provide the Board with information concerning the assumptions used to calculate the reserve or

explain why NYLIM believed the full amount of the increase to the reserve should be included in the analysis of the profitability of the Equity Index Fund. The increase to the reserve was simply shown as a line item on the Equity Index Fund's profitability analysis, without which the Equity Index Fund would have shown a profit margin of 31%. The Board approved the contract as NYLIM proposed.

22. The Board met on June 14 and 15, 2004 to consider the Equity Index Fund's advisory contract renewal for the one-year period beginning on August 1, 2004. The independent consultant retained by the Board submitted a report showing that the Equity Index Fund's management fees were 21 basis points higher than the selected peer-group median. NYLIM's profitability analysis for the Equity Index Fund included in the 2004 15(c) materials reflected net income of $9.8 million, resulting in a 163% profit margin, due to the release of $8.3 million of the reserve into income. NYLIM explained in the analysis that this income resulted from a significant reversal in the amount of the reserve for the Guarantee on NYLIFE's financial statements. Moreover, the internal reports NYLIM provided for the meetings stated that the Independent Trustees had specifically asked NYLIM to focus on the Equity Index Fund and its "above average Net Management Fees." For the first time, NYLIM provided the Board with information concerning the assumptions used to calculate the reserve and explained why NYLIM believed the reserve should be included in the analysis of the profitability of the Equity Index Fund. Also, in response to written questions on behalf of the disinterested members of the Board of Trustees, NYLIM provided information concerning the estimated cost of the guarantee. Moreover, in providing information to the Board concerning the guarantee, the independent consultant indicated that the cost of protecting an original investment over a set time period could be estimated by pricing a put option and estimated that the cost of a 10-year put option on the S&P 500 would range between 31 and 64 basis points per year.

23. NYLIM continued to assert at the June 14 and 15 meetings that the Guarantee feature of the Equity Index Fund justified the higher fees for the Equity Index Fund. In the materials for these meetings, NYLIM asked the Board to "consider . . . that the MainStay Equity Index Fund's total operating expenses are comparable to the total expenses of other types of principal protected funds."[3] Yet during the same meetings, NYLIM provided other materials to the Board stating that the Guarantee was provided to the shareholders at "no cost." The Board did not approve the contract renewal during these meetings.

24. On June 30, 2004, NYLIM amended the prospectus for the Equity Index Fund to inform investors for the first time that the Guarantee was taken into account in setting the management fees for the Equity Index Fund, stating that "For the services that NYLIM and its affiliates provide to the Fund, they receive the fees described in the prospectus. Neither NYLIM nor its affiliates receive a separate fee for providing the Guarantee, although the Guarantee has been considered in connection with the annual renewal of the management fee."

[3] Other types of funds had features like the Equity Index Fund's that served to protect investors from losing their principal investment.

25. In July 2004, as part of the contract renewal approval process, the Board voted to lower the management fee of the Equity Index Fund from 50 basis points to 30 basis points and to cap the Equity Index Fund's expense ratio at 80 basis points.

26. During the relevant period, as a result of its conduct, NYLIM received management fees from the Equity Index Fund in excess of the peer median of approximately $3,950,075.

Violations of Law

A. NYLIM Violated Section 15(c) of the Investment Company Act

27. Section 15(c) of the Investment Company Act requires the investment adviser to a mutual fund "to furnish, such information as may reasonably be necessary to evaluate the terms of any contract whereby [it] undertakes regularly to serve or act as investment adviser ...." to the fund. Section 15(c) of the Investment Company Act requires, among other things, that a majority of a fund's independent directors/trustees approve the advisory contract between the investment adviser and the fund.

28. By virtue of the foregoing, NYLIM willfully[4] violated Section 15(c) of the Investment Company Act in 2002 and 2003. During the 2002 and 2003 15(c) processes NYLIM explained the fee being sought by reference to the Guarantee feature of the Equity Index Fund while failing to provide information necessary for the Board to evaluate the Guarantee's true cost or value. Prior to the 2004 Board meeting, NYLIM did not provide the Board with information concerning the assumptions used to calculate the reserve or explain why NYLIM believed the reserve should be included in the analysis of the profitability of the Equity Index Fund.

B. NYLIM Violated Section 206(2) of the Advisers Act

29. Section 206(2) of the Advisers Act prohibits an investment adviser from engaging "in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client" and imposes on investment advisers a fiduciary duty to their clients to act in "utmost good faith," fully and fairly disclose all material facts, and use reasonable care to avoid misleading clients. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191, 194 (1963). Proof of scienter is not required to establish a violation of Section 206(2). SEC v. Steadman, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992); Steadman v. SEC, 603 F.2d 1126, 1134-35 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981).

30. NYLIM willfully violated Section 206(2) of the Advisers Act in 2002 and 2003 by not disclosing all material facts to the Board during the 15(c) processes for the Equity Index Fund. NYLIFE LLC established a reserve for the Guarantee in its financial statements on January 14, 2002, but in the 2002 15(c) process, NYLIM provided no information to the Board regarding either the estimated cost or value of the Guarantee or the fact that NYLIFE LLC had even

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

established a reserve for the Guarantee in its financial statements. For the 2003 15(c) meeting, NYLIM provided a profitability report to the Board that reflected a $9.9 million expense for the reserve for the Guarantee. NYLIM however did not explain that the expense represented an increase in the estimate of the reserve for the Guarantee, that the reserve for the Guarantee represented the present value of all future payments related to the Guarantee, or that the cost of the Guarantee to NYLIM could have been spread over future years. Moreover, NYLIM did not provide the Board with information concerning the assumptions used to calculate the reserve or explain why NYLIM believed the full amount of the increase to the reserve should have been included in the analysis of the profitability of the Equity Index Fund.

C. NYLIM Violated Section 34(b) of the Investment Company Act

31. Section 34(b) of the Investment Company Act makes it unlawful for any person "to make any untrue statement of a material fact in any registration statement, application, report, account, record, or other document filed" with the Commission pursuant to the Investment Company Act. Section 34(b) also makes it unlawful for any person to "omit to state ... any fact necessary in order to prevent the statements made [in the documents filed with the Commission] . . . from being materially misleading."

32. From March 2002 through June 30, 2004, NYLIM willfully violated Section 34(b) of the Investment Company Act by filing annual reports to shareholders, registration statements, and prospectuses with the Commission in which it stated that there was no charge to the Equity Index Fund or its shareholders for the Guarantee. Those statements were false or misleading as evidenced by NYLIM's repeated assertions during the Section 15(c) meetings in 2002, 2003, and 2004 that its higher management fees were justified by the Guarantee.

Undertakings

33. With respect to distribution of disgorgement, prejudgment interest, and civil penalty, Respondent has agreed to the following undertakings:

a. NYLIM shall be responsible for self administering the distribution of sums ordered as disgorgement, prejudgment interest and civil penalty in Paragraph IV.C. ("Settlement Funds"). Within 180 days of the date of this Order, NYLIM shall cause the distribution to be made by crediting accounts or mailing checks to shareholders and former shareholders ("the affected shareholders") of the Equity Index Fund in proportion to the amount and length of time each shareholder invested in the Equity Index Fund between March 12, 2002 and June 30, 2004; plus interest through the date of the distribution calculated at a risk-free rate not to exceed the Federal Reserve's Federal Funds Rate. All checks shall bear a stale date of 90 days and shall be voided thereafter. NYLIM shall not be required to make any disbursement to any affected shareholder if that shareholder is due less than $20 pursuant to the method outlined above. Furthermore, NYLIM shall not pay any affected shareholder any amount that would exceed the affected shareholder's proportionate share of disgorgement plus interest on the disgorgement through the date of distribution (calculated at a risk free rate not to exceed the federal funds rate as established by the Federal Reserve of the United States (*see* http://www.federalreserve.gov/fomc/fundsrate.htm).

b. Any excess amounts, and any amounts NYLIM is unable, due to factors beyond its control, to pay to any affected shareholder, and any sums that are not paid to any affected shareholder who is due less than $20, shall be transferred to the Securities and Exchange Commission. Such payment shall be made when the final accounting is submitted and shall be: (i) made by United States postal money order, certified check, bank cashier's check or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) 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 (iv) submitted under cover letter that identifies NYLIM as the 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 Christopher R. Conte, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, DC 20549.

c. NYLIM agrees to be responsible for all tax compliance responsibilities associated with the Settlement Funds and may retain any professional services necessary. The costs and expenses of any such professional services shall be borne by NYLIM and shall not be paid out of the Settlement Funds. NYLIM shall also retain the services of and be exclusively responsible for the compensation and expenses of an independent third party not unacceptable to the Commission's staff. The independent third party shall, at least 15 business days prior to the date NYLIM makes the first distribution by crediting an account or mailing a check to the affected shareholders who are due $20 or more, submit for the Commission staff's review an initial accounting and certification of the disposition of the monies to be paid to shareholders pursuant to this Order. The initial accounting and certification shall be in a form not unacceptable to the Commission's staff, and shall include: (i) each payee's broker identification number (NYLIM will, however, upon request by Commission staff, for purposes of the Commission's internal review of the distribution, provide the name and address of any payee); (ii) the amount paid to each payee; (iii) the date of each payment; and (iv) the check number or other identifier of money to be transferred.

d. Within 180 days after the date NYLIM makes the first distribution by crediting an account or mailing a check, NYLIM shall submit to the Commission staff for the Commission's approval a final accounting and certification of the disposition of the monies paid pursuant to this Order. The final accounting and certification shall be in a form provided by the Commission's staff, and shall include but not be limited to: (i) each payee's broker identification number (NYLIM will, however, upon request by Commission staff, for purposes of the Commission's internal review of the distribution, provide the name and address of any payee); (ii) the amount paid to each payee; (iii) the date of each payment; (iv) the check number or other identifier of money transferred; (v) the date and amount of any returned payment; (vi) a description of any effort to locate a prospective payee whose payment was returned, or to whom payment was not made due to factors beyond NYLIM's control; (vii) any amounts to be paid to the Commission pursuant to Section 33.a. above with respect to any prospective payee who NYLIM was unable to pay due to factors beyond its control, or who would be entitled to less than $20 under the method set forth in Paragraph 33.a., above; and (viii) a final statement totaling all payments and anticipated payment to the Commission, which shall reconcile with the amounts ordered under Section IV.C. below.

Any and all supporting documentation for the accounting and certification shall be provided to the Commission's staff upon request. NYLIM shall cooperate with reasonable requests for information in connection with the accounting and certification.

e. After NYLIM has submitted the final accounting to the Commission staff, the staff shall submit the final accounting to the Commission for approval and shall request Commission approval to send the remaining residual amount to the United States Treasury.

f. NYLIM 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 Respondent's compliance with the undertakings set forth herein.

g. For good cause shown, the Commission 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 Respondent NYLIM's Offer.

Accordingly, pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Investment Advisers Act and Sections 15(c) and 34(b) of the Investment Company Act.

B. Respondent is censured.

C. IT IS FURTHER ORDERED that Respondent shall, within five business days of date of this Order, pay disgorgement of $3,950,075, prejudgment interest of $1,350,709, and a civil penalty of $800,000, for a total payment of $6,100,784, into an account opened in the name of the MainStay Equity Index Fund Qualified Settlement Fund consistent with the provisions of Paragraph III 33.a. above.

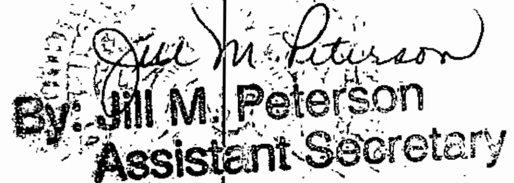
D. There shall be, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund established for the funds described in Section IV.C. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as a civil money penalty pursuant to this Order shall be treated as a penalty paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that it shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, argue that it is entitled to, nor shall it further benefit from any offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such an offset or reduction, Respondent agrees that it shall, within 30 days after entry of a final order granting the offset or reduction, 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 against Respondents in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order in this proceeding.

E. Respondent shall comply with the undertakings enumerated in Section III paragraph 33 above. NYLIM's obligation to pay prejudgment interest, disgorgement, and penalty is not fully satisfied until the funds are disbursed and the final accounting is approved by the Commission and any residual has been transferred to the Commission for disbursement to the United States Treasury.

By the Commission.

Elizabeth M. Murphy
Secretary



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13489

In the Matter of

POLLARD KELLEY AUDITING SERVICES, INC. and TERANCE KELLEY, CPA

Respondents.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted against Pollard Kelley Auditing Services, Inc. ("Pollard-Kelley") and Terance Kelley, CPA ("Kelley" and, with Pollard-Kelley, "Respondents") pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice to determine whether Respondents engaged in improper professional conduct.[1]

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[1] Rule 102(e)(1) provides, in pertinent part: "The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct."

With respect to persons licensed to practice as accountants, Rule 102(e)(1)(iv) provides that "improper professional conduct" means:

> (A) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; or (B) either of the following two types of negligent conduct: (*1*) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted. (*2*) 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.

II.

After an investigation, the Division of Enforcement and the Office of the Chief Accountant allege that:

A. SUMMARY

1. These proceedings arise out of Respondents' tampering with workpapers to conceal multiple deficiencies in their audit of Pegasus Wireless Corporation's 2006 financial statements. During the 2006 audit, Respondents violated numerous professional standards by failing to obtain written representations from Pegasus' management and failing to exercise due care and professional skepticism. In early 2008, nearly one year after completing the audit and after being sued by Pegasus investors for securities fraud, Respondents added additional workpapers to their audit documentation in an attempt to mask deficiencies in the audit. By creating workpapers after the fact and adding them to their audit documentation, without identifying the date they were added or the reason for adding them, Respondents violated Public Company Accounting Oversight Board ("PCAOB") Auditing Standard No. 3. Respondents' conduct, as further described below, constituted improper professional conduct within the meaning of Rule 102(e)(1)(ii) and (iv).

B. RESPONDENTS

2. Pollard Kelley Auditing Services, Inc. is a Colorado corporation licensed to do business in Colorado and Ohio. Pollard-Kelley is a public accounting firm registered with the PCAOB. According to corporate filings, its principal place of business is Kelley's Colorado home. Pollard-Kelley has five employees, including Kelley. The firm served as Pegasus' independent auditor from mid-2005 through approximately November 2007. As auditor, Pollard-Kelley opined that Pegasus' 2005 and 2006 financial statements were prepared in conformity with Generally Accepted Accounting Principles ("GAAP") and that Pollard-Kelley had conducted audits in accordance with the PCAOB's standards.

3. Terance Kelley, CPA, age 62, resides in Lake City, Colorado. He formed Pollard-Kelley and is its vice president of audit services. He performs the vast majority of the firm's audits and performed the audits of Pegasus' 2005 and 2006 financial statements, as well as quarterly reviews of Pegasus financial statements through approximately November 2007. He is licensed as a certified public accountant in Ohio.

C. RELATED PARTY

4. Pegasus Wireless Corporation is a Nevada corporation formed in 2000. After several failed enterprises, it became a shell company by 2003. In June 2005, through a series of reverse mergers, it acquired OTC Wireless, Inc., a private company incorporated in California that designs wireless networking devices. Pegasus had headquarters in Fremont, California, until about January 2007. It currently maintains a mailbox in Palm Beach, Florida. During the relevant period, its securities were registered pursuant to Section 12 of the Securities Exchange Act of 1934

("Exchange Act"). Its shares currently trade on the OTC Bulletin Board and briefly traded on NASDAQ in 2006. Pegasus filed for bankruptcy in January 2008.

D. RESPONDENTS' IMPROPER PROFESSIONAL CONDUCT

Pegasus' Fraud Scheme

5. From 2006 through 2008, Pegasus officers defrauded investors by creating backdated promissory notes memorializing a phony debt, which they used to issue unrestricted shares of Pegasus stock to individuals and entities they controlled. Pegasus issued nearly 480 million shares – 75% of its outstanding shares – based on the fake, backdated promissory notes, resulting in massive dilution of the existing shareholders' ownership interest. The individuals and entities who received shares dumped the stock on the open market and funneled many millions in proceeds to Pegasus officers.

6. Pegasus misled investors about why it issued the shares. For example, in the financial statements included in its quarterly report on Form 10-QSB for the quarter ended September 30, 2006, Pegasus stated: "During the third quarter the Company issued 5,276,016 shares to satisfy $263,800 debt [sic] owed by the Company from prior to the change in control [in 2005]." Similarly, in the financial statements in its annual report on Form 10-KSB for the year ended December 31, 2006, Pegasus represented:

> During 2006 the Company issued 7,376,016 shares of common stock to satisfy $368,532 debt [sic] owed by the Company from prior to the change in control. . . . The Company is obligated on notes payable amounting to $145,000 remaining balance which were undisclosed when current management took control of the shell company. These notes were entered into at various times in 2003 and were 2 year notes, all of which have matured. The notes . . . are convertible into common stock of the parent company at the discretion of the holder. Management two steps back failed to disclose these notes to subsequent management, thus current management was unaware of their existence.

In truth, Pegasus officers in 2006 concocted the debt as a means to enrich themselves.

Respondents' Deficient 2006 Audit

7. From mid-2005 through approximately October 2007, Respondents served as Pegasus' independent auditor, auditing the company's 2005 and 2006 financial statements and reviewing its quarterly statements through the second quarter of 2007.

8. In March 2007, during field work for the 2006 audit, Respondents noted Pegasus' disclosures that it had issued stock to pay previously undisclosed debt. The alleged debt described in the September 30, 2006 10-QSB had grown inexplicably, from $263,800 to $368,532 at year-

end, as had the number of shares issued. (Pegasus had additional debt, which had been previously disclosed, on its balance sheet.) Moreover, the number of shares issued by year-end based on the alleged debt (7,376,016) equaled more than one third of Pegasus' then-outstanding shares.

9. Respondents advised Pegasus in writing that they needed copies of "all agreements in connection with the conversion of $368,532 of debt into common stock." Pegasus' CFO agreed to provide the information.

10. Respondents also requested Pegasus to explain the "basis for the 7,376,016 shares of common stock issued to satisfy $368,532 of debt." On March 28, 2007, Pegasus' CFO replied in writing: "Huh? isn't that rather obvious." Kelley's contemporaneous notes reflect that he continued to have questions about the item.

11. Pegasus failed to provide the promised information or other substantiation or explanation for the alleged debt. Pegasus also failed to provide additional requested information to Respondents, including detail for prepaid expenses; a cash summary, bank reconciliations, and bank statements; supporting invoices for research and development purchases; a breakdown of the goodwill balance; and a copy of an acquisition agreement. Despite these open items, Respondents rendered an unqualified opinion on Pegasus' 2006 financial statements and affirmed its audit was in accordance with the PCAOB's standards. Pegasus included the opinion in its 2006 annual report on Form 10-KSB filed April 3, 2007.

12. Respondents also failed to obtain a written management representation letter from Pegasus for the 2006 audit.

13. PCAOB auditing standards require auditors to exercise reasonable diligence and due professional care in performing an audit. "Due professional care requires the auditor to exercise professional skepticism. . . . [i.e.,] an attitude that includes a questioning mind and a critical assessment of audit evidence." AICPA Codification of Statements on Auditing Standards, "*Due Professional Care in the Performance of Work*," AU § 230.07. "The auditor neither assumes that management is dishonest nor assumes unquestioned honesty. In exercising professional skepticism, the auditor should not be satisfied with less than persuasive evidence because of a belief that management is honest." AU § 230.09. Moreover, an auditor must obtain "sufficient competent evidential matter" to provide "a reasonable basis for forming an opinion." AU § 326.22.

14. In addition, PCAOB auditing standards establish a requirement that the auditor obtain written representations from management as part of an audit. AU § 333.01. The specific representations an auditor should obtain relate to, among other things, management's acknowledgement of its responsibility for the financial statements; its belief that the financial statements are fairly presented in conformity with GAAP, and the completeness of information provided. AU § 333.06. Management's refusal to furnish written representations constitutes a limitation on the scope of the audit sufficient to preclude an unqualified opinion and is ordinarily sufficient to cause an auditor to disclaim an opinion or withdraw from the engagement. AU § 333.13.

15. Respondents departed from the standards described above by failing to obtain competent evidential matter for the alleged debt and other matters and failing to exercise professional skepticism.

16. Respondents further departed from these standards by failing to obtain a written management representation letter from Pegasus for the 2006 audit.

17. During reviews of Pegasus' quarterly financial statements for the quarters ended March 31, 2007, and June 30, 2007, Respondents continued to request information about the alleged debt and other items, but received nothing regarding the debt or other items.

Respondents Tampered with Workpapers When Their Audit Work Was Challenged

18. In late 2007, a Pegasus investor, seeking to represent a class of injured shareholders, sued Pollard-Kelley and others for securities fraud. Pollard-Kelley was served with the complaint on December 29, 2007.

19. On January 1, 2008, Kelley e-mailed a Pegasus officer noting that his firm had been named as a defendant. Kelley wrote: "THIS IS THE TIME TO GET THE FINAL SCHEDULES NEEDED FOR THE 2006 AUDIT TO ME!!!!!!"

20. On February 19, 2008, in connection with its investigation relating to Pegasus, SEC staff requested Pollard-Kelley to produce documents, including documents relating to Pegasus' disclosures about how and why it issued shares to pay the purported convertible debt.

21. In early 2008, having received notice that their audit work was under scrutiny, Respondents determined to add workpapers to their audit documentation. First, Respondents added a written management representation letter. The letter purported to reflect the CEO and CFO's confirmation that the 2006 financial statements are fairly presented in conformity with GAAP; that they made available to Pollard-Kelley all financial records and related data; and that they had no knowledge of fraud involving management. The letter was not signed by Pegasus' CEO or CFO. Rather, Kelley made a handwritten note on the last page of the letter: "Verbally acknowledged & confirmed . . . by [Pegasus' CFO] over the phone. Hard copy to follow."

22. When initially questioned about the workpaper, Kelley falsely testified that he believed he made the handwritten note in March 2007 and that he had the document in March 2007 when he signed off on the 2006 audit. Kelley, however, later stated that he added the workpaper to the audit documentation in 2008 and that his prior testimony was erroneous.

23. In addition to adding the written management representation letter to the audit documentation, Respondents added an undated memo to explain why they opined on Pegasus' 2006 financial statements despite numerous open items. The memo states:

> At the time [Pegasus filed its 10-KSB] a request for additional information and support was made to the client . . . . [W]e were told the materials requested would be provided. The 45 day period of wrapping up audit documentation passed on May 13, 2007 without the receipt of the requested materials.
>
> At that time the firm considered what it should do. Provisions of AU 390 were considered. The firm knew of no reason to suspect the accuracy of the filed financial statements. [The] CFO is a knowledgeable, competent experiences [sic] accountant, with many years experience. Past audits have shown a consistent accuracy of the Company's records under [the CFO's] leadership. We did not know or have any reason to believe the statements as filed were misleading . . . .
>
> We concluded that even with the omitted procedures our audit work papers still supported our opinion. However, we will continue to try to obtain the information requested the complete the additional audit procedures for the items requested on [the 10-KSB filing date].

24. When Kelley created the document in early 2008 and added it, he was suspicious whether the CFO would ever provide the requested documents.

25. PCAOB Auditing Standard No. 3 provides that "[a] complete and final set of audit documentation should be assembled for retention as of a date not more than 45 days after the report release date" (i.e., the "date the auditor grants permission to use the auditor's report in connection with the issuance of the company's financial statements"). ¶¶ 14-15. Although the standard recognizes that "[c]ircumstances may require additions to audit documentation after the report release date," it states that "[a]ny documentation added must indicate the date information was added, the name of the person who prepared the additional documentation, and the reason for adding it." ¶ 16.

26. Respondents departed from this standard by adding the written management representation to the audit documentation in early 2008 without indicating when it was added or the reason for adding it.

27. Respondents further departed from this standard by adding the undated memo to the audit documentation without indicating when it was added or the reason for adding it.

E. VIOLATIONS

As a result of the conduct described above, Respondents engaged in improper professional conduct as defined in Rule 102(e)(1)(ii) and (iv) in that their conduct (A) constituted intentional or knowing conduct, including reckless conduct, that resulted in violation of applicable professional

standards, or in the alternative, (B) constituted negligent conduct, consisting of (1) a single instance of highly unreasonable conduct that resulted in a violation of applicable professional standards in circumstances in which Respondents knew, or should have known, that heightened scrutiny was warranted, or (2) repeated instances of unreasonable conduct by Respondents, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

III.

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

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

B. What, if any, remedial action is appropriate against Respondents pursuant to Rule 102(e) of the Commission's Rules of Practice, including, but not limited to, censure and/or denying, temporarily or permanently, the privilege of appearing or practicing before the Commission.

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 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, 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 upon Respondents in accordance with the provisions of Rule 141 of the Commission's Rules of Practice, 17. C.F.R. § 201.141.

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

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59991; File No. PCAOB-2008-06)

May 28, 2009

Public Company Accounting Oversight Board; Order Approving Proposed Amendment to Board Rules Relating to Inspections

I. Introduction

On December 9, 2008, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") a proposed rule amendment (PCAOB-2008-06) pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act") relating to the Board's rules governing inspections of registered public accounting firms. Notice of the proposed rule amendment was published in the Federal Register on April 24, 2009.[1] The Commission received four comment letters relating to the proposed rule amendment. For the reasons discussed below, the Commission is granting approval of the proposed rule amendment.

II. Description

On December 9, 2008, the PCAOB submitted to the Commission a proposed amendment to its inspection rules to adjust the inspection frequency requirements for certain non-U.S. registered public accounting firms. The proposed amendment would add paragraph (f) to existing Rule 4003 to provide that, with respect to any foreign registered public accounting firm that under the Board's inspection rules had a 2008 deadline for the first Board inspection, such deadline would be extended to 2009. Pursuant to the requirements of Section 107(b) of the Act and Section 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), the Commission published the proposed amendment for public comment on April 20, 2009.

[1] See SEC Release No. 34-59792 (April 20, 2009); 74 FR 18753 (April 24, 2009).

III. Discussion

Section 104 of the Act requires the PCAOB to conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the rules of the PCAOB, the rules of the Commission, and professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers. Section 104(b)(1)(B) of the Act requires the PCAOB to conduct an inspection, at least once every three years, of each registered firm that regularly provides audit reports for 100 or fewer issuers, and Section 104(b)(2) of the Act authorizes the PCAOB to adopt rules adjusting that frequency.

The Commission received four comment letters relating to the proposed rule amendment. Three of the comments came from registered public accounting firms[2] and one came from a foreign regulator.[3] The letters from the accounting firms supported adoption of the amendment, although one questioned whether a one year delay provided sufficient time for resolution of the issues related to the affected inspections. While not specifically related to the proposed amendment, all of the commenters also reiterated views on foreign inspections more generally, which they indicated they also had expressed to the PCAOB in response to a Board request for comment issued concurrently with the issuance of the proposed amendment. We are mindful of these and other views regarding the implications of foreign inspections. We will continue to work with the PCAOB on these issues and encourage the PCAOB to consider these comments in

[2] Deloitte Touche Tohmatsu; PricewaterhouseCoopers LLP; and Ernst & Young LLP.

[3] China Securities Regulatory Commission.

connection with any future action the Board considers, including the impact of a further delay of the inspections affected by this proposed amendment.

The proposed amendment itself does not limit the PCAOB's authority to conduct inspections at any time and does not affect registered firms' obligations under the Act. Nor does it, nor could it, resolve the broader views expressed by the commenters. However, as the Board explained, the adjustment would provide additional time to continue discussions on outstanding matters and work towards cooperation and coordination with authorities in all relevant jurisdictions. The adjustment will accomplish this while delaying a relatively small number of inspections.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed amendment to the Board's rules governing inspections of registered public accounting firms are consistent with the requirements of the Act and the securities laws and are necessary or appropriate in the public interest or for the protection of investors.

IT IS THEREFORE ORDERED, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that the proposed rule amendment (File No. PCAOB-2008-06) be and hereby is approved.

By the Commission.

Elizabeth M. Murphy
Secretary

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2884 / May 28, 2009

INVESTMENT COMPANY ACT OF 1940
Release No. 28749 / May 28, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13492

In the Matter of J. David Huber Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER AS TO J. DAVID HUBER

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 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against J. David Huber ("Huber" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to J. David Huber ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that

Summary

These proceedings arise out of an undisclosed agreement between BISYS Fund Services, Inc. ("BISYS"), a mutual fund administrator, and a mutual fund adviser, AmSouth Bank ("AmSouth"), which was facilitated by former BISYS president and former chairman of the AmSouth Funds' board of trustees, J. David Huber ("Huber" or "Respondent"). Acting through Huber and others, BISYS entered into a 1999 side agreement with AmSouth pursuant to which BISYS was to rebate a portion of its administration fee to the fund advisers in exchange for their promise to continue recommending BISYS as an administrator to the funds' boards of trustees. Following execution of the side agreement, BISYS paid for marketing expenses incurred by the advisers to promote the funds. Occasionally, the fund adviser also used the money dedicated by BISYS to pay expenses unrelated to marketing. Huber executed the 1999 side agreement with AmSouth, on behalf of BISYS. Huber, however, did not disclose either the existence of the 1999 side agreement or its terms to the boards of trustees or shareholders for the AmSouth mutual funds.

As a result, Huber willfully aided and abetted and caused AmSouth's violations of Sections 206(1) and 206(2) of the Advisers Act.

A. RESPONDENT

1. J. David Huber, 62, resides in Florida. From 1996 to March 1999, Huber was the president of BISYS Fund Services; and from April 1999 to June 2005, he was its managing director. As managing director, he maintained his close relationship with a number of BISYS' major clients, including AmSouth. From 1988 to 2005, Huber was a trustee to the AmSouth Funds, and from approximately 1999 through 2005, he was also the chairman of its board of trustees. Huber held Series 7, 26, and 63 licenses from 1987 or 1988 through between 2001 and 2003. Huber became a part-time BISYS employee in 2000 and formally retired in 2005.

B. OTHER RELEVANT ENTITIES

2. During the relevant period, AmSouth was based in Birmingham, Alabama. AmSouth Bank was a subsidiary of AmSouth Bancorporation, and was an unregistered investment adviser that served as the investment adviser to the AmSouth Funds from October 1, 1987, to May 11, 2001. AmSouth Bank was succeeded as adviser by its wholly-owned subsidiary, AmSouth

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

Investment Management Company, LLC ("AIMCO"), a registered investment adviser, on May 12, 2001. On October 1, 2003, AmSouth Asset Management, Inc. ("AAMI") succeeded AIMCO as adviser to the Funds. In 2005, the assets of the AmSouth Funds were merged into, or otherwise became part of, another mutual fund family which is not managed or advised by AmSouth or their successors or affiliates.

3. AmSouth Funds was a Massachusetts business trust registered with the Commission as an investment company until September 23, 2005, when AmSouth Funds was merged into another fund complex, the Pioneer Group, and ceased to exist. AmSouth Funds was an open-end investment company that consisted of 23 individual mutual funds with up to three classes of shares each. AmSouth Funds had a board of trustees consisting of two interested and six independent trustees.[2]

4. BISYS Fund Services, Inc. was a Columbus, Ohio-based division of BISYS Investment Services, a wholly-owned subsidiary of The BISYS Group, Inc., a publicly-traded Delaware corporation with its principal executive offices in Roseland, New Jersey. BISYS served as administrator for approximately 50 mutual fund families with total net assets under management of $275 billion.[3] On or about August 1, 2007, Citigroup acquired the BISYS Group, including its mutual fund administrative operations.

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[2] On September 23, 2008, the Commission instituted public administrative and cease-and-desist proceedings against AmSouth Bank, N.A. and AmSouth Asset Management, Inc., charging AmSouth Asset Management with willfully violating Sections 206(1) and 206(2) of the Advisers Act, and AmSouth Bank and AmSouth Asset Management with willfully violating Section 34(b) of the Investment Company Act and with willfully aiding and abetting and causing violations of Section 12(b) of the Investment Company Act, and Rule 12b-1 thereunder and accepted the settlement offer from AmSouth, requiring AmSouth Asset Management to cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act, and requiring AmSouth Bank and AmSouth Asset Management to cease and desist from committing or causing any violations and any future violations of Sections 12(b) and 34(b) of the Investment Company Act, and Rule 12b-1 thereunder, and to pay disgorgement of $7,789,282 plus prejudgment interest of $2,198,952.81 and a civil penalty of $1,500,000.00, and to distribute the Fair Fund. In the Matter of AmSouth Bank, N.A. (now known as Regions Bank), and AmSouth Asset Management, Inc. (now known as Morgan Asset Management), Investment Advisers Act of 1940 Release No. 2784A, Investment Company Act of 1940 Release No. 28387A (September 23, 2008).

[3] On September 26, 2006, the Commission instituted a settled administrative and cease-and-desist proceeding against BISYS Fund Services, Inc., arising from its undisclosed marketing arrangements with AmSouth and 26 other mutual fund advisers. In the Matter of BISYS Fund Services, Inc., Investment Advisers Act of 1940 Release No. 2554, Investment Company Act of 1940 Release No. 27500 (September 26, 2006). BISYS agreed to the issuance by the Commission of a cease-and-desist order prohibiting it from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act, and Sections 12(b) and 34(b) of the Investment Company Act, and Rule 12b-1(d). BISYS also was ordered to pay

C. GENESIS OF FUND ADMINISTRATOR MARKETING ARRANGEMENTS

5. BISYS provided numerous administration services to mutual fund families. By contract, BISYS was required to provide services, including preparing offering documents such as prospectuses and SAIs, compliance reports, and shareholder reports. In addition, BISYS made its employees available to serve as officers of the mutual funds it administered and assisted in the preparation of materials for fund directors. BISYS also provided distribution services, as well as fund accounting and transfer agency services.

6. BISYS' third-party administration business grew as banks expanded their product line to include proprietary mutual funds within the then-current banking law regulatory environment. Notably, the Glass-Steagall Act prevented banks or their affiliates from serving as an underwriter or a distributor to mutual funds they created and sponsored. BISYS and other administrators stepped in to assume these roles for bank-sponsored funds in exchange for being retained as administrator, fund accountant and/or transfer agent. In part to secure and maintain clients, BISYS and other administrators agreed to dedicate a portion of their administration fee to market these funds, i.e., to provide "marketing budgets" or "fund support." Those marketing budgets began at the creation of the particular bank-sponsored funds.

7. The marketing arrangements generally worked as follows. First, BISYS, in addition to entering into an administration contract with the adviser, also entered into an undisclosed side agreement pursuant to which the administration fee would be split between BISYS and the adviser. These side agreements were not disclosed to the respective mutual funds' boards or shareholders. After entering into the side agreements, the advisers then recommended to the mutual fund boards that the funds enter into administration and other service agreements with BISYS.

8. The administration agreements provided that BISYS would receive an administration fee. Under the marketing arrangement, a substantial portion of the administration fee was allocated to marketing the mutual funds (e.g., wholesaler costs, website design, advertising, and training) pursuant to the undisclosed side agreement between BISYS and the adviser. The advisers effectively determined what expenses would be covered by the marketing budget. Although BISYS paid the marketing expenses directly or by reimbursing the fund or its adviser, BISYS rarely rejected reimbursement for a marketing expense.

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disgorgement of $9,698,835 plus prejudgment interest of $1,703,981.66 and a civil penalty of $10,000,000 which monies were included in a Fair Fund for distribution to the victims of BISYS' violations, and it agreed to retain an independent distribution consultant to distribute the Fair Fund and to retain an independent consultant to review and report on its compliance with certain relevant requirements under the Investment Company Act and Advisers Act.

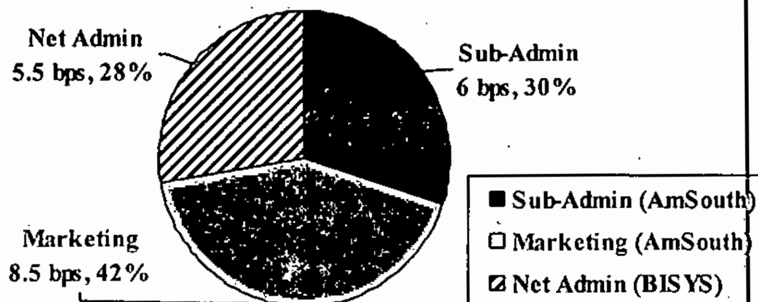
D. HUBER'S ROLE IN THE AMSOUTH MARKETING ARRANGEMENTS

9. In November or December 1998, Huber received a legal memorandum from outside counsel discussing a number of hypothetical situations concerning marketing arrangements. The memorandum recommended that the Administrator disclose marketing arrangements to fund shareholders and trustees in circumstances similar to those described below. Huber signed the 1999 AmSouth side letter and the 1999 administration and sub-administration agreements while he sat on the board of trustees as chairman, but did not disclose the 1999 side letter to the independent trustees or to shareholders.

10. Since the inception of the AmSouth Funds in 1988, BISYS or its predecessor company had an agreement with AmSouth to provide marketing support. From 1988 through October 1999, the agreement was in oral form; from 1999 through 2004, it was in written form. The independent trustees were only generally aware that BISYS provided marketing assistance with respect to the AmSouth Funds from its administration or other service fees. However, the independent trustees were not told specifically how much was spent for marketing or how those monies were spent. At board meetings, BISYS employees stated that over the past year, marketing expenses from BISYS' "bona fide profits" had not exceeded 25% of their fees from the AmSouth Funds.

11. In 1999, BISYS executives negotiated the first written side agreement with AmSouth. In October 1999, Huber signed a side agreement pursuant to which BISYS agreed to pay a specific amount of its administration fee to AmSouth for marketing and sub-administration. In exchange for agreeing to pay a specific amount of its administration fee to AmSouth, AmSouth agreed to recommend to the AmSouth Funds' trustees that they enter into a contract extension with BISYS to provide administration services. The side letter was so critical to AmSouth that an AmSouth officer told Huber that the side letter was a "deal breaker" and that if BISYS "won't do it," one of its competitors will. The AmSouth officer also told Huber that if BISYS did not sign the 1999 side agreement, AmSouth "would not be prepared to recommend to the board our continued, BISYS['] continued involvement with the [AmSouth] Funds." Huber, as managing director of BISYS Fund Services, approved and signed the side letter "Agreed and Accepted, BISYS Fund Services." At the time, Huber was also chairman of the AmSouth Funds.

12. In the October 1999 side letter, BISYS and AmSouth agreed to a stated 20 bps fee for administration and fund accounting services, and also agreed that AmSouth would receive part of that fee, between 5 bps and 6 bps, for providing sub-administration services to the AmSouth Funds. Also from that 20 bps fee, BISYS agreed to pay AmSouth $200,000 per year for dedicated marketing personnel and accrue between 8.5 bps and 12.5 bps (less any waivers) for AmSouth to use for marketing. For assets under management up to $2 billion, for example, administration fees were divided as follows:



The 1999 side letter, therefore, essentially provided that the soon-to-be entered administration contract for 20 bps would be split two ways: one-fourth to BISYS, and three-fourths diverted back to AmSouth (sub-administration and marketing payments).

13. The 1999 side letter stated that "fund agreements will be amended and restated to reflect the terms set forth in this letter." The side letter continued:

> If the information and the fee arrangements outlined in this letter are consistent with your understanding, please sign and date one of the original letters and return it to me. The other original may be retained for your records. Our next step will be to get you copies of the new agreements for your review. Once reviewed by [AmSouth], we will also need to review the agreements with fund counsel and ultimately present the new agreements to the [AmSouth] Mutual Funds Board of Trustees for approval. Obviously, while this letter represents our mutual understanding, these terms will become binding upon the execution of the new, definitive fund agreements, which we will finalize over the next thirty days.

The fund agreements were not amended to reflect the specific terms of the side letter. Accordingly, other than with respect to the overall fee (20 bps) and term (two years), the provisions relating to the marketing budget were not included in the subsequently executed administration agreements that were approved by the AmSouth Funds' trustees.

14. Shortly after entering into the side agreement with AmSouth, Huber executed the administration agreement on behalf of the AmSouth Funds as its chairman, and the sub-administration agreement on behalf of a BISYS subsidiary as its executive vice president, knowing that the administration and sub-administration agreements did not contain the provisions relating to the marketing budget. Huber then presided over the board of trustees meeting during which there was a discussion and vote on renewing BISYS' administration contract with the funds for a two-year term. Huber did not disclose to the independent trustees that he had recently on behalf of BISYS signed the 1999 side agreement between BISYS and AmSouth.

15. Huber became aware of a proposed 2000 side letter from his successor as president of BISYS. The new president of BISYS called Huber and said that AmSouth asked that

he sign the 2000 side letter. Huber responded that he did not know anything specific about the 2000 side letter. But, Huber stated that AmSouth demanded that he sign a side letter in 1999. Huber further said that the new president of BISYS should have lawyers look at the 2000 side letter. Huber concluded, but "I think it's a deal breaker."

16. Huber then received drafts of the 2000 side agreement with AmSouth. The 2000 side agreement was similar to the 1999 one, including the language distinguishing the administration and other service agreements that would be presented to the trustees and the side agreement that would be signed with one copy staying with AmSouth and the other going to BISYS. Further, Huber was copied on an email from an independent trustee asking for a breakdown of the fees for administration and other services in the contract proposals. Despite receiving a draft side agreement four days earlier that outlined the marketing arrangement -- a significant portion of the BISYS fees would be set aside for marketing and the entire fund accounting fee, until $1 million was accumulated would be given to BISYS, not to pay for fund accounting services, but rather to satisfy the marketing budget deficit -- Huber did not correct the disclosure to the independent trustees that the administration fee would be 20 bps and the fund accounting fee would be 2 bps. The side agreement preceded a board meeting, chaired by Huber, in which there was a discussion of a renewal of BISYS' administration contract for a five-year term. Huber did not disclose that he was aware of a draft of the 2000 side agreement. The marketing arrangement with AmSouth ended on October 1, 2004.

E. VIOLATIONS

17. As a result of the conduct described above, Huber willfully aided and abetted and caused AmSouth's violations of Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser.

IV.

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

Accordingly, pursuant to Section 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

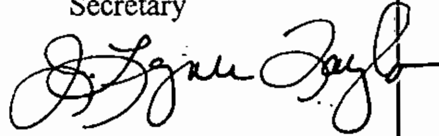
A. Respondent J. David Huber cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act.

B. Respondent shall, within 30 days of the entry of this Order, pay disgorgement of $13,800 and prejudgment interest of $4,200, for a total amount of $18,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA

22312; and (D) submitted under cover letter that identifies J. David Huber 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 Michele Wein Layne, Associate Regional Director, U.S. Securities and Exchange Commission, 5670 Wilshire Blvd, Suite 1100, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2885 / May 28, 2009

INVESTMENT COMPANY ACT OF 1940
Release No. 28750 / May 28, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13493

In the Matter of Melissa M. Hurley, Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER AS TO MELISSA M. HURLEY

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 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act"), against Melissa M. (Lisa) Hurley ("Hurley" 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 her and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to Melissa M. Hurley ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that

Summary

These proceedings arise out of undisclosed agreements between BISYS Fund Services, Inc. ("BISYS"), a mutual fund administrator, and mutual fund advisers, including AmSouth Bank and its two adviser subsidiaries, AmSouth Investment Management Company and AmSouth Asset Management (collectively, "AmSouth"). Former BISYS vice president and general counsel, Melissa M. (Lisa) Hurley, knew about several of BISYS' side agreements, and reviewed drafts of AmSouth's side agreements. BISYS entered into side agreements obligating BISYS to rebate a portion of its administration fee to the fund advisers in exchange for their promise to continue recommending BISYS as an administrator to the funds' boards of trustees. Following execution of the side agreements, BISYS paid for marketing expenses incurred by the advisers to promote the funds. Occasionally, the fund adviser also used the money dedicated by BISYS to pay expenses unrelated to marketing. Hurley reviewed draft side agreements, including AmSouth's 1999 and 2000 side agreements, and knew that the marketing arrangement should be disclosed to fund trustees and shareholders. Hurley did not disclose the terms of the side agreements to the fund trustees or shareholders. In 2003, Hurley also drafted a disclosure template concerning the marketing arrangements for certain fund shareholders, and reviewed and commented on a disclosure template for certain fund boards of trustees. These disclosure templates did not disclose material facts such as the written nature of the agreements, the exchange of a portion of the administration fee for a recommendation to the fund boards, or the source of funds used for marketing.

As a result, Hurley willfully aided and abetted and caused AmSouth Asset Management's violations of Sections 206(1) and 206(2) of the Advisers Act.

A. RESPONDENT

1. **Melissa M. (Lisa) Hurley**, 53, resides in New York state. Hurley was senior vice president and general counsel of BISYS from May 1998 to approximately 2002, and executive vice president and general counsel of BISYS from approximately 2002 through 2006. She is a member of the state bars of New York and Connecticut. Since approximately April 2007, she has been employed by a holding company of an investment adviser, as senior counsel.

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

B. OTHER RELEVANT ENTITIES

2. During the relevant period, AmSouth was based in Birmingham, Alabama. AmSouth Bank was a subsidiary of AmSouth Bancorporation, and was an unregistered investment adviser that served as the investment adviser to the AmSouth Funds from October 1, 1987 to May 11, 2001. AmSouth Bank was succeeded as adviser by its wholly-owned subsidiary, AmSouth Investment Management Company, LLC ("AIMCO"), a registered investment adviser, on May 12, 2001. On October 1, 2003, AmSouth Asset Management, Inc. ("AAMI") succeeded AIMCO as adviser to the Funds. In 2005, the assets of the AmSouth Funds were merged into, or otherwise became part of, another mutual fund family which is not managed or advised by AmSouth or their successors or affiliates.

3. AmSouth Funds was a Massachusetts business trust registered with the Commission as an investment company until September 23, 2005, when AmSouth Funds was merged into another fund complex, the Pioneer Group, and ceased to exist. AmSouth Funds was an open-end investment company which consisted of 23 individual mutual funds with up to three classes of shares each. AmSouth Funds had a board of trustees consisting of two interested and six independent trustees.[2]

4. BISYS Fund Services, Inc. was a Columbus, Ohio-based division of BISYS Investment Services, a wholly-owned subsidiary of The BISYS Group, Inc., a publicly-traded Delaware corporation with its principal executive offices in Roseland, New Jersey. BISYS served as administrator for approximately 50 mutual fund families with total net assets under management of $275 billion.[3] On or about August 1, 2007, Citigroup acquired the BISYS Group, including its mutual fund administrative operations.

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[2] On September 23, 2008, the Commission instituted public administrative and cease-and-desist proceedings against AmSouth Bank, N.A. and AmSouth Asset Management, Inc., charging AmSouth Asset Management with willfully violating Sections 206(1) and 206(2) of the Advisers Act, and AmSouth Bank and AmSouth Asset Management with willfully violating Section 34(b) of the Investment Company Act and with willfully aiding and abetting and causing violations of Section 12(b) of the Investment Company Act, and Rule 12b-1 thereunder and accepted the settlement offer from AmSouth, requiring AmSouth Asset Management to cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act, and requiring AmSouth Bank and AmSouth Asset Management to cease and desist from committing or causing any violations and any future violations of Sections 12(b) and 34(b) of the Investment Company Act, and Rule 12b-1 thereunder, and to pay disgorgement of $7,789,282 plus prejudgment interest of $2,198,952.81 and a civil penalty of $1,500,000.00, and to distribute the Fair Fund. In the Matter of AmSouth Bank, N.A. (now known as Regions Bank), and AmSouth Asset Management, Inc. (now known as Morgan Asset Management), Investment Advisers Act of 1940 Release No. 2784A, Investment Company Act of 1940 Release No. 28387A (September 23, 2008).

[3] On September 26, 2006, the Commission instituted a settled administrative and cease-and-desist proceeding against BISYS Fund Services, Inc., arising from its undisclosed marketing

C. GENESIS OF FUND ADMINISTRATOR MARKETING ARRANGEMENTS

5. BISYS provided numerous administration services to mutual fund families. By contract, BISYS was required to provide services, including assistance in preparing offering documents such as prospectuses and statements of additional information ("SAIs"), compliance reports, and shareholder reports. In addition, BISYS made its employees available to serve as officers and trustees of the mutual funds it administered and assisted in the preparation of materials for fund directors. BISYS also provided distribution services, as well as fund accounting and transfer agency services.

6. BISYS' third-party administration business grew as banks expanded their product line to include proprietary mutual funds within the then-current banking law regulatory environment. Notably, the Glass-Steagall Act prevented banks or their affiliates from serving as an underwriter or a distributor to mutual funds they created and sponsored. BISYS and other administrators stepped in to assume these roles for bank-sponsored funds in connection with being retained as administrator, fund accountant, and/or transfer agent. In part to secure and maintain clients, BISYS and other administrators agreed to dedicate a portion of their administration fee to market these funds, i.e., to provide "marketing budgets" or "fund support." Those marketing budgets began at the creation of the particular bank-sponsored funds.

7. The marketing arrangements generally worked as follows. First, BISYS, in addition to entering into an administration contract with the funds, also entered into an undisclosed side agreement with the adviser. The side agreement described how the administration fee would be split between BISYS and the adviser. These side agreements were not disclosed to the respective mutual funds' boards or shareholders. After entering into the side agreements, the advisers then recommended to the mutual fund boards that the funds enter into administration and other service agreements with BISYS.

8. The administration agreements provided that BISYS would receive an administration fee. Under the marketing arrangement, a substantial portion of the administration fee was allocated to marketing the mutual funds (e.g., wholesaler costs, website design,

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arrangements with AmSouth and 26 other mutual fund advisers. In the Matter of BISYS Fund Services, Inc., Investment Advisers Act of 1940 Release No. 2554, Investment Company Act of 1940 Release No. 27500 (September 26, 2006). BISYS agreed to the issuance by the Commission of a cease-and-desist order prohibiting it from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act, and Sections 12(b) and 34(b) of the Investment Company Act, and Rule 12b-1(d). BISYS also was ordered to pay disgorgement of $9,698,835 plus prejudgment interest of $1,703,981.66 and a civil penalty of $10,000,000 which monies were included in a Fair Fund for distribution to the victims of BISYS' violations, and it agreed to retain an independent distribution consultant to distribute the Fair Fund and to retain an independent consultant to review and report on its compliance with certain relevant requirements under the Investment Company Act and Advisers Act.

advertising, and training) pursuant to the undisclosed side agreement between BISYS and the adviser. The advisers effectively determined what expenses would be covered by the marketing budget. Although BISYS paid the marketing expenses directly or by reimbursing the fund or its adviser, BISYS rarely rejected reimbursement for a marketing expense.

D. HURLEY'S ROLE IN THE MARKETING ARRANGEMENTS

9. Shortly after Hurley began working at BISYS, in May 1998, she retained outside counsel to provide legal advice regarding marketing arrangements. Hurley received and read a written memorandum from outside counsel on or around October 26, 1998. The memorandum analyzed three types of marketing arrangements, including one in which the administrator agreed to pay a fixed amount of its fee to market the mutual funds. The memorandum stated that when the administrator agrees to pay a fixed amount of its fee to market the mutual funds, the administrator has a "duty to disclose the existence of the arrangement to the Fund's directors." Failure to disclose "creates a risk that the administrator could be found to have aided and abetted any violation of the 1940 Act that results from non-disclosure." The memorandum further stated: "If the administrator knows that the payments it is making to the adviser are unlawful, the administrator could be viewed as aiding and abetting the adviser's violation of the 1940 Act." Additionally, the outside counsel wrote, "We recommend that the administrator ensure that the payment arrangements have been disclosed to the Fund's directors and that the Fund's SAI contain" sufficient disclosure, i.e., the "existence of the payments." Hurley did not disclose the AmSouth marketing arrangement to the AmSouth Funds' board of trustees or to the AmSouth Funds' shareholders even though she received, reviewed, and commented on drafts of the 1999 and 2000 AmSouth marketing side letters.

10. Hurley reviewed the two draft side agreements with AmSouth, one in 1999 and one in 2000, and knew they made clear commitments to set aside a designated portion of BISYS' fees for marketing the AmSouth Funds. During her review of the 2000 draft side agreement, she wrote, "Does this mean we are using fund service fee revenues for distribution support? = Illegal under 12b-1." Hurley did not, however, disclose the AmSouth side agreements, or any other side agreement, to fund trustees.

11. In a December 17, 2001 email exchange, a BISYS in-house counsel wrote to Hurley and the general counsel of the BISYS Group, that with regard to renewals and renegotiations of marketing arrangements, the BISYS president "makes the call." The in-house counsel continued, "To the extent possible, I try to soften our commitment or do other things to make the arrangement more palatable." The general counsel of the BISYS Group replied to Hurley and the in-house counsel, "I believe in renewals/renegotiations the goal is to eliminate not just soften our commitment." Hurley then forwarded this email exchange to BISYS' president -- without sending a copy to either the BISYS Group's general counsel or to the in-house counsel -- and added, "I think realistically" some of the side agreements "will not go away" despite the "lofty goal."

12. In 2003, Hurley reviewed and commented on a disclosure template for fund trustees. In the fall of 2003, the Distribution Assistance Program ("DAP") disclosure was made to those fund boards with an affiliated adviser that had a marketing arrangement with BISYS, including AmSouth and eight other mutual fund families. Hurley also reviewed and commented on a draft DAP disclosure for the AmSouth Funds' board of trustees. In September 2003, the AmSouth Funds' trustees received the DAP disclosure from a BISYS manager. The disclosure described marketing arrangements as an "informal arrangement under which BISYS voluntarily expends its own assets in marketing the Funds." This disclosure was misleading, however, because it failed to describe the exchange of a portion of the administration fee for a recommendation to the fund boards, and the fact that BISYS expenditures were not voluntary, but had been negotiated and agreed upon by the parties.

13. On July 10, 2003, Hurley wrote to the legal services unit that "[g]iven the current focus on revenue sharing arrangements involving investment advisors, it is important that BISYS, at a minimum, disclose" the marketing arrangement practice "in the SAI of all funds" with such arrangements. To that end, Hurley drafted a template for inclusion in AmSouth's and 12 other funds' SAIs concerning the marketing arrangements. Hurley wrote, "Disclosure should be simple and straightforward, to the effect that "The Distributor may finance from it [sic] own resources certain activities intended to result in the distribution of the Funds' shares." Despite calling for disclosure, the template was misleading because it, among other things, failed to describe the nature of the arrangement in which BISYS contractually agreed to set aside a certain portion of its administration fee to be used at the adviser's direction in exchange for adviser recommending BISYS as administrator to the funds' board. The disclosure that appeared in at least six SAIs -- including AmSouth Funds' SAI dated November 28, 2003 -- was very similar to Hurley's disclosure template. Specifically, the AmSouth Funds' SAI disclosure stated: "[t]he Distributor [BISYS] and/or its affiliates, may finance from their own resources, certain activities intended to result in the distribution of the Funds' Class A Shares and Class B Shares."

14. In BISYS' fiscal year 2003, Hurley received a performance bonus as part of her BISYS compensation package. The bonus was based partly on the objective of increasing the Investment Services Division's earnings (of which Hurley's division at BISYS was a part) which included earnings from administration services.

E. VIOLATIONS

15. As a result of the conduct described above, Hurley willfully aided and abetted and caused AmSouth Asset Management's violations of Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser.

IV.

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

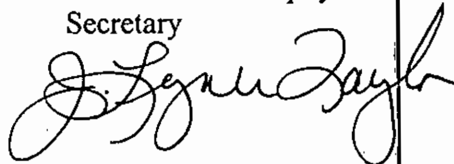
Accordingly, pursuant to Section 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Hurley shall cease and desist from causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act.

B. Respondent shall, within 30 days of the entry of this Order, pay disgorgement of $15,000 and prejudgment interest of $5,569.22, and a civil money penalty of $15,000, for a total amount of $35,569.22, to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Melissa M. (Lisa) Hurley 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 Michele Wein Layne, Associate Regional Director, U.S. Securities and Exchange Commission, 5670 Wilshire Blvd, Suite 1100, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

Commissioner Walter and Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 9033 / May 28, 2009

Securities Exchange Act of 1934
Release No. 59998 / May 28, 2009

Administrative Proceeding
File Number 3-11893

In the Matter of David A. Finnerty, Donald R. Foley II, Scott G. Hunt, Thomas J. Murphy, Jr., Kevin M. Fee, Frank A. Delaney IV, Freddy DeBoer, Todd J. Christie, James V. Parolisi, Robert W. Luckow, Patrick E. Murphy, Robert A. Johnson, Jr., Patrick J. McGagh, Jr., Joseph Bongiorno, Michael J. Hayward, Richard P. Volpe, Michael F. Stern, Warren E. Turk, Gerard T. Hayes, and Robert A. Scavone, Jr. Respondents.	ORDER MAKING FINDINGS, IMPOSING REMEDIAL SANCTIONS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b)(6), 21C AND 11(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 11b-1 THEREUNDER AS TO DAVID A. FINNERTY

I.

On April 12, 2005, the Securities and Exchange Commission ("Commission") entered an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder ("OIP") against respondent David A. Finnerty ("Finnerty").

II.

Finnerty has submitted an Offer of Settlement ("Offer") in these administrative proceedings, 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, Finnerty consents to the entry of this Order Making Findings, Imposing Remedial Sanctions, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder as to David A. Finnerty ("Order"), as set forth below.

III.

On the basis of this Order and Finnerty's Offer, the Commission finds[1] that:

FACTS

1. Finnerty is one of several respondents in pending administrative and cease-and-desist proceedings, file number 3-11893, who have been charged with fraudulent and other improper trading during the period from at least 1999 through June 30, 2003, while they were acting as specialists on the New York Stock Exchange ("NYSE").

2. Finnerty, age 42, of Weehawken, New Jersey, acted as a specialist at Fleet Specialist, Inc. (now known as Banc of America Specialist, Inc.) ("Fleet") and a Fleet predecessor firm from at least January 1, 1999 to approximately April 2003 (the "Relevant Period").

3. During the Relevant Period, Finnerty acted as a specialist in PE Biosystems ("PEB") (from approximately November 1999 to approximately September 2000), Applera Corp. – Celera Genomics Group ("CRA") (from approximately November 1999 to approximately February 2002), and General Electric ("GE") (from approximately September 2000 to approximately April 11, 2003).

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

4. As a specialist, Finnerty had an obligation to serve public customer orders over the proprietary interests of the firm with whom he was formerly employed, Fleet. In his role as a specialist, Finnerty had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from Fleet's own account when those customer orders could be matched with other customer orders. In becoming a specialist, Finnerty represented to the NYSE that he would comply with the NYSE Rules, and thereby fulfill this duty. Finnerty violated his obligation by filling orders through proprietary trades rather than through other customer orders, through two types of improper trading referred to herein as "interpositioning" and "trading ahead."

5. Interpositioning involves a two-step process that allows the specialist to generate a profit for the specialist firm from the spread between two opposite trades. Interpositioning can take various forms. In one form, the specialist purchases stock for the specialist firm's proprietary account from the customer sell order, and then fills the customer buy order by selling from the specialist firm's proprietary account at a higher price – thus locking in a riskless profit for the specialist firm's proprietary account. A second form of interpositioning involves the specialist selling stock into the customer buy order, and then filling the customer sell order by buying for the specialist firm's proprietary account at a lower price – again, locking in a riskless profit for the specialist firm's proprietary account. In both forms of interpositioning, the specialist participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction.

6. Trading ahead involves a practice whereby the specialist fills an agency order through a proprietary trade for the specialist firm's proprietary account – and thereby improperly 'steps in front' of, or 'trades ahead' of, another agency order – simply to allow the specialist firm to take advantage of market conditions promptly. Unlike interpositioning, the practice of "trading ahead" does not necessarily involve a second specialist trade for the specialist firm's proprietary account into the opposite, disadvantaged agency order. For example, in a declining market, a specialist may "trade ahead" by filling a market buy order by selling stock from the specialist firm's proprietary account in front of an agency market sell order. In so doing, the specialist would lock in a higher price for the proprietary trade, then fill the agency sell order *after* the proprietary trade, and thereby force the agency market sell order to accept a slightly lower price as the price of the stock fell.

7. During the Relevant Period, in PEB, CRA, and GE, Finnerty knowingly or recklessly engaged in approximately 26,300 instances of interpositioning, locking in a riskless profit of approximately $4,500,000 for his firm's proprietary account at the expense of customer orders, and approximately 15,000 instances of trading ahead, causing approximately $5,000,000 in customer harm.

APPLICABLE LAW

Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 Thereunder

8. The antifraud provisions of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder prohibit, among other things, any schemes to defraud or fraudulent or deceptive acts and practices in the offer or sale (Section 17(a)) or in connection with the purchase or sale (Section 10(b) and Rule 10b-5) of securities. Basic Inc. v. Levinson, 485 U.S. 224, 235 n.13 (1988) (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968) (en banc)). To prove a violation of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Commission must prove that the respondent acted with scienter. Aaron v. SEC, 446 U.S. 680, 691 (1980). Scienter may be established by proof of conscious behavior or recklessness on the part of the respondent. SEC v. U.S. Environmental, Inc., 155 F.3d 107, 111 (2d Cir. 1998), cert. denied, 526 U.S. 1111 (1999). Scienter need not be shown in order to establish violations of Sections 17(a)(2) and (3) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 696-97 (1980).

9. Pursuant to the NYSE rules described below and his duty as a specialist, Finnerty had a duty to fill customer orders solely in a manner that served the interests of customers or that helped maintain fair and orderly markets. Finnerty expressly represented to the NYSE that he would comply with its rules and thereby represented that he would fulfill these duties; he also held himself out as a member in good standing of the NYSE. As a result, absent disclosure to the contrary by Finnerty, those who submitted orders executed by him – including NYSE members and their customers – were entitled to believe that he would execute their orders in a manner consistent with these duties and would not profit at their expense. By engaging in undisclosed interpositioning and trading ahead in contravention of the duties and representations described above, Finnerty engaged in deceptive conduct. Accordingly, Finnerty willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 11(b) of the Exchange Act and Rule 11b-1 Thereunder

10. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder require various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market." Section 11(b) and Rule 11b-1 permit a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1 if the Commission finds, after appropriate notice and opportunity for hearing, that a specialist has for any account in which he has an interest "effected transactions … which were not part of a course of

dealings reasonably necessary to permit such specialist to maintain a fair and orderly market," and were "not effected in a manner consistent with the rules adopted by such exchange," the Commission may order the exchange to suspend or cancel the specialist's registration. If, however, the exchange itself has suspended or canceled the specialist's registration, no further sanction shall be imposed unless the Commission finds "substantial or continued misconduct."

11. Where specialists make trades for their firm's proprietary accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. The Commission has brought settled actions for sanctions under Exchange Act Section 15(b) against specialists under Section 11(b) and Rule 11b-1. See In the Matter of Albert Fried & Co. and Albert Fried, Jr., 1978 WL 196046, S.E.C. Release No. 34-15293 (Nov. 3, 1978).

12. Several NYSE rules prohibit a specialist from trading ahead of a customer order, as well as from engaging in interpositioning, and require agency orders to be matched whenever possible, consistent with a specialist's duty to maintain a fair and orderly market.

13. NYSE Rule 104 (Dealings by Specialists), which sets forth specialists' obligations, prohibits specialists from trading for their own accounts unless it is reasonably necessary to maintain a fair and orderly market. This is known as the negative obligation. Rule 104 states in relevant part: "No specialist shall effect . . . purchases or sales of any security in which such specialist is registered . . ., unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."[2]

14. NYSE Rule 92 (Limitations on Members' Trading Because of Customers Orders) generally prohibits a member from entering a proprietary order to buy (or sell) a security while in possession of an executable buy (or sell) agency order that could be executed at the same price. During the Relevant Period, Rule 92 stated in relevant part:

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[2] Rule 104.10(3), which describes specialists' affirmative obligations, also expands on the negative obligation:

> Transactions on the Exchange for his own account effected by a member acting as a specialist must constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated. Transactions not part of such a course of dealings … are not to be effected.

> No member shall personally buy . . . any security . . . for his own account or for any account in which he is . . . interested . . . while such member personally holds or has knowledge that his member organization holds an unexecuted market order to buy such security . . . for a customer.[3]

15. Similarly, NYSE Rule 92 also applies to the specialist buying or selling a security while holding an unexecuted market buy or sell order, as well as to circumstances where the specialist holds unexecuted customer limit orders at a price that could be satisfied by the proprietary transaction effected by the specialist.

16. NYSE Rule 123B (Exchange Automated Order Routing System) requires specialists to cross orders received over the DOT system. Rule 123B(d) states in relevant part: "a specialist shall execute System orders in accordance with Exchange auction market rules and procedures, including requirements to expose orders to buying and selling interest in the trading crowd and *to cross orders before buying or selling from his own account.*" (Emphasis added).

17. NYSE Rule 401 requires NYSE members to "adhere to the principles of good business practice in the conduct of his or its business affairs." Similarly, NYSE Rule 476(a)(6) provides sanctions if NYSE members are adjudged guilty of "conduct or proceeding inconsistent with just and equitable principles of trade."

18. As a result of the conduct described above, Finnerty violated the aforementioned NYSE rules and violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

IV.

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

Accordingly, it is hereby ORDERED that:

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3 Rule 92 was amended on January 7, 2002 to read in relevant part:

> [n]o member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security for any account in which such member or member organization or any approved person thereof is directly or indirectly interested (a "proprietary order"), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price.

1. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Finnerty shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Sections 10(b) and 11(b) of the Exchange Act and Rules 10b-5 and 11b-1 thereunder.

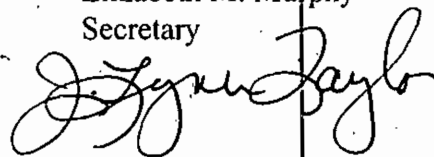
2. Pursuant to Section 15(b)(6) of the Exchange Act, Finnerty be, and hereby is, barred from association with any broker or dealer.

   Any reapplication for association by Finnerty 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 Finnerty, 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.

3. It is further ordered that Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $150,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3711. 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 Finnerty 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 Scott L. Black, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281.

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9036 / May 29, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 60010 / May 29, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13498

In the Matter of

DUSTIN J. LUNT,

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 Dustin J. Lunt ("Respondent" or "Lunt").

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, as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

These proceedings arise out of Lunt's fraudulent offers and sales of securities outside of his association with a registered broker-dealer, and his failure reasonably to supervise a registered representative involved in similar conduct. In October and November 2007, Lunt sold interests in an investment program and promised to pay at least 5% in returns each month. However, Lunt never performed the diligence to determine if there was a reasonable basis for his representations. Lunt also failed to disclose the increasingly troubling signs he encountered demonstrating that the program was nothing more than a Ponzi scheme. Lunt further failed reasonably to supervise a registered representative under his supervision who solicited investors in the same program.

Respondent

1. Respondent Dustin J. Lunt, age 26, is a resident of Mesa, Arizona. He holds Series 6, 26, 63, and 65 licenses. From October 2003 through his resignation in February 2008, Lunt was a registered representative associated with World Group Securities, Inc. ("World Group") in its Tempe, Arizona, branch office. Lunt served as the branch manager of World Group's Tempe office from May 2006 until February 2008.

Other Relevant Entity

2. World Group Securities, Inc., a Delaware corporation headquartered in Duluth, Georgia, has been registered with the Commission as a broker-dealer since 2002. World Group has approximately 5,000 registered representatives in 493 branch offices throughout the United States.

Facts

3. In October and November 2007, Lunt raised $70,000 from four investors, including one of his World Group customers. Lunt told investors that he planned to use their money to invest in a highly profitable venture that funded television advertisements for a variety of products. In written agreements, Lunt promised to pay investors a monthly return of at least 5%. Some of Lunt's investors selected an option in the written agreement to reinvest their profits automatically each month, thereby compounding their anticipated returns. Lunt represented to investors that he would be paid out of returns on the investments after paying investors their profits. Lunt did not offer or sell these investments through World Group, the broker-dealer with which he was affiliated.

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

4. In reality, the purported advertising program for which Lunt raised funds had no business operations and was simply a Ponzi scheme. Although Lunt received some payments from the operators of the Ponzi scheme, he lost approximately $20,000 of investor funds by investing in the scheme.

5. Before soliciting investments for the purported advertising program, Lunt conducted some internet searches, reviewed the program's website, and spoke with its sales representatives. However, he did not perform any other investigation that would provide a reasonable basis for his representations to investors about their anticipated profits of at least 5% each month.

6. Before and during the time that Lunt raised funds from investors, he received information which should have prompted him to make further inquiries about the legitimacy of the advertising program. In August 2007, Lunt viewed the advertising program's website, which made the incredible claim that investors would earn annual returns of anywhere from 4,800% to 12,000%. Furthermore, Lunt learned in September 2007 that the purported advertising program was transitioning its operations offshore to a supposed business partner and would make future payments through a mysterious debit card system. In early November 2007, the advertising program abruptly stopped making payments, and Lunt was unable to obtain any promised returns or a refund of principal from the operators of the program. In late December 2007, Lunt learned that the Commission had filed an enforcement action alleging fraud against the principals of the advertising program and that a Court had frozen bank accounts used by the program. However, Lunt failed to investigate further or to disclose any of these important facts to his investors.

7. Lunt used some of the money he raised to make payments to other investors. However, Lunt did not disclose to investors this use of funds.

8. From August 2007 through January 2008, a registered representative supervised by Lunt raised a total of approximately $1.43 million from eleven investors, including five World Group customers, to invest in the same advertising program for which Lunt solicited investors. Lunt was aware of this person's activities. Lunt was also aware that the same registered representative had previously solicited $330,000 from a World Group customer to place with a third party for an options trading program. Lunt knew that the registered representative was not soliciting or selling securities in either program through World Group. However, Lunt took no action to address the registered representative's activities.

9. In January 2008, the registered representative under Lunt's supervision asked Lunt to attempt to recoup his investors' losses by using approximately $470,000 of investor funds in high-risk, foreign currency trading. Lunt knew that this use of funds had not been disclosed to investors but still agreed to trade the funds. After just a few days of foreign currency trading, Lunt lost additional amounts.

10. Later in January 2008, Lunt told investors simply that the advertising program had lost money. He refunded to them the balance of investors' remaining funds.

11. The investments Lunt and the registered representative he supervised sold to fund the purported advertising program and the options trading program were securities in the form of investment contracts.

12. Throughout the conduct set forth above, Lunt concealed from other supervisory and compliance personnel at World Group that he and the registered representative he supervised were making unapproved recommendations and sales of securities. Lunt disregarded World Group procedures requiring prior written approval of such activities.

13. As a result of the conduct described above, Lunt 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.

14. As a result of the conduct described above, Lunt willfully violated Section 15(a) of the Exchange Act, which prohibits a broker or dealer from using interstate commerce to effect or attempt to induce transactions in securities unless registered with the Commission.

15. As a result of the conduct described above, Lunt failed reasonably to supervise a registered representative under his supervision with a view to preventing that registered representative's violations of the federal securities laws, within the meaning of Section 15(b)(4)(E) of the Exchange Act.

16. Respondent has submitted a sworn Statement of Financial Condition dated October 11, 2008, and other evidence and has asserted his inability to pay a civil penalty.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Lunt'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 Lunt cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder;

B. Respondent Lunt be, and hereby is barred from association with any broker or dealer, with the right to reapply for association after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

C. Respondent Lunt be, and hereby is barred from association in a supervisory capacity with any broker or dealer;

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

E. Based upon Respondent's sworn representations in his Statement of Financial Condition dated October 11, 2008, and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent.

F. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

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 ACT OF 1933
Release No. 9034 / May 29, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 60006 / May 29, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2982 / May 29, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13485

In the Matter of CSK AUTO CORPORATION, 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

O'Reilly Automotive, Inc. ("O'Reilly") has submitted a letter, dated April 8, 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 CSK Auto Corporation's ("CSK") offer to settle to a cease-and-desist order. CSK is a wholly-owned subsidiary of O'Reilly. On May 26, 2009, the Commission issued a cease-and-desist order against CSK. In the order, the Commission alleged that CSK violated (among other provisions) Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. Without admitting or denying the allegations, CSK consented to cease and desist from committing future violations of these (and other) provisions (the "Cease-and-Desist Order").

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 an administrative . . . 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

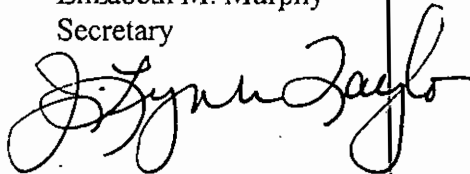
21E(b)(1)(A)(ii) of the Exchange Act. The disqualifications apply except "to the extent otherwise specifically provided by rule, regulation, or order of the Commission." Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act.

Because the violations alleged in the Cease-and-Desist Order were committed at CSK before O'Reilly acquired CSK, and because the Cease-and-Desist Order does not involve allegations of misconduct by O'Reilly or require undertakings by or involving O'Reilly, the Commission has determined that O'Reilly's request for a waiver of the disqualifications resulting from the Cease-and-Desist 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 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to O'Reilly resulting from the entry of the Cease-and-Desist Order is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9035 / May 29, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 60009 / May 29, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13497

In the Matter of

THOMAS S. BLACKWELL

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 Thomas S. Blackwell ("Respondent" or "Blackwell").

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

These proceedings arise out of Blackwell's fraudulent offers and sales of securities outside of his association with a registered broker-dealer. From August 2007 through January 2008, Blackwell sold interests in two investment programs and promised to pay at least 5% in returns each month. However, Blackwell never performed the diligence to determine if there was a reasonable basis for his representations. Blackwell also failed to disclose the increasingly troubling signs he encountered demonstrating that one of these programs was nothing more than a Ponzi scheme.

Respondent

1. Respondent Thomas S. Blackwell, age 30, is a resident of Tempe, Arizona. He holds Series 6 and 63 licenses. From April 2002 through his resignation in February 2008, Blackwell was a registered representative associated with World Group Securities, Inc. ("World Group") in its Tempe, Arizona, branch office.

Other Relevant Entity

2. World Group Securities, Inc., a Delaware corporation headquartered in Duluth, Georgia, has been registered with the Commission as a broker-dealer since 2002. World Group has approximately 5,000 registered representatives in 493 branch offices throughout the United States.

Facts

3. In August 2007, Blackwell solicited $330,000 from a World Group customer to place with a third party for options trading. Blackwell entered into a written agreement with the investor and agreed to pay him a monthly rate of return of at least 5%. This investor selected an option in the written agreement to reinvest his profits automatically each month, thereby compounding his anticipated returns. Blackwell did not explain how his own compensation would be calculated, but he told the investor that he would be paid only after the investor received his return.

4. In his agreement with the investor, Blackwell stated that the anticipated rate of return was "based on past performance" and that the trader "had a good track record" in options trading. However, Blackwell had not investigated the past performance of the trader and had no reasonable basis for these representations. Within a few weeks, the trader lost approximately $155,000 of the investor's funds. Blackwell did not disclose these losses to the investor.

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

5. From August 2007 through January 2008, Blackwell raised a total of approximately $1.43 million from eleven investors, including the investor referenced above and four other World Group customers. Blackwell told these investors that he planned to use their money to invest in a highly profitable venture that funded television advertisements for a variety of products. In written agreements, Blackwell promised to pay investors a monthly return of at least 5%. Blackwell also represented to investors that he would be paid from the investments only after paying them their monthly profits.

6. In reality, the purported advertising program for which Blackwell raised funds had no business operations and was simply a Ponzi scheme. Although Blackwell received some payments from the operators of the Ponzi scheme, he lost approximately $445,000 by investing in the scheme.

7. Before soliciting investments for the purported advertising program, Blackwell conducted internet searches, visited the offices of the advertising program, reviewed the program's website, and spoke with its sales representatives. However, he did not perform any other investigation that would provide a reasonable basis for his representations to investors about their anticipated profits of at least 5% each month.

8. Throughout the time Blackwell was raising funds from investors, he received information which should have prompted him to make further inquiries about the legitimacy of the advertising program. In August 2007, Blackwell viewed the advertising program's website, which made the incredible claim that investors would earn annual returns of anywhere from 4,800% to 12,000%. Furthermore, Blackwell learned in September 2007 that the purported advertising program was transitioning its operations offshore to a supposed business partner and would make future payments through a mysterious debit card system. In early November 2007, the advertising program abruptly stopped making payments, and, except for one instance, Blackwell was unable to obtain any promised returns or a refund of principal from the operators of the program. In late December 2007, Blackwell learned that the Commission had filed an enforcement action alleging fraud against the principals of the advertising program and that a Court had frozen bank accounts used by the program. Still, Blackwell failed to investigate further or to disclose any of these important facts to the investors he solicited.

9. Blackwell used some of the money he raised to make payments to other investors. He also used more than $122,000 of investor funds to pay his personal expenses, including $5,400 in lease payments on a luxury automobile. Blackwell did not disclose either of these uses of investor funds. Moreover, his use of investor funds to pay his personal expenses contradicted his affirmative statements that he would not receive compensation until after investors' returns were paid.

10. In January 2008, Blackwell tried to recoup investors' losses by allowing another individual to use approximately $470,000 of remaining investor funds in high-risk, foreign currency trading. Blackwell did not disclose this use of funds to investors. After just a few days of foreign currency trading, Blackwell lost additional amounts and ceased further use of investor funds.

11. In early February 2008, Blackwell told investors simply that the advertising program had lost money. He refunded $542,000 to them, which constituted the balance of investors' remaining funds.

12. The investments Blackwell sold to fund the options trading program and the purported advertising program were securities in the form of investment contracts. Blackwell did not offer and sell these securities through World Group, the broker-dealer with which he was associated, or any other registered broker-dealer.

13. As a result of the conduct described above, Blackwell 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.

14. As a result of the conduct described above, Blackwell willfully violated Section 15(a) of the Exchange Act, which prohibits a broker or dealer from using interstate commerce to effect or attempt to induce transactions in securities unless registered with the Commission.

15. Respondent has submitted a sworn Statement of Financial Condition dated July 15, 2008, and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest and a civil penalty.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Blackwell'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 Blackwell cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder;

B. Respondent Blackwell be, and hereby is barred from association with any broker or dealer, with the right to reapply for association after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission; and

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 pay disgorgement of $122,465.89 and prejudgment interest of $4,015.62, but that payment of such amount for $126,481.51 is waived based upon Respondent's sworn representations in his Statement of Financial Condition dated July 15, 2008, and other documents submitted to the Commission. Also, based upon Respondent's sworn representations in his Statement of Financial Condition dated July 15, 2008, and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent.

E. The Division of Enforcement may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; (2) seek an order directing payment of disgorgement and pre-judgment interest; and (3) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest or a penalty should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; (4) contest the imposition of the maximum penalty allowable under law; or (5) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Casey and Commissioner Aguilar not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60000 / May 29, 2009

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2886 / May 29, 2009

Admin. Proc. File No. 3-12747

In the Matter of

MARIA T. GIESIGE
913 Lincoln Drive
Defiance, OH 43512

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING
INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Violation of Antifraud Provisions

Offer and Sale of Unregistered Securities

Unregistered Broker-Dealer

Former associated person of a registered broker-dealer and former investment adviser committed fraud in connection with the offer and sale of securities, sold unregistered securities where no exemption from registration existed, and acted as an unregistered broker-dealer by selling securities outside the scope of her relationship with the registered broker-dealer. Held, it is in the public interest to bar Respondent from association with any broker, dealer, or investment adviser, to require the payment of disgorgement, and to impose a third-tier civil penalty.

APPEARANCES:

Maria T. Giesige, pro se.

Thomas Melton and Karen L. Martinez, for the Division of Enforcement.

Appeal filed: October 30, 2008
Last brief received: January 5, 2009

I.

Maria T. Giesige, who was associated from November 2004 to January 2007 with Investors Capital Corp. ("Investors Capital"), a registered broker-dealer, and subsequently registered as an investment adviser in the State of Ohio, appeals from a decision of an administrative law judge. 1/ The law judge found that Giesige made material misstatements and omitted material facts in connection with the sale of the securities of Carolina Development Co. ("Carolina Development" or the "Company"), a Nevada corporation headquartered in California, in willful violation of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940. 2/

The law judge also found that Giesige sold unregistered Carolina Development securities when no exemption from registration was available, in violation of Securities Act Sections 5(a) and 5(c). 3/ The law judge further found that Giesige engaged in conduct outside the scope of her association with Investors Capital by selling Carolina Development securities to her customers without obtaining the required approvals to do so from Investors Capital and, therefore, acted as an unregistered broker-dealer, in willful violation of Section 15(a) of the Exchange Act. 4/

The law judge ordered that: (1) Giesige cease and desist from violations of the above-referenced provisions; (2) Giesige be barred from association with any broker, dealer, or investment adviser; (3) Giesige pay disgorgement of $21,015.03, plus prejudgment interest; and (4) Giesige pay a third-tier civil penalty of $500,000. The law judge ordered that the disgorgement and civil penalty amounts be included in a Fair Fund to benefit Giesige's customers harmed by the violations. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

1/ Maria T. Giesige, Initial Decision Rel. No. 359 (Oct. 7, 2008), 94 SEC Docket 10635, 10638.

2/ 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5, 15 U.S.C. § 80b-6(1) and (2), respectively.

3/ 15 U.S.C. §§ 77e(a), 77e(c).

4/ 15 U.S.C. § 78o(a).

II.

A. On appeal, Giesige does not challenge the law judge's findings of violation, nor does she challenge the cease and desist order or the imposition of bars from association with any broker, dealer, or investment adviser. Giesige does, however, request, due to her alleged inability to pay, that the Commission "remove the third-tier penalty and the disgorgement and interest." The events at issue are described in detail in the Initial Decision, and our review of the record finds that the conclusions therein are supported by the record and we rely on them in making our findings. We summarize some of the findings to provide a background for our sanctions discussion.

Giesige Giesige has worked in the financial services industry since 1986. Giesige holds Series 6, Series 7, Series 26, and Series 63 licenses, and holds an Ohio license to sell health and life insurance. Giesige has been associated with several different registered broker-dealer firms during her career, including Investors Capital at the time of the recommendations and sales at issue in this proceeding. In approximately February 2007, Giesige terminated her association with Investors Capital and registered as an investment adviser in the State of Ohio. She thereafter operated as a sole proprietorship adviser, although the services she provided to her advisory customers, including managing customers' assets for a fee, remained the same as those that she performed before her registration.

Carolina Development In late 2005 and early 2006, Giesige made recommendations to approximately fifty of her broker-dealer and advisory customers that they purchase Carolina Development securities totaling approximately $1,490,000. Giesige and her then-husband invested a total of approximately $29,000 in Carolina Development during the same time period. In its promotional materials, Carolina Development purported to be a real estate development corporation with valuable land holdings and the prospect of an imminent initial public offering ("IPO"). In reality, however, Carolina Development neither registered its securities nor took any steps necessary to launch an IPO. The Company's securities traded on the over-the-counter market and were reported in the National Quotation Service Pink Sheets, an electronic quotation system.

In December 2005, the Commission staff had begun an investigation of Carolina Development. Based on the results of this investigation, on February 16, 2006, the United States District Court for the Central District of California, Southern Division, issued a preliminary injunction against further violations of the securities laws by the principals of the Company and appointed a receiver (the "Receiver") for Carolina Development. 5/ The Receiver discovered that Carolina Development had no revenue-generating activities and that new investors served as the only source of revenue for the Company. Although Carolina Development raised approximately $52,000,000 from over 1,400 investors between September 2004 and January 2006, the Receiver found that Carolina Development's assets in February 2006 consisted only of a bank account

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5/ SEC v. Vander Tuig, Civil Action No. SACV 06-0172AHS (C.D. Cal. 2006).

totaling $4,400,000, real estate (the most valuable asset of which was substantially encumbered by liens), and office furniture. The Receiver discovered that Carolina Development had no books and accounting records whatsoever and that all of the figures on the income statement, balance sheets, statement of assets, and land values that Carolina Development distributed in its promotional materials were false. The Receiver sold Carolina Development's most valuable real estate holding, a plot of 768 acres in Texas, for approximately $30,000,000 but netted only $8,000,000 after the payment of secured liens on the property. 6/

Giesige's Recommendations Giesige learned about Carolina Development from George Allendorf, a salesperson who had recommended another investment to Giesige in 2003. Giesige began selling shares of Carolina Development to her customers in late 2005. Allendorf provided Giesige with Carolina Development promotional materials, including a Private Placement Memorandum ("PPM"). The PPM stated that an investment in Carolina Development was only appropriate for accredited investors with a net worth of at least $1,000,000 and income of over $200,000 or $300,000 with a spouse, in each of the prior two years. Allendorf also provided Giesige with lists that purported to show properties owned by Carolina Development and copies of the Company's 2005 income statement and balance sheets for 2003, 2004, and 2005.

Giesige acknowledged in her testimony that she did not understand most of the terminology on the financial statements. Nonetheless, she gave the financial statements to her customers. Giesige made no effort to verify the financial statements, saying, "I just couldn't believe that someone would just make all this stuff up." Giesige testified that Carolina Development told her that the Company's financial statements were audited in preparation for an IPO, but Giesige did not request a copy of the audited financials. However, she stated that she called an accounting firm she had been told was performing work for Carolina Development and that she was told that no audit had been completed. In fact, the Company never had audited financial statements.

Giesige conducted research on the Internet that led her to believe that Carolina Development was endorsed by professional golfers Arnold Palmer, Jack Nicklaus, and Greg Norman, whose pictures appeared in the Carolina Development promotional materials. Giesige stated, ". . . there was some kind of a link – I wanted to make sure that the two golf players that were on the front were really endorsing it. And so I did some reading on that and found that they, you know – they were – they seemed to be connected. And so I did as much verifying as I could on the Internet." Giesige conducted no other due diligence besides her Internet search to reach her conclusion that the golfers endorsed Carolina Development. There was, in fact, no

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6/ The Receiver continues to seek recovery of Carolina Development investors' funds through the sale of additional real estate holdings, the seizure of bank accounts, attempts to discover additional money hidden by the principals, the prosecution of disgorgement actions against licensed securities salespeople, and actions against attorneys who represented the Company.

relationship between the golfers and Carolina Development, and Arnold Palmer had specifically requested that Carolina Development stop using his name and image in its promotional materials.

Giesige distributed the Carolina Development materials to many of her customers and recommended Carolina Development as a good investment. Many of the customers testified that Giesige gave them the impression that she had done substantial due diligence and research on Carolina Development. Giesige estimates that about one quarter of her then-existing customers invested in Carolina Development on her recommendation. As word spread about Giesige's recommendation of Carolina Development, she also gained many new customers, most of whom were co-workers of her then-husband at a General Motors plant. Giesige conducted several meetings at her office with new and existing customers, during which she distributed the Company's promotional materials, recommended Carolina Development as a good investment, and on occasion conducted conference calls with Allendorf and one of the Company's principals. Giesige signed the subscription agreements of many of her customers "for the Carolina Development Company, by Maria Giesige, authorized representative." Giesige received $21,015.03 and 13,905 Carolina Development shares from the Company in referral fees for her sales of Carolina Development to her customers.

Although Giesige only learned about Carolina Development in October of 2005, she told her customers that the Company would have an IPO by the end of 2005, even though she knew that the Company did not have audited financials. Giesige told her customers that the book value of Carolina Development's shares was $9.00 per share at the time, but that the customers could buy shares for $3.00 per share prior to the IPO. Giesige conducted no research to determine the accuracy of the $9.00 book value of the Company's shares that Allendorf quoted her.

When one of the customers noticed prior to making his investment that Carolina Development was trading on the Pink Sheets at twenty or thirty cents a share, he questioned Giesige about it. Giesige repeated to the customer the explanation she apparently received from the Company, without conducting any further inquiry to verify the information, telling the customer that he had seen the ticker symbol of a different company and that Carolina Development had bought that ticker symbol to speed up its IPO. Giesige testified, "I got an explanation from [the Company about the presence of a ticker symbol for Carolina Development on the Pink Sheets], but that was when I started to really get worried that something was wrong." Giesige made no effort to find out additional information about the Company's trading on the Pink Sheets, did not advise any of her other customers of these developments, and made no effort to inform any of her customers of her worries.

Giesige made specific projections about the future value of Carolina Development shares to several customers, stating that, after the IPO, the price of the shares would increase from $3.00 per share to $9.00 per share in a few months, and ultimately would reach $21.00 or more per share. On February 10, 2006, Giesige sent a mailing to her customers stating that Carolina Development's IPO had been delayed until March 2006, but she encouraged the customers to be

"patient, it isn't every day we have the opportunity to make 1000% gain in less than a year" and that the customers could expect "between $20 to $50 IPO price."

The record contains Preliminary Investor Response Forms from forty-five Giesige customers who purchased Carolina Development shares. Many of these customers also testified at Giesige's hearing. With a few exceptions, the customers were inexperienced and unsophisticated investors, with moderate incomes and savings. Giesige testified that, at the time, she believed that at most five of the customers were accredited. When one of Giesige's customers asked her about the requirement that all Carolina Development investors be accredited, Giesige told the customer that Allendorf "had gotten the standards reduced." Giesige told another unaccredited investor that Allendorf "was allowing non-accredited investors to participate in this opportunity."

On Giesige's recommendation, many of the customers invested funds from their retirement savings in Carolina Development, including, in some cases, taking loans against 401(k) accounts and reverse mortgages in order to make the purchases. Other customers made investments in individual retirement accounts ("IRAs"). Although Giesige testified at the hearing that she believed she had made adequate disclosure of the risk involved in the Carolina Development investment, the law judge credited the testimony of customer witnesses that Giesige did not tell them that she considered Carolina Development to be a risky investment, but rather expressed great confidence in the upside potential of the Company. The law judge also found that Giesige did not tell her customers that she had no experience with private placement offerings or IPOs, or that she received referral fees from the Company.

Giesige did not notify Investors Capital of her activities in connection with Carolina Development and did not effect her customers' purchases through Investors Capital. After the Carolina Development fraud was exposed and the Company was put into receivership, Giesige continued to endorse the merits of the Company, advising customers that they had a good chance of receiving a significant portion of the amounts they invested plus a profit and claimed that the Receiver's reports were inaccurate. 7/ Giesige encouraged her customers not to talk to the Receiver. She told one customer, who had lost all of her retirement savings, that Allendorf would make payments to keep the customer from losing her family's home, but the customer has received no money.

B. <u>The Initial Decision</u>

The law judge found that Giesige failed to do any due diligence, and that she made numerous material misrepresentations and omissions of material facts in her recommendations of

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7/ The Receiver testified, "[i]t seemed like [Giesige] was spreading misinformation about the case early on and I had conversations with her where I encouraged her not to do that."

Carolina Development stock to her customers. 8/ The law judge concluded that Giesige acted with scienter and that her conduct "has damaged many investors and caused irreparable damage to some." The law judge concluded that Giesige had engaged in repeated fraudulent conduct in her sales of Carolina Development securities, in violation of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5.

The law judge also found, based on the definition of investment adviser in Section 202(a)(11) of the Advisers Act, 9/ that Giesige acted as an investment adviser for her customers in late 2005 and 2006, even though she was not registered as an investment adviser in Ohio until February 2007. The law judge found that Giesige had breached her fiduciary duty to her advisory customers by making the misrepresentations and omissions discussed above. The law judge found that this breach of fiduciary duty was particularly egregious in that "almost all of [the customers] were people of moderate means who are fairly conservative in their level of risk tolerance," and many of the customers had invested their retirement funds in Carolina Development on Giesige's recommendation. Based on these findings, the law judge found that Giesige violated Advisers Act Sections 206(1) and (2).

The law judge further found that Giesige sold unregistered Carolina Development securities. The law judge rejected Giesige's arguments that she was not in fact offering or selling Carolina Development shares, noting that Giesige held several meetings at her office at which she recommended that her customers purchase Carolina Development shares, and that Giesige received referral fees from Carolina Development for the purchases her customers made. The law judge further found that Giesige knew that Carolina Development's securities were unregistered and that she knew that most of her customers who purchased the unregistered securities were not accredited investors. The law judge thus found that the exemption from

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8/ Among those cited in the Initial Decision were "false balance sheets, false claims of land ownership and land values, the false claim that Carolina Development had audited financials, the false claim that it had taken steps to register its shares for sale to the general public, the false claim that the shares had a book value of $9.00, and the omission that shares were selling on the Pink Sheets for less than $1.00 when she was selling shares for $3.00 a share."

9/ 15 U.S.C. § 80b-2(a)(11). Section 202(a)(11) defines an investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or indirectly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. . . ." Several customers, including two of the customers who worked at General Motors, testified that, during the relevant period, they paid Giesige quarterly management fees based on a percentage of their assets under management. This activity occurred without the knowledge or permission of Investors Capital. As the law judge found, "The overwhelming evidence in this record establishes that Giesige was acting as an investment adviser long before she was licensed to do so by the State of Ohio in 2007."

registration in Section 4(2) of the Securities Act for private placements was not available. Based on these facts, the law judge found, "Giesige's conduct of selling unregistered shares of Carolina Development to some fifty investors using the means and instruments of interstate commerce was a violation of Sections 5(a) and 5(c) of the Securities Act."

The law judge also held that Giesige was not authorized by Investors Capital, the broker-dealer firm with which she was associated at the time, to sell Carolina Development shares. The law judge noted that Giesige recommended the investments to her customers; provided them with the Company's promotional materials; put the customers in contact with the Company, including signing certain subscription agreements as a Company representative; and received referral fees from the Company for her customers' purchases. The law judge found, "As a person engaged in the business of effecting transactions in securities for the account of others, Giesige was acting as a broker." Because Giesige was not individually registered as a broker-dealer with the Commission at the time, the law judge found that Giesige violated Exchange Act Section 15(a).

The law judge also found that "Giesige's testimony under oath was not credible." The law judge noted that Giesige's assertions at the hearing that she warned her customers about the risks of an investment in Carolina Development were contradicted by the testimony of many customers, who stated that "Giesige was very confident about Carolina Development's upside potential" and that "Giesige did not explain that, as unregistered securities, Carolina Development shares were a very risky investment." The law judge further noted additional inconsistencies in Giesige's testimony, including with respect to when she became aware that the Company's securities were not registered and when she began to provide fee-based asset management services to her customers.

Based on the record before us, we find that Giesige willfully violated Securities Act Sections 5(a), 5(c), and 17(a), Exchange Act Sections 10(b) and 15(a), Exchange Act Rule 10b-5, and Advisers Act Sections 206(1) and 206(2). 10/

III.

Giesige's Appeal

A. Giesige's Motion to Adduce Additional Evidence Along with her brief on appeal, Giesige has submitted a Motion to Adduce Additional Evidence (the "Motion to Adduce").

10/ Although the law judge did not make a specific finding of willfulness with regard to the Section 5 violations, we find that the record amply supports that Giesige's conduct in violating Section 5 was willful. The requirement that Giesige acted willfully may be satisfied by a showing that she intended to do the acts that constituted the violations. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

Under Rule 452 of the Commission's Rules of Practice, 11/ parties may file motions to adduce evidence not included in the record, provided "that such additional evidence is material and there were reasonable grounds for failure to adduce such evidence previously." For the reasons set forth below, we deny Giesige's motion.

1. Exhibit A Prior to the hearing before the law judge, Giesige and the Division of Enforcement engaged in settlement discussions. During the course of the settlement discussions, Giesige provided the Division with a sworn statement of her financial condition, dated February 4, 2008, which Giesige includes as Exhibit A to the Motion to Adduce. Because this document was provided to the Division as part of ultimately unsuccessful settlement discussions, under Rule 240(c)(6) of the Commission's Rules of Practice, it was not included in the record during Giesige's hearing. 12/ Although Giesige was represented by counsel during the entirety of her hearing before the law judge, she did not attempt to enter any evidence establishing her financial condition or her alleged inability to pay a monetary sanction during the course of the hearing. For the first time before the law judge, Giesige attempted to introduce her sworn statement of financial condition as an appendix to her post-hearing brief. 13/ In the Initial Decision, the law judge granted the Division's motion to strike the appendix from the record, finding that "Giesige has waived her right to claim that she is unable to pay disgorgement or a civil penalty because she did not assert this claim at the hearing."

The law judge's determination to strike Giesige's untimely effort to introduce evidence purporting to show an inability to pay a monetary sanction after the hearing was correct. Under Rule 340(b) of the Commission's Rules of Practice, 14/ post-hearing proposed findings of fact and conclusions, such as the ones to which Giesige sought to attach her sworn statement of financial condition before the law judge, "must be supported by citations to specific portions of the record." As noted above, the record includes no evidence relating to Giesige's ability to pay a monetary sanction. When a respondent asserts an inability to pay, the opposing party (in this case, the Division) should be afforded the opportunity to conduct a "searching inquiry" into the

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11/ 17 C.F.R. § 201.452.

12/ 17 C.F.R. § 201.240(c)(6). Rule 240(c)(6) states, "If the Commission rejects the offer of settlement, the person making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer. . . . "

13/ Like Exhibit A, the financial statement did not include the required attachments. See text accompanying note 16 infra.

14/ 17 C.F.R. § 201.340(b).

claim. 15/ Because Giesige did not make her claim during the hearing, the Division had no opportunity to call its own witnesses, introduce exhibits, or cross-examine Giesige about the claim.

We also find that Exhibit A is not sufficiently complete to be material to the issue of inability to pay. Although Exhibit A states that Giesige "will enclose" credit card statements, "Dell leases," bank and brokerage account statements, and statements for retirement accounts, nothing is attached. Nor does Exhibit A attach the income tax returns required by the Commission financial disclosure form. 16/ We also note that Exhibit A is not updated and current as required under Commission Rule of Practice 630(b). 17/

Even if we found that Giesige had demonstrated an inability to pay, we have discretion not to waive a penalty and disgorgement if the conduct is sufficiently egregious. 18/ As discussed below, we believe that Giesige's conduct is egregious and does not warrant a waiver of the penalty or disgorgement.

2. Exhibit B Exhibit B to Giesige's Motion to Adduce includes email messages between Giesige's former counsel and the Division during the period before the hearing when the parties were discussing a potential settlement of the proceeding. According to Giesige, "[Exhibit B] proves information on the Sworn Financial Statement was provided to the Division's satisfaction in a PRE-Hearing and satisfactory way." (emphasis in original) Giesige's counsel appears to have discussed the financial information with the Division in the context of settlement negotiations. However, as noted above, under Rule 240(c)(6), unsuccessful settlement discussions are not included in the record.

3. Exhibit C In the Initial Decision, the law judge stated, "Resolution of the proceeding was delayed because of an unsuccessful attempt by the parties to settle." Giesige claims that this statement in the Initial Decision is inaccurate because, according to Giesige, her counsel and the Division "DID come to a successful attempt to settle, even though [the law judge] said we did not, but for some reason the Commission rejected it." (emphasis in original)

15/ Castle Sec. Corp., Securities Exchange Act Rel. No. 52580 (Oct. 11, 2005), 86 SEC Docket 1466, 1474.

16/ Form D-A Model Disclosure of Assets and Financial Information Form, 17 C.F.R. §209.1. ¶ K.1 (requiring that any federal tax returns for year of first violation and all subsequent years be attached).

17/ 17 C.F.R. § 201.630(b).

18/ David Henry Disraeli and Lifeplan Associates, Inc., Securities Act Rel. No. 8880 (Dec. 21, 2007), 92 SEC Docket 883 n.124.

Under Rule 240(c)(6), Exhibit C to Giesige's Motion to Adduce, a document entitled "Offer of Settlement of Maria Giesige," was not part of the record before the law judge. Further, Exhibit C does not, as Giesige claims, "show that there was a successful attempt by the parties to settle which is the opposite of what [the law judge] claims on Pg 2 of her Initial Decision." Because the parties did not, in fact, settle the proceeding, the law judge's statement in the Initial Decision is accurate.

4. Exhibit D Exhibit D to the Motion to Adduce is Giesige's counsel's response to the Division's objection to Giesige's attempt to introduce the sworn financial statement as an exhibit to Giesige's post-hearing brief. This document is already part of the record on appeal.

B. Disgorgement The purpose of a disgorgement award is to deprive the wrongdoer of ill-gotten gains and to deter others from violating the securities laws. 19/ Giesige received $21,015.03 in referral fees from Carolina Development for her sales of Carolina Development securities to her customers. Because Giesige received this money as compensation for the very transactions that constituted the violations at issue, the disgorgement order is appropriate, whether or not Giesige is currently able to pay the full disgorgement amount.

C. Civil Penalty Third-tier penalties are in the public interest where the violations at issue involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and, in addition, resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission. 20/ Where a third-tier penalty is in the public interest, the Commission is authorized to assess a maximum $130,000 penalty for each violative act or omission. 21/ As discussed above, Giesige made numerous and repeated misstatements and omissions to each of her approximately fifty customers who purchased Carolina Development securities, and the Commission has the authority to assess a penalty for each of these individual violations.

We have held, "An applicant's ability to pay is but one factor to consider in determining whether a penalty is in the public interest." 22/ Where the egregiousness of an applicant's conduct outweighs any consideration of the respondent's inability to pay the civil penalty, the

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19/ SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (citing SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987), cert. denied, 108 S. Ct. 1751 (1988); SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971), cert. denied, 404 U.S. 1005 (1971)).

20/ 15 U.S.C. §§ 78u-2(b), 80b-3(i)(2).

21/ See 17 C.F.R. § 201.1003.

22/ Bearcat, Inc., 57 S.E.C. 406, 429 (2004) (citing Brian A. Schmidt, 55 S.E.C. 576, 597-98 (2002)).

public interest requires that the civil penalty be imposed. 23/ Although Giesige acknowledges that she exercised "poor judgment and because of this many people have been hurt" and states "I have withdrawn my [Ohio registered investment adviser] license and accept the barring of my other securities licenses," she appears to argue that her conduct was not sufficiently egregious to warrant the law judge's imposition of the third-tier civil penalty. Giesige states, "There was not one witness that neither testified [sic] nor seemed to feel that I was operating in the fashion that [the law judge] describes [in the Initial Decision.] I realize now that I was to be held to a higher standard and an unscrupulous company duped me and I shared information with others that I believed to be true."

The record contradicts Giesige's assertions that her conduct was not egregious. Although some of the customers continue to trust Giesige and some of them apparently continue to allow Giesige to manage their portfolios, all of the customers testified that Giesige recommended Carolina Development to them as a good investment. Most of the customers who invested were unaccredited. They had moderate incomes and trusted Giesige to make recommendations suited to their investment needs. Many of the customers invested significant portions of their retirement savings in a fraudulent enterprise based on the recommendations of Giesige. Giesige conducted virtually no research to back up her recommendations. Although Giesige learned that no audit of the Company's financial statements had ever been completed, she did not disclose this to her customers. Giesige repeatedly and without basis told her customers that Carolina Development was close to launching an IPO, and she made specific, baseless projections that the value of the stock would increase from their $3.00 per share purchase price to over $20.00 per share. She failed to inform the customers that Carolina Development shares traded on the Pink Sheets at a price below $1.00 per share during the entire time that she recommended them to her customers, even after a customer alerted her to this fact. Giesige asserted to her customers, without engaging in any independent effort to confirm the Company's numbers, that the book value of their shares was $9.00 per share when, in fact, the book value was considerably lower.

The law judge further found that Giesige did not disclose to her customers that the Carolina Development investments were risky. In addition, Giesige never disclosed to her customers the $21,105 in referral fees that she received from the Company. As a result, while Giesige personally invested money in Carolina Development, any losses she suffered, unlike those of her customers, are mitigated by her receipt of referral fees for convincing her customers to invest.

As set forth in this opinion, we find that Giesige's conduct involved fraudulent misstatements and omissions, some of which were knowing while others were extremely reckless. In sum, her conduct manifested a reckless disregard of the provisions of the securities laws Giesige violated, and the conduct caused her customers to suffer losses that were significant to them. We further find that the egregiousness of Giesige's conduct outweighs any inability she may have to pay the amount, even if we were to accept Giesige's motion to introduce her

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23/ Id. (citing Schmidt, 55 S.E.C. at 598).

untimely and inadequate evidence of her inability to pay. Given that Giesige made numerous misstatements and omissions to each of the approximately fifty customers who purchased Carolina Development securities on her recommendation, for each of which violations the Commission has the authority to assess a $130,000 penalty, we believe that the law judge's assessment of a civil penalty in the amount of $500,000 is not unreasonable. 24/

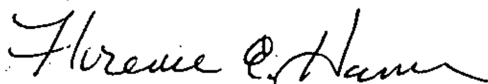
D. Fair Fund

The law judge ordered "the creation of a Fair Fund and that the amount of disgorgement and civil money penalties be placed in this Fair Fund and used for the benefit of Carolina Development investors who were harmed by the violations found in [the Initial Decision]," pursuant to Rule of Practice 1100. 25/ "Sarbanes-Oxley's Fair Fund provision provides the [Commission] with flexibility by permitting it to distribute civil penalties among defrauded investors by adding the civil penalties to the disgorgement fund." 26/ We direct that the civil money penalty and disgorgement amounts ordered in this matter be paid into such a fund.

An appropriate order will issue. 27/

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

Elizabeth M. Murphy
Secretary



By: Florence E. Harmon
Deputy Secretary

24/ The law judge noted that the $500,000 penalty amount was "less than the total of $130,000 penalty for each of the fifty investments." We note that even a $10,000, second-tier penalty for each of the misstatements or omissions Giesige made with respect to the investments of the fifteen customers who testified at the hearing would produce a penalty amount greater than the $500,000 penalty assessed by the law judge.

25/ 17 C.F.R. § 201.1100.

26/ Official Comm. of the Unsecured Creditors of Worldcom, Inc. v. SEC, 467 F.3d 73, 82 (2d Cir. 2006) (citing Section 308(a) of the Sarbanes-Oxley Act, 15 U.S.C. § 7246(a)).

27/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60000 / May 29, 2009

INVESTMENT ADVISES ACT OF 1940
Rel. No. 2886 / May 29, 2009

Admin. Proc. File No. 3-12747

In the Matter of

MARIA T. GIESIGE
913 Lincoln Drive
Defiance, OH 43512

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Maria T. Giesige cease and desist from committing or causing any violations, or any future violations, of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933; Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5; and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940; and it is further

ORDERED that Maria T. Giesige be barred from association with any broker, dealer, or investment adviser; and it is further

ORDERED that Maria T. Giesige shall disgorge $21,105.03, and prejudgment interest in the amount of $4,883.28 from March 1, 2006, computed as set forth in Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600(b); and it is further

ORDERED that Maria T. Giesige shall pay a civil money penalty in the amount of $500,000; and it is further

ORDERED that the disgorgement and civil money penalty be used to create a "Fair Fund" for the benefit of investors pursuant to Commission Rules of Practice 1100-1106.

Payment of the amount to be disgorged, prejudgment interest, and the civil money penalty shall be: (1) made by United States postal money order, certified check, bank cashier's check, or bank money order; (2) made payable to the Securities and Exchange Commission; (3) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312; and (4) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement , directed to the attention of the counsel of record.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60005 / May 29, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2981 / May 29, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13495

In the Matter of UNITED INDUSTRIAL CORPORATION, Respondent.	CORRECTED 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 United Industrial Corporation ("UIC" 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[1] that:

Summary

1. Beginning in late 2001, and continuing through 2002, UIC, through its indirect, wholly owned subsidiary ACL Technologies, Inc. ("ACL"), made multiple payments to one of its foreign agents in connection with a military aircraft depot ACL was building for the Egyptian Air Force ("EAF") in Cairo, Egypt. Thomas Wurzel, ACL's former President and a U.S. citizen and resident, authorized the payments to the agent while he knew or consciously disregarded the high probability that the agent would offer, provide or promise at least a portion of such payments to active EAF officials for the purpose of influencing such officials to obtain or retain business for UIC through ACL. As a result, ACL, which was headquartered in California at the time, was awarded a Contract Engineering Technical Services ("CETS") contract with gross revenues and net profit to ACL of approximately $5.3 million and $267,571, respectively. During this time, UIC lacked meaningful controls to prevent or detect the ACL President's authorization of illicit payments to the agent. The UIC legal department approved the retention of the agent despite a lack of documented due diligence and the failure of the agency agreement to comply with corporate policy. Moreover, a UIC official approved at least one payment to the agent, and the illicit payments to the agent were mischaracterized on UIC's books and records as legitimate business expenses.

Respondent

2. UIC, a Delaware corporation headquartered in Hunt Valley, Maryland, focuses on the design and production of defense, training, transportation and energy systems for the U.S. Department of Defense and domestic and international customers. At the time of the conduct described below, UIC's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and was listed on the New York Stock Exchange.[2]

Other Relevant Persons/Entities

3. ACL Technologies, Inc. ("ACL") was an indirect, wholly owned subsidiary of UIC, and was formerly headquartered in Brea, California. ACL's parent corporation was AAI Corporation, a direct, wholly owned subsidiary of UIC. ACL developed, operated and maintained

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

[2] On December 18, 2007, UIC was acquired by an affiliate of Textron Inc. ("Textron"). Textron's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. Following the acquisition, UIC filed a Form 15 Notice of Termination of Registration of its common stock under Exchange Act Section 12(g). UIC survives the acquisition as an indirect wholly owned subsidiary of Textron. All of the conduct described in Section III of this Order occurred prior to the acquisition of UIC by Textron.

stationary and mobile test equipment in support of hydraulics, pneumatics, electrical, mechanical and fuel requirements of commercial and military aircraft.

4. Thomas E. Wurzel, is a United States citizen and resides in Bend, Oregon. From 1992 to 2004, Wurzel served as the President of ACL and maintained an office in Brea, California. From at least 1995 forward, UIC held Wurzel out as a member of its senior management team.

Facts

A. Background

5. In October 1999, the U.S. Air Force awarded ACL a project to build a F-16 combat aircraft depot for EAF and to provide, operate and train Egyptian labor to use the associated testing equipment for the depot (the "Egyptian F-16 Depot Project"). ACL was awarded the Egyptian F-16 Depot Project as part of the U.S. Department of Defense's foreign military sale ("FMS") program. FMS contracts generally are purchases by foreign governments from the U.S. Government of weapons and other defense items, services and military training, which the U.S. Government fulfills by entering into contracts with private-sector defense contractors. Accordingly, as the purchaser and ultimate end-user for the F-16 depot facility that would be built, the EAF directed when, to what extent and how money would be spent on the project.[3] Moreover, the EAF could select a particular contractor for a project it desired through its use of "sole source" requests. A sole source request would avoid the normal competitive bidding process and result in the award of a "no bid" contract to the beneficiary of the request.

6. In connection with the Egyptian F-16 Depot Project, the EAF submitted a "sole source" request for ACL's services and in 1999 ACL was awarded the contract for the Project. The original 1999 award included initial funding to ACL of $14 million under the primary contract for development of the F-16 depot (called the "integration" contract), with an estimated total contract value of $28 million. In subsequent years, ACL was awarded "add-on" contracts and contract modifications that supplemented its revenues following ACL's initial award of the integration contract. These additional revenues included supplemental funding for the integration contract of approximately $29.6 million, a separate contract to build a surface treatment facility (or "STF" contract) valued at approximately $2.7 million, and in April 2002, a new contract to help train Egyptian military personnel to operate the F-16 depot, known as CETS, ultimately valued at approximately $5.3 million. In total, the Egyptian F-16 Depot Project, including the principal integration contract, the STF and CETS contracts, and other modifications and add-on contracts, generated approximately $64 million in revenue and $8.6 million in net profit for ACL from 1999 through 2004, representing over one-third of ACL's total gross revenues over the same period.

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[3] Although the EAF was the customer for the Egyptian F-16 Depot Project, ACL did not enter into any formal arrangement directly with the EAF; rather, ACL's contractual obligations for the Egyptian F-16 Depot Project were with the U.S. Air Force, which served as an intermediary on the Project and supervised logistical and procurement matters.

B. ACL Retains a Former EAF General as Consultant

7. By at least December 1996, Wurzel ("ACL's President") had enlisted the assistance of a foreign agent, a retired EAF General (the "EAF Agent"), to act as a consultant to ACL to help influence the EAF in moving the Egyptian F-16 Depot Project forward. By at least December 1997, ACL's President also authorized monthly stipends of $4,000 to the EAF Agent, although ACL did not maintain any due diligence files for the agent at that time and did not have a formal consulting contract with the agent until March 13, 1998 (at which time the agent's monthly stipends were raised to $20,000). As ACL's President stated in 1997 correspondence to the EAF Agent, the purpose for hiring the agent was clear: "[ACL's] objective, as before, is to convince the EAF to hire us as the integrating contractor" for the Project. As a former EAF General, the EAF Agent's potential to influence the contracting process was heightened as, according to ACL's Vice President and Program Manager for the Egyptian F-16 Depot Project, in Egypt, "it's a very small community of high-level military people." In addition, ACL's President was aware that the EAF Agent had a personal relationship with at least one active EAF official.

8. Shortly after the Project's initial October 1999 award, ACL's President authorized the EAF Agent, through his company, to continue to act as ACL's consultant for obtaining business. The EAF Agent's role as the company's Egyptian-based "consultant" was continued through a new consulting agreement with the agent in November 1999.[4] That agreement essentially renewed the terms of the prior 1998 consulting contract, including paying the agent a monthly stipend of $20,000 per month. Although ACL had already been awarded the initial integrating contract for the Egyptian F-16 Depot Project, this new agreement was geared towards helping solicit new or add-on business related to the Project. ACL's President described this understanding of the continuing consulting relationship in an e-mail to the agent in February 2001: "We are certainly interested in paying for other new business if you can work it. . . . [T]he training effort needs some influence to make sure we are not excluded and the EAF needs to insist on our follow on support after the Depot is in place."[5]

9. In April 2000, several months after the initial October 1999 award, ACL's President also separately authorized the EAF Agent to act as a local labor subcontractor for ACL in connection with its work on the Egyptian F-16 Depot Project. In this role, the EAF Agent was brought under the umbrella of ACL's principal contract with the U.S. Air Force, with the agent's company receiving reimbursement from ACL for coordinating the retention of local labor for the Project. Beginning in the fall of 2000, ACL made periodic payments to the EAF Agent's company for his provision of local labor on the larger Egyptian F-16 Depot Project. The EAF Agent submitted monthly invoices to ACL for these services and included in these invoices were the agent's own expenses as "program manager" on the project with compensation varying between $4,300 and $11,100 per month. This compensation was separate from the consulting fees ACL

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[4] Around this time, UIC's legal department first approved the retention of the EAF Agent as ACL's agent for the Egyptian Depot Project, despite knowing that ACL had already been using the EAF Agent as its agent without prior approval, and despite also knowing that the EAF Agent's existing agency agreement did not conform to UIC's policies prohibiting contingent arrangements on government contracts.

[5] "Follow on support" refers to a contract modification to permit ACL's continuing to assist the EAF with the new aircraft maintenance depot once the primary work constructing the depot was complete.

paid to the agent, which by August of 2000 had totaled over $434,000. However, because ACL rolled the EAF Agent's subcontract labor expenses into ACL's submission to the U.S. Air Force for reimbursement of its aggregate material costs on the Egyptian F-16 Depot Project, ACL routinely was late in making payment to the EAF Agent's company under the labor subcontract.

10. By mid-2001 ACL had satisfied its remaining obligations under the consulting agreement executed with the EAF Agent in November 1999, and it was not renewed. However, as articulated in an e-mail from the EAF Agent in June 2001, ACL's President had promised "to continue paying us the consultant fee either through the service contract or any other way." As a result, from mid-2001 through 2002, the EAF Agent regularly contacted ACL's President to request a variety of payments, a portion of which related to reimbursement to the EAF Agent's company for the legitimate provision of local labor on the Project, and a portion of which were requests for additional funds in circumstances that strongly indicated they would be used to make illicit payments. ACL's President approved payments for additional funds, and he also knew that the EAF Agent charged ACL for his subcontract labor at a rate that enabled the agent to maintain a cushion between what he paid the project's local employees and what he received from ACL; this cushion was on top of the agent's own salary as "project manager" of the subcontract labor.

C. Illicit Payments Tied to CETS Contract

(i) *Improper payments through cushion in the EAF Agent's invoices*

11. During early 2001, ACL targeted a new contract, known as CETS, which was related to the Egyptian F-16 Depot Project. The CETS contract involved providing personnel for technical assistance on-site at Helwan Air Force Base in Cairo, Egypt, where the depot was being constructed, so that EAF personnel could get hands-on training to do testing and make repairs to their aircraft. The EAF Agent assisted ACL with obtaining this contract add-on, and in August 2001, ACL learned that the EAF had submitted to the U.S. Air Force its recommendation that ACL be awarded a "sole source" contract for the CETS project.

12. In December 2001, months before the CETS project would be officially awarded to ACL, the EAF Agent e-mailed ACL's President telling him that ACL could expect the formal award of CETS in the near future because the EAF Agent had "succeeded to make the [EAF] give all the pressure on the USAF to finalize the sole source . . . ." The EAF Agent then added, "[i]t is very important to start giving motivation that we discussed to give it before the year end. It was better to give it before the feast but we cant [sic] do this now." To help provide the "motivation," the EAF Agent requested an advance of funds separate and apart from payments due on his invoices under his local labor subcontract. Although no separate payments were made by ACL at the time, within a week, at the direction of ACL's President, ACL wired the EAF Agent approximately $114,000 against invoices received from the agent for labor subcontract services.

13. In January 2002, the EAF Agent again emailed ACL's President requesting funds to cover due invoices, plus additional funds to "secure our team loyalty . . . as you have started to have some doubts about ou[r] commitment with them." When ACL had not forwarded any new money to the EAF Agent by late February 2002, the EAF Agent sent another more pressing e-mail to ACL's President: "Congratulations on the CETS contract. Thank[] God that our key persons

are still on their position till now. We are now in a very critical situation to really get the benefit out [sic] this contract. We should satisfy our people and really we can not do that from our resources as we used to do before." The EAF Agent then asked for an "urgent response" from ACL's President regarding a list of payment requests, including past due invoices for his labor subcontract work, a separate advance payment of $300,000, a "CETS lump Sum Payment of 50% from our 8% fee from the contract value as agreed before," and "[c]ontinuing a consultation monthly fee for the remaining 50%." In March 2002, at the ACL's President's direction, ACL wired the EAF Agent amounts due on his past-due labor subcontract invoices, although it did not advance him monies for his separate funding requests outlined in his February e-mail.

14. On April 4, 2002, after having received payments from ACL on his past due invoices but not having received any additional monies, the EAF Agent e-mailed another payment request to ACL's President. This time, the EAF Agent told ACL's President that he was planning to use the additional money "to motivate people and secure our business specially (sic) the **CETS**." (Emphasis in original). Making it clear that the agent was distinguishing between payments to him to "secure our business" and payments to him for his provision of subcontract labor, the EAF Agent added "[a]lso please bare [sic] in mind that the due invoices for domestic services reached US $272,120" (referring to subcontract labor invoices submitted to ACL for February and March 2002). Later that day, and without questioning the EAF Agent's stated purpose for the funds, ACL's President responded that ACL would "advance" monies to the agent, but would offset the payment against pending labor subcontractor invoices for services provided by the EAF Agent; ACL paid the EAF Agent four days later.

15. On April 30, 2002, ACL received the official award of the CETS subcontract from the U.S. Air Force's designated contractor Aeronautical Radio, Incorporated ("ARINC"), with an initial funding to ACL in the amount of $500,000. Internal documents reflect that, around this time, ACL had estimated that the total potential contract revenues for the CETS program, if awarded, were approximately $8 million.

(ii) *Improper $100,000 "advance" payment to the EAF Agent*

16. On June 4, 2002, the EAF Agent again requested monies separate and apart from the regular payments ACL was making to him on his labor subcontract invoices. Noting the recent success regarding ACL's receipt of sole source letters for the CETS project and a separate project for a surface treatment facility (known as the "STF" project), the EAF Agent added "our people should be awarded before the next PMR,[6] [sic] it is very important to keep the pressure to get all the allocated budget of the US$8M" (referring to the anticipated total value of the CETS contract). Apparently frustrated that ACL had offset its prior payments to him against the agent's invoices for subcontract labor, the EAF Agent specifically requested that these new monies not be deducted from his labor invoices; rather, the EAF Agent requested that ACL send "at least US$200,000

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6 PMRs were two weeks of substantive meetings held every six months, one each in the United States and in Egypt every year, to discuss the progress, status and recommendations for pending or new projects related to the Egyptian F-16 Depot Project. PMRs typically were attended by representatives of the U.S. Air Force, the EAF, the U.S. Embassy and the Project's principal contractors, including ACL, and presented the EAF with the opportunity to make its preferences for particular contracts, or particular contractors, known in-person to the U.S. Air Force. The next PMR was scheduled to take place in Sacramento, California in July 2002.

before the next PMR to fulfil [sic] the present commitment . . . . This will help keep[] the pressure to get all the CETS budget as well as the [surface treatment facility project] which is [in] the final phase." ACL's President responded in an e-mail by noting that ACL included $40,000 per month for the EAF Agent's services under the CETS contract which "will permit you to meet all your obligations." Since the initiation of the CETS contract had been delayed, however, ACL's President suggested that ACL could pay the EAF Agent an advance under the existing integration contract.

17. Two days later on June 6, 2002, the EAF Agent again emailed ACL's President, this time requesting approximately $200,000 in past due labor subcontract invoices and an additional $100,000 advance payment; the EAF Agent added that "[t]his could help us fulfil [sic] the commitment . . . ." ACL's President responded by instructing the EAF Agent to send ACL a $100,000 invoice, and to type on the invoice, among other things, that "THIS INVOICE IS FOR ADVANCE PAYMENT OF RENTAL OF EQUIPMENT AND CONTRACTING OF MATERIAL AND SERVICES UNDER THE F-16 EAF DEPOT INTEGRATION CONTRACT" (capitalization in original). There is no indication in the correspondence between ACL's President and the EAF Agent, or elsewhere, that there was any actual need for "rental equipment" or "advance" payments for other of the agent's services given that he billed for his labor services in the ordinary course of business.

18. On June 10, 2002, bypassing typical protocol that required the EAF Agent to submit his labor subcontract invoices first to ACL's on-site project manager for his review and approval, the EAF Agent e-mailed an invoice directly to ACL's President using the language specified by ACL's President. That day, ACL's President affixed his signature to the invoice and authorized the $100,000 advance payment to the agent. A UIC corporate official located at AAI's headquarters' in Maryland subsequently approved this payment without inquiring into the purpose or justification for the payment. Relying on the invoice drafted at the ACL President's direction, ACL then inaccurately recorded the $100,000 advance on its books as a bona fide "material" expense of the Egyptian F-16 Depot Project; instead, the $100,000 advance was paid to the EAF Agent based on a concocted invoice, and for reasons that were neither transparent nor based on the provision of any identifiable legitimate services.

(iii) *Improper $50,000 "marketing" payment to the EAF Agent*

19. In the Fall of 2002, the EAF Agent continued to press ACL's President for additional payments that had no relation to his labor subcontract services, suggesting in an e-mail that the new monies were needed to meet "commitments" and to "keep the momentum." This language was consistent with that in prior e-mails, which had suggested that the EAF Agent would use such monies to influence officials who could recommend the award of business to ACL. ACL's President agreed to provide the agent with additional funds – this time through a purported "marketing contract." By using this vehicle to provide the EAF Agent with funds, ACL's President caused ACL to pay the EAF Agent from ACL's funds outside those associated with the Egyptian F-16 Depot Project. In December 2002, the EAF Agent sent an invoice for $50,000 to ACL for "[m]arketing service for the period from July 02 – December 02," and ACL's President, without further inquiry as to the nature of the services provided, authorized payment of the invoice.

ACL neither created nor executed any new marketing agreement with the EAF Agent that would cover this $50,000 payment.

20. Between the fall of 2002 and 2004, ACL was awarded an additional five CETS funding contracts (or "modifications") worth a total of $4.7 million. Combined with ACL's initial funding for the contract received in late April 2002, ACL received total gross revenue of approximately $5.3 million, and net profits of $267,571, for its work on the CETS contract.

D. Fraudulent "Repayment" of $100,000 Advance

21. In January 2004, ACL's President traveled to Egypt to visit the site of the Egyptian F-16 Depot Project. During this trip, ACL's President attended a meeting with the EAF Agent, ACL's Vice President and the company's on-site project manager at the project manager's apartment in Cairo. During this meeting, ACL's President indicated that ACL would forgive the $100,000 debt the EAF Agent owed the company as a result of the advance payment made to the Agent in June 2002. Rather than forgive the debt in a direct and transparent manner, ACL's President approved a plan for the agent to submit false invoices to ACL to make it appear that the agent had repaid the $100,000 advance. The scheme ACL's President approved would have the agent "repay" the $100,000 advance in ten equal installments by putting a $10,000 credit on the EAF Agent's labor subcontract invoices for a ten month period. To offset any real repayment of the debt, ACL's President also approved the EAF Agent's expenses to be inflated on each of the ten invoices at least by the amount of the $10,000 credit.

22. In March 2004, the scheme was put into effect. At that time, ACL first received subcontract labor invoices from the EAF Agent covering the January 2004 service period, which reflected a $10,000 credit for "Advance pay back." The same January 2004 invoice showed that the agent's aggregate cost for his subcontract labor had increased by slightly more than $10,000 as compared to his aggregate labor cost for the same work for December 2003. The EAF Agent's increase in labor costs, as shown by the invoices, was directly attributable to a categorical increase in the monthly salary rates for each type of labor provided to the Egyptian F-16 Depot Project (aggregating to slightly more than $10,000). For the next nine months, through the October 2004 service period, the EAF Agent's invoices reflected the monthly $10,000 credit deducted from his total costs, until the debt was "repaid." For seven of those nine months, until September 2004, the EAF Agent's invoices also reflected the inflated labor rates. In September 2004, in response to a new initiative by the U.S. Air Force to contain ACL's costs on the project, ACL required the EAF Agent's rates to be reduced to approximately their 2003 levels.

E. Internal Controls Violations

23. During the relevant period, UIC lacked internal controls sufficient to detect or prevent improper payments such as those made by ACL to the EAF Agent. In fact, throughout the duration of the Egyptian F-16 Depot Project, ACL's President was able to authorize large payments to the EAF Agent, including the improper $100,000 advance payment to the agent in June 2002 and the $50,000 "marketing services" payment later that year, without meaningful substantiation or supporting documents. In fact, from 1997 through 2002, ACL paid the EAF

Agent in total approximately $564,000 for "consulting" or "marketing" services without meaningful records detailing the services being provided.

24. ACL's President was able to approve payments to the EAF Agent as early as September 1997 in the absence of a written contract with the agent, which ACL's President first executed with the agent in March 1998, and while maintaining no written record of having conducted any due diligence. Though UIC instituted policies in late 1999 requiring any employee wishing to engage the services of a foreign agent to submit due diligence forms for the agent to corporate counsel prior to retaining such agent, ACL did not submit such forms until 2002; even then, the due diligence forms were largely completed by the EAF Agent himself. In addition, though UIC's regulatory compliance policy in place as early as 1997 required consulting contracts to include certain representations, including, but not limited to, that (a) the consultant was aware of the FCPA; (b) that UIC's auditors and accountants would be granted access to the consultant's books and records; and (c) that the consultant submit a signed statement of continuing FCPA compliance prior to each commission or other compensation payment to the consultants, it was not until 2003 that the EAF Agent operated under an agreement with ACL that contained any of these representations and, even then, the provision requiring open access to the consultant's books and records still was not included.

25. UIC's corporate legal department in 1999 approved ACL's retention of the EAF Agent. Such approval was given even though the new agreement with the EAF Agent did not contain FCPA provisions required by corporate policy. Moreover, the legal department approved the agent despite learning that ACL had already been using the EAF Agent without prior approval and that the EAF Agent's existing agency agreement did not conform to UIC's existing policies prohibiting contingent arrangements on government contracts.

Legal Analysis

26. As described above, between late 2001 and 2002, ACL's President authorized multiple illicit payments to the EAF Agent in connection with ACL's efforts to receive new business related to the CETS project of the Egyptian F-16 Depot Project. In light of: (i) the EAF's Agent's multiple e-mails to ACL's President during the relevant period in which the agent requested monies from ACL while strongly indicating that such monies would be used, in whole or in part, to pay military officials who could influence the award of business to ACL; (ii) the ACL President's authorization of payments to the EAF Agent in the face of such requests; (iii) the ACL President's authorization of the creation of fraudulent invoices to conceal that, at his direction, the June 2002 $100,000 advance to the agent had been forgiven; and (iv) the ACL President's knowledge that, during the relevant period, ACL was seeking the award of the CETS business, ACL's President knew, or consciously disregarded the high probability, that the EAF Agent would offer, provide or promise the payments he had authorized (or a portion thereof) to EAF officials for the purpose of influencing such officials to obtain or retain business for UIC through ACL. As a result, ACL was awarded the CETS contract and received ill gotten net profits associated with the CETS contract of $267,571.

27. During the relevant period, ACL was an indirect, wholly owned subsidiary of UIC based in California. ACL's President authorized and directed multiple illicit payments to the EAF

Agent to obtain or retain business for UIC. ACL's President was ACL's highest ranking officer and had a direct reporting line to the CEO of UIC (who also acted as the CEO of UIC's direct, wholly owned subsidiary and ACL's parent corporation, AAI Corporation). UIC, in its Forms 10-K and annual reports, routinely listed ACL's President as a member of UIC's "senior management." Additionally, as discussed above, UIC's corporate legal department approved the retention of the EAF Agent despite a lack of documented due diligence and despite an agency agreement that violated corporate policy. Moreover, a UIC corporate official approved the $100,000 advance payment to the EAF Agent in June 2002.

28. As a result of the conduct described above, UIC violated Section 30A of the Exchange Act, which prohibits any issuer with a class of securities registered pursuant to Section 12 of the Exchange Act, in order to obtain or retain business, from giving, or authorizing the giving of, anything of value to any foreign official for purposes of influencing the official or inducing the official to act in violation of his or her lawful duties, or to secure any improper advantage; or to induce a foreign official to use his influence with a foreign government or foreign governmental instrumentality to influence any act or decision of such government or instrumentality.

29. As a result of the conduct described above, UIC violated Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect their transactions and disposition of their assets.

30. As a result of the conduct described above, UIC violated Section 13(b)(2)(B) of the Exchange Act, which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded in accordance with management's general or specific authorization; transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets; access to assets is permitted only in accordance with management's general or specific authorization; and the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

UIC's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that, pursuant to Section 21C of the Exchange Act:

A. Respondent UIC cease and desist from committing or causing any violations and any future violations of Sections 30A, 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

B. IT IS FURTHERED ORDERED that Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $267,571.00 and prejudgment interest of $70,108.42 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies United Industrial Corporation 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 Charles E. Cain, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5553.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary