

SECURITIES AND EXCHANGE COMMISSION

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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

*55 Documents*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62198 / June 1, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13916

In the Matter of  
  
Sintec Co. Ltd.,  
  
Respondent.

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

**I.**

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

**II.**

After an investigation, the Division of Enforcement alleges that:

**A. RESPONDENT**

1. Sintec Co. Ltd. ("SINJF")<sup>1</sup> (CIK No. 1133512) is a Korean corporation located in Bucheon City, Korea with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SINJF 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 \$1,057,707 for the prior year. As of May 19, 2010, the common stock of SINJF was quoted on the Pink Sheets operated by Pink OTC Markets Inc., had two market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

**B. DELINQUENT PERIODIC FILINGS**

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic

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<sup>1</sup>The short form of each issuer's name is also its stock symbol.

reports and, through its failure to maintain a valid address on file with the Commission as required by Commission rules, failed to receive the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

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

4. As a result of the foregoing, Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 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 hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

### IV.

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

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

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-

3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Elizabeth M. Murphy  
Secretary

*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. 62201 / June 1, 2010**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-13917**

**In the Matter of**

**Life Resources, Inc.,  
Lifestar Corp.,  
Lifeworks Holdings, Inc.,  
Listo, Inc.,  
Log Point Technologies, Inc.,  
Lrnn Corp., and  
Lysander Minerals Corp.  
(f/k/a Lysander Gold 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 Life Resources, Inc., Lifestar Corp., Lifeworks Holdings, Inc., Listo, Inc., Log Point Technologies, Inc., Lrnn Corp., and Lysander Minerals Corp. (f/k/a Lysander Gold Corp.).

**II.**

After an investigation, the Division of Enforcement alleges that:

**A. RESPONDENTS**

1. Life Resources, Inc. (CIK No. 59399) is an Oregon corporation located in Redlands, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Life Resources is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for

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the period ended June 30, 1998, which reported a net loss of \$204,467 for the prior twelve months.

2. Lifestar Corp. (CIK No. 923137) is an expired Utah corporation located in Santa Monica, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lifestar is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2000, which reported a net loss of \$59,152 for the prior three months.

3. Lifeworks Holdings, Inc. (CIK No. 891084) is a permanently revoked Nevada corporation located in Carlsbad, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lifeworks Holdings is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended January 31, 1995, which reported a net loss of \$546,835 for the prior nine months. As of May 24, 2010, the company's stock (symbol "LWHI") was traded on the over-the-counter markets.

4. Listo, Inc. (CIK No. 1166829) is a revoked Nevada corporation located in Phoenix, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Listo 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 \$250,459 for the prior three months.

5. Log Point Technologies, Inc. (CIK No. 915569) is a dissolved Colorado corporation located in Santa Clara, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Log Point 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 \$124,277 for the prior three months. As of May 24, 2010, the company's stock (symbol "LGPT") was traded on the over-the-counter markets.

6. Lrnn Corp. (CIK No. 1124861) is a Nevada corporation located in Phoenix, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lrnn 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, 2004, which reported a net loss of \$25,894 for the prior nine months. As of May 24, 2010, the company's stock (symbol "LRNE") was traded on the over-the-counter markets.

7. Lysander Minerals Corp. (f/k/a Lysander Gold Corp.) (CIK No. 1023527) is a British Columbia corporation located Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lysander 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, 1997, which reported a net loss of \$6,431,000 for the prior year. As of May 24, 2010, the company's stock (symbol "LYMCF") was traded on the over-the-counter markets.

## B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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 registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

### 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any 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

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 62202 / June 1, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13918**

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**In the Matter of**

**Vikonics, Inc.,**  
**Vision Ten, Inc.,**  
**Vizacom, Inc.,**  
**Voiceflash Networks, Inc.**  
**(d/b/a The Dataflash Corp.),**  
**VoiceIQ, Inc.**  
**(n/k/a Yoho Resources, Inc.),**  
**Voyus, Ltd., and**  
**VSI Holdings, Inc.,**  
  
**Respondents.**

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**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 Vikonics, Inc., Vision Ten, Inc., Vizacom, Inc., Voiceflash Networks, Inc. (d/b/a The Dataflash Corp.), VoiceIQ, Inc. (n/k/a Yoho Resources, Inc.), Voyus, Ltd., and VSI Holdings, Inc.

**II.**

After an investigation, the Division of Enforcement alleges that:

**A. RESPONDENTS**

1. Vikonics, Inc. (CIK No. 814932) is a dissolved New York corporation located in West Orange, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Vikonics 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, 2000, which reported a net loss of \$82,323 for the

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prior three months. As of May 19, 2010, the company's stock (symbol "VKSI") was traded on the over-the-counter markets.

2. Vision Ten, Inc. (CIK No. 848101) is a forfeited Delaware corporation located in Carlstadt, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Vision Ten is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2000, which reported a net loss of \$71,064 for the prior six months.

3. Vizacom, Inc. (CIK No. 926331) is a void Delaware corporation located in Great River, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Vizacom is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2002, which reported a net loss of over \$8.77 million for the prior nine months. As of May 19, 2010, the company's stock (symbol "VIZY") was traded on the over-the-counter markets.

4. Voiceflash Networks, Inc. (d/b/a The Dataflash Corp.) (CIK No. 1022959) is a dissolved Florida corporation located in Deerfield Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Voiceflash 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 July 31, 2002. As of May 19, 2010, the company's stock (symbol "VFNX") was traded on the over-the-counter markets.

5. VoiceIQ, Inc. (n/k/a Yoho Resources, Inc.) (CIK No. 1084142) is an Ontario corporation located in Markham, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VoiceIQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-FR registration statement on July 13, 2001, which reported a net loss of over \$4.24 million for the prior six months. As of May 19, 2010, the company's stock (symbol "YOHOF") was traded on the over-the-counter markets.

6. Voyus, Ltd. (CIK No. 1116031) is a Bermuda corporation located in Hamilton, Bermuda with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Voyus 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 \$8.9 million for the prior twelve months.

7. VSI Holdings, Inc. (CIK No. 354611) is a dissolved Georgia corporation located in Livonia, Michigan with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VSI Holdings 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 \$3.9 million for the prior three months.

## B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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 registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

### 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any 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*  
Elizabeth M. Murphy  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

June 1, 2010

In the Matter of

Sintec Co. Ltd.,

File No. 500-1

ORDER OF SUSPENSION OF  
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Sintec Co. Ltd. because it has not filed any periodic reports since the period ended December 31, 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 company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on June 1, 2010, through 11:59 p.m. EDT on June 14, 2010.

By the Commission.

Elizabeth M. Murphy  
Secretary

  
By: Florence E. Harmon  
Deputy Secretary

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**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 62210 / June 2, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-11538**

**In the Matter of**

**J. MICHAEL SCARBOROUGH and**  
**ROYAL ALLIANCE ASSOCIATES, INC.,**

**Respondents.**

**ORDER DIRECTING**  
**DISBURSEMENT OF**  
**FAIR FUND**

On February 6, 2009, the United States Securities and Exchange Commission (“Commission”) published a Notice of Proposed Plan of Distribution and Opportunity for Comment (Exchange Act Rel. No. 59368) pursuant to Rule 1103 of the Commission’s Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. §201.1103. The Notice advised parties they could obtain a copy of the proposed plan of distribution (“Distribution Plan”) at [www.sec.gov](http://www.sec.gov). The Notice also advised that all persons desiring to comment on the Distribution Plan could submit their comments, in writing, no later than March 9, 2009. No comments were received by the Commission in response to the Notice. On May 15, 2009, the Commission issued an Order Approving Plan of Distribution (Exchange Act Rel. No. 59930).

The Distribution Plan provides that the Commission will arrange for distribution of the Fair Fund when a validated electronic payment file listing the payees with the identification information required to make the distribution has been received and accepted. The validated electronic payment file has been received and accepted for the disbursement of \$2,324,199.06.

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Accordingly, it is ORDERED that the Commission staff shall disburse the Fair Fund in the amount stated in the validated electronic payment file of \$2,324,199.06, as provided for in the Distribution Plan.

By the Commission.

*Elizabeth M. Murphy*  
Elizabeth M. Murphy  
Secretary

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION  
June 3, 2010

In the Matter of the Application of  
INTERNATIONAL POWER GROUP, LTD.

c/o Vivian R. Drohan, Esq. and Stephen J. Chamberlain, Esq.  
Drohan Lee LLP  
489 Fifth Avenue  
New York, NY 10017

For Review of Action Taken by  
THE DEPOSITORY TRUST COMPANY

ORDER GRANTING ORAL ARGUMENT

International Power Group, Ltd. ("IPWG") filed an application, pursuant to Section 19(d)(1) of the Securities Exchange Act of 1934,<sup>1</sup> for review of action taken by The Depository Trust Company (the "DTC").<sup>2</sup> In connection with IPWG's application for review, the DTC has filed a motion requesting oral argument before the Commission, pursuant to Commission Rule of Practice 451.<sup>3</sup> IPWG does not oppose the DTC's request for oral argument.

Under Rule of Practice 451, the Commission "may order oral argument with respect to any matter" if it determines that "the decisional process would be significantly aided by oral argument." The DTC asserts that oral argument is "in the interest of the parties, the Commission and the National Clearance and Settlement System." This proceeding involves questions of first

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<sup>1</sup> 15 U.S.C. § 78s(d)(1).

<sup>2</sup> The DTC, a registered clearing agency, is a wholly owned subsidiary of The Depository Trust & Clearing Corporation.

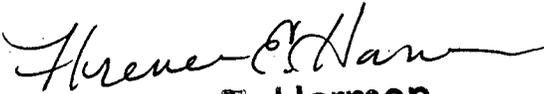
<sup>3</sup> 17 C.F.R. § 201.451.

impression, including the procedural obligations of a registered clearing agency to an entity other than a participant. Resolution of these questions may have broader implications for the national clearance and settlement system. Accordingly, we have determined, as a discretionary matter, based on the unique facts and circumstances of this appeal, that the Commission's decisional process would be significantly aided by oral argument.

Accordingly, IT IS ORDERED, pursuant to Rule 451 of the Rules of Practice, that the request of respondent The Depository Trust Company for oral argument be, and it hereby is, granted. The Commission's Office of the Secretary will issue an order scheduling the oral argument after the Commission has received the parties' briefs on appeal.

By the Commission.

Elizabeth M. Murphy  
Secretary

  
By: Florence E. Harmon  
Deputy Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940  
Release No. 3034 / June 3, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13920

In the Matter of

DAVID W. WEHRS,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against David W. Wehrs ("Wehrs" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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### III.

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

1. Wehrs is the owner of Maryland Title and Escrow, Co., Inc. ("MTE"). Until at least July 2009, Wehrs acted as an investment adviser and induced at least 13 investors to provide him with money for investment into a purported fund offered through MTE. Wehrs is not registered with the Commission in any capacity. Wehrs, 54 years old, resides in Annapolis, Maryland.

2. On May 28, 2010, a final judgment was entered by consent against Wehrs, permanently enjoining him from future violations of Sections 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), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. David W. Wehrs and Maryland Title and Escrow Co., Inc., Civil Action Number 1:10-cv-00242-BEL, in the United States District Court for the District of Maryland.

3. The Commission's complaint alleged that, in connection with the purchase and sale of securities, Wehrs made numerous oral and written misrepresentations to investors to induce them to invest money into his purported fund, misappropriated investor funds, falsely stated to investors that their funds were invested, sent out false account statements indicating that investor funds were fully invested and earning returns, and otherwise engaged in a variety of conduct which operated as a fraud and deceit on investors.

### IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act that Respondent Wehrs be, and hereby is barred from association with any investment adviser.

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

and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

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. 62228 / June 4, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-11579**

**In the Matter of**

**INVIVA, INC. AND  
JEFFERSON NATIONAL LIFE  
INSURANCE COMPANY,**

**Respondents.**

**ORDER DIRECTING DISBURSEMENT  
OF FAIR FUND**

On December 18, 2009, the United States Securities and Exchange Commission ("Commission") published a Notice of Proposed Plan of Distribution and Opportunity for Comment (Exchange Act Rel. No. 61210) pursuant to Rule 1103 of the Commission's Rules on Fair Funds and Disgorgement Plans, 17 C.F.R. §201.1103. The Notice advised parties they could obtain a copy of the Proposed Plan of Distribution ("Distribution Plan") at [www.sec.gov](http://www.sec.gov). The Notice also advised that all persons desiring to comment on the Distribution Plan could submit their comments, in writing, no later than January 18, 2010. No comments were received by the Commission in response to the Notice. On February 26, 2010, the Commission issued an Order Approving Plan, Appointing a Fund Administrator, and Waiving Bond (Exchange Act Rel. No. 61600).

The Distribution Plan provides that the Commission will arrange for distribution of the Fair Fund through the United States Department of Treasury's Financial Management System when a validated electronic payment file listing the payees with the identification information required to make the distribution has been received and accepted by the staff. The validated electronic payment file has been received and accepted for the disbursement of \$5,461,603.97.

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Accordingly, it is ORDERED that the Commission staff shall disburse the Fair Fund in the amount stated in the validated electronic payment file of \$5,461,603.97 as provided for in the Distribution Plan.

By the Commission.

*Elizabeth M. Murphy*  
Elizabeth M. Murphy  
Secretary

*Commissioner Aguilar  
Not Participating*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62226 / June 4, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13924

In the Matter of

GUILLERMO HARO,

Respondent.

ORDER INSTITUTING  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT 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 Guillermo Haro ("Haro" or the "Respondent").

II.

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

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### III.

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

1. Haro, age 41, is a resident of Glendora, California. Haro became a World Financial Group, Inc. ("WFG") associate in 2001 and has been a registered representative for World Group Securities, Inc. ("WGS"), a broker/dealer registered with the Commission, since April 2002. Haro has no prior disciplinary history with the Commission or any state or self-regulatory organization.

2. On April 21, 2010, a final judgment was entered by consent against Haro permanently restraining and enjoining him from violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and from aiding and abetting future violations of Section 17(a) of the Exchange Act and Rules 17a-3(a)(6) and 17a-3(a)(17) thereunder in the civil action entitled Securities and Exchange Commission v. Ainsworth, et al., Civil Action Number EDCV 08-1350 VAP (OPx), in the United States District Court for the Central District of California.

3. The Commission's Complaint alleged that Haro's recommendation to customers to purchase a Variable Universal Life insurance policy was unsuitable.

### IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Haro be, and hereby is barred from association with any broker or dealer with the right to reapply for association in the capacity as a registered representative after one (1) year and as a supervisor after four (4) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against 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**

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**

**Release No. 62219 / June 4, 2010**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-13921**

**In the Matter of**

**Miracor Diagnostics, Inc.,  
Monaco Finance, Inc.,  
MPEL Holdings Corp.  
(f/k/a Computer Transceiver Systems, Inc.),  
MR3 Systems, Inc., and  
Mutual Risk Management, 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 Miracor Diagnostics, Inc., Monaco Finance, Inc., MPEL Holdings Corp. (f/k/a Computer Transceiver Systems, Inc.), MR3 Systems, Inc., and Mutual Risk Management, Ltd.

**II.**

After an investigation, the Division of Enforcement alleges that:

**A. RESPONDENTS**

1. Miracor Diagnostics, Inc. (CIK No. 723906) is an expired Utah corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Miracor Diagnostics 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, 2006, which reported a net loss of \$3,200,161 for the prior nine months. As of May 21, 2010, the company's stock (symbol "MRDG") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink

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

2. Monaco Finance, Inc. (CIK No. 865830) is a delinquent Colorado corporation located in Greenwood Village, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Monaco Finance 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, 1999, which reported a net loss of \$7,883,000 for the prior nine months. As of May 21, 2010, the company’s stock (symbol “MONFA”) was quoted on the Pink Sheets, had three market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

3. MPEL Holdings Corp. (CIK No. 1048644) (f/k/a Computer Transceiver Systems, Inc.) (CIK No. 23120) is a New York corporation located in Melville, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MPEL Holdings 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, 1999. MPEL Holdings merged with Computer Transceiver Systems and MPEL Holdings was the surviving entity, but both issuers have their own CIK numbers, thus we request that the securities of both issuers be suspended or revoked. As of May 21, 2010, the company’s stock (symbol “MPEH”) 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).

4. MR3 Systems, Inc. (CIK No. 1133541) is a forfeited Delaware corporation located in San Francisco, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MR3 Systems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of \$1,002,332 for the nine months ended September 31, 1995. As of May 21, 2010, the company’s stock (symbol “MRMR”) 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. Mutual Risk Management Ltd. (CIK No. 826918) is a Bermuda corporation located in Hamilton, Bermuda with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Mutual Risk Management is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K/A for the period ended December 31, 2001, which reported a net loss of \$109,189,000 for the prior twelve months. On January 1, 2003, the company filed a petition under Section 304 of the Bankruptcy Code (now Chapter 15) in the U.S. Bankruptcy Court for the Southern District of New York, and the case was terminated on April 6, 2009. As of May 21, 2010, the company’s stock (symbol “MLRMF”) was quoted on the Pink Sheets, had eight market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

## B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission, 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 registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

### 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)].

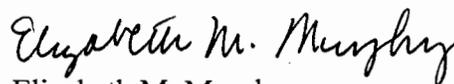
If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

  
Elizabeth M. Murphy  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

June 4, 2010

In the Matter of

Miracor Diagnostics, Inc.,  
Monaco Finance, Inc.,  
MPEL Holdings Corp.  
(f/k/a Computer Transceiver Systems, Inc.),  
MR3 Systems, Inc.,  
Mutual Risk Management, Ltd.,

File No. 500-1

ORDER OF SUSPENSION OF  
TRADING

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Monaco Finance, 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 MPEL Holdings Corp. (f/k/a Computer Transceiver Systems, Inc.) because it has not filed any periodic reports since 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 MR3 Systems, Inc. because it has not filed any periodic reports since the period ended September 30, 2005.

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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Mutual Risk Management Ltd. because it has not filed any periodic reports since the period ended December 31, 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 June 4, 2010, through 11:59 p.m. EDT on June 17, 2010.

By the Commission.

*Elizabeth M. Murphy*  
Elizabeth M. Murphy  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62222 / June 4, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13922

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In the Matter of

Alpha Resources, Inc.,  
Amber's Stores, Inc.,  
American BioMed, Inc.,  
American Completion Program  
1983-3, and  
Amtronics Enterprises, Ltd.,

Respondents.

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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 Alpha Resources, Inc., Amber's Stores, Inc., American BioMed, Inc., American Completion Program 1983-3, and Amtronics Enterprises, Ltd.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Alpha Resources, Inc. (CIK No. 1031381) is a void Delaware corporation located in Clearwater, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Alpha Resources is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2003, which reported a net loss of \$146,437 since the company's January 13, 1997 inception.

2. Amber's Stores, Inc. (CIK No. 888456) is a forfeited Texas corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Amber's Stores is delinquent in its periodic

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filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended April 28, 1996, which reported a net loss of over \$1.53 million for the prior three months. On September 8, 1995, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Texas, which was converted to Chapter 7, and the case was terminated on November 20, 2002. As of May 24, 2010, the company's stock (symbol "ABRS") was traded on the over-the-counter markets.

3. American BioMed, Inc. (CIK No. 867572) is a void Delaware corporation located in The Woodlands, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). American Biomed 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 \$311,712 for the prior three months. On July 20, 2000, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of Texas, and the case was terminated on December 14, 2004.

4. American Completion Program 1983-3 (CIK No. 743458) is a canceled Texas limited partnership located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). American Completion 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, 1996, which reported a net loss of \$36,725 for the prior nine months. On February 1, 2002, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Southern District of Texas, and the case was still pending as of May 26, 2010.

5. Amtronics Enterprises, Ltd. (CIK No. 855928) is a British Columbia corporation located in Metairie, Louisiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Amtronics 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, 1993, which reported a net loss of \$166,807 for the prior three months. On March 17, 1998, the British Columbia Securities Commission ("BCSC") issued a cease trading order against Amtronics for its delinquent filings with the BCSC.

#### B. DELINQUENT PERIODIC FILINGS

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

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

is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires issuers to file quarterly reports.

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

### III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any corporate names of any Respondents.

### 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

*Elizabeth M. Murphy*  
Elizabeth M. Murphy  
Secretary

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 62235 / June 7, 2010**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 3139 / June 7, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13925**

_____ )	
In the Matter of )	ORDER INSTITUTING CEASE-AND-DESIST
China Yuchai International Limited, )	PROCEEDINGS PURSUANT TO SECTION
Respondent. )	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 China Yuchai International Limited ("China Yuchai" 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 Respondent 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.

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### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

1. This matter concerns China Yuchai's violations of the reporting, books and records and internal controls provisions of the securities laws, arising out of China Yuchai's material overstatement of net income for the year ended December 31, 2005. The overstatement was caused by an erroneous material adjusting journal entry made at China Yuchai's majority-owned subsidiary, Guangxi Yuchai Machinery Company Limited ("Guangxi Yuchai"). China Yuchai included the overstated financial results in its annual report for 2005, which it filed with the Commission in August 2006. In 2008, China Yuchai restated its 2005 financial statements, including the reversal of the erroneous adjusting journal entry at the subsidiary.

2. China Yuchai is a Bermuda company headquartered in Singapore. China Yuchai's common stock is registered with the Commission under Section 12(b) of the Exchange Act, and is listed on the New York Stock Exchange. China Yuchai owns 76.4% of Guangxi Yuchai, a Sino-foreign joint stock company, headquartered in Yulin City in the People's Republic of China ("PRC"). Guangxi Yuchai manufactures and distributes diesel engines in the PRC.

3. The erroneous material adjusting journal entry arose as a result of inadequate financial controls at Guangxi Yuchai. Guangxi Yuchai had been consistently profitable between 1998 and 2004. In the second half of 2005, however, Guangxi Yuchai's financial statements began to reflect monthly losses, which worsened as the year progressed. Guangxi Yuchai's management and finance department considered whether technical problems with new accounting software installed earlier that year had overstated the "Goods Received/Invoices Not Received" ("GR/IR") account, because the GR/IR year-end balance had grown significantly over the previous year. The GR/IR account tracks the cost of raw materials delivered to Guangxi Yuchai's warehouse prior to the receipt of invoices from vendors. GR/IR is consolidated with Accounts Payable on Guangxi Yuchai's balance sheet.

4. To investigate the possible error, the Guangxi Yuchai procurement department staff manually counted warehouse receiving documents and called suppliers to discuss shipments and invoices. Using the procurement department data, the finance department staff substantiated a GR/IR account balance of Rmb 400 million, but the accounting software indicated a balance of Rmb 568 million. On January 20, 2006, the finance department input an adjusting entry of Rmb 168 million (equivalent to approximately \$21 million) into the GR/IR account for the period ending December 31, 2005.

5. After the adjusting entry had been made, personnel in the Guangxi Yuchai finance department discovered additional warehouse receipts that had not been included in the January 2006 count. The discovery of the additional warehouse receipts indicated that the adjusting journal entry made in January 2006 was at least partially erroneous. However, no one at

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<sup>1</sup> 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.

Guangxi Yuchai informed anyone at China Yuchai of the discovery of the additional receipts or informed the parent company that the adjusting journal entry was at least partially erroneous.

6. On August 8, 2006, China Yuchai filed its 2005 annual report with the Commission on Form 20-F, incorrectly reporting net income of \$8.5 million as a result of the erroneous adjusting journal entry.

7. In June 2007, finance personnel at China Yuchai learned that the January 2006 adjusting journal entry was at least partially erroneous when an accountant in the Guangxi Yuchai finance department proposed a partial reversal of the adjusting entry. China Yuchai's Audit Committee was informed of the issue and hired outside counsel to conduct an internal investigation of the issue.

8. In August 2007, following a preliminary investigation, China Yuchai publicly disclosed that it was conducting an investigation into a possible accounting error and that "Rmb 168 million . . . may have to be reversed."

9. On May 30, 2008, China Yuchai filed an amended Form 20-F which restated its financial results for 2005. In the restatement, China Yuchai reported a net loss for the year of \$4 million instead of the \$8.5 million net income originally reported (a decrease of approximately \$12.5 million). Guangxi Yuchai reversed the entire January 2006 adjusting entry. During the course of finalizing the adjusting entry in the restated financial results for 2005, China Yuchai identified certain other accounting errors not previously known and corrected these other accounting errors in its restated financial results for 2005.

10. China Yuchai has made changes to Guangxi Yuchai's internal controls designed to diminish the likelihood of such problems in the future. These included effecting changes in the personnel in the Guangxi Yuchai finance department, adopting new procedures for posting accounting entries, and training finance personnel in U.S. Generally Accepted Accounting Principles.

11. As a result of the conduct described above, China Yuchai violated Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission information, documents, and annual reports as the Commission may require, and mandate that reports contain such further material information as may be necessary to make the required statements not misleading.

12. China Yuchai's 2005 annual report on Form 20-F, filed on August 8, 2006, materially overstated the company's net income and other financial performance measurements, due to the erroneous adjusting journal entry at China Yuchai's majority-owned subsidiary.

13. As a result of the conduct described above, China Yuchai 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. As a result of the erroneous material adjustment to the GR/IR account, China Yuchai's books, records, and accounts were materially misstated and did not accurately and fairly reflect the transactions and dispositions of the company's assets.

14. As a result of the conduct described above, China Yuchai 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 as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles. China Yuchai's internal controls were not sufficient to prevent the entry of an erroneous material adjustment to the accounts of its majority-owned subsidiary, or to require the reversal of that adjustment when it became apparent that it was erroneous.

**China Yuchai'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 China Yuchai's Offer.

Accordingly, it is hereby ORDERED that, pursuant to Section 21C of the Exchange Act, Respondent China Yuchai cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

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. 62243 / June 8, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13930**

**In the Matter of**

**DUANE C. JOHNSON,**

**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 Duane C. Johnson ("Respondent").

**II.**

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

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### III.

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

1. Johnson, age 53, is a Utah resident. Johnson was the Novus Technologies, LLC point of contact for Novus' real estate and portfolio development. Johnson personally participated in the solicitation of investors on behalf of Novus.

2. On May 25, 2010, a final judgment was entered by consent against Johnson, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a)(1), (2) and (3) of the Securities Act of 1933 ("Securities Act"), 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. Novus Technologies, LLC, et al., Civil Action Number 2:07-CV-0235, in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that Johnson, directly or indirectly, made use of the mails or the means or instrumentalities of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase and sale of, securities in Novus without being registered as a broker-dealer with the Commission or associated with a broker-dealer registered with the Commission. The Commission's complaint also alleged that in connection with the sale of Novus securities, Johnson misused and misappropriated investor funds, falsely stated to investors that their funds were secure, indicated to investors that investor funds were fully invested and earning returns, and otherwise engaged in a variety of conduct which operated as a fraud and deceit on investors. The complaint also alleged that Johnson sold unregistered securities.

### IV.

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

Accordingly, it is hereby ORDERED:

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

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

By the Commission.

Elizabeth M. Murphy  
Secretary

  
By: Jill M. Peterson  
Assistant Secretary



## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

## III.

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

1. **Bonica**, age 60, passed the CPA exam in 1978 in New York State and is a certified public accountant. He joined Monster, Inc. in April 1994, and was the controller until mid-2001, when he became the vice president for investor relations and financial planning. Bonica was terminated in December 2006.

2. **Monster Worldwide, Inc.** ("Monster"), formerly known as TMP Worldwide Inc., is a Delaware corporation that is the parent company of Monster.com, a leading global online career and recruitment resource. Headquartered in New York, New York, Monster employs approximately 4,600 employees in 35 countries. Monster's common stock is currently registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and trades on the NASDAQ National Market System under the symbol "MNST." Monster's initial public offering of shares of its common stock occurred on December 12, 1996.

3. On April 30, 2008, the Commission filed a complaint against Bonica in *SEC v. James Treacy and Anthony Bonica*, 08 CV 4052 (S.D.N.Y.). On May 28, 2010, the court entered an order permanently restraining and enjoining Bonica from direct or indirect violations of Section 17(a) of the Securities Act of 1933 [15 U.S.C. § 77q(a)], Sections 10(b) and 13(b)(5) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78m(b)(5)] and Rules 10b-5 and 13b2-1 [17 C.F.R. §§ 240.10b-5 and 240.13b2-1] thereunder, and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 14(a) of the Exchange Act [15 U.S.C. §§ 78m(a), 78m(b)(2)(A) and 78n(a)], and Rules 12b-20, 13a-1, 13a-11, 13a-13 and 14a-9 [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13 and 240.14a-9] thereunder. Bonica was also ordered to pay a \$60,000 civil money penalty, \$115,736.71 of disgorgement and \$33,800.89 in prejudgment interest.

4. The Commission's complaint alleged, among other things, that Bonica participated in a fraudulent stock option backdating scheme; that Bonica's fraudulent conduct caused Monster's periodic filings and proxy statements to falsely portray Monster's options as having been granted at exercise prices equal to the fair market value of Monster's common stock

on the date of the grant, when, in fact, Monster was granting in-the-money options; and that Bonica understood the accounting consequences of granting in-the-money options but did nothing to ensure that Monster properly accounted for these options in its financial statements. Bonica's conduct caused Monster to file materially false and misleading public reports that contained financial statements that materially understated its compensation expenses and materially overstated its quarterly and annual net income. On December 13, 2006, Monster restated its historical financial results for 1997-2005 in a cumulative pre-tax amount of approximately \$339.5 million to record additional non-cash charges for option related compensation. The complaint further alleged that Bonica benefited from the scheme, including the receipt and exercise of backdated grants of in-the-money options.

#### IV.

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

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

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

B. After three years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy  
Secretary

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

*Commissioner Aguilar  
Commissioner Paredes  
not participating*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62238 / June 8, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13926

In the Matter of

Jay Lapine, Esq.

Respondent.

ORDER INSTITUTING PUBLIC  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT TO RULE 102(e) OF THE  
COMMISSION'S RULES OF PRACTICE,  
MAKING FINDINGS AND IMPOSING  
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Jay Lapine ("Respondent" or "Lapine") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.<sup>1</sup>

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

<sup>1</sup> 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.

proceedings, and the findings contained in Sections III(1), (3) and (5) below, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

### III.

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

1. Lapine, age 59, is and has been an attorney licensed to practice in the States of Texas and Ohio. In 1997, Lapine became Vice President, General Counsel and Assistant Secretary of HBO & Co. (HBOC). He became General Counsel of the Information Technology (former HBOC) unit of McKesson HBOC, Inc. following the January 1999 merger of McKesson Corporation with HBOC. He held this position until June 21, 1999. Lapine is currently employed as General Counsel by a wholly-owned United States subsidiary of a foreign corporation whose securities are not traded on a United States exchange.

2. McKesson Corporation has been, at all relevant times, a leading healthcare supply and software company with executive offices in San Francisco, California. At all relevant times, its common stock was registered pursuant to Section 12(b) of the Exchange Act and was listed on the New York Stock Exchange. In January 1999, McKesson merged with HBOC, then the largest supplier of management software for hospitals and other health care providers, whose common stock was registered pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and was listed on the NASDAQ National Market. McKesson became McKesson HBOC, Inc., which operated HBOC as a wholly-owned subsidiary unit. Later, McKesson HBOC reverted to its pre-merger name of McKesson Corporation.

3. On September 27, 2001, the Commission filed a complaint against Lapine in the United States District Court for the Northern District of California, *SEC v. Lapine*, No. C-01-3650.

4. The Commission's complaint alleged, among other things, that Lapine participated in two major transactions that were part of a larger fraudulent scheme by HBOC and McKesson HBOC executives to inflate software revenue in violation of Generally Accepted Accounting Principles by using concealed side letters and backdated contracts from January 1998 through the first quarter of 1999. The complaint further alleged that Lapine falsified documents and circumvented internal accounting controls and that he aided and abetted these violations by HBOC and McKesson HBOC as well as aided and abetted the companies' failure to maintain accurate books and records and HBOC's filing of materially false periodic reports with the Commission.

5. On March 1, 2010, the United States District Court for the Northern District of California entered a final judgment by consent against Lapine, permanently enjoining him from violating Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(5) of the Exchange Act and Rules 10b-5, 12b-20, 13a-13 and 13b2-1 thereunder, and from aiding and abetting the violations of Sections 13(a), 13(b)(5) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-13 and 13b2-1 thereunder. Lapine was also ordered to pay a \$60,000 civil penalty and was prohibited 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 [15 U.S.C. § 78I] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Lapine is suspended from appearing or practicing before the Commission as an attorney for five years. Furthermore, after five years from the date of this Order, Lapine has the right to apply for reinstatement by submitting an affidavit to the Commission's Office of General Counsel truthfully stating, under penalty of perjury, that he has complied with this Order, that he is not the subject of any suspension or disbarment as an attorney by a court of the United States or of any state, territory, district, commonwealth or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Elizabeth M. Murphy  
Secretary

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

*Commissioner Karedes  
not participating*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933  
Release No. 9125 / June 8, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13927

In the Matter of

Gordon Brent Pierce,  
Newport Capital Corp., and  
Jenirob Company Ltd.,

Respondents.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") against Gordon Brent Pierce ("Pierce"), Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement ("Division") alleges that:

Nature of the Proceeding

1. This matter involves an unregistered distribution of stock by Gordon Brent Pierce, a Canadian stock promoter. Pierce reaped \$7.7 million in unlawful profits by selling stock in Lexington Resources, Inc. ("Lexington"), a now defunct oil and gas company, through two offshore companies that he controlled, Newport Capital Corp. and Jenirob Company Ltd. Pierce, Newport and Jenirob did not register their sales or qualify for an exemption from registration.
2. Beginning in late 2003, Pierce controlled Lexington by holding the majority of its stock and by providing Lexington a consultant CEO who was employed by Pierce. In 2003 and 2004, Pierce directed the CEO to issue 3.2 million Lexington shares without restrictive legends to Pierce and one of Pierce's associates. Pierce then distributed these shares during 2004 while he conducted a massive spam and newsletter campaign touting Lexington stock. As Lexington's stock

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price skyrocketed to \$7.50 per share, Pierce sold 1.6 million of the 3.2 million shares to the public through accounts of Newport and Jenirob at an offshore bank for profits of \$7.7 million. This was in addition to \$2 million in profits Pierce made through sales of Lexington stock in his personal account, sales found to be in violation of the federal securities laws in a previous action filed by the Division. See In the Matter of Gordon Brent Pierce, Admin. Proc. File No. 3-13109 (Initial Decision dated June 5, 2009; Notice that Initial Decision Has Become Final dated July 8, 2009).

### Respondents

3. Pierce has provided stock promotion and capital raising services to Lexington and other issuers in the U.S. and Europe through various consulting companies that he controls. Pierce, 52, is a Canadian citizen residing in Vancouver, British Columbia and the Cayman Islands.

4. Newport is a privately-held corporation organized in March 2000 under the laws of Belize. Newport has a registered agent in Belize and maintains offices in Zürich, Switzerland and London, England. Pierce has been President and a director of Newport since 2000.

5. Jenirob is a privately-held corporation organized in January 2004 under the laws of the British Virgin Islands. Jenirob has a registered agent in the British Virgin Islands and uses the mailing address of a law firm in Liechtenstein.

### Facts

#### *Pierce Controlled Lexington*

6. Lexington is a Nevada corporation that was a public shell company known as Intergold Corp. until November 2003, when it entered into a reverse merger with a private company known as Lexington Oil and Gas LLC and changed its name to Lexington Resources. Lexington's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act from 2003 until June 4, 2009, when its registration was revoked. From 2003 to 2007, Lexington stock was quoted on the over-the-counter bulletin board under the symbol "LXRS." In 2008, Lexington's only operating subsidiaries entered Chapter 7 bankruptcy.

7. From 2002 to 2007, Pierce provided Intergold and then Lexington with operating funds, stock promotion services and capital-raising services through at least three different consulting companies that Pierce controlled, including Newport. Pierce used these companies to conceal his role and avoid being identified by name in Commission filings.

8. From 2002 to 2004, an individual who worked for Pierce served as CEO and Chairman of Intergold and then Lexington through a consulting arrangement with one of the companies that Pierce controlled. The individual was paid by Pierce's consulting company, not by Intergold or Lexington. The individual also worked for Pierce through Newport and received more than \$250,000 from Newport in 2004.

9. Intergold and Lexington did not have their own offices, but used the offices of Pierce's consulting companies in northern Washington State, near Vancouver, Canada. Pierce's employees answered telephones, responded to shareholder inquiries, and performed all other administrative functions for Intergold and Lexington.

10. By October 2003, shortly before the reverse merger, Intergold owed one of Pierce's consulting companies nearly \$1.2 million. On November 18, 2003, to satisfy part of this debt, the CEO and Chairman of Intergold agreed to issue to Pierce, through one of his consulting companies, vested options to acquire 950,000 shares of the public company. At the time, these shares constituted 64% of Intergold's outstanding shares (on a post-exercise basis).

11. Three days later, as part of the reverse merger, the CEO and Chairman agreed to issue 2.25 million additional shares with restrictive legends to another offshore company that Pierce formed and controlled. As a result, Pierce controlled more than 70% of Lexington's outstanding stock after the reverse merger.

12. Shortly after the reverse merger, Lexington purchased an interest in an oil and gas property owned by Pierce, and then Lexington hired another company controlled by Pierce to drill a well on that property. Lexington later purchased interests in a handful of other oil and gas properties and drilled a few additional wells that produced small amounts of natural gas, but Lexington never generated any meaningful revenue.

#### *Lexington Issued Millions of Shares to Pierce and His Associates*

13. Within days of the reverse merger, Lexington began issuing stock to Pierce and his associates pursuant to the stock options granted to Pierce's consulting company. Pierce told Lexington's CEO and Chairman who should receive the shares and how many.

14. Between November 2003 and January 2004, Lexington issued 500,000 shares to Pierce and 300,000 shares to one of Pierce's associates. These became 1.5 million shares and 900,000 shares, respectively, upon Lexington's three-for-one stock split on January 29, 2004.

15. In February 2004, Pierce told Lexington's CEO and Chairman to grant his company additional stock options. Lexington then issued an additional 320,000 shares to Pierce and 495,000 shares to Pierce's associate in May and June 2004. In total, Pierce and his associate received 3.2 million shares (on a post-split basis) between November 2003 and June 2004, all without restrictive legends.

16. Lexington improperly attempted to register these issuances by filing registration statements on Form S-8, an abbreviated form of registration statement that may not be used for the issuance of shares to consultants who provide stock promotion or capital-raising services, like Pierce and his associate. Lexington's invalid S-8 registration statements only purported to cover issuances by Lexington, not any subsequent resales by Pierce and his associate.

***Pierce Conducted a Promotional Campaign Touting Lexington Stock***

17. In late February 2004, Pierce and his associate began actively promoting Lexington by sending millions of spam emails and newsletters through a publishing company that Pierce controlled. At the same time, Lexington issued a flurry of optimistic press releases about its current and potential operations.

18. During the promotional campaign, Pierce personally met with potential Lexington investors and distributed folders with promotional materials and press releases. Pierce's associate worked for Pierce's publishing company and was responsible for communicating with potential Lexington investors in Europe through Pierce's consulting company.

19. From February to June 2004, Lexington's stock price increased from \$3.00 to \$7.50, and Lexington's average trading volume increased from 1,000 to about 100,000 shares per day, reaching a peak of more than 1 million shares per day in late June 2004.

***Pierce Distributed Lexington Stock Through Newport and Jenirob***

20. The stock option agreements between Lexington and Pierce's consulting company and the option exercise agreements signed by Pierce and his associate provided that all shares were to be acquired for investment purposes only and with no view to resale or other distribution. No registration statements were filed relating to any resales of Lexington stock by Pierce, Newport or Jenirob.

21. Of the 3.2 million shares Lexington issued to Pierce and his associate between November 2003 and June 2004, Pierce sold 300,000 through his personal account at a bank in Liechtenstein and distributed 2.8 million through Newport and Jenirob.

22. Within days of Lexington's issuance of these 2.8 million shares, Pierce instructed Lexington's CEO and Chairman to transfer them all to Newport or Jenirob. Pierce then further transferred 1.2 million of the 2.8 million shares to ten individuals and entities in Canada and the U.S., and Pierce transferred the remaining 1.6 million shares to the bank in Liechtenstein.

23. Pierce produced to the Division copies of statements from his personal account at the bank in Liechtenstein showing that he sold 300,000 Lexington shares in June 2004 for net proceeds of \$2 million. Pierce refused to produce any documents relating to sales of Lexington stock that he made through accounts at the Liechtenstein bank other than his personal account.

24. During 2004, the Liechtenstein bank sold 2.5 million Lexington shares in the open market through an omnibus brokerage account in the U.S. held in the Liechtenstein bank's name for proceeds of more than \$13 million, including \$8 million in June 2004 alone.

25. In March 2009, the Division received additional documents relating to the Liechtenstein bank's sales of Lexington stock. These documents showed that, in addition to Pierce's sales through his personal account, Pierce deposited 1.6 million Lexington shares in accounts at the Liechtenstein bank in the names of Newport and Jenirob. Pierce was the beneficial owner of the Newport and Jenirob accounts. Pierce sold the 1.6 million shares

through the Newport and Jenirob accounts between February and December 2004 for net proceeds of \$7.7 million.

26. In addition to his refusal to produce records pertaining to Newport and Jenirob, Pierce filed appeals in Liechtenstein that further delayed the Division's efforts to obtain documents related to Pierce's Lexington stock sales through the Newport and Jenirob accounts.

***Pierce Was Previously Found Liable For Unregistered Lexington Stock Sales  
In His Personal Account***

27. On July 31, 2008, the Commission instituted cease-and-desist proceedings against Pierce, Lexington and Lexington's CEO/Chairman to determine whether all three respondents violated Sections 5(a) and 5(c) of the Securities Act and whether Pierce also violated the Securities Exchange Act of 1934 (the "Exchange Act") by failing to accurately report his Lexington stock ownership and transactions. Admin. Proc. File No. 3-13109. In that action, the Division sought disgorgement from Pierce of the \$2 million in net proceeds from his sale of the 300,000 Lexington shares in his personal account at the Liechtenstein bank in June 2004.

28. An evidentiary hearing in the prior action was held regarding Pierce February 2-4, 2009.

29. Before issuance of the Initial Decision in the prior action, the Division moved to admit the new evidence first received in March 2009 showing that Pierce sold an additional 1.6 million Lexington shares through the Newport and Jenirob accounts, and also sought the additional \$7.7 million in disgorgement. The new evidence was admitted in the prior action, but the Administrative Law Judge ruled that disgorgement of the \$7.7 million in proceeds from Pierce's sales in the Newport and Jenirob accounts was outside the scope of the Order Instituting Proceedings ("OIP") in the prior action because Newport and Jenirob were not named in the OIP.

30. The Initial Decision in the prior action, issued June 5, 2009, found that Pierce committed the alleged violations of the Securities Act and Exchange Act and ordered Pierce to disgorge \$2,043,362.33 in proceeds from his sale of the 300,000 Lexington shares in his personal account. Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009.

**Violations**

31. As a result of the conduct described above, Respondents Pierce, Newport and Jenirob violated Sections 5(a) and 5(c) of the Securities Act, which, among other things, unless a registration statement is on file or in effect as to a security, prohibit any person, directly or indirectly, from: (i) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; (ii) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or (iii) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the

use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

### III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that cease-and-desist proceedings be instituted to determine:

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

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

C. Whether Respondents should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act.

### IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

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

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

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

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within

the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy  
Secretary

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

*Commissioner Casey  
not participating*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940  
Release No. 3035 / June 8, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13928

In the Matter of

PEQUOT CAPITAL  
MANAGEMENT, INC. AND  
ARTHUR J. SAMBERG,

Respondents.

ORDER INSTITUTING  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT TO SECTIONS 203(e) AND  
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 Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Pequot Capital Management, Inc. ("Pequot" or "Respondent Pequot") and Arthur J. Samberg ("Samberg" or "Respondent Samberg") (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondents consent to the entry of this Order Instituting Administrative Proceedings Pursuant to Sections

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203(e) and 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 Respondents' Offers, the Commission finds that:

1. Samberg, age 69, is a resident of Ossining, New York. He has been the chairman and chief executive officer of Pequot since its founding in 1998.
2. Pequot is an investment adviser incorporated in Connecticut. It was headquartered in Westport, Connecticut until May 2009, at which time its offices were moved to Wilton, Connecticut. Pequot has been registered with the Commission since 1998 as an investment adviser.
3. On June 2, 2010, a final judgment was entered by consent against Pequot and Samberg, permanently enjoining them from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Pequot Capital Management, Inc., et al.*, Civil Action Number 3:10-cv-00831-CFD, in the United States District Court for the District of Connecticut. Pequot and Samberg were also ordered to pay \$15,142,020 in disgorgement on a joint and several basis, together with prejudgment interest thereon in the amount of \$2,696,448. In addition, Pequot and Samberg were each ordered to pay a \$5 million civil money penalty.
4. The Commission's complaint alleged that, while in possession of material, nonpublic information and prior to the public announcement by Microsoft Corporation ("Microsoft") concerning its earnings for the quarter ended March 31, 2001, Samberg purchased numerous Microsoft options on behalf of funds he managed for Pequot and recommended that a friend purchase Microsoft securities. According to the complaint, Pequot's and Samberg's trading in Microsoft securities resulted in total gains of approximately \$14,769,960, and Samberg's friend had gains of \$372,060.

### 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 203(e) of the Advisers Act, that Respondent Pequot is hereby censured;

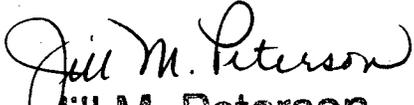
Pursuant to Section 203(f) of the Advisers Act, Respondent Samberg be, and hereby is barred from association with any investment adviser, provided however, that for a period of up to 15 months from the entry of this Order, Samberg may, solely for the purposes of completing the

wind down of Pequot, making final payments and distributions to investors in the funds Pequot manages, and preserving value for those investors in the interim, (1) participate in advisory activities and (2) continue to be associated with Pequot while Pequot acts as an investment adviser.

Any reapplication for association by Respondent Samberg 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 Respondent Samberg, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy  
Secretary

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

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 62257 / June 10, 2010

Admin. Proc. File No. 3-13817

In the Matter of  
  
LASERSIGHT, INC., *et al.*,  
  
LOEHMANN'S, INC., Respondent.

ORDER DISMISSING LOEHMANN'S, INC. FROM PROCEEDING

On March 15, 2010 the Commission issued an Order Instituting Proceedings ("OIP") against Loehmann's, Inc. ("Loehmann's") and ten other respondents under Section 12(j) of the Securities Exchange Act of 1934.<sup>1</sup> The OIP alleged that Loehmann's had "a class of securities registered with the Commission pursuant to Exchange Act Section 12(g)" and was delinquent in its filings with the Commission.

On April 9, 2010, the Division of Enforcement moved to dismiss Loehmann's from the proceeding.<sup>2</sup> According to the Division, Loehmann's has no securities registered with the Commission. The Division has attached to its motion an affidavit from the Division of Corporation Finance. On September 30, 2005, Loehmann's Holdings, Inc. ("Loehman's Holdings"), Loehmann's corporate parent, filed a Form 15 with the Commission, thereby voluntarily deregistering Loehmann's securities. According to the affidavit, however, Loehmann's Holdings mistakenly used its own Central Index Key ("CIK") number<sup>3</sup> on the form, 843081, rather than Loehmann's CIK number, 60064. Because of Loehmann's Holdings' error, Corporation Finance staff investigating the status of Loehmann's filings found no electronic record of the deregistration, making it appear to the staff that Loehmann's was delinquent in its reporting obligations. Soon after the OIP was issued, however, Loehmann's Holdings notified

<sup>1</sup> 15 U.S.C. § 78l(j).

<sup>2</sup> Loehmann's has not responded to the Division's motion, nor has any other party.

<sup>3</sup> The CIK number is a unique number assigned by the Commission to each entity that is required to file reports with the Commission.

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the Division that Loehmann's Holdings had deregistered Loehmann's securities by filing the above-mentioned Form 15. Corporation Finance confirmed Loehmann's Holdings' filing.

The affidavit explains further that, under limited circumstances, Corporation Finance may "recognize and treat as valid a Form 15 that meets the requirements of the rules necessary to terminate a Section 12 Exchange Act registration" notwithstanding the "clerical mistake of filing under the wrong CIK number." According to the affidavit, this is the state of affairs with Loehmann's. Corporation Finance also represents that it placed a comment on the internal EDGAR database listing for Loehmann's stating that "[a] form 15 was submitted by Loehmann's Holding[s] for its subsidiary," and the filing status on that database is "delineated as 'inactive.'" Thus, Loehmann's currently has no class of securities registered with the Commission. Because revocation or suspension of registration are the only remedies available in this proceeding instituted pursuant to Exchange Act Section 12(j), we find it appropriate to dismiss Loehmann's from this proceeding.<sup>4</sup>

Accordingly, it is ORDERED that the proceeding with respect to Loehmann's, Inc. be, and it hereby is, dismissed.

By the Commission.

Elizabeth M. Murphy  
Secretary

  
By: Florence E. Harmon  
Deputy Secretary

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<sup>4</sup> See *TelcoBlue, Inc.*, Securities Exchange Act Rel. No. 58061 (June 30, 2008), 93 SEC Docket 7335 (dismissing Section 12(j) proceeding with respect to a respondent that "no longer [had] a class of securities registered under Section 12 of the Exchange Act").

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-62252; File Nos. SR-BATS-2010-014; SR-EDGA-2010-01; SR-EDGX-2010-01; SR-BX-2010-037; SR-ISE-2010-48; SR-NYSE-2010-39; SR-NYSEAmex-2010-46; SR-NYSEArca-2010-41; SR-NASDAQ-2010-061; SR-CHX-2010-10; SR-NSX-2010-05; SR-CBOE-2010-047)

June 10, 2010

Self-Regulatory Organizations; BATS Exchange, Inc.; EDGA Exchange, Inc.; EDGX Exchange, Inc.; NASDAQ OMX BX, Inc.; International Securities Exchange LLC; New York Stock Exchange LLC; NYSE Amex LLC; NYSE Arca, Inc.; The NASDAQ Stock Market LLC; Chicago Stock Exchange, Inc.; National Stock Exchange, Inc.; Chicago Board Options Exchange, Incorporated; Order Granting Accelerated Approval to Proposed Rule Changes Relating to Trading Pauses Due to Extraordinary Market Volatility

I. Introduction

On May 18, 2010, each of BATS Exchange, Inc. ("BATS"), EDGX Exchange, Inc. ("EDGX"), NASDAQ OMX BX, Inc. ("BX"), International Securities Exchange LLC ("ISE"),<sup>1</sup> New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("NYSEAmex"), NYSE Arca, Inc. ("NYSEArca"), The NASDAQ Stock Market LLC ("NASDAQ"), National Stock Exchange, Inc. ("NSX") and Chicago Board Options Exchange, Incorporated ("CBOE") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1)<sup>2</sup> of the Securities Exchange Act of 1934 ("Act"),<sup>3</sup> and Rule 19b-4 thereunder,<sup>4</sup> proposed rule changes to amend certain of their respective rules, or adopt new rules, to provide for trading pauses in individual stocks when the price moves ten percent or more in the preceding five minute period. On May 19, 2010, EDGA Exchange, Inc ("EDGA") and Chicago Stock Exchange, Inc. ("CHX")

<sup>1</sup> ISE filed a technical amendment to the proposed rule change on June 4, 2010.

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 15 U.S.C. 78a.

<sup>4</sup> 17 CFR 240.19b-4.

filed proposed rule changes to provide for similar trading pauses.<sup>5</sup> The proposed rule changes were published for comment in the Federal Register on May 24, 2010.<sup>6</sup> The Commission received 26 comments on the proposals and on the broader concept of circuit breakers on individual securities.<sup>7</sup> The NYSE responded to the comments in a

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<sup>5</sup> The term “Exchanges” shall refer collectively to all of the exchanges in this order. The term “Listing Markets” refers collectively to NYSE, NYSEAmex and NASDAQ. The term “Nonlisting Markets” refers collectively to the remaining nine national securities exchanges. The term SROs refers collectively to the Exchanges and the Financial Industry Regulatory Authority (“FINRA”).

<sup>6</sup> See Securities Exchange Act Release Nos. 62121 (May 19, 2010), 75 FR 28834 (May 24, 2010); 62123 (May 19, 2010), 75 FR 28844 (May 24, 2010); 62124 (May 19, 2010), 75 FR 28828 (May 24, 2010); 62125 (May 19, 2010), 75 FR 28836 (May 24, 2010); 62126 (May 19, 2010), 75 FR 28831 (May 24, 2010); 62127 (May 19, 2010), 75 FR 28837 (May 24, 2010); 62128 (May 19, 2010), 75 FR 28830 (May 24, 2010); 62129 (May 19, 2010), 75 FR 28839 (May 24, 2010); 62131 (May 19, 2010), 75 FR 28845 (May 24, 2010); 62132 (May 19, 2010), 75 FR 28847 (May 24, 2010); 62122 (May 19, 2010), 75 FR 28833 (May 24, 2010); and 62130 (May 19, 2010), 75 FR 28842 (May 24, 2010).

On May 18, 2010, FINRA filed a proposed rule change, which was approved today. See Securities Exchange Act Release No. 62133 (May 19, 2010), 75 FR 28841 (May 24, 2010); Securities Exchange Act Release No. 62251 (June 10, 2010)(SR-FINRA-2010-025).

<sup>7</sup> The Commission considered letters received prior to May 18 discussing the concept of individual stock circuit breakers as well as formal letters citing the rule filings. See Letter from Senator Charles E. Schumer to Chairman Schapiro, Commission, et. al., dated May 10, 2010; Letter from Congressman Edward J. Markey to Chairman Schapiro, Commission, dated May 11, 2010; Letter from Cliff Pereira to Elizabeth M. Murphy, Secretary, Commission, dated May 13, 2010; Letter from Thomas Hofler to Elizabeth M. Murphy, Secretary, Commission, dated May 13, 2010 (“Hofler Letter”); Letter from James K. Rutledge to Rule-Comments, Commission, dated May 13, 2010; Letter from John Meredith to Elizabeth M. Murphy, Secretary, dated May 19, 2010; Letter from Peter Skopp, Molinete Trading Inc. to Elizabeth M. Murphy, Secretary, Commission, dated May 20, 2010 (“Molinete Letter”); letter from Paul Rogers to Rule-Comments, Commission, dated May 20, 2010; Letter from Congressman Eric Cantor to Chairman Schapiro, Commission, dated May 21, 2010; Letter from T.P. Tursick to Elizabeth M. Murphy, Secretary, Commission, dated May 25, 2010; Letter from James J. Angel to the Commission, dated May 25, 2010 (“Angel Letter”); Letter from Larry Harris, USC Marshall School of Business, to Elizabeth M. Murphy, Secretary, Commission, dated May 26, 2010 (“Harris

letter dated June 8, 2010.<sup>8</sup> This order grants accelerated approval to the proposed rule changes.

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Letter”); Letter from Judith Kittinger to WebMaster, Commission, dated May 27, 2010; Letter from Congresswoman Melissa L. Bean to Chairman Schapiro, Commission, dated May 28, 2010 (“Bean Letter”); Letter from Patrick J. Healy, Issuer Advisory Group, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated May 31, 2010 (“IAG Letter”); Letter from Hal McIntyre, The Summit Group, to Elizabeth M. Murphy, Commission, undated “Summit Group Letter”); Letter from Ira Shapiro, BlackRock Inc. to Elizabeth M. Murphy, Secretary, Commission, dated June 2, 2010 (“BlackRock Letter”); Letter from Christopher Nagy, TD Ameritrade to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“TD Ameritrade Letter”); Letter from Alexander M. Cutler, Business Roundtable to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“Business Roundtable Letter”); Letter from George U. Sauter, The Vanguard Group, Inc. to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“Vanguard Letter”); Letter from Julie Sweet, Accenture plc to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“Accenture Letter”); Letter from Tom Quaadman, Center for Capital Markets Competitiveness to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (CCMC Letter”); Letter from Jeffrey W. Rubin, American Bar Association Business Law Section to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“ABA Letter”); Letter from Karrie McMillan, Investment Company Institute to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“ICI Letter”); Letter from Daniel Mathisson, Credit Suisse Securities (USA) LLC to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“Credit Suisse Letter”); Letter from Leonard J. Amoroso, Knight Capital Group, Inc. to Elizabeth M. Murphy, Secretary, Commission, dated June 4, 2010 (“Knight Letter”).

<sup>8</sup> See Letter from Janet Kissane, Senior Vice President – Legal & Corporate Secretary, NYSE Euronext to Elizabeth M. Murphy, Secretary, Commission, dated June 8, 2010 (“Response Letter”), including data and analysis. See also Memo from the Division of Risk, Strategy and Financial Innovation to File, dated June 4, 2010.

## II. Description of the Proposals

On May 6, 2010, the U.S. equity markets experienced a severe disruption.<sup>9</sup>

Among other things, the prices of a large number of individual securities suddenly declined by significant amounts in a very short time period, before suddenly reversing to prices consistent with their pre-decline levels. This severe price volatility led to a large number of trades being executed at temporarily depressed prices, including many that were more than 60% away from pre-decline prices and were broken by the Exchanges. The Commission is concerned that events such as those that occurred on May 6 can seriously undermine the integrity of the U.S. securities markets. Accordingly, it is working on a variety of fronts to assess the causes and contributing factors of the May 6 market disruption and to fashion policy responses that will help prevent a recurrence.

The Commission also recognizes the importance of moving quickly to implement appropriate steps that could help limit potential harm from extreme price volatility. In this regard, it is pleased that the SROs began consulting soon after May 6 in an effort to develop consistent circuit breaker rules that could be implemented on an expedited basis. The SROs were able to reach agreement on a consistent approach, and, on May 18 and 19, 2010, all of the SROs filed proposed rule changes with the Commission.

These rules would require the Listing Markets to issue five-minute trading pauses for individual securities for which they are the primary Listing Market if the transaction price of the security moves ten percent or more from a price in the preceding five-minute

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<sup>9</sup> The events of May 6 are described more fully in the report of the staffs of the Commodity Futures Trading Commission ("CFTC") and the Commission, titled Report of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, "Preliminary Findings Regarding the Market Events of May 6, 2010," dated May 18, 2010.

period. The Listing Markets would notify the other Exchanges and market participants of the imposition of a trading pause by immediately disseminating a special indicator over the consolidated tape.<sup>10</sup> Under the rules, once a Listing Market issues a trading pause, the other Exchanges would be required to pause trading in that security on their markets.<sup>11</sup> In order to avoid interfering with existing procedures designed to facilitate orderly openings and closings, the trading pause requirements would apply only from 9:45 a.m. until 3:35 p.m.

At the end of the five-minute pause, the primary Listing Market would reopen trading in the security in accordance with its procedures for doing so. Trading would resume on the other Exchanges and in the over-the-counter market once trading has resumed on the primary Listing Market. In the event of a significant imbalance on the primary Listing Market at the end of a trading pause, the primary Listing Market may delay reopening. If the primary Listing Market has not reopened within ten minutes from the initiation of the trading pause, however, the other Exchanges may resume trading.<sup>12</sup>

The Exchanges have proposed that these rule changes be implemented as a pilot that would end on December 10, 2010. The pilot period would enable the Exchanges and the Commission to assess the effect of the new rules on the marketplace. To initiate this

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<sup>10</sup> When a trading pause is issued, the Listing Market will immediately notify the single plan processor responsible for consolidation of information for the security pursuant to Rule 603 of Regulation NMS under the Exchange Act. The single plan processor for all listed securities other than Nasdaq-listed securities is the Securities Industry Automation Corporation ("SIAC"). The single plan processor for Nasdaq-listed securities is Nasdaq.

<sup>11</sup> FINRA's rule provides that it will similarly pause trading in the over-the-counter market by FINRA members, including alternative trading systems and market makers, when a Listing Market has issued a trading pause.

<sup>12</sup> Some of the Nonlisting Markets, such as ISE, may not begin trading under their proposed rules until the Listing Market begins.

pilot promptly, the proposed rules would be in effect only with respect to securities included in the S&P 500 Index. The Commission understands that the Exchanges expect to file additional rule proposals in the near future to expand the scope of the pilot (for example, to include ETFs) within the pilot period.<sup>13</sup>

The Exchanges have requested that the Commission approve the proposed rule changes on an accelerated basis, so that they may become operative as soon as practicable.

### III. Discussion of Comments and Commission Findings

As of June 7, the Commission received 26 comment letters regarding the proposed rule changes, a substantial number of which were generally supportive. For example, an institutional investor stated that “on very rare occasions like May 6 a pause in trading is necessary to give market participants a chance to ‘reset’ and react appropriately to periods of dislocation. A reasonable trading halt will provide investors time to rationally assess the market events and commit liquidity at appropriate price levels.”<sup>14</sup> Another institutional investor strongly supported single stock circuit breakers, noting that “trading pauses may reduce market volatility resulting from temporary supply-demand imbalances without unduly interrupting price discovery.”<sup>15</sup>

The commenters also raised a variety of significant issues regarding the scope and operation of the circuit breakers. These include: (1) whether the circuit breakers should be expanded beyond S&P 500 stocks, particularly to exchange traded funds (“ETFs”) and

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<sup>13</sup> Any such rule proposals would be published for public comment in accordance with Section 19(b) of the Act.

<sup>14</sup> See Vanguard Letter, supra note 7.

<sup>15</sup> See, e.g., BlackRock Letter, supra note 7.

the securities of other companies that were most severely affected on May 6;<sup>16</sup> (2) the need for revised market-wide circuit breakers;<sup>17</sup> and (3) operational issues regarding the circuit breakers, including the times when they should apply,<sup>18</sup> the threshold events that

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<sup>16</sup> See, e.g., ABA Letter, Accenture Letter, Angel Letter, Bean Letter, CCMP Letter, Credit Suisse Letter, IAG Letter, ICI Letter (expressing particular concern that if circuit breakers exist for individual securities contained in ETFs' baskets, but not for the ETFs themselves, ETFs could again suffer disproportionately during a market event such as that of May 6), Summit Group Letter, TD Ameritrade Letter, and Vanguard Letter, supra note 7. One commenter also raised concerns about the potential consequences of circuit breakers being triggered simultaneously in many securities. See Angel Letter.

<sup>17</sup> See, e.g., Angel Letter, supra note 7.

<sup>18</sup> Suggestions included applying the circuit breakers for the entire trading day (i.e., including during the opening and closing periods). See, e.g., Angel Letter (noting the considerable trading activity and volatility that occurs during the first and last minutes of the trading day), Credit Suisse Letter (noting that in S&P 500 stocks 6% of the daily volume typically occurs from 9:30 a.m. to 9:45 a.m., and 18% occurs from 3:35 p.m. to 4:00 p.m., and that intra-day volatility tends to be highest during these time periods), IAG Letter, and TD Ameritrade Letter (arguing that the many retail investor orders executed at market open should not be deprived the protections of the circuit breaker rules), supra note 7.

should trigger them and the length of the pause,<sup>19</sup> the procedures for resuming trading after a pause,<sup>20</sup> and alternatives to the circuit breaker mechanism.<sup>21</sup>

The Commission believes that most if not all of these suggestions regarding potential ways to improve or perfect the scope and operation of the circuit breaker, or variations on them, were generally considered by the Exchanges in developing a uniform proposal that could be implemented in a reasonably short period of time and yet provide important benefits to the markets.<sup>22</sup> The Commission recognizes that all of these issues warrant continued close consideration in the coming days and months, and it expects that

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<sup>19</sup> Suggestions included using a trigger threshold other than 10% or a pause period other than five minutes. See, e.g., Angel Letter (suggesting securities outside the S&P 500 may need a trigger threshold greater than 10%, and that the pause period may need to be longer than five or ten minutes), BlackRock Letter (arguing that the 10% circuit breaker level is too narrow, with their data showing it would have halted trading on only 58 of S&P 500 stocks on May 6, 2010, as opposed to 309 S&P 500 stocks on that day with a 5% circuit breaker), Credit Suisse Letter (suggesting a ten-minute halt period), Hofler Letter (suggesting that trigger thresholds vary commensurate with the stock's volatility, perhaps 5% for low beta stocks, 10% for medium beta stocks, and 30% for high beta stocks), Knight Letter (recommending a minimum trigger threshold of 15%, and the use of more sophisticated variables such as dollar price, average daily volume, and market capitalization), and Summit Group Letter (suggesting a longer pause period may be required to allow small investors to respond), supra note 7. Other commenters suggested using a trigger based on the national best bid or offer rather than a trade price. See, e.g., Molinete Letter, supra note 7.

<sup>20</sup> Suggestions included precluding resumption of trading until the primary listing market has resolved any imbalances. See, e.g., BlackRock Letter, Credit Suisse Letter, Knight Letter and TD Ameritrade Letter, supra note 7. But see Harris Letter, supra note 7 (arguing that trade halt rules are anti-competitive because they encourage traders to submit their orders to the dominant exchanges so that they can participate in the call auctions that restart trading).

<sup>21</sup> Suggestions included using a futures-style "limit down" mechanism rather than a full trading pause. See, e.g., Accenture Letter, Credit Suisse Letter, and Harris Letter (arguing that trading at prices that reverse the triggering price change should be permitted), supra note 7.

<sup>22</sup> See, e.g., Response Letter, supra note 8.

the SROs will continue to consult with each other, the Commission and market participants on both the scope and operation of the circuit breakers.

With respect to the specific proposals under consideration here, however, the Commission has evaluated them based on whether they are consistent with the Act and whether they represent a useful first step that should improve the existing procedures for protecting investors and maintaining fair and orderly markets. It finds that the proposals meet these standards and therefore is approving them on an expedited basis.

The Commission agrees that consideration should be given by the Exchanges to whether the circuit breakers should be expanded to additional securities, but does not believe that there is a reason to delay the implementation of circuit breakers for S&P 500 stocks as a reasonable first step.<sup>23</sup> Similarly, it agrees that the existing market-wide circuit breakers should be re-examined in light of current market conditions, but again does not believe that the initial stage of the circuit breaker pilot for individual stocks should be delayed pending that re-examination. With respect to operational issues regarding the circuit breakers, the Commission anticipates that the Exchanges will continue to evaluate these issues during the pilot period, and will propose any modifications to the circuit breakers that may be necessary or appropriate before that

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<sup>23</sup> In particular, the Commission acknowledges the concerns raised by the ICI, Blackrock, and others regarding the potential adverse consequences for ETFs if the circuit breakers cover individual securities that are held by an ETF but not the ETF itself. Those comment letters do not explicitly recommend delaying the launch of the pilot program with respect to the S&P 500, but they do urge that ETFs be added to the pilot as soon as possible. As noted below, the Commission anticipates that the Exchanges will be proposing amendments to the pilot to include ETFs.

period has ended, but does not believe that the first stage of the circuit breaker pilot should be delayed pending such consideration.<sup>24</sup>

A few commenters expressed concern that the proposed circuit breakers could cause more harm than good. One, for example, suggested that the Exchanges' timeframe for implementation of the proposed rule changes could be overly aggressive and lead to systems problems.<sup>25</sup> The Commission understands that the Exchanges have been working closely with market participants to address implementation issues and facilitate a prompt yet workable roll-out of the circuit breaker pilot.<sup>26</sup> No other comments were received indicating that exchanges, other trading venues or broker-dealers would not be able to fully implement the proposed circuit breakers within the timeframes established in the Exchange filings.

Other commenters questioned whether trading halts may exacerbate price volatility, and one stated that a trading halt on May 6 might have increased the order imbalance preventing an intraday recovery.<sup>27</sup> Many other commenters, however,

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<sup>24</sup> Commenters also raised a number of issues not directly related to the scope or operation of the trading pauses. One, for example, was the operation of the Exchanges' erroneous trade rules. See TD Ameritrade Letter, supra note 7. The Commission expects that the Exchanges will continue to consult on these rules and anticipates they will submit proposals to clarify their operation in the near future.

<sup>25</sup> See Molinete Letter, supra note 7.

<sup>26</sup> See Response Letter, supra note 9.

<sup>27</sup> See Harris Letter, supra note 7 (arguing that trading halts will attenuate volatility if liquidity or rationality arrives before markets return to normal operation, and positing that on May 6 many traders would have thought the price drop was due to fundamental valuation issues, in which case the order imbalance could have grown larger during the halt as traders drew incorrect inferences from the event). See also Molinete Letter, supra note 7 (suggesting the proposed rules may exacerbate market volatility rather than reduce it due to the interplay of stock circuit breaker rules, erroneous trade rules, and market participants' reactions to

believed that the events of May 6 demonstrate the need for trading pauses in individual stocks as a means to reduce excessive market volatility.<sup>28</sup> The Commission agrees that the proposed trading pauses are prudent measures that are appropriately being introduced on a pilot basis to address extraordinarily severe and harmful price volatility of the kind that occurred on May 6.

In sum, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges. In particular, the Commission finds that the proposals are consistent with Section 6(b)(5) of the Act,<sup>29</sup> which among other things requires that the rules of national securities exchanges be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.<sup>30</sup>

The Commission believes the proposed rule changes, among other things, will establish consistent, market-wide trading pauses as a means to prevent potentially

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securities nearing the threshold). Another commenter urged the Commission to proceed cautiously in this area, expressing the view that “unencumbered market forces are preferable to the implementation of artificial trade frictions wherever possible.” See Knight Letter, *supra* note 7. The Commission will continue to consider these comments in evaluating the impact of the pilot.

<sup>28</sup> See, e.g., Accenture Letter, BlackRock Letter, Business Roundtable Letter, CCMP Letter, Credit Suisse Letter, ICI Letter, TD Ameritrade Letter, Vanguard Letter, *supra* note 7.

<sup>29</sup> 15 U.S.C. 78f(b)(5).

<sup>30</sup> In approving the proposed rule change, the Commission notes that it has considered the proposed rules’ impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

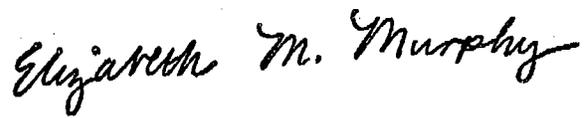
destabilizing price volatility and will thereby help promote the goals of investor protection and fair and orderly markets.

The Commission also finds good cause for approving the proposals before the 30<sup>th</sup> day after the publication of notice thereof in the Federal Register. The Exchanges have worked quickly and cooperatively to devise a response to the events of May 6, 2010. The Commission received a number of comments on the proposals, the great majority of which were supportive of the proposed trading pause. The proposed changes are being implemented on a pilot basis so that the Commission and the Exchanges can monitor the effects of the pilot on the marketplace and consider adjustments, as necessary. The Commission believes that accelerating approval of these proposals is appropriate as it will enable the Exchanges nearly immediately to begin coordinating trading pauses across markets in the event of sudden changes in the value of the S&P 500 Index stocks. In particular, the Commission believes that these proposed rule changes should further the goals of investor protection and fair and orderly markets.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>31</sup> that the proposed rule changes (SR-BATS-2010-014; SR-EDGA-2010-01; SR-EDGX-2010-01; SR-BX-2010-037; SR-ISE-2010-48; SR-NYSE-2010-39; SR-NYSEAmex-2010-46; SR-NYSEArca-2010-41; SR-NASDAQ-2010-061; SR-CHX-2010-10; SR-NSX-2010-05; SR-CBOE-2010-047) be, and hereby are, approved on an accelerated basis.

By the Commission.



Elizabeth M. Murphy  
Secretary

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<sup>31</sup> 15 U.S.C. 78s(b)(2).

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 62262 / June 10, 2010**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 3144 / June 10, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13935**

**In the Matter of**

**L. REX ANDERSEN, CPA,**

**Respondent.**

**ORDER INSTITUTING PUBLIC  
ADMINISTRATIVE PROCEEDINGS AND  
IMPOSING TEMPORARY SUSPENSION  
PURSUANT TO RULE 102(e)(3) OF THE  
COMMISSION'S RULES OF PRACTICE**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Rule 102(e)(3)<sup>1</sup> of the Commission's Rules of Practice against L. Rex Andersen ("Respondent" or "Andersen").

**II.**

The Commission finds that:

**A. RESPONDENT**

1. Andersen, age 80, is and has been a certified public accountant ("CPA") licensed to practice in the State of Nevada and was previously licensed in Arizona and California.

<sup>1</sup> Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

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From approximately 1992 through 2002, he was a partner at Andersen Andersen & Strong, L.C., a public accounting firm. Presently, he is an accountant at Madsen & Associates CPA's Inc. in Murray, Utah, a public accounting firm registered with the Public Company Accounting Oversight Board, where he performs audits of public and private companies.

B. CIVIL INJUNCTION

2. On May 4, 2010, the U.S. District Court for the District of Nevada entered a final judgment against Andersen, permanently enjoining him from future violations, direct or indirect, of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder and Rule 2-02 of Regulation S-X, and aiding and abetting violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder. Securities and Exchange Commission v. Exotics.com, Inc., et al., Civil Action Number 2:05-cv-00531-PMP-GWF. Andersen also was ordered to pay disgorgement, prejudgment interest, and a civil money penalty totaling \$126,219.04.

3. The Commission's complaint alleged that Andersen performed audits of the 1999 and 2000 year-end financial statements of Hardrock Mines, Inc. that were not conducted in accordance with generally accepted auditing standards ("GAAS"), and he caused his firm to issue audit reports falsely stating that the financial statements were presented in conformity with generally accepted accounting principles ("GAAP"). Hardrock Mines (later known as Exotics.com, Inc.) was an issuer of securities that were registered with the Commission and approved for quotation on the OTC Bulletin Board. The complaint further alleged that Andersen did not act as an independent auditor during the audits because he himself had prepared most of the client's books and records and its financial statements. Moreover, Andersen created the client's books and records in reliance on documents that he knew, or was reckless in not knowing, were fraudulent. The complaint also alleged that the fraudulent audit reports provided by Andersen were incorporated in public filings made by Hardrock Mines and Exotics.com, including a Form 10-SB registration statement and two Form 10-KSB annual reports.

III.

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has permanently enjoined Andersen, a CPA, from violating the Federal securities laws within the meaning of Rule 102(e)(3)(i)(A) of the Commission's Rules of Practice. In view of these findings, the Commission deems it appropriate and in the public interest that Andersen be temporarily suspended from appearing or practicing before the Commission.

IT IS HEREBY ORDERED that Andersen be, and hereby is, temporarily suspended from appearing or practicing before the Commission as an accountant. This Order shall be effective upon service on the Respondent.

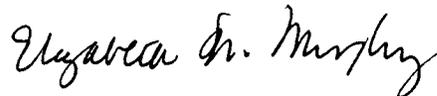
IT IS FURTHER ORDERED that Andersen may within thirty days after service of this Order file a petition with the Commission to lift the temporary suspension. If the Commission

within thirty days after service of the Order receives no petition, the suspension shall become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission shall, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Andersen personally or by certified mail at his last known address.

By the Commission.



Elizabeth M. Murphy  
Secretary

*Chairman Schapiro  
not participating*

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62251; File No. SR-FINRA-2010-025)

June 10, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Accelerated Approval to Proposed Rule Change to Amend FINRA Rule 6121 (Trading Halts Due to Extraordinary Market Volatility) to Permit FINRA to Halt Trading by FINRA Members Otherwise Than on an Exchange Where a Primary Listing Market has Issued a Trading Pause due to Extraordinary Market Conditions

I. Introduction

On May 18, 2010, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act"),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed rule change to amend FINRA Rule 6121 (Trading Halts Due to Extraordinary Market Volatility) to permit FINRA to halt trading by FINRA members otherwise than on an exchange where a primary listing market has issued a trading pause due to extraordinary market conditions.<sup>4</sup>

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> Also on May 18, 2010, each of BATS Exchange, Inc. ("BATS"), EDGX Exchange, Inc. ("EDGX"), NASDAQ OMX BX, Inc. ("BX"), International Securities Exchange LLC ("ISE"), New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("NYSEAmex"), NYSE Arca, Inc. ("NYSEArca"), The NASDAQ Stock Market LLC ("NASDAQ"), National Stock Exchange, Inc. ("NSX") and Chicago Board Options Exchange, Incorporated ("CBOE") filed proposed rule changes. On May 19, 2010, EDGA Exchange, Inc. ("EDGA") and Chicago Stock Exchange, Inc. ("CHX") filed proposed rule changes to provide for similar trading pauses. See Securities Exchange Act Release Nos. 62121 (May 19, 2010), 75 FR 28834 (May 24, 2010); 62123 (May 19, 2010), 75 FR 28844 (May 24, 2010); 62124 (May 19, 2010), 75 FR 28828 (May 24, 2010); 62125 (May 19, 2010), 75 FR 28836 (May 24, 2010); 62126 (May 19, 2010), 75 FR 28831 (May 24, 2010); 62127 (May 19, 2010), 75 FR 28837 (May 24, 2010); 62128 (May 19, 2010), 75 FR 28830 (May 24, 2010); 62129 (May 19, 2010), 75

The proposed rule change was published for comment in the Federal Register on May 24, 2010.<sup>5</sup> The Commission received 26 comments on the proposals and on the broader concept of circuit breakers on individual securities.<sup>6</sup> This order grants

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FR 28839 (May 24, 2010); 62131 (May 19, 2010), 75 FR 28845 (May 24, 2010); 62132 (May 19, 2010), 75 FR 28847 (May 24, 2010); 62122 (May 19, 2010), 75 FR 28833 (May 24, 2010); and 62130 (May 19, 2010), 75 FR 28842 (May 24, 2010). These filings are being approved today by the Commission. See Securities Exchange Act Release No. 62252 (June 10, 2010). In this order, the term “Exchanges” refers collectively to all of the exchanges. The term “Listing Markets” refers collectively to NYSE, NYSEAmex and NASDAQ. The term “Nonlisting Markets” refers collectively to the remaining nine national securities exchanges. The term “SROs” refers to the Exchanges and the Financial Industry Regulatory Authority (“FINRA”).

<sup>5</sup> See Securities Exchange Act Release No. 62133 (May 19, 2010), 75 FR 28841 (May 24, 2010).

<sup>6</sup> The Commission considered letters received prior to May 18 discussing the concept of individual stock circuit breakers as well as formal letters citing the rule filings. See Letter from Senator Charles E. Schumer to Chairman Schapiro, Commission, et. al., dated May 10, 2010; Letter from Congressman Edward J. Markey to Chairman Schapiro, Commission, dated May 11, 2010; Letter from Cliff Pereira to Elizabeth M. Murphy, Secretary, Commission, dated May 13, 2010; Letter from Thomas Hofler to Elizabeth M. Murphy, Secretary, Commission, dated May 13, 2010 (“Hofler Letter”); Letter from James K. Rutledge to Rule-Comments, Commission, dated May 13, 2010; Letter from John Meredith to Elizabeth M. Murphy, Secretary, dated May 19, 2010; Letter from Peter Skopp, Molinete Trading Inc. to Elizabeth M. Murphy, Secretary, Commission, dated May 20, 2010 (“Molinete Letter”); letter from Paul Rogers to Rule-Comments, Commission, dated May 20, 2010; Letter from Congressman Eric Cantor to Chairman Schapiro, Commission, dated May 21, 2010; Letter from T.P. Tursick to Elizabeth M. Murphy, Secretary, Commission, dated May 25, 2010; Letter from James J. Angel to the Commission, dated May 25, 2010 (“Angel Letter”); Letter from Larry Harris, USC Marshall School of Business, to Elizabeth M. Murphy, Secretary, Commission, dated May 26, 2010 (“Harris Letter”); Letter from Judith Kittinger to WebMaster, Commission, dated May 27, 2010; Letter from Congresswoman Melissa L. Bean to Chairman Schapiro, Commission, dated May 28, 2010 (“Bean Letter”); Letter from Patrick J. Healy, Issuer Advisory Group, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated May 31, 2010 (“IAG Letter”); Letter from Hal McIntyre, The Summit Group, to Elizabeth M. Murphy, Commission, undated “Summit Group Letter”); Letter from Ira Shapiro, BlackRock Inc. to Elizabeth M. Murphy, Secretary, Commission, dated June 2, 2010 (“BlackRock Letter”); Letter from Christopher Nagy, TD Ameritrade to Elizabeth M. Murphy, Secretary, Commission, dated

accelerated approval to the proposed rule change.

## II. Description of the Proposals

On May 6, 2010, the U.S. equity markets experienced a severe disruption.<sup>7</sup>

Among other things, the prices of a large number of individual securities suddenly declined by significant amounts in a very short time period, before suddenly reversing to prices consistent with their pre-decline levels. This severe price volatility led to a large number of trades being executed at temporarily depressed prices, including many that were more than 60% away from pre-decline prices and were broken by the SROs. The Commission is concerned that events such as those that occurred on May 6 can seriously undermine the integrity of the U.S. securities markets. Accordingly, it is working on a variety of fronts to assess the causes and contributing factors of the May 6 market disruption and to fashion policy responses that will help prevent a recurrence.

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June 3, 2010 (“TD Ameritrade Letter”); Letter from Alexander M. Cutler, Business Roundtable to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“Business Roundtable Letter”); Letter from George U. Sauter, The Vanguard Group, Inc. to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“Vanguard Letter”); Letter from Julie Sweet, Accenture plc to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“Accenture Letter”); Letter from Tom Quaadman, Center for Capital Markets Competitiveness to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (CCMC Letter”); Letter from Jeffrey W. Rubin, American Bar Association Business Law Section to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“ABA Letter”); Letter from Karrie McMillan, Investment Company Institute to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“ICI Letter”); Letter from Daniel Mathisson, Credit Suisse Securities (USA) LLC to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (“Credit Suisse Letter”); Letter from Leonard J. Amoruso, Knight Capital Group, Inc. to Elizabeth M. Murphy, Secretary, Commission, dated June 4, 2010 (“Knight Letter”).

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The events of May 6 are described more fully in the report of the staffs of the Commodity Futures Trading Commission (“CFTC”) and the Commission, titled Report of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, “Preliminary Findings Regarding the Market Events of May 6, 2010,” dated May 18, 2010.

The Commission also recognizes the importance of moving quickly to implement appropriate steps that could help limit potential harm from extreme price volatility. In this regard, it is pleased that FINRA began consulting with the Exchanges soon after May 6 in an effort to develop consistent circuit breaker rules that could be implemented on an expedited basis. FINRA and the Exchanges were able to reach agreement on a consensus approach, and, on May 18 and 19, 2010, all of the SROs filed proposed rule changes with the Commission.

These rules would require the Listing Markets to issue five-minute trading pauses for individual securities for which they are the primary Listing Market if the transaction price of the security moves ten percent or more from a price in the preceding five-minute period. The Listing Markets would notify the other Exchanges and market participants of the imposition of a trading pause by immediately disseminating a special indicator over the consolidated tape.<sup>8</sup> Under the rules, once a Listing Market issues a trading pause, the other Exchanges would be required to pause trading in that security on their markets. FINRA's rule provides that it will similarly pause trading in the over-the-counter market by FINRA members, including alternative trading systems and market makers, when a Listing Market has issued a trading pause. In order to avoid interfering with existing procedures designed to facilitate orderly openings and closings, the trading pause requirements would apply only from 9:45 a.m. until 3:35 p.m.

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<sup>8</sup> When a trading pause is issued, the Listing Market will immediately notify the single plan processor responsible for consolidation of information for the security pursuant to Rule 603 of Regulation NMS under the Exchange Act. The single plan processor for all listed securities other than Nasdaq-listed securities is the Securities Industry Automation Corporation ("SIAC"). The single plan processor for Nasdaq-listed securities is Nasdaq.

At the end of the five-minute pause, the primary Listing Market would reopen trading in the security in accordance with its procedures for doing so. Trading would resume on the other Exchanges and in the over-the-counter market once trading has resumed on the primary Listing Market. In the event of a significant imbalance on the primary Listing Market at the end of a trading pause, the primary Listing Market may delay reopening. If the primary Listing Market has not reopened within ten minutes from the initiation of the trading pause, however, the other Exchanges may resume trading.<sup>9</sup> In addition, FINRA's proposed rule permits over-the-counter market participants to resume trading only if trading has resumed on at least one Exchange.

FINRA has proposed that this rule change be implemented as a pilot that would end on December 10, 2010. The pilot period would enable the SROs and the Commission to assess the effect of the new rules on the marketplace. To initiate this pilot promptly, the proposed rules would be in effect only with respect to securities included in the S&P 500 Index. The Commission understands that FINRA expects to file an additional rule proposal in the near future to expand the scope of the pilot (for example, to include ETFs) within the pilot period.<sup>10</sup>

FINRA has requested that the Commission approve the proposed rule change on an accelerated basis, so that it may become operative as soon as practicable.

### III. Discussion of Comments and Commission Findings

As of June 7, the Commission received 26 comment letters regarding the proposed rule changes, a substantial number of which were generally supportive. For

<sup>9</sup> Some of the Nonlisting Markets, such as ISE, may not begin trading under their proposed rules until the Listing Market begins.

<sup>10</sup> Any such rule proposals would be published for public comment in accordance with Section 19(b) of the Act.

example, an institutional investor stated that “on very rare occasions like May 6 a pause in trading is necessary to give market participants a chance to ‘reset’ and react appropriately to periods of dislocation. A reasonable trading halt will provide investors time to rationally assess the market events and commit liquidity at appropriate price levels.”<sup>11</sup> Another institutional investor strongly supported single stock circuit breakers, noting that “trading pauses may reduce market volatility resulting from temporary supply-demand imbalances without unduly interrupting price discovery.”<sup>12</sup>

The commenters also raised a variety of significant issues regarding the scope and operation of the circuit breakers. These include: (1) whether the circuit breakers should be expanded beyond S&P 500 stocks, particularly to exchange traded funds (“ETFs”) and the securities of other companies that were most severely affected on May 6;<sup>13</sup> (2) the need for revised market-wide circuit breakers;<sup>14</sup> and (3) operational issues regarding the circuit breakers, including the times when they should apply,<sup>15</sup> the threshold events that

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<sup>11</sup> See Vanguard Letter, supra note 6.

<sup>12</sup> See, e.g., BlackRock Letter, supra note 6.

<sup>13</sup> See, e.g., ABA Letter, Accenture Letter, Angel Letter, Bean Letter, CCMP Letter, Credit Suisse Letter, IAG Letter, ICI Letter (expressing particular concern that if circuit breakers exist for individual securities contained in ETFs’ baskets, but not for the ETFs themselves, ETFs could again suffer disproportionately during a market event such as that of May 6), Summit Group Letter, TD Ameritrade Letter, and Vanguard Letter, supra note 6. One commenter also raised concerns about the potential consequences of circuit breakers being triggered simultaneously in many securities. See Angel Letter.

<sup>14</sup> See, e.g., Angel Letter, supra note 6.

<sup>15</sup> Suggestions included applying the circuit breakers for the entire trading day (i.e., including during the opening and closing periods). See, e.g., Angel Letter (noting the considerable trading activity and volatility that occurs during the first and last minutes of the trading day), Credit Suisse Letter (noting that in S&P 500 stocks 6% of the daily volume typically occurs from 9:30 a.m. to 9:45 a.m., and 18% occurs from 3:35 p.m. to 4:00 p.m., and that intra-day volatility tends to be highest during these time periods), IAG Letter, and TD Ameritrade Letter

should trigger them and the length of the pause,<sup>16</sup> the procedures for resuming trading after a pause,<sup>17</sup> and alternatives to the circuit breaker mechanism.<sup>18</sup>

The Commission believes that most if not all of these suggestions regarding potential ways to improve or perfect the scope and operation of the circuit breaker, or variations on them, were generally considered by FINRA and the Exchanges in developing consistent proposals that could be implemented in a reasonably short period of time and yet provide important benefits to the markets. The Commission recognizes that all of these issues warrant continued close consideration in the coming days and

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(arguing that the many retail investor orders executed at market open should not be deprived the protections of the circuit breaker rules), supra note 6.

<sup>16</sup> Suggestions included using a trigger threshold other than 10% or a pause period other than five minutes. See, e.g., Angel Letter (suggesting securities outside the S&P 500 may need a trigger threshold greater than 10%, and that the pause period may need to be longer than five or ten minutes), BlackRock Letter (arguing that the 10% circuit breaker level is too narrow, with their data showing it would have halted trading on only 58 of S&P 500 stocks on May 6, 2010, as opposed to 309 S&P 500 stocks on that day with a 5% circuit breaker), Credit Suisse Letter (suggesting a ten-minute halt period), Hofler Letter (suggesting that trigger thresholds vary commensurate with the stock's volatility, perhaps 5% for low beta stocks, 10% for medium beta stocks, and 30% for high beta stocks), Knight Letter (recommending a minimum trigger threshold of 15%, and the use of more sophisticated variables such as dollar price, average daily volume, and market capitalization), and Summit Group Letter (suggesting a longer pause period may be required to allow small investors to respond), supra note 6. Other commenters suggested using a trigger based on the national best bid or offer rather than a trade price. See, e.g., Molinete Letter, supra note 6.

<sup>17</sup> Suggestions included precluding resumption of trading until the primary listing market has resolved any imbalances. See, e.g., BlackRock Letter, Credit Suisse Letter, Knight Letter and TD Ameritrade Letter, supra note 6. But see Harris Letter, supra note 6 (arguing that trade halt rules are anti-competitive because they encourage traders to submit their orders to the dominant exchanges so that they can participate in the call auctions that restart trading).

<sup>18</sup> Suggestions included using a futures-style "limit down" mechanism rather than a full trading pause. See, e.g., Accenture Letter, Credit Suisse Letter, and Harris Letter (arguing that trading at prices that reverse the triggering price change should be permitted), supra note 6.

months, and it expects that FINRA will continue to consult with the Exchanges, the Commission and market participants on both the scope and operation of the circuit breakers.

With respect to the specific proposals under consideration here, however, the Commission has evaluated them based on whether they are consistent with the Act and whether they represent a useful first step that should improve the existing procedures for protecting investors and maintaining fair and orderly markets. It finds that the proposal meets these standards and therefore is approving it on an expedited basis.

The Commission agrees that consideration should be given by FINRA to whether the circuit breakers should be expanded to additional securities, but does not believe that there is a reason to delay the implementation of circuit breakers for S&P 500 stocks as a reasonable first step.<sup>19</sup> Similarly, it agrees that the existing market-wide circuit breakers should be re-examined in light of current market conditions, but again does not believe that the initial stage of the circuit breaker pilot for individual stocks should be delayed pending that re-examination. With respect to operational issues regarding the circuit breakers, the Commission anticipates that FINRA will continue to evaluate these issues during the pilot period, and will propose any modifications to the circuit breakers that

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<sup>19</sup> In particular, the Commission acknowledges the concerns raised by the ICI, Blackrock, and others regarding the potential adverse consequences for ETFs if the circuit breakers cover individual securities that are held by an ETF but not the ETF itself. Those comment letters do not explicitly recommend delaying the launch of the pilot program with respect to the S&P 500, but they do urge that ETFs be added to the pilot as soon as possible. As noted below, the Commission anticipates that FINRA will be proposing amendments to the pilot to include ETFs.

may be necessary or appropriate before that period has ended, but does not believe that the first stage of the circuit breaker pilot should be delayed pending such consideration.<sup>20</sup>

A few commenters expressed concern that the proposed circuit breakers could cause more harm than good. One, for example, suggested that the timeframe for implementation of the proposed rule change could be overly aggressive and lead to systems problems.<sup>21</sup> The Commission understands that FINRA has been working closely with market participants to address implementation issues and facilitate a prompt yet workable roll-out of the circuit breaker pilot. No other comments were received indicating that exchanges, other trading venues or broker-dealers would not be able to fully implement the proposed circuit breakers within the timeframes established in the FINRA filing.

Other commenters questioned whether trading halts may exacerbate price volatility, and one stated that a trading halt on May 6 might have increased the order imbalance preventing an intraday recovery.<sup>22</sup> Many other commenters, however,

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<sup>20</sup> Commenters also raised a number of issues not directly related to the scope or operation of the trading pauses. One, for example, was the operation of the SROs' erroneous trade rules. See TD Ameritrade Letter, supra note 6. The Commission expects that FINRA and the Exchanges will continue to consult on these rules and anticipates they will submit proposals to clarify their operation in the near future.

<sup>21</sup> See Molinete Letter, supra note 6.

<sup>22</sup> See Harris Letter, supra note 6 (arguing that trading halts will attenuate volatility if liquidity or rationality arrives before markets return to normal operation, and positing that on May 6 many traders would have thought the price drop was due to fundamental valuation issues, in which case the order imbalance could have grown larger during the halt as traders drew incorrect inferences from the event). See also Molinete Letter, supra note 6 (suggesting the proposed rules may exacerbate market volatility rather than reduce it due to the interplay of stock circuit breaker rules, erroneous trade rules, and market participants' reactions to securities nearing the threshold). Another commenter urged the Commission to proceed cautiously in this area, expressing the view that "unencumbered market

believed that the events of May 6 demonstrate the need for trading pauses in individual stocks as a means to reduce excessive market volatility.<sup>23</sup> The Commission agrees that the proposed trading pauses are prudent measures that are appropriately being introduced on a pilot basis to address extraordinarily severe and harmful price volatility of the kind that occurred on May 6.

In sum, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FINRA. In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,<sup>24</sup> which among other things requires that the rules of FINRA be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.<sup>25</sup>

The Commission believes the proposed rule change, among other things, will establish consistent, market-wide trading pauses as a means to prevent potentially destabilizing price volatility and will thereby help promote the goals of investor protection and fair and orderly markets.

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forces are preferable to the implementation of artificial trade frictions wherever possible.” See Knight Letter, *supra* note 6. The Commission will continue to consider these comments in evaluating the impact of the pilot.

<sup>23</sup> See, e.g., Accenture Letter, BlackRock Letter, Business Roundtable Letter, CCMP Letter, Credit Suisse Letter, ICI Letter, TD Ameritrade Letter, Vanguard Letter, *supra* note 6.

<sup>24</sup> 15 U.S.C. 78f(b)(5), 15 U.S.C. 78o-3(b)(6).

<sup>25</sup> In approving the proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

The Commission also finds good cause for approving the proposal before the 30<sup>th</sup> day after the publication of notice thereof in the Federal Register. FINRA has worked quickly and cooperatively with the Exchanges to devise a response to the events of May 6, 2010. The Commission received a number of comments on the proposal, the great majority of which were supportive of the proposed trading pause. The proposed rule change is being implemented on a pilot basis so that the Commission and FINRA can monitor the effects of the pilot on the marketplace and consider adjustments, as necessary. The Commission believes that accelerating approval of this proposal is appropriate as it will enable FINRA nearly immediately to begin coordinating trading pauses with the Exchanges in the event of sudden changes in the value of the S&P 500 Index stocks. In particular, the Commission believes that this proposed rule change should further the goals of investor protection and fair and orderly markets.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>26</sup> that the proposed rule change (SR-FINRA-2010-025) be, and hereby is, approved on an accelerated basis.

By the Commission.

*Elizabeth M. Murphy*

Elizabeth M. Murphy  
Secretary

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<sup>26</sup> 15 U.S.C. 78s(b)(2).

*Commissioner Watter  
not participating*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62261 / June 10, 2010

INVESTMENT ADVISERS ACT OF 1940  
Release No. 3037 / June 10, 2010

INVESTMENT COMPANY ACT OF 1940  
Release No. 29296 / June 10, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13934

In the Matter of  
  
SAM P. DOUGLASS and  
ANTHONY R. MOORE,  
  
Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND  
CEASE-AND-DESIST PROCEEDINGS,  
PURSUANT TO SECTION 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934,  
SECTION 203(f) OF THE INVESTMENT  
ADVISERS ACT OF 1940 and SECTION 9(b) OF  
THE INVESTMENT COMPANY ACT OF 1940

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 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Sam O. Douglass ("Douglass" or "Respondent Douglass") and Anthony R. Moore ("Moore" or "Respondent Moore").

II.

After an investigation, the Division of Enforcement alleges that:

A. Respondents

1. **Douglass**, age 77, resides in Houston, Texas and was chairman and CEO of Equus Total Return, Inc. ("Equus" or "the Fund"), a business development company, from

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September 1991 to December 2007. Douglass is an attorney licensed in Texas. He is currently an interested director for Equus.

2. **Moore**, age 63, resides in London, England and is the co-founder and CEO of Moore, Clayton & Co., Inc., an international private equity investment and advisory firm. He served as Equus's co-chairman and president from June 2005 to December 2007, and as its CEO from June 2005 to August 2007.

**B. Relevant Entities**

3. **Equus**, a Delaware corporation based in Houston, Texas, became a business development company ("BDC") on September 6, 1991. Equus trades as a closed-end fund on the New York Stock Exchange, under the symbol "EQS." Its securities are registered under Section 12(b) of the Exchange Act.

4. **Moore, Clayton & Co., Inc. ("MCC")**, is an international private equity investment and advisory firm headquartered in London with operations in many countries including the United States. Moore is one of MCC's principal shareholders.

5. **Moore Clayton Capital Advisors, Inc. ("MCCA")**, a Delaware corporation based in Houston, Texas, is wholly owned by MCC. MCCA was a Commission-registered investment adviser from July 5, 2005 to July 6, 2009, when its contract with Equus was not renewed. MCCA became Equus's investment adviser, via proxy vote, on June 30, 2005.

6. **Equus Capital Administration Company ("ECAC")**, a Utah corporation based in Houston, Texas and controlled by Moore, acted as Equus's administrator from June 30, 2005 to July 1, 2009.

7. **Equus Capital Management Corporation ("ECMC")**, a Delaware corporation based in Houston, Texas and controlled by Douglass, was a Commission-registered investment adviser from June 8, 1984 to September 29, 2005. ECMC was Equus's investment adviser and administrator from May 9, 1997 to June 30, 2005.

**C. Proposed Change in Equus's Investment Adviser**

8. In late 2004, several large Equus shareholders pressed Equus management to consider liquidating the Fund. Consequently, on January 21, 2005, Equus's board created a special committee of three independent directors to review alternatives, including hiring a new adviser.

9. About the same time, Douglass learned that Moore wanted to purchase a U.S.-based investment management company. He proposed that Moore purchase Douglass's interest in ECMC and take over as Equus's adviser. Accordingly, in January 2005, Moore and his firm, MCC, agreed to purchase Douglass's ECMC shares. Douglass then asked the special committee to consider hiring MCCA as Equus's new investment adviser.

10. On March 31, 2005, the special committee recommended that the board engage MCCA as adviser. The special committee further recommended that ECAC (MCCA's sister company) become the Fund administrator.

11. On May 5, 2005, MCC agreed to purchase Douglass's interests in ECMC for more than \$4 million. The purchase agreement was contingent on Equus shareholder and Board approval of MCCA's appointment as adviser and ECAC's appointment as administrator. As part of the agreement, MCCA agreed to purchase 27.5% of the Fund's outstanding shares.

12. Because several large Equus shareholders still favored liquidating the Fund rather than merely changing advisers, MCC agreed, as part of its purchase of Equus shares, to acquire these shareholders' stock at a negotiated price of \$9.49 per share (about \$1 per share above the market price).

**D. MCCA's Proposed Advisory Agreement**

13. MCCA's proposed advisory agreement with Equus provided that MCCA would receive an annual asset based fee of 2% and a performance fee equal to 20% of the Fund's realized capital gain, net of all realized capital loss and unrealized capital depreciation. This differed from Equus's agreement with ECMC, under which ECMC and its officers received stock options to incentivize their performance. Section 205 of the Advisers Act generally prohibits investment advisers from receiving performance fees. Section 205(b)(3) provides an exception for advisory contracts with BDCs if, among other things, the BDC doesn't have 'outstanding any option, warrant, or right issued' pursuant to Section 61(a)(3)(B) of the ICA, which permits BDCs to issue certain options. Therefore, to enter an advisory agreement with Equus that included a performance fee, MCCA had to purchase the outstanding options issued to ECMC and Equus employees who continued to work for the Fund after the change in advisers.

**E. The Proxy Statement**

14. On April 6, 2005, Equus's board approved the special committee's recommendations and authorized the filing of proxy materials recommending that shareholders approve MCCA's advisory agreement and ECAC's administration agreement. Equus filed its preliminary proxy statement on May 10, 2005, and filed its definitive proxy statement on May 27, 2005. Both proxy filings proposed to discontinue the stock option plan and to require MCCA to purchase all outstanding stock options from the Fund's officers and directors. The proposed administration agreement stated that, while MCCA was responsible for all investment professionals' expenses including salaries, ECAC may provide "significant managerial assistance to the Fund's portfolio companies." Payments to ECAC were capped at \$450,000 per year.

**F. Retention of Certain Employees**

15. After the special committee recommended MCCA as the new adviser, Moore told Douglass that MCCA needed to retain certain ECMC employees, especially its senior vice president ("the senior vice president"), an Equus senior vice president who located and evaluated

the companies in which Equus invested. Accordingly, Douglass began negotiating the senior vice president's retention.

16. On June 10, 2005, Douglass, through his assistant, sent the senior vice president an e-mail outlining his new compensation arrangement with MCCA. This arrangement included a 26% premium MCCA would pay for the senior vice president's stock options, which effectively priced his options at \$10.49 per share, compared to the then-current market price of \$8.30. The e-mail specifically identified the manner in which Douglass and Moore would disguise the premium. It provided that the senior vice president would receive a \$60,000 retention bonus and enter into a consulting agreement with ECAC that would compensate the senior vice president \$373,620. The consulting agreement paid the senior vice president to provide the same services as his existing employment agreement with MCCA (under which he was to receive \$220,000 per year plus bonus), meaning that he was to be paid twice for the same work.

**G. Douglass's Materially Misleading Statements in a June 22, 2005 Press Release**

17. On June 17, 2005, in the midst of the proxy solicitation, Dow Jones Newswire ran a story about Equus, highlighting the Fund's performance issues and discussing ongoing disagreements between the Fund's management and certain large shareholders about the Fund's fate. The story specifically quoted one shareholder who said that the Fund "should be shut down." The Dow Jones story also noted the proxy statement's commitment that MCCA would purchase 27.5% of Equus's outstanding shares on the public market or through "privately-arranged transactions with individual shareholders." According to the story, this raised concerns among some shareholders that not all shareholders would be given the chance to sell at a favorable price.

18. In response to the Dow Jones Newswire story, Equus issued a press release on June 22, 2005, regarding the proposed change in advisers. Douglass approved the issuance of this press release. The press release addressed, among other things, the change in adviser's incentive compensation structure and MCCA's commitment to purchase shares. To allay concerns that current Fund management would benefit from MCCA's "privately-arranged transactions" to purchase shares, Douglass stated in the press release:

"In order to adopt the new incentive compensation structure, the Fund may not have any outstanding stock options in accordance with legal requirements. To facilitate the exercise of the existing stock options held by officers and directors, Moore Clayton may buy the shares issued upon exercise of such options. **The purchase price paid for any such shares will not exceed the current market price for the shares.**" [Emphasis added.]

19. The market price for Equus shares at the time was approximately \$8.30 per share. Douglass approved this press release even though he had already negotiated an agreement whereby MCCA would pay the senior vice president a significant premium above market price for his options. This release therefore was materially misleading. Equus filed the press release

with the Commission on June 22, 2005, under cover of Form 8-K and also filed it on June 24, 2005, as definitive additional proxy materials on Schedule 14A.

**H. Approval of MCCA and ECAC's appointment**

20. Equus's shareholders approved MCCA as the new adviser and ECAC as the new administrator on June 30, 2005. Equus's board, at a meeting later that day, approved the contracts to appoint MCCA as Equus's new adviser and ECAC as the Fund's new administrator. In addition, that day the senior vice president and Moore signed the senior vice president's consulting agreement with MCCA and his consulting agreement with ECAC.

**I. Special Administrative Fee**

21. During the June 30, 2005 board meeting, Moore disclosed that ECAC had encountered \$800,000 in "unforeseen administrative expenses" relating to the adviser change and asked Equus to cover those expenses. Although not disclosed at the board meeting, a significant portion of the "unforeseen administrative expenses" was the senior vice president's compensation, which had been agreed to nearly three weeks earlier.

22. In response, Equus's board formed a special committee, consisting of three independent board directors, to examine the unforeseen administrative expenses and to determine whether the Fund should reimburse ECAC. During the special committee's review, an independent director discussed with Moore the components of the special administrative fee. Moore admitted that some of the expenses included retention bonuses for the senior vice president and others, but did not enumerate the specific amounts.

23. On August 9, 2005, upon the special committee's recommendation, Equus's board agreed to pay MCCA a one-time supplemental fee of \$535,000 (approximately 1% of the Fund's assets at the time) to reimburse "extraordinary costs that were incurred by the Management Company above what had been anticipated" with respect to the change in administrators. In effect, the Fund paid for the stock option premium paid to the senior vice president without any disclosure to the shareholders or the public.

24. Equus's CFO thereafter prepared (or assigned someone to prepare) a spreadsheet outlining the components of the fee: \$400,000 for the senior vice president's consulting agreement with ECAC; \$60,000 for the senior vice president's retention bonus; and \$75,000 of retention bonuses for other personnel.

**J. Equus's Subsequent Commission Filings**

25. Equus filed its second quarter 2005 Form 10-Q on August 15, 2005. Moore certified this filing, which disclosed that the Fund had reimbursed ECAC \$535,000 for unexpected costs and expenses associated with the change in administrators. The Form 10-Q, however, failed to disclose the true purposes of the special administrative fee or that the majority of the funds compensated the senior vice president.

26. On March 31, 2006, Equus filed its 2005 Form 10-K, which Moore certified. This filing also disclosed that the special administrative fee was associated with the change in administrators, but failed to disclose that the special administrative fee primarily compensated a Fund officer.

27. On April 24, 2006, Equus filed its annual proxy statement providing information about officer and director compensation in 2005. The proxy statement represented that the senior vice president received compensation of \$136,620 in 2005, consisting of realized earnings from the company's acquisition of his 198,000 stock options. This figure was materially understated because the senior vice president, in fact, received more than \$460,000 from the transaction. This misleading compensation disclosure was incorporated by reference in Equus's 2005 Form 10-K.

28. Douglass and Moore were responsible for using the senior vice president's consulting agreement to pay the senior vice president a stock-option premium. Therefore, they knew by June 2005 that, by recording the payment as an administrative expense, Equus's books and records were inaccurate. Douglass and Moore also failed to inform Equus's CFO and Equus's auditor of the true nature of the payments to the senior vice president. They both also signed false management-representation letters to the auditor for the third quarter of 2005 and for fiscal year 2005. In these letters, Douglass and Moore confirmed that Equus's financial information was fairly presented and that all material transactions were properly recorded. These representations were materially misleading in light of the senior vice president's undisclosed stock-option premium. Therefore, Douglass and Moore circumvented Equus's internal controls and lied to Equus's auditors.

**K. Violations**

29. As a result of the conduct described above, Douglass willfully violated:

a. 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;

b. Section 13(b)(5) of the Exchange Act, which provides that no person shall knowingly falsify any book, record, or account of an issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, or is required to file reports pursuant to Section 15(d) of the Exchange Act, or knowingly circumvent the registrant's system of internal accounting controls;

c. Rule 13b2-1 under the Exchange Act, which provides that no person shall, directly or indirectly, falsify or cause to be falsified any book, record, or account subject to Section 13(b)(2)(A) of the Exchange Act;

d. Rule 13b2-2(a) under the Exchange Act, which prohibits an officer or director of an issuer from, directly or indirectly: (1) making, or causing to be made, a materially false or misleading statement; or (2) omitting, or causing to be omitted, a statement of a material fact necessary to make the statements made, in light of the circumstances under which they were

made, not misleading to an accountant in connection with a required audit, or the preparation or filing of a required document or report;

e Section 14(a) of the Exchange Act and Rule 14a-9 thereunder, which required that proxy solicitations not be false or misleading, not omit to state any material fact necessary in order to make the statements therein not false or misleading, or correct any statement in earlier communications with respect to the proxy solicitation that has become false or misleading.

30. As a result of the conduct described above, Moore willfully violated:

a. Section 13(b)(5) of the Exchange Act, which provides that no person shall knowingly falsify any book, record, or account of an issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, or is required to file reports pursuant to Section 15(d) of the Exchange Act, or knowingly circumvent the registrant's system of internal accounting controls;

b. Rule 13b2-1 under the Exchange Act, which provides that no person shall, directly or indirectly, falsify or cause to be falsified any book, record, or account subject to Section 13(b)(2)(A) of the Exchange Act;

c. Rule 13b2-2(a) under the Exchange Act, which prohibits an officer or director of an issuer from, directly or indirectly: (1) making, or causing to be made, a materially false or misleading statement; or (2) omitting, or causing to be omitted, a statement of a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading to an accountant in connection with a required audit, or the preparation or filing of a required document or report;

d. Rule 13a-14 under the Exchange Act, which required Moore, as Equus's principal executive and financial officer, to certify in each quarterly and annual report filed or submitted by Equus under Section 13(a) of the Exchange Act, that: (1) he had reviewed the report; and (2) based on his knowledge, the report did not contain any untrue statement of material fact, or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the report;

e Section 14(a) of the Exchange Act and Rule 14a-9 thereunder, which required that proxy solicitations not be false or misleading, not omit to state any material fact necessary in order to make the statements therein not false or misleading, or correct any statement in earlier communications with respect to the proxy solicitation that has become false or misleading.

31. As a result of the conduct described above, Moore willfully aided and abetted and caused violations of 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.

32. As a result of the conduct described above, Douglass willfully aided and abetted and caused violations of Section 13(a) of the Exchange Act and Rule 13a-11 thereunder, which required Equus to file information and documents as prescribed by the Commission, including current reports, and to include in those reports any material information as may be necessary to make the required statements in those reports not misleading in light of the circumstances under which the statements were made

33. As a result of the conduct described above, Douglass and Moore willfully aided and abetted and caused violations of:

a. Section 13(a) of the Exchange Act and Rules 13a-1, 13a-13, and 12b-20 thereunder, which required Equus to file information and documents as prescribed by the Commission, including annual and quarterly reports, and to include in those reports any material information as may be necessary to make the required statements in those reports not misleading in light of the circumstances under which the statements were made;

b. Section 13(b)(2)(A) of the Exchange Act, which required Equus, as a reporting company, to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflected its transactions and dispositions of its assets;

c. Section 13(b)(2)(B) of the Exchange Act which required Equus, as a reporting company, to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions were recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles; and

d. Section 206(1) and Section 206(2) of the Advisers Act which prohibited ECMC and MCCA from employing any device, scheme, or artifice to defraud clients or prospective clients or engage in any transaction, practice, or course of business that defrauds clients or prospective clients.

### III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act including, but not limited to, civil penalties pursuant to Section 9(d) of the Investment Company Act and whether the Respondents should be barred or suspended from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

C. Whether, pursuant to Section 21C of the Exchange Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of the provisions set forth Section II.K above;

D. Whether, pursuant to Section 21C(f) of the Exchange Act, Respondent Douglass should be prohibited 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, or that is required to file reports pursuant to Section 15(d) of the Exchange Act; and

E. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 203 of the Advisers Act, including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act and whether, pursuant to Section 203(f) of the Advisers Act, Respondents should be barred or suspended from being associated with an investment adviser.

#### IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III. hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

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

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

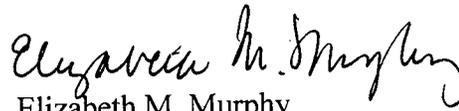
This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule

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

By the Commission.

  
Elizabeth M. Murphy  
Secretary

*Commissioner Walter  
not participating*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62260 / June 10, 2010

ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 3143 / June 10, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13933

In the Matter of

HARRY O. NICODEMUS IV,  
CPA

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 Harry O. Nicodemus IV, CPA ("Nicodemus" 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 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.

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### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### RESPONDENT

1. **Nicodemus** resides in Katy, Texas and was the chief financial officer of Equus Total Return, Inc. ("Equus"), a business development company ("BDC"), from November 2003 to November 2006. He is a CPA licensed in Texas.

#### OTHER RELEVANT ENTITY

2. **Equus**, a Delaware corporation based in Houston, Texas, became a BDC on September 6, 1991. Equus trades as a closed-end fund on the New York Stock Exchange, under the symbol "EQS." Its securities are registered under Section 12(b) of the Exchange Act.

#### FACTS

3. On June 30, 2005, Equus's shareholders approved a new fund adviser and a new fund administrator. Equus's board ratified the shareholder vote at a meeting later that day.

4. On August 9, 2005, Equus's board agreed to pay the new fund administrator a one-time supplemental fee of \$535,000 to reimburse "extraordinary costs that were incurred by [the fund administrator] above what had been anticipated" with respect to the change in administrators.

5. Nicodemus thereafter prepared (or assigned someone to prepare) a spreadsheet outlining the components of the supplemental fee: \$400,000 for a consulting agreement with an Equus officer ("Fund officer"); \$60,000 for the Fund officer's retention bonus; and \$75,000 of retention bonuses for other personnel. The spreadsheet was prepared in connection with finalizing Equus's second quarter 2005 Form 10-Q.

6. Equus filed its second quarter 2005 Form 10-Q on August 15, 2005. Nicodemus certified this filing, which disclosed that the Fund had reimbursed the new administrator \$535,000 for unexpected costs and expenses associated with the change in administrators. The Form 10-Q, however, failed to disclose that the true purpose of the special administrative fee was to compensate the Fund officer.

7. On March 31, 2006, Equus filed its 2005 Form 10-K, which Nicodemus certified. This filing also disclosed that the special administrative fee was associated with the change in administrators, but failed to disclose that the true purpose of the special administrative fee was to compensate the Fund officer.

8. On April 24, 2006, Equus filed its annual proxy statement providing information about officer and director compensation in 2005. The proxy statement represented that the Fund

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<sup>1</sup> 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.

officer received compensation of \$136,620 in 2005, consisting of realized earnings from the company's acquisition of his 198,000 stock options. This figure was materially understated because the Fund officer in fact received more than \$430,000 from the transaction.

#### VIOLATIONS

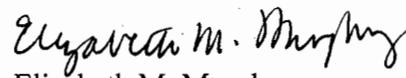
9. As a result of conduct described above, Nicodemus violated Rule 13a-14 under the Exchange Act. In addition, Nicodemus caused Equus's violations of Section 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 13a-1, 13a-13 and 12b-20 thereunder.

#### IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Nicodemus's Offer. Accordingly, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that:

Respondent cease and desist from committing or causing any violations and any future violations of Exchange Act Rule 13a-14 and from causing any violations and any future violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, and Rules 13a-1, 13a-13 and 12b-20 thereunder.

By the Commission.

  
Elizabeth M. Murphy  
Secretary

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-62266; File No. 265-26]

**COMMODITY FUTURES TRADING COMMISSION**

**Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues**

**AGENCIES:** Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC") (each, an "Agency," and collectively, "Agencies").

**ACTION:** Notice of Meeting of Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues.

**SUMMARY:** The Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues is providing notice that it will hold a public meeting on Tuesday, June 22, 2010, in the Auditorium, Room L-002, at the SEC's main offices, 100 F Street, NE, Washington, DC. The meeting will begin at 1:00 p.m. (EST) and will be open to the public. The Committee meeting will be webcast on the SEC's Web site at <http://www.sec.gov>. Persons needing special accommodations to take part because of a disability should notify a contact person listed below. The public is invited to submit written statements to the Committee.

The agenda for the meeting includes: (i) committee organizational matters; (ii) testimony by representatives from various exchanges and firms regarding the market events of May 6; (iii) updates from staff; and (iv) discussion of next steps for the Committee.

Pursuant to 41 CFR Section 102-3.150(b), the Agencies are providing less than fifteen days notice of the meeting so that Committee members can quickly begin to hear from exchanges and firms regarding the market events of May 6, 2010, and make

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recommendations related to market structure issues that may have contributed to the volatility, as well as disparate trading conventions and rules across various markets.

**DATES:** Written statements should be received on or before noon on Friday, June 18, 2010.

**ADDRESSES:** Because the Agencies will jointly review all comments submitted, interested parties may send comments to either Agency and need not submit responses to both Agencies. Respondents are encouraged to use the title "Joint CFTC-SEC Advisory Committee" to facilitate the organization and distribution of comments between the Agencies. Interested parties are invited to submit responses to:

Securities and Exchange Commission: Written comments may be submitted by the following methods:

Electronic Comments

- Use the SEC's Internet submission form (<http://www.sec.gov/rules/other.shtml>);
- or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov).

Please include File No. 265-26 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F St., NE, Washington 20549. All submissions should refer to File No. 265-26.

To help the SEC process and review your comments more efficiently, please use only one method. The SEC staff will post all comments on the SEC's Internet Web site (<http://www.sec.gov/rules/other.shtml>). Comments will also be available for Web site

viewing and printing in the SEC's Public Reference Room, 100 F St., NE, Washington DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from your submissions. You should submit only information that you wish to make available publicly.

Commodity Futures Trading Commission:

- Written comments may be mailed to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581, attention Office of the Secretary; transmitted by facsimile to the CFTC at (202) 418-5521; or transmitted electronically to [Jointcommittee@cftc.gov](mailto:Jointcommittee@cftc.gov).

Reference should be made to "Joint CFTC-SEC Advisory Committee."

**FOR FURTHER INFORMATION CONTACT:** Ronesha Butler, Special Counsel, at (202) 551-5629, Division of Trading and Markets, or Elizabeth M. Murphy, Committee Management Officer, at (202) 551-5400, Securities and Exchange Commission, 100 F St., NE, Washington DC 20549, or Martin White, Committee Management Officer, at (202) 418-5129, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:** In accordance with Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 1, § 10(a), James R. Burns and Timothy

Karpoff, each Co-Designated Federal Officer of the Committee, acting jointly, have approved publication of this notice.

By the Securities and Exchange Commission.

*Elizabeth M. Murphy*

Elizabeth M. Murphy  
Committee Management Officer

By the Commodity Futures Trading Commission.

*Martin White*

Martin White  
Committee Management Officer

Dated: June 10, 2010



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 Mahler's Offer, the Commission finds that:

A. Mahler was a corporate attorney at a New York law firm of Nixon Peabody at all relevant times until January 2005, when she resigned. Mahler is admitted to practice law in the State of New York.

B. On September 17, 2009, the Commission filed a complaint against Mahler entitled SEC v. Melissa A. Mahler, (Case 1:09-cv-01767-PLF), in the United States District Court for the District of Columbia. On March 15, 2010, the court entered an order permanently enjoining Mahler, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. Mahler was also ordered to pay \$5,800 in disgorgement, plus \$2,192 in prejudgment interest, and a civil penalty of \$5,800.

C. The Commission's complaint alleged, among other things, that Mahler traded on material, nonpublic information in breach of her duty of loyalty and confidentiality, thereby violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

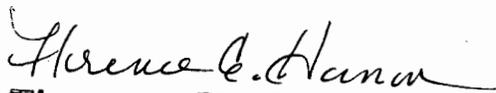
### IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Mahler is suspended from appearing or practicing before the Commission as an attorney for five years. After five years from the date of this order, Mahler has the right to apply for reinstatement by submitting an application to the Commission's Office of the General Counsel.

By the Commission.

Elizabeth M. Murphy  
Secretary

  
By: Florence E. Harmon  
Deputy Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

June 11, 2010

IN THE MATTER OF

Micro Laboratories, 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 Micro Laboratories, Inc. ("Micro Laboratories") because it has not filed any periodic reports since the period ended June 30, 2005. Micro Laboratories is quoted on the Pink Sheets operated by Pink OTC Markets, Inc. under the ticker symbol MLAR.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company, and any equity securities of any entity purporting to succeed to this issuer.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company, and any equity securities of any entity purporting to succeed to this issuer, is suspended for the period from 9:30 a.m. EDT on June 11, 2010, through 11:59 p.m. EDT on June 24, 2010.

By the Commission.

*Florence E. Harmon*  
By: Florence E. Harmon  
Deputy Secretary

Elizabeth M. Murphy  
Secretary

27 of 55

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62280)

Order Granting Application for Extension of a Temporary Conditional Exemption Pursuant to Section 36(a) of the Exchange Act by the International Securities Exchange, LLC Relating to the Ownership Interest of International Securities Exchange Holdings, Inc. in an Electronic Communications Network

June 11, 2010

I. Introduction

On December 22, 2008, the Securities and Exchange Commission (“Commission”) approved a proposal filed by the International Securities Exchange, LLC (“ISE” or “Exchange”) in connection with corporate transactions (the “Transactions”) in which, among other things, the parent company of ISE, International Securities Exchange Holdings, Inc. (“ISE Holdings”), purchased a 31.54% ownership interest in Direct Edge Holdings LLC (“Direct Edge”), the owner and operator of Direct Edge ECN (“DECN”), a registered broker-dealer and electronic communications network (“ECN”).<sup>1</sup> Following the closing of the Transactions (the “Closing”), Direct Edge’s wholly-owned subsidiary, Maple Merger Sub LLC (“Merger Sub”) began to operate a marketplace for the trading of U.S. cash equity securities by Equity Electronic Access Members of ISE (the “Facility”), under ISE’s rules and as a “facility,” as defined in Section 3(a)(2) of the Securities Exchange Act of 1934 (“Exchange Act”),<sup>2</sup> of ISE.<sup>3</sup>

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<sup>1</sup> See Securities Exchange Act Release No. 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (order approving File No. SR-ISE-2008-85).

<sup>2</sup> 15 U.S. C. 78c(a)(2).

<sup>3</sup> Under Section 3(a)(2) of the Act, the term “facility,” when used with respect to an exchange, includes “its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.”

DECN, which operates as an ECN and submits its limit orders to the Facility for display and execution, is an affiliate of ISE through ISE Holdings' equity interest in DE Holdings. DECN also is a facility, as defined in Section 3(a)(2) of the Exchange Act, of ISE because it is an affiliate of ISE used for the purpose of effecting and reporting securities transactions. Because DECN is a facility of ISE, ISE, absent exemptive relief, would be obligated under Section 19(b) of the Exchange Act to file with the Commission proposed rules governing the operation of DECN's systems and subscriber fees.

On December 22, 2008, the Commission exercised its authority under Section 36 of the Exchange Act to grant ISE a temporary exemption, subject to certain conditions, from the requirements under Section 19(b) of the Exchange Act with respect to DECN's proposed rules.<sup>4</sup> On June 19, 2009, the Commission extended this temporary exemption for an additional 180 days, subject to certain conditions.<sup>5</sup> On December 16, 2009, the Commission further extended the temporary exemption for an additional 180 days, subject to certain conditions.<sup>6</sup>

On May 19, 2010, ISE filed with the Commission, pursuant to Rule 0-12<sup>7</sup> under the Exchange Act, an application under Section 36(a)(1) of the Exchange Act<sup>8</sup> to extend the relief

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<sup>4</sup> See Securities Exchange Act Release No. 59133 (December 22, 2008), 73 FR 79940 (December 30, 2008) ("Exemption Order").

<sup>5</sup> See Securities Exchange Act Release No. 60152 (June 19, 2009), 74 FR 30334 (June 25, 2009) ("June Extension").

<sup>6</sup> See Securities Exchange Act Release No. 61174 (December 16, 2009), 74 FR 68294 (December 23, 2009) ("December Extension").

<sup>7</sup> 17 CFR 240.0-12.

<sup>8</sup> 15 U.S.C. 78mm(a)(1).

granted in the Exemption Order through August 31, 2010.<sup>9</sup> This order grants ISE's request, subject to the satisfaction of certain conditions, which are outlined below.

II. Application for an Extension of the Temporary Conditional Exemption from the Section 19(b) Rule Filing Requirements

On May 19, 2010, ISE requested that the Commission exercise its authority under Section 36 of the Exchange Act to temporarily extend, subject to certain conditions, the temporary conditional exemption granted in the Exemption Order from the rule filing procedures of Section 19(b) of the Exchange Act in connection with ISE Holdings' equity ownership interest in DE Holdings and the continued operation of DECN as a facility of ISE.<sup>10</sup>

In May 2009, EDGA Exchange, Inc., and EDGX Exchange, Inc. (together, the "Exchange Subsidiaries"), two wholly-owned subsidiaries of DE Holdings, filed with the Commission Form 1 applications (the "Form 1 Applications") to register as national securities exchanges under Section 6 of the Exchange Act.<sup>11</sup> The Form 1 Applications, which included the proposed rules of the Exchange Subsidiaries, were published for comment on September 17, 2009,<sup>12</sup> and the Commission granted the Exchange Subsidiaries' exchange registration applications on March 12, 2010.<sup>13</sup>

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<sup>9</sup> See letter from Michael J. Simon, General Counsel and Secretary, ISE, to Elizabeth M. Murphy, Secretary, Commission, dated May 19, 2010 ("Extension Request").

<sup>10</sup> See Extension Request at 3.

<sup>11</sup> See Extension Request at 2.

<sup>12</sup> Securities Exchange Act Release No. 60651 (September 11, 2009), 74 FR 47827 ("Form 1 Applications Notice"). See Extension Request at 2 and 3.

<sup>13</sup> Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) ("Exchange Registration Order"). See Extension Request at 2.

ISE states that the Exchange Subsidiaries expect to begin operating as national securities exchanges in early July 2010.<sup>14</sup> To ensure a smooth transition of trading from DECN to the Exchange Subsidiaries, there will be a two-week pre-launch period during which members will be able to enter mock orders on each Exchange Subsidiary using test symbols.<sup>15</sup> Following the launch date, there will be a two-week phase-in period during which securities currently traded on DECN will be moved from DECN to each Exchange Subsidiary.<sup>16</sup> ISE believes that this process will help to ensure the functionality of the Exchange Subsidiaries and an orderly transition from DECN to the Exchange Subsidiaries.<sup>17</sup> Accordingly, to ensure the launch of the Exchange Subsidiaries, phase-in the trading of all securities on the Exchange Subsidiaries, decommission DECN after the Exchange Subsidiaries are trading all symbols, and incorporate the ability to respond to unanticipated transition issues, ISE requests an additional extension until August 31, 2010, of the relief granted in the Exemption Order.<sup>18</sup> ISE expects that DECN will continue to operate as a facility of ISE for a relatively brief period.<sup>19</sup>

ISE believes that it would be unduly burdensome and inefficient to require DECN's operating rules to be separately subject to the Section 19(b) rule filing process because the published rules of the Exchange Subsidiaries "substantially align with DECN's operations in

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<sup>14</sup> See Extension Request at 2.

<sup>15</sup> Id.

<sup>16</sup> Id. Once a symbol has migrated from DECN to the Exchange Subsidiaries, it will no longer be available for trading on DECN and will only be available for trading on the Exchange Subsidiaries. See Extension Request at note 6. After all symbols have migrated to the Exchanged Subsidiaries, DECN intends to promptly file a "Cessation of Operations Report" with the Commission and to cease operations as an ECN. See Extension Request at 2.

<sup>17</sup> See Extension Request at 2 and 3.

<sup>18</sup> See Extension Request at 2.

<sup>19</sup> Id. ISE states that it would be impracticable for DECN to display its limit orders other than on the Facility. See Extension Request at 4.

practice and DECN is only operating temporarily as a facility of ISE until all symbols are fully migrated to the Exchange Subsidiaries.”<sup>20</sup> ISE believes, further, that the publication of the Exchange Subsidiaries’ rules as part of the Form 1 Applications should help to mitigate any concerns regarding the transparency of the rules under which DECN will continue to operate, temporarily, as a facility of ISE.<sup>21</sup>

ISE has asked the Commission to exercise its authority under Section 36 of the Exchange Act to grant ISE a temporary extension, until August 31, 2010, subject to certain conditions, of the Exemption Order’s relief from the Section 19(b) rule filing requirements that otherwise would apply to DECN as a facility of ISE.<sup>22</sup> The extended temporary conditional exemption would commence immediately and would permit the continued operation of DECN until all symbols are fully migrated to the Exchange Subsidiaries, but in no event later than August 31, 2010.<sup>23</sup> ISE believes that the extended temporary conditional exemption will help to ensure an orderly transition from DECN to the Exchange Subsidiaries.<sup>24</sup>

ISE states, in addition, that the extended exemption will not diminish the Commission’s ability to monitor ISE and DECN.<sup>25</sup> In this regard, ISE notes that to the extent that ISE makes changes to its systems, including the Facility, during the extended temporary exemption period, or thereafter, it remains subject to Section 19(b) and thus obligated to file proposed rule changes with the Commission.<sup>26</sup> Further, in the Extension Request, ISE commits to satisfying certain

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<sup>20</sup> See Extension Request at 3.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

conditions, as outlined below, which are identical to the conditions in the Exemption Order, the June Extension, and the December Extension.<sup>27</sup> For example, as a condition to the extended temporary exemption, ISE will be required to submit proposed rule changes with respect to any material changes to DECN's functions during the exemption period.<sup>28</sup> ISE notes, however, that neither ISE nor DECN anticipates any material changes to DECN's functionality during the extended temporary exemption period.<sup>29</sup>

### III. Order Granting Extension of Temporary Conditional Section 36 Exemption

In 1996, Congress gave the Commission greater flexibility to regulate trading systems, such as DECN, by granting the Commission broad authority to exempt any person from any of the provisions of the Exchange Act and to impose appropriate conditions on their operation.<sup>30</sup> Specifically, NSMIA added Section 36(a)(1) to the Exchange Act, which provides that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."<sup>31</sup> In enacting Section 36, Congress indicated that it expected that "the Commission will use this authority to promote efficiency, competition and

<sup>27</sup> See Extension Request at note 9 and accompanying text. ISE also represents that it has complied with the conditions in the Exemption Order, the June Extension, and the December Extension, and that it will continue to comply with these conditions during any extension of the relief granted in the Exemption Order. See Extension Request at 4.

<sup>28</sup> See Extension Request at 3.

<sup>29</sup> See Extension Request at note 8.

<sup>30</sup> 15 U.S.C. 78mm(a). Section 36 of the Exchange Act was enacted as part of the National Securities Markets Improvements Act 1996, Pub. L. No. 104-290 ("NSMIA").

<sup>31</sup> 15 U.S.C. 78mm(a)(1).

capital formation.”<sup>32</sup> It particularly intended to give the Commission sufficient flexibility to respond to changing market and competitive conditions:

The Committee recognizes that the rapidly changing marketplace dictates that effective regulation requires a certain amount of flexibility. Accordingly, the bill grants the SEC general exemptive authority under both the Securities Act and the Securities Exchange Act. This exemptive authority will allow the Commission the flexibility to explore and adopt new approaches to registration and disclosure. It will also enable the Commission to address issues relating to the securities markets more generally. For example, the SEC could deal with the regulatory concerns raised by the recent proliferation of electronic trading systems, which do not fit neatly into the existing regulatory framework.<sup>33</sup>

As noted above, on December 22, 2008, the Commission exercised its Section 36 exemptive authority to grant ISE a temporary exemption, subject to certain conditions, from the 19(b) rule filing requirements in connection with the Transaction.<sup>34</sup> The Commission granted temporary extensions of this exemptive relief, subject to certain conditions, on June 19, 2009,<sup>35</sup> and December 16, 2009.<sup>36</sup> In addition, the Commission previously granted similar exemptive relief in connection with Nasdaq’s acquisition of Brut, LLC, the operator of the Brut ECN.<sup>37</sup>

Section 19(b)(1) of the Exchange Act requires a self-regulatory organization (“self-regulatory organization” or “SRO”), including ISE, to file with the Commission its proposed rule changes accompanied by a concise general statement of the basis and purpose of the proposed

<sup>32</sup> H.R. Rep. No. 104-622, 104<sup>th</sup> Cong., 2<sup>d</sup> Sess. 38 (1996).

<sup>33</sup> S. Rep. No. 104-293, 104<sup>th</sup> Cong., 2<sup>d</sup> Sess. 15 (1996).

<sup>34</sup> See Exemption Order, supra note 4.

<sup>35</sup> See June Extension, supra note 5.

<sup>36</sup> See December Extension, supra note 6.

<sup>37</sup> See Securities Exchange Act Release No. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004). Although granting the ISE’s Extension Request would result in a temporary exemption longer than the exemption granted in connection with Nasdaq’s acquisition of Brut, LLC, the Commission believes that it is appropriate to provide the Exchange Subsidiaries with a further extension to help facilitate an orderly transition from DECEN to the Exchange Subsidiaries.

rule change. Once a proposed rule change has been filed with the Commission, the Commission is required to publish notice of it and provide an opportunity for public comment. The proposed rule change may not take effect unless approved by the Commission by order, unless the rule change is within the class of rule changes that are effective upon filing pursuant to Section 19(b)(3)(A) of the Act<sup>38</sup> or put into effect summarily pursuant to Section 19(b)(3)(B) of the Act.<sup>39</sup>

Section 19(b)(1) of the Exchange Act defines the term "proposed rule change" to mean "any proposed rule or rule change in, addition to, or deletion from the rules of [a] self-regulatory organization." Pursuant to Section 3(a)(27) and 3(a)(28) of the Exchange Act, the term "rules of a self-regulatory organization" means (1) the constitution, articles of incorporation, bylaws and rules, or instruments corresponding to the foregoing, of an SRO, and (2) such stated policies, practices and interpretations of an SRO (other than the Municipal Securities Rulemaking Board) as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules. Rule 19b-4(b) under the Exchange Act,<sup>40</sup> defines the term "stated policy, practice, or interpretation" to mean generally "any material aspect of the operation of the facilities of the self-regulatory organization or any statement made available to the membership, participants, or specified persons thereof that establishes or changes any standard, limit, or guideline with respect to rights and obligations of specified persons or the meaning, administration, or enforcement of an existing rule."

The term "facility" is defined in Section 3(a)(2) of the Exchange Act, with respect to an exchange, to include "its premises, tangible or intangible property whether on the premises or not, any right to use such premises or property or any service thereof for the purpose of effecting

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<sup>38</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>39</sup> 15 U.S.C. 78s(b)(3)(B).

<sup>40</sup> 17 CFR 240.19b-4(b).

or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.”

ISE acknowledges that Merger Sub has operated the Facility as a facility of ISE since the Closing.<sup>41</sup> Absent an exemption, Section 19(b) of the Exchange Act and Rule 19b-4 thereunder would require ISE to file proposed rules with the Commission to allow ISE to operate DECN as a facility of ISE.

As described more fully above, ISE states that the Exchange Subsidiaries expect to begin operating as national securities exchanges in early July 2010.<sup>42</sup> To ensure a smooth transition from DECN to the Exchange Subsidiaries, there will be a two-week pre-launch period during which members will be able to enter mock orders on the Exchange Subsidiaries using test symbols.<sup>43</sup> Following the launch date of the Exchange Subsidiaries, there will be a two-week phase-in period during which securities currently trading on DECN will be moved from DECN to each Exchange Subsidiary.<sup>44</sup> ISE requests a temporary extension until August 31, 2010, of the relief granted in the Exemption Order, subject to certain conditions, to allow for the pre-launch testing and phase-in of trading on the Exchange Subsidiaries and to provide an orderly transition from DECN to the Exchange Subsidiaries.<sup>45</sup> ISE notes that DECN intends to cease operations as an ECN when all symbols are fully migrated to the Exchange Subsidiaries.<sup>46</sup> Accordingly, ISE

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<sup>41</sup> See Extension Request at 1. As discussed above, ISE owns a 31.54% ownership interest in DE Holdings, the sole owner of Merger Sub.

<sup>42</sup> See Extension Request at 2.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> See Extension Request at 2 and 3.

<sup>46</sup> See Extension Request at 2.

expects that DECN will continue to operate as a facility of ISE for a relatively brief period of time.<sup>47</sup> ISE represents that it has complied with the conditions in the Exemption Order, the June Extension, and the December Extension, and that it will continue to comply with these conditions during any extension of the relief granted in the Exemption Order.<sup>48</sup>

The Commission believes that it is appropriate to grant a temporary extension of the relief provided in the Exemption Order, subject to the conditions described below, to allow DECN to continue to operate as a facility of ISE without being subject to the rule filing requirements of Section 19(b) of the Exchange Act for a temporary period.<sup>49</sup> Accordingly, the Commission has determined to grant ISE's request for an extension of the relief granted in the Exemption Order, subject to certain conditions, through the earlier of (1) the completion of the migration of all symbols from DECN to the Exchange Subsidiaries; or (2) August 31, 2010. The Commission finds that the temporary extended conditional exemption from the provisions of Section 19(b) of the Exchange Act is appropriate in the public interest and is consistent with the protection of investors. In particular, the Commission believes that the temporary extended exemption should help to promote efficiency and competition in the market by allowing DECN to continue to operate as an ECN for a limited period of time while the Exchange Subsidiaries test their systems and phase-in the trading of securities on the Exchange Subsidiaries. The Commission notes ISE's belief that it would be unduly burdensome and inefficient to require DECN's operating rules to be separately subjected to the Section 19(b) rule filing and approval

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<sup>47</sup> Id.

<sup>48</sup> See Extension Request at 4.

<sup>49</sup> In granting this relief, the Commission makes no finding regarding whether ISE's operation of DECN as a facility would be consistent with the Exchange Act.

process because DECN will operate only temporarily as a facility of ISE.<sup>50</sup> In addition, the Commission notes that ISE represents that the rules of the Exchange Subsidiaries, which were published for comment as part of the Form 1 Applications, “substantially align” with DECN’s operations in practice.<sup>51</sup> Accordingly, the Commission believes that the publication of the Form 1 Applications, coupled with the posting of the rules of the Exchange Subsidiaries on Direct Edge’s web site, should help to mitigate any concerns regarding transparency with respect to the rules under which DECN will continue to operate, temporarily, as a facility of ISE.

To provide the Commission with the opportunity to review and act upon any proposal to change DECN’s fees or to make material changes to DECN’s operations as an ECN during the period covered by the extended temporary exemption, as well as to ensure that the Commission’s ability to monitor ISE and DECN is not diminished by the extended temporary exemption, the Commission is imposing the following conditions while the extended temporary exemption is in effect. The Commission believes such conditions are necessary and appropriate in the public interest for the protection of investors. Therefore, the Commission is granting to ISE an extended temporary exemption, until the earlier of (1) the completion of the migration of all symbols from DECN to the Exchange Subsidiaries; or (2) August 31, 2010, pursuant to Section 36 of the Exchange Act, from the rule filing requirements imposed by Section 19(b) of the Exchange Act as set forth above, provided that ISE and DECN comply with the following conditions:

- (1) DECN remains a registered broker-dealer under Section 15 of the Exchange Act<sup>52</sup> and continues to operate as an ECN;

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<sup>50</sup> See Extension Request at 3.

<sup>51</sup> See Extension Request at 3.

<sup>52</sup> 15 U.S.C. 78g.

- (2) DECN operates in compliance with the obligations set forth under Regulation ATS;
- (3) DECN and ISE continue to operate as separate legal entities;
- (4) ISE files a proposed rule change under Section 19 of the Exchange Act<sup>53</sup> if any material changes are sought to be made to DECN's operations. A material change would include any changes to a stated policy, practice, or interpretation regarding the operation of DECN or any other event or action relating to DECN that would require the filing of a proposed rule change by an SRO or an SRO facility;<sup>54</sup>
- (5) ISE files a proposed rule change under Section 19 of the Exchange Act if DECN's fee schedule is sought to be modified; and
- (6) ISE treats DECN the same as other ECNs that participate in the Facility, and, in particular, ISE does not accord DECN preferential treatment in how DECN submits orders to the Facility or in the way its orders are displayed or executed.<sup>55</sup>

In addition, the Commission notes that the Financial Industry Regulatory Authority is currently the Designated Examining Authority for DECN.

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<sup>53</sup> 15 U.S.C. 78s.

<sup>54</sup> See Section 19(b) of the Exchange Act and Rule 19b-4 thereunder. The Commission notes that a material change would include, among other things, changes to DECN's operating platform; the types of securities traded on DECN; DECN's types of subscribers; or the reporting venue for trading that takes place on DECN. The Commission also notes that any rule filings must set forth the operation of the DECN facility sufficiently so that the Commission and the public are able to evaluate the proposed changes.

<sup>55</sup> See Extension Request at note 9.

For the reasons discussed above, the Commission finds that the extended temporary conditional exemptive relief requested by ISE is appropriate in the public interest and is consistent with the protection of investors.

IT IS ORDERED, pursuant to Section 36 of the Exchange Act,<sup>56</sup> that the application for an extended temporary conditional exemption is granted through the earlier of (1) the completion of the migration of all symbols from DECN to the Exchange Subsidiaries; or (2) August 31, 2010, effective immediately.

By the Commission.



Elizabeth M. Murphy  
Secretary

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<sup>56</sup>

15 U.S.C. 78mm.



## B. DELINQUENT PERIODIC FILINGS

2. Respondent is delinquent in its periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1). In particular, it has not filed a periodic report with the Commission since 2005.

3. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

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

## III.

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

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

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

## IV.

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

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

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the

Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

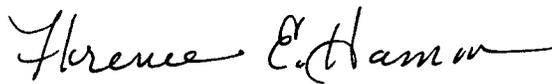
IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

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

By the Commission.

Elizabeth M. Murphy  
Secretary

Attachment

  
By: Florence E Harmon  
Deputy Secretary

Appendix 1

Chart of Delinquent Filings for Micro Laboratories, Inc.

Form Type	Period Ended	Due Date	Months Delinquent (as of April 29, 2010)
10-QSB	09/30/05	11/14/05	53
10-QSB	12/31/05	02/14/06	50
<b>10-KSB</b>	03/31/06	06/29/06	46
10-QSB	06/30/06	08/14/06	44
10-QSB	09/30/06	11/14/06	41
10-QSB	12/31/06	02/14/07	38
<b>10-KSB</b>	03/31/07	06/29/07	34
10-QSB	06/30/07	08/14/07	32
10-QSB	09/30/07	11/14/07	29
10-QSB	12/31/07	02/14/08	26
<b>10-KSB</b>	03/31/08	06/30/08	22
10-QSB	06/30/08	08/14/08	20
10-QSB	09/30/08	11/14/08	17
10-QSB	12/31/08	02/16/09	14
<b>10-KSB</b>	03/31/09	06/29/09	10
10-QSB	06/30/09	08/14/09	8
10-QSB	09/30/09	11/16/09	5
10-QSB	12/31/09	02/15/10	2

*Commissioner Casey and  
Commissioner Walter  
not participating*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62278 / June 11, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13938

In the Matter of

DIATECT INTERNATIONAL  
CORPORATION

Respondent.

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Diatect International Corporation ("DTCT.PK")<sup>1</sup> (CIK No. 319124), is a California corporation headquartered in Heber City, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DTCT.PK is delinquent in its periodic filings with the Commission, having not filed its quarterly report on Form 10-Q for the quarter ended September 30, 2009 and its annual report on Form 10-K for the year ended December 31, 2009.

<sup>1</sup> The short form of the issuer name is also its stock symbol.

## B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filing with the Commission having repeatedly failed to meet its obligations to file timely periodic reports.

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

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

## III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of Respondent.

## IV.

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

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

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to

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

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

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

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

By the Commission.

Elizabeth M. Murphy  
Secretary

*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. 62279 / June 11, 2010**

**INVESTMENT ADVISERS ACT OF 1940**

**Release No. 3038 / June 11, 2010**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-13939**

**In the Matter of**

**RYAN NESTOR,**

**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 Ryan Nestor ("Nestor" or "Respondent").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.1 and 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.

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### III.

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

1. Nestor is a resident of Marblehead, Massachusetts and former registered representative of MML Investors Services, Inc. ("MML"), a broker-dealer and investment adviser registered with the Commission.
2. On March 30, 2009, Nestor pled guilty to two counts of Wire Fraud in violation of Title 18 of the United States Code, Section 1343 before the United States District Court for the District of Massachusetts, in United States v. Ryan Nestor, Criminal No. 09-10060-MLW. On August 6, 2009, the Court sentenced Nestor to 36 months imprisonment, imposed a \$7,500.00 fine and ordered \$750,721.77 in restitution. The judgment of conviction was entered against Nestor on September 8, 2009.
3. The Wire Fraud counts of the criminal Information to which Nestor pled guilty alleged, inter alia, that while acting as an investment adviser and a registered representative of a broker-dealer and investment adviser, Nestor knowingly and willingly devised and participated in a scheme to defraud two of MML's customers. For the first count of Wire Fraud, the Information alleges that on or about April 2, 2007, Nestor forged one customer's signature on an MML wire transfer authorization form and thereby initiated a wire transfer in the amount of \$170,000 from that customer's MML brokerage account to a bank account maintained in California by AOB Commerce, Inc. ("AOB"), a California-based company. This transfer was not authorized by the customer, nor was she aware this transfer had been made. For the second count of Wire Fraud, the Information alleges that on or about May 14, 2007 Nestor forged a second customer's signature to an MML wire transfer authorization form and thereby initiated a wire transfer in the amount of \$590,000 from the second customer's MML trust account to a bank account maintained by AOB. This transfer was also unauthorized, and the second customer was unaware the transfer had been made. By depositing those funds into AOB's account in California, Nestor engaged in monetary transactions affecting interstate commerce. On August 13, 2007, AOB was placed into receivership.<sup>1</sup>

### IV.

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

Accordingly, it is hereby ORDERED:

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<sup>1</sup> On July 12, 2007, the Commission filed an emergency civil injunctive action against AOB alleging that it had raised more than \$45 million from hundreds of investors nationwide through unregistered offerings and sales of promissory notes that purportedly guaranteed interest of up to 5.5% per month. On August 13, 2007 the United States District Court entered an order preliminarily enjoining AOB from violating the antifraud and securities registration provisions of the federal securities laws, freezing AOB's assets and appointing a receiver.

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

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

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**June 15, 2010**

**In the Matter of**

**American Energy Services, Inc.,  
Dynacore Patent Litigation Trust,  
Earth Sciences, Inc.,  
Empiric Energy, Inc.,  
Future Carz, Inc.,  
NBI, Inc.,  
Noble Group Holdings, Inc.  
(f/k/a Leasing Solutions, Inc. and Le Bon  
Table Brand Foods Corp.)  
Reliance Acceptance Group, Inc., and  
Vegas Equity International Corp.,**

**File No. 500-1**

**ORDER OF SUSPENSION OF  
TRADING**

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Dynacore Patent Litigation Trust 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 Earth Sciences, Inc. because it has not filed any periodic reports since the period ended March 31, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Empiric Energy, 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 Future Carz, Inc. because it has not filed any periodic reports since the period ended March 31, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of NBI, 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 Noble Group Holdings, Inc. (f/k/a Leasing Solutions, Inc. and Le Bon Table Brand Foods Corp.) because it has not filed any periodic reports since the period ended December 31, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Reliance Acceptance Group, Inc. because it has not filed any periodic reports since the period ended September 30, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Vegas Equity International Corp. because it has not filed any periodic reports since the period ended December 31, 2005.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on June 15, 2010, through 11:59 p.m. EDT on June 28, 2010.

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. 62292 / June 15, 2010**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-13940**

**In the Matter of**

**American Energy Services, Inc.,  
Dynacore Patent Litigation Trust,  
Earth Sciences, Inc.,  
Empiric Energy, Inc.,  
Future Carz, Inc.,  
NBI, Inc.,  
Noble Group Holdings, Inc.  
(f/k/a Leasing Solutions, Inc. and Le Bon  
Table Brand Foods Corp.),  
Reliance Acceptance Group, Inc., and  
Vegas Equity International 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 American Energy Services, Inc., Dynacore Patent Litigation Trust, Earth Sciences, Inc., Empiric Energy, Inc., Future Carz, Inc., NBI, Inc., Noble Group Holdings, Inc. (f/k/a Leasing Solutions, Inc. and Le Bon Table Brand Foods Corp.), Reliance Acceptance Group, Inc., and Vegas Equity International Corp.

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## II.

After an investigation, the Division of Enforcement alleges that:

### A. RESPONDENTS

1. American Energy Services, Inc. ("AEYS")<sup>1</sup> (CIK No. 1068205) is a forfeited Texas corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AEYS 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 November 30, 2002, which reported a net loss of \$488,522 for the prior nine months. On April 21, 2004, AEYS filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Texas, which was terminated on July 16, 2008. As of June 9, 2010, the common stock of AEYS 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. Dynacore Patent Litigation Trust ("DYHCS") (CIK No. 1193415) is a Delaware grantor trust located in San Antonio, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DYHCS 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 \$131,453 for the prior nine months. DYHCS is not a corporation, but rather a Delaware grantor trust created pursuant to bankruptcy court order to prosecute various patent litigation claims owned by Dynacore Holdings Corp. and distribute the proceeds, if any, of such litigation. As of June 9, 2010, the beneficial interests of DYHCS 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. Earth Sciences, Inc. ("ESCI") (CIK No. 30985) is a Colorado corporation located in Littleton, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ESCI 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, 2004, which reported a net loss of \$11,000 for the prior three months. As of June 9, 2010, the common stock of ESCI 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).

4. Empiric Energy, Inc. ("EPRC") (CIK No. 921182) is a void Delaware corporation located in Addison, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EPRC 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 \$613,710 for the prior nine months. As of June 9, 2010, the common stock of EPRC 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).

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<sup>1</sup>The short form of each issuer's name is also its stock symbol.

5. Future Carz, Inc. ("FCRZ") (CIK No. 1103546) is a Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FCRZ 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, 2004. As of June 9, 2010, the common stock of FCRZ was quoted on the Pink Sheets, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. NBI, Inc. ("NBII") (CIK No. 313518) is a Delaware corporation located in Longmont, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NBII is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2003, which reported a net loss of \$1,940,000 for the prior nine months. As of June 9, 2010, the common stock of NBII 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. Noble Group Holdings, Inc. (f/k/a Leasing Solutions, Inc. and Le Bon Table Brand Foods Corp.) ("LBTF") (CIK No. 803443) is a California corporation located in Hoffman Estates, Illinois, with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). LBTF 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, 1998, which reported a net loss of \$56,591,000 for the prior year. On November 17, 1999, LBTF filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of California, which was terminated on September 23, 2008.

8. Reliance Acceptance Group, Inc. ("RACCQ") (CIK No. 721059) is a forfeited Delaware corporation located in San Antonio, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RACCQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1997, which reported a net loss of \$15,377,000 for the prior nine months. On February 9, 1998, RACCQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was terminated on December 20, 2004. As of June 9, 2010, the common stock of RACCQ 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).

9. Vegas Equity International Corp. ("VEIC") (CIK No. 1243445) is a revoked Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VEIC 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, 2005, which reported a net loss of \$21,000 for the prior year. As of June 9, 2010, the common stock of VEIC 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

10. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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 hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

## 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, and any successor under Exchange Act Rules 12b-2 or 12g-3,

and any new corporate names of any 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 permitted by the Commission Rules of Practice.

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

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

By the Commission.

Elizabeth M. Murphy  
Secretary

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

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 230 and 270**

**[Release Nos. 33-9126; 34-62300; IC-29301; File No. S7-12-10]**

**RIN 3235-AK50**

**INVESTMENT COMPANY ADVERTISING: TARGET DATE RETIREMENT  
FUND NAMES AND MARKETING**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission is proposing amendments to rule 482 under the Securities Act of 1933 and rule 34b-1 under the Investment Company Act of 1940 that, if adopted, would require a target date retirement fund that includes the target date in its name to disclose the fund's asset allocation at the target date immediately adjacent to the first use of the fund's name in marketing materials. The Commission is also proposing amendments to rule 482 and rule 34b-1 that, if adopted, would require marketing materials for target date retirement funds to include a table, chart, or graph depicting the fund's asset allocation over time, together with a statement that would highlight the fund's final asset allocation. In addition, the Commission is proposing to amend rule 482 and rule 34b-1 to require a statement in marketing materials to the effect that a target date retirement fund should not be selected based solely on age or retirement date, is not a guaranteed investment, and the stated asset allocations may be subject to change. Finally, the Commission is proposing amendments to rule 156 under the Securities Act that, if adopted, would provide additional guidance regarding statements in marketing materials for target date retirement funds and other investment companies that could be misleading. The amendments are intended to provide enhanced

information to investors concerning target date retirement funds and reduce the potential for investors to be confused or misled regarding these and other investment companies.

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

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-12-10 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 S7-12-10. 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 Web site viewing and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal

identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Devin F. Sullivan, Senior Counsel; Michael C. Pawluk, Branch Chief; or Mark T. Uyeda, Assistant Director, Office of Disclosure Regulation, Division of Investment Management, at (202) 551-6784, 100 F Street, NE, Washington, DC 20549-8549.

**SUPPLEMENTARY INFORMATION:** The Securities and Exchange Commission (“Commission”) is proposing amendments to rules 156<sup>1</sup> and 482<sup>2</sup> under the Securities Act of 1933 (“Securities Act”)<sup>3</sup> and rule 34b-1<sup>4</sup> under the Investment Company Act of 1940 (“Investment Company Act”).<sup>5</sup>

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<sup>1</sup> 17 CFR 230.156.

<sup>2</sup> 17 CFR 230.482.

<sup>3</sup> 15 U.S.C. 77a et seq.

<sup>4</sup> 17 CFR 270.34b-1.

<sup>5</sup> 15 U.S.C. 80a-1 et seq.

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## I. BACKGROUND

### A. Growth of Target Date Retirement Funds

Over the past two decades, there has been a sizable shift in how Americans provide for their retirement needs. Previously, many Americans were able to rely on a combination of Social Security and company-sponsored defined benefit pension plans.<sup>6</sup> Today, however, defined benefit pension plans are less common and individuals are increasingly dependent on participant-directed vehicles, such as 401(k) plans,<sup>7</sup> that make them responsible for accumulating sufficient assets for their retirement.<sup>8</sup>

As a result, Americans are increasingly responsible for constructing and managing their own retirement portfolios. Effective management of a retirement portfolio can be a challenging task, requiring significant knowledge and commitment of time.<sup>9</sup>

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<sup>6</sup> See, e.g., United States Government Accountability Office, Retirement Savings: Automatic Enrollment Shows Promise for Some Workers, but Proposals to Broaden Retirement Savings for Other Workers Could Face Challenges, at 3 (Oct. 2009) (stating that “[t]raditionally, employers that sponsored retirement plans generally established ‘defined benefit’ plans”).

<sup>7</sup> A 401(k) plan is a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

<sup>8</sup> Department of Labor data indicate that the number of active participants in defined benefit plans fell from about 27 million in 1975 to approximately 20 million in 2006, whereas the number of active participants in defined contribution plans increased from about 11 million in 1975 to 66 million in 2006. See Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 FR 5253, 5253-54 (Feb. 2, 2010) (joint request for information from the Department of the Treasury and the Department of Labor).

<sup>9</sup> See, e.g., Testimony of Barbara D. Bovbjerg, Director, Education, Workforce, and Income Security, United States Government Accountability Office, before the U.S. Senate Special Committee on Aging, 401(k) Plans: Several Factors Can Diminish Retirement Savings, but Automatic Enrollment Shows Promise for Increasing Participation and Savings, at 5-6 (Oct. 28, 2009), available at <http://www.gao.gov/new.items/d10153t.pdf> (attributing the failure of some employees to

Target date retirement funds (hereinafter “target date funds”) are designed to make it easier for investors to hold a diversified portfolio of assets that is rebalanced automatically among asset classes over time without the need for each investor to rebalance his or her own portfolio repeatedly.<sup>10</sup> A target date fund is typically intended for investors whose retirement date is at or about the fund’s stated target date. Target date funds generally invest in a diverse mix of asset classes, including stocks, bonds, and cash and cash equivalents (such as money market instruments). As the target date approaches and often continuing for a significant period thereafter, a target date fund shifts its asset allocation in a manner that is intended to become more conservative – usually by decreasing the percentage allocated to stocks.<sup>11</sup>

Managers of target date funds have stated that, in constructing these funds, they attempt to address a variety of risks faced by individuals investing for retirement, including investment risk, inflation risk, and longevity risk.<sup>12</sup> Balancing these risks involves tradeoffs, such as taking on greater investment risk in an effort to increase

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participate in defined contribution plans to “a tendency to procrastinate and follow the path that does not require an active decision”).

<sup>10</sup> See, e.g., Youngkyun Park, Investment Behavior of Target-Date Fund Users Having Other Funds in 401(k) Plan Accounts, 30 Employee Benefit Research Institute Issue Brief, at 2 (Dec. 2009).

<sup>11</sup> See, e.g., Josh Charlson et al., Morningstar Target-Date Series Research Paper: 2009 Industry Survey, at 6 (Sept. 9, 2009) (“2009 Morningstar Paper”); Investment Company Institute, 2010 Investment Company Fact Book, at 116 (2010) (“2010 Fact Book”).

<sup>12</sup> See, e.g., Transcript of Public Hearing on Target Date Funds and Other Similar Investment Options before the U.S. Securities and Exchange Commission and the U.S. Department of Labor, at 62 (June 18, 2009), available at <http://www.sec.gov/spotlight/targetdatefunds/targetdatefunds061809.pdf> (“Joint Hearing Transcript”) (testimony of John Ameriks, Principal, Vanguard Group).

returns and reduce the chances of outliving one's retirement savings.<sup>13</sup> Further, target date fund managers have taken different approaches to balancing these risks, and thus target date funds for the same retirement year have had different asset allocations.<sup>14</sup>

The schedule by which a target date fund's asset allocation is adjusted is commonly referred to as the fund's "glide path." The glide path typically reflects a gradual reduction in equity exposure before reaching a "landing point" at which the asset allocation becomes static. For some target date funds, the landing point occurs at or near the target date, but for other funds, the landing point is reached a significant number of years – as many as 30 – after the target date.<sup>15</sup> While there are some target date funds with landing points at or near the target date, a significant majority have landing points after the target date.<sup>16</sup>

Since the inception of target date funds in the mid-1990s, assets held by these funds have grown considerably. Today, assets of target date funds registered with the Commission total approximately \$270 billion.<sup>17</sup> Target date funds received

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<sup>13</sup> See *id.* at 23-24 (testimony of Richard Whitney, Director of Asset Allocation, T. Rowe Price).

<sup>14</sup> See 2009 Morningstar Paper, *supra* note 11, at 6 (attributing variations in asset allocations to philosophical differences among fund companies' asset allocators and their approaches to balancing risks).

<sup>15</sup> Based on Commission staff analysis of registration statements filed with the Commission.

<sup>16</sup> Of the nine largest target date fund families representing approximately 93% of assets under management in target date funds, the period of time between the target date and the landing point is 0 years for one fund family, 7 years for one fund family, 7-10 years for one fund family, 10 years for one fund family, 10-15 years for two fund families, 20 years for one fund family, 25 years for one fund family, and 30 years for one fund family. The largest families were determined based on Commission staff analysis of data as of March 31, 2010, obtained from Morningstar Direct.

<sup>17</sup> Based on Commission staff analysis of data as of March 31, 2010, obtained from Morningstar Direct.

approximately \$43 billion in net new cash flow during 2009, \$42 billion during 2008, and \$56 billion during 2007, compared to \$22 billion in 2005 and \$4 billion in 2002.<sup>18</sup>

Recently, target date funds have become more prevalent in 401(k) plans as a result of the designation of these funds as a qualified default investment alternative (“QDIA”) by the Department of Labor pursuant to the Pension Protection Act of 2006.<sup>19</sup> The QDIA designation provides liability protection for an employer who sponsors a defined contribution plan and places contributions of those plan participants who have not made an investment choice into a target date fund or other QDIA.<sup>20</sup> According to one study, 70% of U.S. employers surveyed now use target date funds as their default investment.<sup>21</sup>

#### **B. Recent Concerns about Target Date Funds**

Market losses incurred in 2008, coupled with the increasing significance of target date funds in 401(k) plans,<sup>22</sup> have given rise to a number of concerns about target date

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<sup>18</sup> See 2010 Fact Book, supra note 11, at 173 (Table 50).

<sup>19</sup> See Default Investment Alternatives Under Participant Directed Individual Account Plans, 72 FR 60452, 60452-53 (Oct. 24, 2007) (“QDIA Adopting Release”). Under the Pension Protection Act, the Department of Labor was directed to adopt regulations that “provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.” Pension Protection Act of 2006, Public Law 109-280.

<sup>20</sup> See QDIA Adopting Release, supra note 19, 72 FR at 60452-53. As an alternative to a target date fund as a QDIA, Department of Labor regulations permit a plan sponsor to select a “balanced fund” that is consistent with a target level of risk appropriate for participants of the plan as a whole or a “managed account” that operates similarly to a target date fund. 29 CFR 2550.404c-5(e)(4)(ii)-(iii).

<sup>21</sup> Margaret Collins, Target-Date Retirement Funds May Miss Mark for Unsavvy Savers, Bloomberg (Oct. 15, 2009) (citing a Mercer, Inc. study of more than 1,500 companies).

<sup>22</sup> See Investment Company Institute, The U.S. Retirement Market, Third Quarter 2009, at 31 (Feb. 2010) (approximately 67% of assets held by target date funds as of September 30, 2009, were attributable to defined contribution plans).

funds. In particular, concerns have been raised regarding how target date funds are named and marketed.

Target date funds that were close to reaching their target date suffered significant losses in 2008, and there was a wide variation in returns among target date funds with the same target date.<sup>23</sup> Investment losses for funds with a target date of 2010 averaged nearly 24% in 2008, ranging between approximately 9% and 41%<sup>24</sup> (compared to losses for the Standard & Poor's 500 Index ("S&P 500"), the Nasdaq Composite Index ("Nasdaq Composite"), and the Wilshire 5000 Total Market Index ("Wilshire 5000") of approximately 37%, 41%, and 37%, respectively).<sup>25</sup> By contrast, in 2009, returns for 2010 target date funds ranged between approximately 7% and 31%, with an average return of approximately 22%<sup>26</sup> (compared to returns for the S&P 500, Nasdaq Composite, and Wilshire 5000 of approximately 26%, 44%, and 28%, respectively).<sup>27</sup> Although the 2009 returns were positive, the differences between 2008 and 2009 returns demonstrate

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<sup>23</sup> See, e.g., Gail MarksJarvis, Missing Their Marks; Target Date Funds Took Too Many Risks for 401(k) Investors Nearing Retirement, Chicago Tribune (Mar. 22, 2009); Mark Jewell, Not All Target-Date Funds Are Created Equal, Associated Press (Jan. 15, 2009).

<sup>24</sup> Based on Commission staff analysis of data obtained from Morningstar Direct. See also Pamela Yip, Losing Sight of Retirement Goals; Target-Date Mutual Funds Aren't Always on the Mark, Dallas Morning News (May 11, 2009) (reviewing 2008 performance of target date funds); Robert Powell, Questions Arise on Target-Date Funds after Dismal 2008, MarketWatch (Feb. 4, 2009) (same).

<sup>25</sup> See S&P 500 monthly and annual returns, available at <http://www.standardandpoors.com/indices/market-attributes/en/us>; Nasdaq Composite Index performance data, available at [http://www.nasdaq.com/asp/dynamic\\_charting.aspx?symbol=IXIC&selected=IXIC](http://www.nasdaq.com/asp/dynamic_charting.aspx?symbol=IXIC&selected=IXIC); and Wilshire Index Calculator, available at <http://www.wilshire.com/Indexes/calculator/>.

<sup>26</sup> Based on Commission staff analysis of data obtained from Morningstar Direct.

<sup>27</sup> See *supra* note 25.

significant volatility. In addition, 2009 returns, like 2008 returns, reflect significant variability among funds with the same target date.

While the variations in returns among target date funds with the same target date can be explained by a number of factors, one key factor is the use of different asset allocation models by different funds, with the result that target date funds sharing the same target date have significantly different degrees of exposure to more volatile asset classes, such as stocks.<sup>28</sup> Equity exposure has ranged from approximately 25% to 65% at the target date and from approximately 20% to 65% at the landing point.<sup>29</sup> We note that opinions differ on what an optimal glide path should be.<sup>30</sup> An optimal glide path for one investor may not be optimal for another investor with the same retirement date, with the optimal glide path depending, among other things, on an investor's appetite for certain types of risk, other investments, retirement and labor income, expected longevity, and savings rate.

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<sup>28</sup> See 2009 Morningstar Paper, supra note 11, at 6-9.

<sup>29</sup> Based on Commission staff analysis of registration statements filed with the Commission.

<sup>30</sup> See, e.g., statement of Joseph C. Nagengast, Target Date Analytics LLC, at 2 (May 22, 2009), available at <http://www.sec.gov/comments/4-582/4582-3.pdf> (stating that “the glide path must be designed to provide for a predominance of asset preservation as the target date nears and arrives”); Josh Cohen, Russell Investments, Twelve Observations on Target Date Funds, at 2 (Apr. 2008), available at <http://www.dol.gov/ebsa/pdf/cmt-06080910.pdf> (arguing against high equity allocations at the target date). But see Anup K. Basu and Michael E. Drew, Portfolio Size Effect in Retirement Accounts: What Does It Imply for Lifecycle Asset Allocation Funds, 35 J. Portfolio Mgmt. 61, 70 (Spring 2009) (suggesting that “the growing size of the plan participant’s contributions in later years calls for aggressive asset allocation – quite the opposite of the strategy currently followed by lifecycle asset allocation funds”); Joint Hearing Transcript, supra note 12, at 103 (testimony of Seth Masters, Chief Investment Officer for Blend Strategies and Defined Contributions, AllianceBernstein) (stating that the objective of target date funds should not be to minimize risk and volatility nearing retirement, but rather to minimize the risk that participants will run out of money in retirement).

In June 2009, the Commission and the Department of Labor held a joint hearing on target date funds.<sup>31</sup> Representatives of a wide range of constituencies participated at the hearing, including investor advocates, employers who sponsor 401(k) plans, members of the financial services industry, and academics. Some participants at the hearing spoke of the benefits of target date funds (for example, as a means to permit investors to diversify their holdings and prepare for retirement), but a number raised concerns, particularly regarding investor understanding of the risks associated with, and the differences among, target date funds. Some of these concerns revolved around the naming conventions of target date funds and the manner in which target date funds are marketed.

One concern raised at the hearing was the potential for a target date fund's name to contribute to investor misunderstanding about the fund. Target date fund names generally include a year, such as 2010. The year is intended as the approximate year of an investor's retirement, and an investor may use the date contained in the name to identify a fund that appears to meet his or her retirement needs.<sup>32</sup> This naming convention, however, may contribute to investor misunderstanding of target date funds.<sup>33</sup>

Investors may not understand, from the name, the significance of the target date in the

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<sup>31</sup> See Joint Hearing Transcript, *supra* note 12.

<sup>32</sup> See, e.g., statement of Karrie McMillan, General Counsel, Investment Company Institute, at Target Date Fund Joint Hearing (June 18, 2009) ("McMillan statement"), available at <http://www.dol.gov/ebsa/pdf/ICI061809.pdf>, at 6-7 (stating that the expected retirement date that is used in target date fund names is a point in time to which investors easily can relate).

<sup>33</sup> See, e.g., Joint Hearing Transcript, *supra* note 12, at 65 (testimony of Marilyn Capelli-Dimitroff, Chair, Certified Financial Planner Board of Standards, Inc.) (stating that target date funds may be "fundamentally misleading" to investors because they can be managed in ways that are inconsistent with reasonable expectations created by the names).

fund's management or the nature of the glide path up to and after that date. For example, investors may expect that at the target date, most, if not all, of their fund's assets will be invested conservatively to provide a pool of assets for retirement needs.<sup>34</sup> They also may mistakenly assume that funds that all have the same date in their name are managed according to a uniform asset allocation strategy.<sup>35</sup>

Another concern raised at the hearing was the degree to which the marketing materials provided to 401(k) plan participants and other investors in target date funds may have contributed to a lack of understanding by investors of those funds and their associated investment strategies and risks. A number of hearing participants expressed concern regarding target date fund marketing. For example, one participant stated that "there are significant problems with how [target date funds] are presently marketed," and that "what is lacking is clear and understandable information on the investment strategy and potential risks associated with that strategy."<sup>36</sup> Another participant cited a survey that her organization had conducted, which involved showing a composite description of target date funds derived from actual marketing materials to survey subjects, the majority of whom perceived that those materials made "a promise that [did] not, in fact, exist."<sup>37</sup>

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<sup>34</sup> See *id.* at 87 (testimony of David Certner, Legislative Counselor and Legislative Policy Director, AARP) (hypothesizing that investors who were looking at 2010 target date funds were "thinking something much more conservative than maybe the theoretical notions of what the payouts are going to be over a longer lifetime period").

<sup>35</sup> See *id.* at 272 (testimony of Ed Moore, President, Edelman Financial Services) (asserting that the practice of funds referring to themselves by year is misleading because each fund is permitted to create its own asset allocation in the absence of industry standards regarding portfolio management and construction).

<sup>36</sup> *Id.* at 153 (testimony of Mark Wayne, National Association of Independent Retirement Plan Advisors).

<sup>37</sup> *Id.* at 178 (testimony of Jodi DiCenzo, Behavioral Research Associates). A copy of the survey results is available at <http://www.sec.gov/comments/4-582/4582-1a.pdf>.

According to that participant, some of the survey respondents who reviewed the marketing materials thought that target date funds made various promises, such as “funds at the time of retirement,” a “secure investment with minimal risks,” similarity to “a guaranteed investment” during a market downturn, or “a comfortable retirement.”<sup>38</sup>

Our staff has reviewed a sample of target date fund marketing materials and found that the materials often characterized target date funds as offering investors a simple solution for their retirement needs. The materials typically presented a list of funds with different target dates and invited investors to choose the fund that most closely matches their anticipated retirement date. Even though the marketing materials for target date funds often included some information about associated risks, they often accompanied this disclosure with slogan-type messages or other catchphrases encouraging investors to conclude that they can simply choose a fund without any need to consider their individual circumstances or monitor the fund over time.

The simplicity of the messages presented in these marketing materials at times belies the fact that asset allocation strategies among target date fund managers differ and that investments that are appropriate for an investor depend not only on his or her retirement date, but on other factors, including appetite for certain types of risk, other investments, retirement and labor income, expected longevity, and savings rate. The investor is, in effect, relying on the fund manager’s asset allocation model, which may or may not be appropriate for the particular investor. The model’s assumptions could be inappropriate for an investor either from the outset or as a result of a change in economic

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Id.

or other circumstances, such as job loss, unexpected expenditures that lead to decreased contributions, or serious illness affecting life expectancy.

As a first step to address potential investor misunderstanding of target date funds, the Commission recently posted on its investor education Web site a brochure explaining target date funds and matters that an investor should consider before investing in a target date fund.<sup>39</sup> Today, we are proposing to take another step to address the concerns that have been raised. We are proposing amendments to rule 482 under the Securities Act and rule 34b-1 under the Investment Company Act that, if adopted, would require a target date fund that includes the target date in its name to disclose the fund's asset allocation at the target date immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name in marketing materials. We are also proposing amendments to rule 482 and rule 34b-1 that, if adopted, would require enhanced disclosure in marketing materials for a target date fund regarding the fund's glide path and asset allocation at the landing point, as well as the risks and considerations that are important when deciding whether to invest in a target date fund. Finally, we are proposing amendments to rule 156 under the Securities Act that, if adopted, would provide additional guidance regarding statements in marketing materials for target date funds and other investment companies that could be misleading. The amendments that we are proposing in this release are intended to address the concerns that have been

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<sup>39</sup> See Investor Bulletin: Retirement Funds (May 6, 2010), available at <http://www.sec.gov/investor/alerts/tdf.htm> and [http://investor.gov/investor-bulletin-target-date-retirement-funds/?preview=true&preview\\_id=1154&preview\\_nonce=908a042f2f/](http://investor.gov/investor-bulletin-target-date-retirement-funds/?preview=true&preview_id=1154&preview_nonce=908a042f2f/). This brochure is also posted on the Department of Labor's Web site and is available at <http://www.dol.gov/ebsa/pdf/TDFInvestorBulletin.pdf>.

raised regarding the potential for investor misunderstanding to arise from target date fund names and marketing materials.

## **II. DISCUSSION**

### **A. Content Requirements for Target Date Fund Marketing Materials**

We are proposing to amend our rules governing investment company marketing materials to address concerns regarding target date fund names and information presented in target date fund marketing materials. To address concerns that a target date fund's name may contribute to investor misunderstanding about the fund, we are proposing to require marketing materials for a target date fund that includes the target date in its name to disclose, together with the first use of the fund's name, the asset allocation of the fund at the target date.

We are also proposing to require enhanced disclosures to address concerns regarding the degree to which the marketing materials provided to 401(k) plan participants and other investors in target date funds may have contributed to a lack of understanding by investors of those funds and their associated strategies and risks. First, we are proposing amendments that would require target date fund marketing materials that are in print or delivered through an electronic medium to include a table, chart, or graph depicting the fund's glide path, together with a statement that, among other things, would highlight the fund's asset allocation at the landing point. Radio and television advertisements would be required to disclose the fund's asset allocation at the landing point. Second, we are proposing amendments that would require a statement that a target date fund should not be selected based solely on age or retirement date, that a target date fund is not a guaranteed investment, and that a target date fund's stated asset allocations may be subject to change. These enhanced disclosure requirements would apply to all

target date funds, including those that do not include a date in their names, except that the landing point disclosures for radio and television advertisements would apply only to target date funds that include a date in their names.

## 1. Background and Scope of Proposed Amendments

Rule 482 under the Securities Act permits investment companies to advertise information prior to delivery of a statutory prospectus.<sup>40</sup> Rule 482 advertisements are “prospectuses” under Section 10(b) of the Securities Act.<sup>41</sup> As a result, a rule 482 advertisement need not be preceded or accompanied by a statutory prospectus.<sup>42</sup> Rule 34b-1 under the Investment Company Act prescribes the requirements for supplemental sales literature (i.e., sales literature that is preceded or accompanied by the statutory prospectus).<sup>43</sup> We are proposing to amend rules 482 and 34b-1 to require enhanced

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<sup>40</sup> “Statutory prospectus” refers to the prospectus required by Section 10(a) of the Securities Act [15 U.S.C. 77j(a)]. In 2009, the Commission adopted rule amendments that, for mutual fund securities, permit certain statutory prospectus delivery obligations under the Securities Act to be satisfied by sending or giving key information in the form of a summary prospectus. See Investment Company Act Release No. 28584 (Jan. 13, 2009) [74 FR 4546 (Jan. 26, 2009)] (amending rule 498 under the Securities Act).

<sup>41</sup> 15 U.S.C. 77j(b).

<sup>42</sup> Under the Securities Act, the term “prospectus” generally is defined broadly to include any communication that offers a security for sale. See Section 2(a)(10) of the Securities Act [15 U.S.C. 77b(a)(10)]. Section 5(b)(1) of the Securities Act [15 U.S.C. 77e(b)(1)] makes it unlawful to use interstate commerce to transmit any prospectus relating to a security with respect to which a registration statement has been filed unless the prospectus meets the requirements of Section 10 of the Securities Act [15 U.S.C. 77j]. Because a rule 482 advertisement is a prospectus under Section 10(b), a rule 482 advertisement need not be preceded or accompanied by a statutory prospectus to satisfy the requirements of Section 5(b)(1).

<sup>43</sup> 17 CFR 270.34b-1. Under Section 2(a)(10)(a) of the Securities Act [15 U.S.C. 77b(a)(10)(a)], a communication sent or given after the effective date of the registration statement is not deemed a “prospectus” if it is proved that prior to or at the same time with such communication a statutory prospectus was sent or given to the person to whom the communication was made.

disclosures to be made in target date fund marketing materials, whether or not those materials are preceded or accompanied by a fund's statutory prospectus.<sup>44</sup>

We are proposing that the amendments apply to advertisements and supplemental sales literature that place a more than insubstantial focus on one or more target date funds.<sup>45</sup> Under the proposal, whether advertisements or supplemental sales literature place a more than insubstantial focus on one or more target date funds would depend on the particular facts and circumstances. Our intention in proposing the "more than insubstantial focus" test is to cover a broad range of materials. Materials that relate exclusively to one or more target date funds would be covered. Some materials that cover a broad range of funds, such as a bound volume of fact sheets that include target date funds or a Web site that includes Web pages for target date funds, also would be covered because they include information about target date funds that is more than insubstantial. We do not, however, intend to cover materials that may not be primarily focused on marketing target date funds to investors (e.g., a complete list of each fund within a fund complex, together with its performance), but that are nonetheless considered advertisements or supplemental sales literature under rules 482 and 34b-1.

For purposes of the proposed amendments, a "target date fund" would be defined as an investment company that has an investment objective or strategy of providing varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures that changes over time based on an investor's age,

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<sup>44</sup> The proposed amendments would apply to any investment company registered under Section 8 of the Investment Company Act [15 U.S.C. 80a-8] or separate series of a registered investment company that meets the proposed definition of target date fund.

<sup>45</sup> Proposed rules 482(b)(5)(ii), (iii), (iv), and (v); proposed rule 34b-1(c).

target retirement date, or life expectancy.<sup>46</sup> This definition is intended to encompass target date funds that are marketed as retirement savings vehicles and that have given rise to the concerns described in this release.

The proposed definition is intended to ensure that the proposed amendments would apply to all funds that hold themselves out to investors as target date funds, including those that qualify under the Department of Labor's QDIA regulations. The proposed definition is similar to the description of a target date fund provided in the Department of Labor's QDIA regulations.<sup>47</sup> However, we are not proposing to apply certain eligibility criteria of a QDIA, namely, that a target date fund apply generally accepted investment theories, be diversified so as to minimize the risk of large losses, and change its asset allocations and associated risk levels over time with the objective of becoming more conservative with increasing age. Because we believe that investors in any fund that holds itself out as a target date fund would benefit from the disclosures that we are proposing, regardless of whether the fund is eligible for QDIA status, the proposed definition is not limited only to those funds that meet the more restricted criteria required for QDIA status and the resulting liability protection for plan sponsors. In addition, unlike the Department of Labor's description, the proposed definition refers to a fund's investment objective or strategy, rather than how the fund is "designed." While

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<sup>46</sup> Proposed rule 482(b)(5)(i)(A); proposed rule 34b-1(c).

<sup>47</sup> See 29 CFR § 2550.404c-5(e)(4)(i) (defining as a permissible QDIA "an investment fund product or model portfolio that applies generally accepted investment theories, is diversified so as to minimize the risk of large losses and that is designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant's age, target retirement date (such as normal retirement age under the plan) or life expectancy. Such products and portfolios change their asset allocations and associated risk levels over time with the objective of becoming more conservative (*i.e.*, decreasing risk of losses) with increasing age.").

we believe that these two concepts generally are equivalent, we are proposing that the definition refer to the fund's "investment objective or strategy" because funds are required to disclose their investment objectives and strategies in their statutory prospectuses.<sup>48</sup>

We request comment on the scope of the proposed amendments and, in particular, on the following issues:

- Does the proposed definition of "target date fund" cover the types of funds that should be subject to the proposal, or should we modify the definition in any way? The proposed definition requires that a target date fund have both equity and fixed income exposures. Is this condition too restrictive? For example, could a fund market itself as a target date fund, yet not include equity exposure and/or fixed income exposure, and therefore not be subject to the proposed amendments? Would the proposed definition cover types of funds other than target date funds that are designed to meet retirement goals? If so, is this appropriate or should the definition be modified? Should our proposal cover any fund with a date in its name?
- We are proposing that the amendments apply to marketing materials that place a more than insubstantial focus on one or more target date funds. Is this limitation appropriate, or should any or all of the proposed amendments apply to all marketing materials that include any reference to a target date fund? Should specific types of materials be exempted from the rule? If so, how should this exemption be defined? Is the "more than

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<sup>48</sup> See Items 2, 4, and 9 of Form N-1A.

insubstantial focus” standard sufficiently clear in this context or should it be modified? Is there an alternative standard that would satisfy the Commission’s objectives and be easier to apply? Should the Commission provide further guidance on facts and circumstances that would cause marketing materials to be considered to place a more than insubstantial focus on one or more target date funds? If so, what should this guidance be?

## **2. Use of Target Dates in Fund Names**

We are proposing to require a target date fund that includes the target date in its name to disclose, together with the first use of the fund’s name, the asset allocation of the fund at the target date.<sup>49</sup> This proposed requirement would apply to advertisements and supplemental sales literature that place a more than insubstantial focus on one or more target date funds. This proposal is intended to convey information about the allocation of the fund’s assets at the target date and reduce the potential for names that include a target date to contribute to investor misunderstanding of target date funds. For example, if a target date fund remains significantly invested in equity securities at the target date, the proposed disclosure would help to reduce or eliminate incorrect investor expectations that the fund’s assets will be invested in a more conservative manner at that time.

The proposal would amend rule 482 under the Securities Act and rule 34b-1 under the Investment Company Act to require that an advertisement or supplemental sales literature that places a more than insubstantial focus on one or more target date funds, and

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<sup>49</sup> Based on Commission staff analysis of data obtained from Morningstar Direct, the Commission staff believes that all funds operating as target date funds currently contain a date in their names.

that uses the name of a target date fund that includes a date (including a year), must disclose the percentage allocations of the fund among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) as follows: (1) an advertisement, or supplemental sales literature, that is submitted for publication or use prior to the date that is included in the name would be required to disclose the target date fund's intended asset allocation at the date that is included in the name and must clearly indicate that the percentage allocations are as of the date in the name; and (2) an advertisement, or supplemental sales literature, that is submitted for publication or use on or after the date that is included in the name would be required to disclose the target date fund's actual asset allocation as of the most recent calendar quarter ended prior to the submission of the advertisement for publication or use and must clearly indicate that the percentage allocations are as of that date.<sup>50</sup>

As described in the preceding paragraph, for target date fund advertisements and supplemental sales literature that are submitted for publication or use on or after the target date, we are proposing to require disclosure of the target date fund's current asset allocation, rather than the fund's intended target date asset allocation. We believe that after the target date has been reached, the fund's asset allocation at the target date is of limited relevance to investors and may be confusing or misleading if disclosed prominently with the name. However, we believe that disclosure of the current asset allocation is important to prevent investors from wrongly concluding that the fund is invested more conservatively than is the case. The rule, as proposed, would require disclosure of the actual current asset allocation when the target date that is included in the

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<sup>50</sup> Proposed rule 482(b)(5)(iii); proposed rule 34b-1(c).

name, which may be a year, has been reached. As a result, the rule would require the current allocation to be used beginning on January 1 of the target date year even if the fund reaches its target date allocation later in the year. We believe that this is appropriate because investors who have reached their retirement year may retire at any point in that year, so that the current allocation may be more relevant than the intended allocation later in the year.

Under the proposal, the required disclosure regarding the asset allocation must appear immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name. Furthermore, the disclosure would be required to be presented in a manner reasonably calculated to draw investor attention to the information.<sup>51</sup>

Our proposal would amend rules 482 and 34b-1 to address the use of target date fund names that include the target date. We emphasize that investors should not rely on a fund's name as the sole source of information about the fund's investments and risks. A fund's name, like any other single item of information about the fund, cannot provide comprehensive information about the fund. In the case of target date funds, the fund's name provides no information about the asset allocation or portfolio composition.

However, target date fund names are designed to be significant to investors when

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<sup>51</sup> Id. The requirement that the target date asset allocation be presented in a manner reasonably calculated to draw investor attention to the information is the same presentation requirement that applies to certain legends required in advertisements and supplemental sales literature delivered through an electronic medium. See rule 482(b)(5); rule 34b-1. We do not believe that the presentation requirements set forth in current rule 482(b)(5) for certain legends required in print advertisements and supplemental sales literature (e.g., type size and style) would be appropriate for the proposed target date asset allocation disclosure. For example, if the name of the target date fund in an advertisement is presented in a very large type size, but the major portion of the advertisement is presented in significantly smaller type size, rule 482(b)(5) would permit the use of the smaller type size, which may not be sufficient to attract investor attention.

selecting a fund.<sup>52</sup> For that reason, the Commission is proposing amendments to rules 482 and 34b-1 that are intended to address the potential of target date fund names to confuse or mislead investors regarding the allocation of a fund's assets at its target date.

Under the proposal, a fund's intended asset allocation at the target date (or, for periods on and after the target date, a fund's actual asset allocation as of the most recent calendar quarter) would, in essence, serve to alert investors to the existence of investment risk associated with the fund at and after the target date. In proposing the amendments, we do not intend to suggest that the asset allocation, by itself, is a complete guide to the investment strategies or risks of a fund at and after the target date. Rather, the asset allocation may help counterbalance any misimpression that a fund is necessarily conservatively managed at the target date or thereafter or that all funds with the same target date are similarly managed. There could be other ways of pursuing this goal that could result in more concise disclosure and perhaps simpler categorizations and computations by funds. These could include requiring marketing materials to disclose some, but not all, of a target date fund's asset allocation, such as the equity allocation,<sup>53</sup> the cash and cash equivalent allocation,<sup>54</sup> or the non-cash allocation.<sup>55</sup> We have proposed

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<sup>52</sup> See, e.g., McMillan statement, supra note 32, at 6-7 (stating that the expected retirement date that is used in target date fund names is a point in time to which investors easily can relate).

<sup>53</sup> Although the equity allocation may not be a precise proxy for investment risk, it has been observed that past performance for 2010 target date funds has generally, but not universally, followed the equity allocations. See Josh Charlson et al., Morningstar Target-Date Series Research Paper: 2010 Industry Survey, at 9 (Mar. 15, 2010).

<sup>54</sup> By including only the cash and cash equivalent allocation, investors would be alerted to the percentage allocation of the investments with the least investment risk.

<sup>55</sup> Inclusion of the non-cash allocation would alert investors to the percentage allocation of investments that have more investment risk than cash and cash equivalents.

requiring disclosure of the entire asset allocation because we believe that this disclosure may convey better information about investment risk than alternatives that disclose only part of the asset allocation, but we request comment on the alternatives.

The proposal does not prescribe either the asset classes to be used in disclosing a target date fund's asset allocation or the methodology for calculating the percentage allocations. Instead, each target date fund will determine which asset classes to present and the methodology for calculating the percentage allocations. The purpose of the proposal is to address the potential of target date fund names to confuse or mislead investors by conveying some information about the fund's asset allocation at and after the target date. While we recognize that it is useful for investors to be able to compare target date funds and request comment on what additional requirements would best facilitate this, our goal in this proposal is not to prescribe a single metric that can be used by investors to compare target date funds and select among them. For this reason, and because asset allocation models are subject to continuing refinement and development (such as the introduction of exposure to additional asset classes in order to increase diversification), at this time we are not proposing to prescribe either the specific asset classes to be used in disclosing the asset allocation or the specific methodology for calculating the percentage allocations. However, we request comment on whether such requirements would be useful to investors. We note that current target date fund prospectuses typically use asset classes such as "equity," "fixed income," and "cash and cash equivalents."<sup>56</sup> If the rule is adopted as proposed, we would expect that many target date funds would use these asset classes in making the required disclosure.

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<sup>56</sup> Based on Commission staff analysis of registration statements filed with the Commission.

Although we are not proposing required categories or calculation methodologies, we emphasize that, as with any disclosure contained in advertisements and supplemental sales literature, the disclosure of the asset allocation would be subject to the antifraud provisions of the federal securities laws.<sup>57</sup> Compliance with the specific requirements of rule 482 and rule 34b-1 does not relieve an investment company of any liability under the antifraud provisions of the federal securities laws.<sup>58</sup> Moreover, rule 482 advertisements are also subject to Section 12(a)(2) of the Securities Act, which imposes liability for materially false or misleading statements in a prospectus or oral communication, subject to a reasonable care defense.<sup>59</sup>

The proposal requires disclosure of the asset allocation among “types of investments.” While many target date funds invest indirectly in underlying asset classes by investing in other investment companies,<sup>60</sup> we would not consider it sufficient for a target date fund to disclose percentage allocations to investments in types of investment companies. Instead, by “types of investments,” we mean the underlying asset classes in which the target date fund invests, whether directly or through other funds. For example,

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<sup>57</sup> See, e.g., Section 17(a) of the Securities Act [15 U.S.C. 77q]; Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b)]; Section 34(b) of the Investment Company Act [15 U.S.C. 80a-33].

<sup>58</sup> See Investment Company Act Release No. 26195 (Sept. 29, 2003) [68 FR 57760, 57762 (Oct. 6, 2003)] (emphasizing that advertisements under rule 482 and supplemental sales literature under rule 34b-1 are subject to the antifraud provisions of the federal securities laws).

<sup>59</sup> See *id.* (stating that when “we initially proposed rule 482 in 1977, we indicated that rule 482 advertisements would be subject to [S]ection 12(a)(2) of the Securities Act and the antifraud provisions of the federal securities laws” and noting that “[s]ince then we have reiterated that compliance with the ‘four corners’ of rule 482 does not alter the fact that funds . . . are subject to the antifraud provisions of the federal securities laws with respect to fund advertisements”).

<sup>60</sup> Based on Commission staff analysis of registration statements filed with the Commission.

a target date fund that is subject to the proposed rule would be required to disclose its percentage allocation to equity securities, rather than to equity funds. We believe this approach would provide better information because investment companies are not required to be fully invested in one type of investment.<sup>61</sup>

Target date fund prospectuses today typically disclose specific percentage allocations to various asset classes at the target date. While fund prospectuses sometimes note that there may be small variations from those percentages, they do not typically disclose broad ranges of potential percentage allocations.<sup>62</sup> If the proposal were adopted, we would not view it as inconsistent with the rule for a fund to disclose a range of potential percentages that is consistent with its prospectus disclosures. We would not expect the ranges disclosed to be broad ranges of percentage allocations, nor would we expect ranges to replace the specific percentage allocations disclosed in the prospectus. Moreover, it would be inconsistent with the rule and potentially misleading for a fund to include a range, with the intent of investing only at one end of the range. In addition, representations about ranges of potential percentage allocations may be misleading if funds deviate materially from the stated ranges.

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<sup>61</sup> For example, a fund whose name suggests that it focuses its investments in equity securities must have a policy to invest, under normal circumstances, at least 80% of its net assets, plus the amount of any borrowing for investment purposes, in equity securities. Rule 35d-1(a)(2)(i) under the Investment Company Act [17 CFR 270.35d-1(a)(2)(i)].

<sup>62</sup> Based on Commission staff review of prospectuses filed with the Commission.

We request comment on the proposed required disclosure of a target date fund's target date (or current) asset allocation, and, in particular, on the following issues:

- The proposed requirement to disclose the target date (or current) asset allocation together with the first use of a target date fund's name would apply only if the fund's name includes a date. Should the proposed requirement apply to all target date funds, including those that do not include a date as part of their name?
- For target date fund marketing materials that are submitted for publication or use prior to the target date, we are proposing to require disclosure of the fund's intended asset allocation at the target date. For materials that are submitted for publication or use on or after the target date, we are proposing to require disclosure of the fund's actual asset allocation as of the most recent calendar quarter ended prior to the submission of the materials. Is this appropriate? Should the proposed requirements apply only to marketing materials that are submitted for publication or use prior to the target date? Should marketing materials that are submitted for publication or use on or after the target date provide disclosure of the fund's asset allocation as of the target date, rather than the fund's actual asset allocation as of the most recent calendar quarter ended prior to the submission of the materials?
- Should we require disclosure of the current allocation beginning on January 1 of the target date year, or should we instead require disclosure of the intended target date allocation until the particular date within the

target date year upon which the target date allocation is reached? Which of these approaches would be more helpful and less confusing to investors? Which of these approaches would be easier for funds to implement? Is there a different approach that we should consider in the fund's target date year?

- The proposal would require disclosure of the target date (or current) asset allocation of the fund to appear immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name. Is this sufficient? For example, should this information be disclosed each time the fund's name appears or is used in marketing materials? Should this information be disclosed where the fund's name is presented most prominently (e.g., where the fund's name is written in the largest font size)? Should this information be disclosed in a location other than immediately adjacent to or immediately following the fund's name?
- Under the proposal, the fund's target date (or current) asset allocation would be required to be presented in a manner reasonably calculated to draw investor attention to the information. Are there other presentation alternatives that may better highlight this information for investors (e.g., requirements as to font size, type style, separate box, etc.)? Are any or all of the presentation requirements that currently apply to certain legends in written advertisements under rule 482(b)(5) more appropriate?

- Should we prescribe the specific format for the target date (or current) asset allocation disclosure in order to foster more effective communication? For example, should we require a table, chart, or graph?
- Should marketing materials for a target date fund that includes a date in its name, as proposed, be required to include the fund's allocation across all types of investments, or should target date fund marketing materials be required to disclose some, but not all, of the fund's asset allocation, such as the equity allocation, the cash and cash equivalent allocation, or the non-cash allocation? Would any of these approaches be more effective than the proposal at conveying investment risk at or after the target date? Alternatively, would any of the approaches confuse or mislead investors by conveying only a partial allocation or cause investors to rely excessively on information about their exposure to a particular asset class? Are any of these approaches and/or the proposal easier for funds to implement, for example, because the necessary asset categorizations or computations would be simpler? Are there allocations for other categories or sub-categories of investments that should be required to be disclosed in target date fund marketing materials?
- How effective is disclosure of the target date (or current) asset allocation in conveying level of investment risk and/or other information to investors and in preventing investors from being confused or misled? Do investors need other information along with allocation percentages in order to understand the significance of those percentages? For example, do they

need information about the long-term performance, risks, and volatility of different asset classes? If so, how should this be conveyed (e.g., in marketing materials, prospectuses, educational materials, or through other means)? Should we require this information to be provided by target date funds to investors?

- The proposal would require that a target date fund's target date (or current) asset allocation be disclosed together with the first use of the fund's name in marketing materials. Furthermore, the disclosure would be required to be presented in a manner that is reasonably calculated to draw investor attention to the information. What effect might this disclosure have on investor behavior? Is the proposed disclosure of a target date fund's asset allocation likely to be an effective way to reduce investor misunderstanding or confusion with respect to the fund's name? Would the proposed disclosure reduce investor overreliance on the fund's name? Will it improve investor understanding of a fund's investment strategy, portfolio construction, risk factors, and overall suitability as an investment? To what extent, if any, might the prominent disclosure of the asset allocation have the effect of conferring special significance on the information? Would the prominent disclosure of the asset allocation place appropriate significance on the information? Would investors instead place undue emphasis on a fund's target date (or current) asset allocation because of the prominence of the disclosure? How would investors' consideration of the target date (or current) asset allocation disclosure be

affected by the proposed required disclosure of the glide path and landing point information described in Part II.A.3 below? Would this additional disclosure serve to prevent undue emphasis by investors on the target date (or current) asset allocation disclosure?

- Would our proposal encourage or discourage investors from seeking further information about a target date fund's glide path or other relevant information? For example, would investors examine the fund's entire glide path, which would also be required to be disclosed prominently in marketing materials under our proposals, as described in Part II.A.3 below? Would investors instead overemphasize the fund's target date or current allocation? Would investors rely more heavily on a target date fund's marketing materials if the target date or current asset allocation was included, and if so, would they be less likely to seek more information about the fund? To what extent might the special emphasis on asset allocation at the target date cause investors to prioritize investment risk at a particular moment in time over longevity risk, inflation risk, or other risks? Is additional disclosure required to focus attention on inflation and longevity risks? Do target date funds' current advertising practices, coupled with the fact that our advertising rules permit the inclusion of information about longevity and inflation risks, suggest that the Commission needs to require disclosure with respect to these risks, or would these risks be adequately addressed in fund marketing materials without the need for additional regulation? Is there any evidence that

target date funds have failed, or are likely to fail, to provide adequate information about inflation and longevity risks absent regulation by the Commission?

- Is there additional disclosure, or a disclaimer, that could be provided in connection with the required asset allocation disclosure that could reduce the likelihood that investors might focus too much on asset allocation at the target date? For example, should the disclosure concerning a fund's target date (or current) asset allocation be accompanied by a cross-reference to the disclosure of risks and considerations relating to target date funds discussed in Part II.A.4 below? Would such a cross-reference reduce the possibility that an investor might overemphasize the target date asset allocation disclosure? What are the potential consequences for investors if they were to place too much emphasis on investment risk at the target date without giving appropriate consideration to longevity, inflation, or other risks? Is additional disclosure necessary to aid investors' evaluation of longevity, inflation, or other risks? If so, what disclosure should be required? Would the proposed asset allocation disclosure cause investors to seek professional advice? We would be particularly interested in any empirical data on investor behavior that would address these questions, including empirical data on how fund investors make investment decisions and the role of fund names in those decisions.

- To what extent might target date fund managers take steps in response to the proposed required disclosure of the target date (or current) asset allocation? For example, might target date fund managers change asset allocations at the target date as a result of the proposed required disclosure and its potential impact on investor behavior? Would fund managers provide additional disclosure about how to evaluate the asset allocation in order to address any possibility that investors may overemphasize the target date asset allocation because of the prominence of the disclosure? Would a fund manager's investment strategy, portfolio construction, selection of asset categories disclosed, and marketing change as a result of the proposal's required disclosure of target date (or current) asset allocation? For example, might fund managers compose the fund's fixed-income allocation differently to take on additional investment risk, in order to seek higher returns, while showing a lower equity allocation at or after the target date?
- Should the proposal be modified in any manner to address any impact that it may have on fund investor or manager behavior?
- Should we specify the particular categories of investments for which allocations must be shown and how these categories should be defined? If so, what should they be (e.g., equity securities, fixed income securities, and cash and cash equivalents)? Should these broad asset classes be further subdivided, such as based upon maturity and credit quality for fixed income securities, or capitalization and market type (e.g., domestic,

foreign, and emerging market) for equity securities? How should the use of alternative investment strategies (e.g., hedging strategies) be reflected in the particular categories of investments for which allocations must be shown? Should we require funds to expressly disclose the use of leverage arising from borrowings or derivatives in their asset allocations? If so, how? Would specifying the particular categories of investments for which allocations must be shown result in greater comparability among target date funds?

- Should we attempt to enhance comparability among target date funds by prescribing a methodology for calculating a fund's percentage allocations at and after the target date? Are investors likely to attempt to compare target date (or current) asset allocations among target date funds and, if so, will they be able to make appropriate comparisons or will they be confused or misled if funds have used different methodologies? If we were to adopt a methodology, should the asset allocation percentages be calculated against a particular base (e.g., net assets, net assets plus the amount of borrowings for investment purposes, total assets, or total investments)? Depending on the base selected, could situations arise where a fund's aggregate asset allocation exceeds 100%, such as in situations where the fund engages in borrowing or invests in derivatives that involve leverage? Would this confuse or mislead investors? To what extent do target date funds, or their underlying funds, engage in borrowing or invest in derivatives that involve leverage? Under the proposal, would

the disclosed target date (or current) asset allocations for funds that do and do not use leverage be meaningful, or would they have any potential to confuse or mislead investors? Are there methodologies that could accurately convey to investors differences in investment risk between a fund that uses leverage, either through borrowing or investing in derivative instruments, and a fund that does not use leverage?

- If we do not specify the particular categories of investments or prescribe a methodology for calculating a fund's percentage allocations, would target date fund managers select the categories and methodologies in a manner that results in a high degree of correlation between the fund's investment risk implied by its asset allocation and its actual investment risk, or might they select categories and methodologies that result in disclosed allocations that do not accurately reflect investment risk? Would the prominence of the disclosure in marketing materials affect managers' behavior in selecting categories and methodologies? Would the flexibility to choose categories of investments and the methodology for calculating percentage allocations result in presentations that are materially misleading?
- Other than prescribing categories of investments or the methodology for calculating percentage allocations, are there other means to enhance comparability among target date and current asset allocations? To what extent should we seek to enhance comparability among these disclosures?

- Would permitting target date funds to include a range to be allocated to each class limit the effectiveness of the proposed amendments? For example, are there ranges that would be so broad that they would render the information conveyed essentially meaningless? Would permitting any range be problematic, regardless of how broad or narrow? Would permitting ranges result in the potential for abuse? Should there be limitations on the size of the range (e.g., 2%, 5%, or 10%) or should a range not be permitted?
- The proposal focuses on the asset allocation at the target date because the target date is included in the fund's name. Should target date fund marketing materials be required to include the asset allocation as of the landing point in close proximity to the fund name, either in lieu of, or in addition to, the asset allocation as of the target date? Should target date fund marketing materials submitted for publication or use prior to the target date be required to include the asset allocation as of a current date either in lieu of, or in addition to, the asset allocation as of the target date?
- Is it appropriate and feasible to require a target date fund that invests in other funds to disclose its asset allocation at or after the target date in terms of types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents)? Should we instead require a target date fund that invests in other funds to base its asset allocation on the types of funds in which it invests (e.g., equity funds, fixed income funds, money market funds), either because this approach would provide

better information to investors or would be simpler and more cost-effective for funds to implement? If so, how should funds be categorized? For example, in order to be characterized as an equity fund for this purpose, should a fund be required to invest 100% of its assets in equity securities or 80% or some other percentage? Would this methodology result in overstatement or understatement of a particular type of investment, and could it lead to an inaccurate depiction of a target date fund's asset allocations?

- To what extent do fund investors understand the significance of asset allocation, including the relationship between asset allocation and investment risk, inflation risk, and longevity risk? Are there alternative means of providing investors with important information regarding target date funds in lieu of, or in addition to, requiring disclosure of the target date (or current) asset allocation? For example, should target date fund marketing materials be required to disclose a risk rating based on a scale or index (e.g., 1 through 5, with 1 being least risky) that could be compared to other target date funds? If so, how would such a scale or index be designed? Should the scale or index reflect only investment risk, or should it also take into account longevity and/or inflation risk?
- In addition to, or in lieu of, the proposed disclosure of the target date asset allocation, should there be additional disclosure immediately adjacent to a target date fund name indicating whether the glide path extends to the target date or through the life expectancy of the investor? If so, what

would be the most effective way to concisely disclose such information?

What are the ramifications to investor behavior of disclosing the date through which the glide path is managed?

- Should we require target date fund names, or disclosures immediately adjacent to those names, to provide more information to investors regarding a target date fund's landing point and/or asset allocations at the landing point? Should we, for example, require that any date used in the name of a target date fund be the landing point rather than the target date except in cases where the landing point and the target date are the same? What impact would this have? Would it, for example, make it easier for investors to compare target date funds and select an appropriate fund? Should we, instead, require narrative disclosure to accompany a target date fund name that indicates whether or not the fund reaches its most conservative allocation at the target date and, if not, when that point is reached?
- Are there additional, or different, amendments to rules 482 and 34b-1 or any other rules that would effectively address the concerns relating to target date fund names? Section 35(d) of the Investment Company Act prohibits a registered investment company from using a name that the Commission finds by rule to be materially deceptive or misleading.<sup>63</sup> In 2001, the Commission adopted rule 35d-1 under the Investment Company Act to address certain categories of names that are likely to mislead an

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<sup>63</sup> 15 U.S.C. 80a-34(d).

investor about an investment company's investments and risks.<sup>64</sup> Should we require the target date asset allocation to be included as part of the fund's name, so that it would appear every time the name is used? Should we amend rule 35d-1 to prohibit the use of a date in target date fund names? Should we amend rule 35d-1 to only permit target date funds to use the landing point date in its name, rather than the target date? Should we require the target date asset allocation to appear adjacent to a fund's name in its statutory prospectus, summary prospectus, shareholder reports, or other required filings as well as in marketing materials?

### **3. Asset Allocation Table, Chart, or Graph and Landing Point Allocation**

We are proposing amendments to rules 482 and 34b-1 to require that advertisements and supplemental sales literature that are in print or delivered through an electronic medium, and that place a more than insubstantial focus on one or more target date funds, include a prominent table, chart, or graph that clearly depicts the percentage allocations among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) over the entire life of the fund or funds at identified periodic intervals that are no longer than five years in duration.<sup>65</sup> The table, chart, or graph would also be required to clearly depict the percentage allocations among types of investments at the inception of the fund or funds, the target date, the landing point, and, in the case of an advertisement or supplemental sales literature that relates to a single

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<sup>64</sup> See Investment Company Act Release No. 24828 (Jan. 17, 2001) [66 FR 8509 (Feb. 1, 2001)], as corrected by Investment Company Act Release No. 24828A (Mar. 8, 2001) [66 FR 14828 (Mar. 14, 2001)].

<sup>65</sup> Proposed rule 482(b)(5)(iv); proposed rule 34b-1(c).

target date fund, as of the most recent calendar quarter ended prior to the submission of the advertisement or supplemental sales literature for publication.<sup>66</sup> The table, chart, or graph requirement would apply to all target date funds, including those that do not have dates in their names.

The term “target date” is defined in the proposed amendments as any date, including a year, that is used in the name of a target date fund. If no date is used in the name, the “target date” is the date described in the fund’s prospectus as the approximate date that an investor is expected to retire or cease purchasing shares of the fund.<sup>67</sup> We are proposing to define the term “landing point” as the first date, including a year, at which the asset allocation of a target date fund reaches its final asset allocation among types of investments.<sup>68</sup>

We are proposing periodic intervals of no longer than five years because the Commission staff has observed a number of presentations of target date fund glide paths in statutory prospectuses and marketing materials that use five-year intervals, and five-year intervals appear to be effective in conveying information about how the asset allocation changes over time. We considered other intervals, including longer intervals (such as ten years) and shorter intervals (such as one year). However, we are concerned that longer intervals may not provide enough information about how and when the asset allocation changes, while shorter intervals may produce a presentation that is cluttered and potentially confusing to investors.

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<sup>66</sup> Cf. rule 482(d)(3)(ii) (requiring any quotation of average annual total return contained in an advertisement to be current to the most recent calendar quarter ended prior to submission of the advertisement for publication).

<sup>67</sup> Proposed rule 482(b)(5)(i)(B).

<sup>68</sup> Proposed rule 482(b)(5)(i)(C).

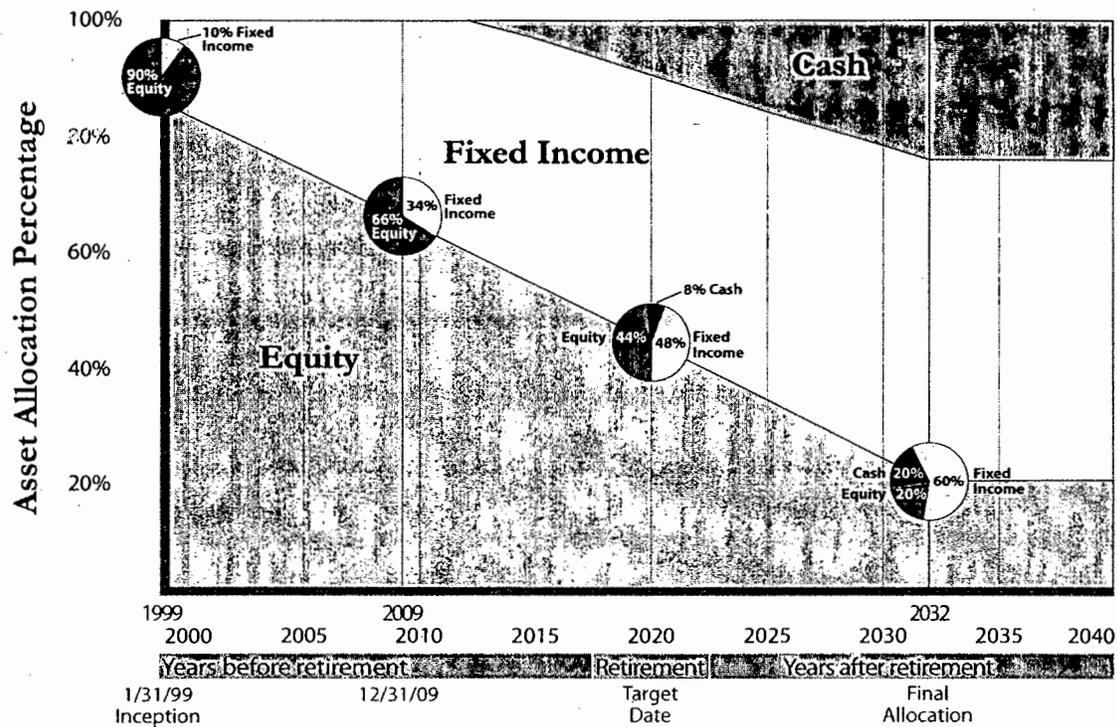
The proposed table, chart, or graph requirement is intended to ensure that investors who receive target date fund marketing materials also receive basic information about the glide path. If marketing materials relate to a single target date fund, the table, chart, or graph must clearly depict the actual percentage allocations among types of investments from the inception of the fund through the most recent calendar quarter ended prior to the submission of the materials for publication and the future intended percentage allocations of the fund. This requirement is intended to ensure that marketing materials that are focused on a single target date fund provide information about the fund's historical and intended future asset allocations. In addition, the table, chart, or graph must identify the periodic intervals and the inception date, target date, landing point, and most recent calendar quarter end using specific dates. In the case of single fund marketing materials, we believe that the use of specific dates, rather than the number of years before or after retirement, may be easier for investors to understand. Examples of presentations that may be appropriate for a single target date fund include the following:

**Example 1**

Asset Allocation	Inception						Target				Final		
	1/31/99			12/31/09			Date			Allocation			
Equity	90%	84%	74%	66%	64%	54%	44%	34%	24%	20%	20%	20%	
Fixed Income	10%	16%	26%	34%	36%	43%	48%	53%	58%	60%	60%	60%	
Cash	0%	0%	0%	0%	0%	3%	8%	13%	18%	20%	20%	20%	
	1999	2000	2005	2009	2010	2015	2020	2025	2030	2032	2035	2040	



## Example 2



If marketing materials relate to multiple target date funds with different target dates that all have the same pattern of asset allocations, the proposal would permit the materials to include either separate presentations for each fund that meet the requirements described in the preceding paragraph or a single table, chart, or graph that clearly depicts the intended percentage allocations of the funds among types of investments and that identifies the periodic intervals and other required points using numbers of years before and after the target date. This would be the case, for example, when a fund family advertises all of its target date funds in a single advertisement, and the target date funds all share a common glide path.<sup>69</sup> We believe that this approach for advertisements

<sup>69</sup> For example, a fund family could have 2010, 2020, and 2030 target date funds. All three would share a common glide path, but the 2020 fund would reach each point on the glide path 10 years after the 2010 fund, and the 2030 fund would reach each point on the glide path 20 years after the 2010 fund.

focusing on multiple target date funds is appropriate because a generic table, chart, or graph illustrating the glide path for all of the funds may be able to effectively convey the asset allocation for each of the particular funds at various dates along the glide path.

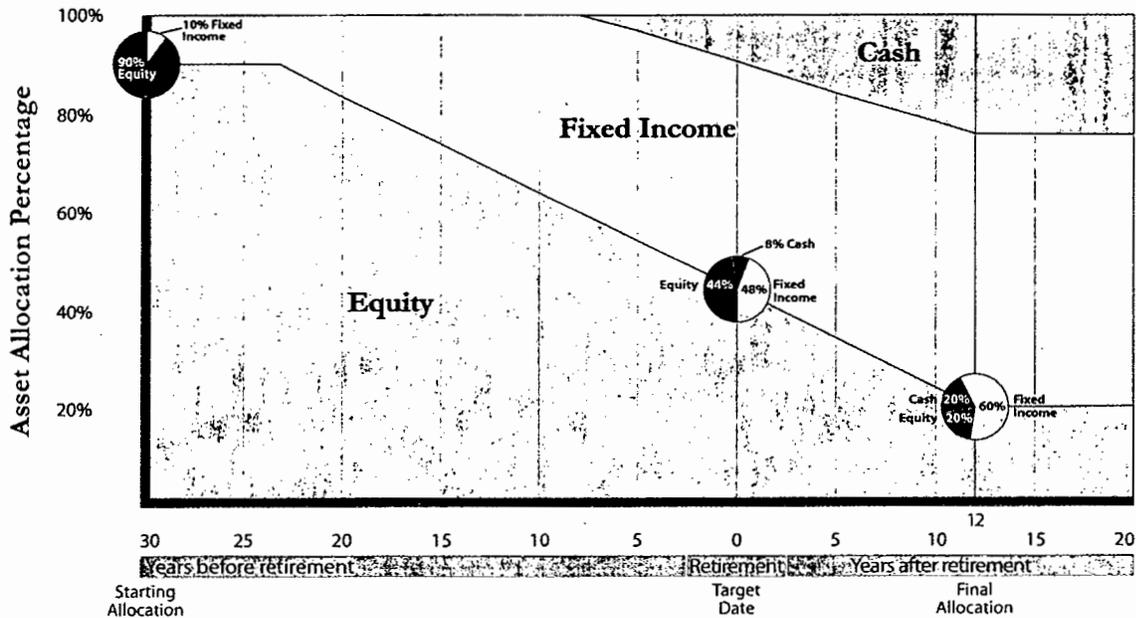
Examples of presentations of a generic table, chart, or graph that may be appropriate for a multiple fund advertisement are as follows:

**Example 1**

Asset Allocation	Starting Allocation							Target Date				Final Allocation
Equity	90%	90%	84%	74%	64%	54%	44%	34%	24%	20%	20%	20%
Fixed Income	10%	10%	16%	26%	36%	43%	48%	53%	58%	60%	60%	60%
Cash	0%	0%	0%	0%	0%	3%	8%	13%	18%	20%	20%	20%
	30	25	20	15	10	5	0	5	10	12	15	20

← Years Before Retirement → Retirement ← Years After Retirement →

**Example 2**



If the proposal were adopted, a target date fund whose asset allocations may vary within a range (e.g., target date allocations of 40%-50% equity securities, 40%-50% fixed

income securities, 0%-10% cash and cash equivalents) should present the range in its table, chart, or graph. In the case of marketing materials that relate to a single target date fund, ranges, if applicable, should be shown for future periods, but could not be shown for past periods, because the fund would be required to show its actual allocations for past periods. As noted above, it would be inconsistent with the rule and potentially misleading for a target date fund to include ranges with the intent of investing only at one end of the ranges.<sup>70</sup>

We believe that it is important for target date funds to highlight certain key information about the glide path – that the asset allocation changes over time; that the asset allocation becomes fixed at the landing point, as well as the final allocation; and any discretion by the fund’s adviser to modify the glide path shown. We believe that a target date fund’s final asset allocation is important information for investors.<sup>71</sup> Investors need to consider whether a particular target date fund’s final allocation, and the date that the final allocation is reached, are consistent with the investor’s goals.

For these reasons, we are proposing to require that the proposed table, chart, or graph be immediately preceded by a statement that helps explain the table, chart, or graph to investors in the case of advertisements and supplemental sales literature that (i) relate to a single target date fund and are submitted for publication prior to the landing point; or (ii) relate to multiple target date funds with different target dates that all have the same pattern of asset allocations. The statement would be required to include the following

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<sup>70</sup> See note 62 and discussion at accompanying paragraph.

<sup>71</sup> See, e.g., Joint Hearing Transcript, *supra* note 12, at 154 (testimony of Mark Wayne, National Association of Independent Retirement Plan Advisors) (discussing disclosure of the landing point for target date fund glide paths).

information: (i) the asset allocation changes over time; (ii) the landing point (or in the case of a table, chart, or graph for multiple target date funds, the number of years after the target date at which the landing point will be reached); an explanation that the asset allocation becomes fixed at the landing point; and the intended percentage allocations among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) at the landing point; and (iii) whether, and the extent to which, the intended percentage allocations among types of investments may be modified without a shareholder vote. We are not proposing any particular presentation requirements for the statement because we propose to require the statement to immediately precede the table, chart, or graph, which must itself be prominent. For that reason, we believe that more specific presentation requirements, such as font size, are unnecessary.

We are not proposing to require the explanatory statement in advertisements and supplemental sales literature that relate to a single target date fund that are submitted for publication on or after the landing point. Because the landing point will have already been reached, the disclosure that the asset allocation changes over time and the landing point disclosures will be of limited, if any, relevance to investors. However, the marketing materials would nonetheless be required to include a statement that advises an investor whether, and the extent to which, the intended percentage allocations among types of investments may be modified without a shareholder vote.<sup>72</sup>

We are not proposing to apply the table, chart, or graph requirement or a similar requirement to radio or television advertisements because it appears to be difficult to convey this information effectively in those media and could result in the imposition of very substantial costs for additional advertising time. We believe, however, that

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<sup>72</sup> Proposed rule 482(b)(5)(ii)(C); proposed rule 34b-1(c).

investors who are attempting to determine whether a target date fund is an appropriate investment would consider the disclosure of the landing point and the fund's asset allocation at the landing point to be important information. Therefore, we are proposing to amend rules 482 and 34b-1 to require that a radio or television advertisement that is submitted for use prior to the landing point and that places a more than insubstantial focus on one or more target date funds, and that uses the name of a target date fund that includes a date (including a year), must disclose the landing point, an explanation that the allocation of the fund becomes fixed at the landing point, and the intended percentage allocations of the fund among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) at the landing point.<sup>73</sup> We are limiting this disclosure to advertisements that relate to funds whose name includes a date because those advertisements would be required to contain the target date allocation,<sup>74</sup> and we are concerned that investors understand that the target date allocation is not the final allocation. The proposed disclosure would be required to be given emphasis equal to that used in the major portion of the advertisement.<sup>75</sup>

We are not proposing to require the landing point disclosures in radio and television advertisements that are submitted for use at and after the landing point. The

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<sup>73</sup> Proposed rule 482(b)(5)(v). As discussed in Part II.A.4 infra, radio and television advertisements that place a more than insubstantial focus on one or more target date funds must also include a statement that advises an investor whether, and the extent to which, the intended percentage allocation of the target date fund among types of investments may be modified without a shareholder vote. See proposed rule 482(b)(5)(ii)(C).

<sup>74</sup> See proposed rule 482(b)(5)(iii).

<sup>75</sup> See proposed rule 482(b)(6); proposed rule 34b-1(c). This is the same requirement that currently applies to certain legend-type disclosures under rule 482(b)(5), which we propose to renumber as rule 482(b)(6).

reason is that those advertisements would be required to contain the fund's actual asset allocation as of the most recent calendar quarter, which should be the same as, or more relevant than, the fund's past asset allocation at the landing point.<sup>76</sup>

We request comment on the proposed asset allocation table, chart, or graph and related narrative disclosure and, in particular, on the following:

- Is the proposed definition of “target date” appropriate? Should it be modified in any way? Do all target date funds use a target date in their names or prospectuses? Do any target date funds use an alternative to a specific target date in their names or prospectuses? For example, do some target date funds provide a range of years (e.g., 2010-2014)? If so, should we modify the definition of “target date” to reflect this?
- As proposed, the amendments, with the exception of the amendments relating to radio and television advertisements that use the name of a target date fund that includes a date, would apply to all target date funds. Should any or all of the proposed amendments apply only to target date funds that include a date in their name? Should radio and television advertisements for target date funds be required to include the target date and/or landing point asset allocations, whether or not the fund name includes a date?
- Would the proposed table, chart, or graph requirement be helpful to investors? Should we prescribe the specific format of the table, chart, or graph in order to enhance comparability for investors? For example, would one form (e.g., graph) be more easily understandable by investors

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<sup>76</sup> See proposed rule 482(b)(5)(iii).

than another (e.g., table)? Should we try to enhance comparability among target date funds by prescribing a methodology for calculating a fund's percentage allocations? Should we specify the particular types of investments for which allocations must be shown in the table, chart, or graph and how these types should be defined?<sup>77</sup>

- Should the table, chart, or graph be required to be prominent? Are there other presentation requirements that would be more appropriate?
- Should the table, chart, or graph, as proposed, be required in supplemental sales literature that is preceded or accompanied by a statutory prospectus, or is it unnecessary in those instances because sufficient information is contained in the prospectus?
- Are the differences in requirements for marketing materials that relate to a single target date fund and multiple target date funds appropriate, or should they be modified? Should the table, chart, or graph for a single target date fund be required to show the fund's actual historical asset allocations? Will the use of actual historical asset allocations be helpful or confusing to investors in cases where a fund has changed from its previous glide path? Should the table, chart, or graph for a single target date fund instead be permitted to show the current glide path that is common to all target date funds in a fund family? Would it be misleading for marketing

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We have raised a number of questions on methodology and types of investments in our request for comment in Part II.A.2 regarding disclosure of asset allocation at the target date in proximity to fund names. Commenters are invited to address those questions on methodology and types of investments with respect to the table, chart, or graph as well.

materials for a single target date fund to omit the fund's historical asset allocations?

- Should the table, chart, or graph for a single target date fund be required to clearly depict the current asset allocation? Should we, as proposed, require the asset allocation as of the most recent calendar quarter ended prior to the submission of the marketing materials for publication? Are there any circumstances where we should permit the table, chart, or graph for a single target date fund to exclude asset allocations for past periods? If we permit a single target date fund to exclude past asset allocations in any circumstances, should we nonetheless prohibit a fund from excluding past asset allocations if the marketing materials contain past performance information for the fund? Are past asset allocations helpful to allow an investor to assess the performance of the target date fund relative to the risk taken? Would disclosure of past performance information without disclosure of past asset allocations confuse or mislead investors?
- Is the proposed maximum five-year interval for the table, chart, or graph appropriate? Should it be shorter (e.g., 1 year or 3 years) or longer (e.g., 10, 15, or 20 years)? Are there any periods for which intervals of shorter duration should be shown? For example, should the table, chart, or graph depict the five years before the target date and/or landing point using one-year intervals? Is it necessary to require any particular interval? Is it also appropriate to require asset allocations at the fund's inception, target date, and landing point, as proposed?

- Would the proposed required statement preceding the table, chart, or graph be helpful to investors? Is any of the information unnecessary? Is there additional information that should be required to be included in the proposed statement? Should we prescribe the particular content of the statement? What would be the clearest plain English format for the statement? Should any particular presentation requirements, such as font size or style, apply to the statement that is required to accompany the table, chart, or graph? Should we require marketing materials that relate to a single target date fund that are submitted for publication on or after the landing point to include the explanatory statement preceding the table, chart, or graph?
- We are proposing that radio and television advertisements provide information relating to the landing point. Should this information be required in marketing materials that are submitted for use on or after the landing point? Is there additional information that should be required to be included in radio and television advertisements? For example, is there a means of effectively communicating information comparable to that contained in the table, chart, or graph requirement in radio or television advertisements?

**4. Disclosure of Risks and Considerations Relating to Target Date Funds**

We are proposing to amend rules 482 and 34b-1 to require target date fund advertisements and supplemental sales literature that place a more than insubstantial focus on one or more target date funds to include a statement that is intended to inform an

investor regarding certain risks and considerations that are important when deciding whether to invest in a target date fund. Because of the importance of this information, we are proposing that the required statement be subject to the presentation requirements that currently apply to other important legend disclosures under rules 482 and 34b-1.<sup>78</sup> In addition, because we believe that this disclosure would be pertinent to investors in all target date funds, including those that do not have a date in their names, the statement would be required in the marketing materials for all target date funds, regardless of whether a fund includes a date in its name.

First, the statement would be required to advise an investor to consider, in addition to his or her age or retirement date, other factors, including the investor's risk tolerance, personal circumstances, and complete financial situation.<sup>79</sup> As described above, our staff has reviewed a sample of target date fund marketing materials and observed that these materials often characterize target date funds as offering investors a simple solution for their retirement needs, such as by inviting investors to choose the fund whose target date most closely matches their anticipated retirement date.<sup>80</sup> In addition, the inclusion of a date in a target date fund's name, as is typically the case today, provides a mechanism by which an investor may identify a fund that appears to meet his or her retirement needs based simply on a retirement date. As a result, we believe that it is important to highlight the fact that the appropriateness of a target date fund investment depends not only on age or retirement date, but on other factors.

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<sup>78</sup> Proposed rule 482(b)(6); proposed rule 34b-1(c).

<sup>79</sup> Proposed rule 482(b)(5)(ii)(A); proposed rule 34b-1(c).

<sup>80</sup> See discussion supra Part I.B.

Second, the statement would be required to advise an investor that an investment in the fund is not guaranteed and that it is possible to lose money by investing in the fund, including at and after the target date.<sup>81</sup> Concerns have been raised about the degree to which marketing materials for target date funds may have contributed to a lack of understanding by investors of those funds and their associated investment strategies and risks. Investors may expect that at the target date, most, if not all, of their fund's assets will be invested conservatively to provide a pool of assets for retirement needs. Some marketing materials may be misperceived as promising minimal risks or a guaranteed investment.<sup>82</sup> To address potential investor misunderstanding with respect to the safety of target date funds, particularly at and after an investor's retirement, the proposed amendments would require target date fund marketing materials to alert investors to the risk of loss.

Third, unless disclosed as part of the statement immediately preceding the table, chart, or graph that is required in marketing materials that are in print or delivered through an electronic medium, the statement would be required to advise an investor whether, and the extent to which, the intended percentage allocations of a target date fund among types of investments may be modified without a shareholder vote.<sup>83</sup> Target date funds are designed to make it easier for investors to hold a diversified portfolio of assets that is rebalanced automatically among asset classes over time. A target date fund's

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<sup>81</sup> Proposed rule 482(b)(5)(ii)(B); proposed rule 34b-1(c).

<sup>82</sup> See notes 37-38 and discussion at accompanying text.

<sup>83</sup> Proposed rule 482(b)(5)(ii)(C). See proposed rule 482(b)(5)(iv)(C) (statement required to precede table, chart, or graph). See also note 71 and discussion at accompanying paragraph (discussion of statement required to precede table, chart, or graph).

disclosed intended asset allocations over time are a principal distinguishing feature of the fund. The proposed amendments are intended to inform investors of any flexibility that the fund and its investment adviser retain to modify allocations from time to time. We would note that, because a target date fund is, in essence, marketing the expertise of its manager in designing appropriate asset allocations over the long term, as a general matter, we would not expect target date funds to modify their glide paths frequently. In addition, we would expect that a manager would have a sound basis for any changes to a target date fund's glide path. Further, we would expect a target date fund's board of directors to monitor both the frequency and nature of the manager's exercise of its flexibility to modify the fund's glide path.<sup>84</sup>

We request comment generally on the proposed required statement regarding risks and considerations and, in particular, on the following issues:

- The proposed amendments apply to all target date funds. Should the proposed amendments apply only to target date funds that include a date in their name?
- Will the proposed required statement that is intended to inform an investor regarding important risks and considerations be effective? Should the proposed requirement be modified? Are any of the proposed disclosures not relevant or helpful in the case of some or all target date funds? Should

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<sup>84</sup> Cf. Independent Directors Council, Board Oversight of Target Retirement Date Funds (2010), available at [http://www.ici.org/idc/idc\\_directors\\_resources/idc\\_public\\_other\\_publications/10\\_idc\\_trd\\_f](http://www.ici.org/idc/idc_directors_resources/idc_public_other_publications/10_idc_trd_f) (suggesting that a target date fund board may want to ask questions about the adviser's flexibility to actively adjust asset allocation along the glide path to take into account market conditions, how frequently adjustments might be made, and criteria and limits for making adjustments).

additional disclosures be required? Should we prescribe the particular language of the statement?

- As proposed, the existing presentation requirements under rules 482 and 34b-1 would apply to the proposed new statement. Should they be modified in any way for this context?
- Are there additional rule amendments that would address any concerns regarding target date fund marketing materials? For example, should such materials disclose the past performance of the fund's asset allocation model or similar models? If this information should be disclosed, would this information be more appropriately included in prospectuses or shareholder reports?

#### **B. Antifraud Guidance**

Rule 156 under the Securities Act provides guidance on the types of information in investment company sales literature that could be misleading. It applies to all sales literature, whether or not those materials are preceded or accompanied by the fund's statutory prospectus.<sup>85</sup> Under rule 156, whether a statement involving a material fact is misleading depends on an evaluation of the context in which it is made. Rule 156 outlines certain situations in which a statement could be misleading. These include certain general factors that could cause a statement to be misleading,<sup>86</sup> as well as

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<sup>85</sup> Rule 156(c) under the Securities Act [17 CFR 230.156(c)] defines "sales literature" to include "any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company."

<sup>86</sup> A statement could be misleading because of (i) other statements being made in connection with the offer of sale or sale of the securities in question; (ii) the absence of explanations, qualifications, limitations, or other statements necessary or appropriate to

circumstances where representations about past or future investment performance<sup>87</sup> and statements involving a material fact about the characteristics or attributes of an investment company<sup>88</sup> could be misleading.

We are proposing to amend rule 156 to address certain statements suggesting that securities of an investment company are an appropriate investment. Marketing materials for target date funds often focus to a significant extent on the purpose for which (*i.e.*, to meet retirement needs) and the investors for whom (*i.e.*, investors of specified ages and retirement dates) the funds are intended. In light of the nature of target date fund marketing materials, and the concerns that have been raised about those materials, we are proposing to amend rule 156 to address statements that relate to the appropriateness of an investment. While target date funds are the immediate impetus for the proposed amendments to rule 156, the proposed amendments, like the current provisions of rule 156 would, if adopted, apply to all types of investment companies. This reflects our view

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make such statement not misleading; or (iii) general economic or financial conditions or circumstances. See rule 156(b)(1) under the Securities Act [17 CFR 230.156(b)(1)].

<sup>87</sup> Representations about past or future investment performance could be misleading because of statements or omissions made involving a material fact, including situations where (i) portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances; and (ii) representations, whether express or implied, are made about future investment performance. See rule 156(b)(2) under the Securities Act [17 CFR 230.156(b)(2)].

<sup>88</sup> A statement involving a material fact about the characteristics or attributes of an investment company could be misleading because of (i) statements about possible benefits connected with or resulting from services to be provided or methods of operation which do not give equal prominence to discussion of any risks or limitations associated therewith; (ii) exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by the company, services, security of investment or funds, effects of government supervision, or other attributes; and (iii) unwarranted or incompletely explained comparisons to other investment vehicles or to indexes. See rule 156(b)(3) under the Securities Act [17 CFR 230.156(b)(3)].

that certain types of statements or representations have the potential to mislead investors, regardless of the type of investment company that is the subject of these statements.

The proposed amendments to rule 156 would provide that a statement suggesting that securities of an investment company are an appropriate investment could be misleading in two circumstances. First, such a statement could be misleading because of the emphasis it places on a single factor, such as an investor's age or tax bracket, as the basis for determining that an investment is appropriate.<sup>89</sup> Age and tax bracket are specified in the proposed rule language as examples of factors that could be overemphasized within sales literature, but this is not intended to suggest that they are the only factors whose overemphasis could cause sales literature to be misleading.

This proposed provision of the rule arises out of our recognition that while target date funds use investor ages and expected retirement dates as a mechanism by which an investor may identify a fund that appears to meet his or her retirement needs, undue emphasis on the single factor of age or retirement date could cause an investor to fail to consider other factors, such as the investor's particular financial situation, personal circumstances, and risk tolerance, that are important in selecting an appropriate investment.<sup>90</sup> This could result in investor confusion, and, in some circumstances, could even result in an investor being misled. We have included tax bracket as an example of a

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<sup>89</sup> Proposed rule 156(b)(4)(i).

<sup>90</sup> The models used for asset allocation in target date funds are based on additional factors and not solely on an investor's retirement date. For example, target date fund models may make certain assumptions about investors' contributions, salary increases, loans, and distributions that may vary widely across investors in the same age or retirement groups. See J.P. Morgan Asset Management, Ready! Fire! Aim? How Some Target Date Fund Designs are Missing the Mark on Providing Retirement Security to Those Who Need It Most at 7-9 (Oct. 2007), available at <http://www.dol.gov/ebsa/pdf/TDFSupp6.pdf> (observing that differences in these assumptions have a large impact on the assets projected to be available at retirement).

factor that could be overemphasized by some investment companies, for example, tax-exempt funds or variable annuity issuers, and not because it has been emphasized by target date funds.

Second, a statement suggesting that securities of an investment company are an appropriate investment could be misleading under the proposed amendment because of representations, whether express or implied, that investing in the securities is a simple investment plan or that it requires little or no monitoring by the investor.<sup>91</sup> While target date funds are designed to make it easier for investors to hold a diversified portfolio of assets that is rebalanced automatically among asset classes over time, the selection of an appropriate fund does not entail a simple decision. The fact that target date fund managers have adopted very different asset allocation strategies is itself indicative of the complexity involved in selecting an appropriate asset allocation and, as discussed in the preceding paragraph, the selection of appropriate investments involves the consideration of multiple factors. Similarly, a decision to invest in an investment company of another type is not a simple decision, as it involves numerous considerations, including the investment objectives and strategies, costs, and risks of the fund and the investor's complete financial situation, personal circumstances, and risk tolerance.

In addition, while a particular target date fund could be an appropriate investment at the time the fund was initially selected by the investor, this may change over time as, for example, the investor experiences changes in his or her life expectancy or other personal circumstances, financial condition, or risk tolerance. This is equally true of all types of investment companies. As a result, the Commission is concerned that

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<sup>91</sup> Proposed rule 156(b)(4)(ii).

representations that an investment in the securities of a target date fund or other investment company is a simple investment plan or requires little or no monitoring by the investor have the capacity to confuse and potentially to mislead investors. These representations may dissuade an investor from sufficient examination of the investment objectives and strategies, costs, and risks of a target date fund or other investment company and of the appropriateness of an initial or additional investment in the fund, given the investor's complete financial situation, personal circumstances, and risk tolerance. These representations may also dissuade an investor from monitoring an investment or conducting a periodic review and assessment of the fund's performance and continuing fit with the investor's objectives and changing life situation.

We request comment on the proposed amendments to rule 156 and, in particular, on the following issues:

- Are the proposed amendments to rule 156 appropriate? Should the proposed amendments apply to all investment companies or only to target date funds? If the proposed amendments are not made applicable to all investment companies, are there types of funds other than target date funds (e.g., balanced or lifestyle funds), to which the proposed amendments should apply?
- Will the proposed amendments to rule 156 discourage marketing materials for target date funds and other funds that have the potential to confuse or mislead investors? Are there additional amendments to rule 156 that would help to emphasize the obligations under the antifraud provisions of funds

and their underwriters and dealers and that would address concerns regarding target date fund marketing materials?

- Are there any factors, in addition to age and tax bracket, that should be included in the proposed amendments as examples of single factors that could be overemphasized in determining whether an investment is appropriate?

### **C. Technical and Conforming Amendments**

We are proposing technical and conforming amendments to rule 34b-1. We are proposing to remove references to paragraphs (a) and (b) of rule 34b-1 in the introductory text and the note to introductory text to indicate, in a more straightforward manner, that the references are to the entirety of rule 34b-1.<sup>92</sup> We are also proposing to revise the heading of the current note that follows paragraph (b) of rule 34b-1 to state explicitly that the note applies to paragraph (b). We are also proposing amendments to cross-references in rule 34b-1 to reflect the proposed redesignation of paragraph (b)(5) in rule 482 as paragraph (b)(6). In addition, we are proposing to replace the reference to “NASD Regulation, Inc.” in the note to paragraph (h) of rule 482 with “Financial Industry Regulatory Authority, Inc.”

### **D. Compliance Date**

If the proposed amendments to rules 482 and 34b-1 are adopted, the Commission expects to require target date fund advertisements and supplemental sales literature that are used 90 days or more after the effective date of the amendments to comply with the amendments. If the proposed amendments to rule 156 are adopted, the Commission

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<sup>92</sup> Paragraphs (a) and (b) are the only paragraphs of current rule 34b-1.

expects that the amendments to rule 156 will take effect immediately upon the effective date of the amendments.

The Commission requests comment on the proposed compliance dates. Are the proposed periods an appropriate transition period for compliance, or should they be shorter or longer? Should the Commission require compliance with rules 482 and 34b-1 based on the date that advertisements and supplemental sales literature are used or the date that advertisements and supplemental sales literature are submitted for publication, or should it require compliance on some other basis?

**E. Request for Comments on Prospectus Disclosure Requirements**

The amendments that we are proposing address the concerns that have been raised regarding the potential for investor misunderstanding to arise from target date fund names and marketing materials. In this release, we are not proposing amendments to the prospectus disclosure requirements. A target date fund is currently required to disclose, among other things, its investment objective, principal investment strategies, including the particular type or types of investments in which the fund principally invests or will invest, the principal risks of investing in the fund, and its fees and expenses.<sup>93</sup> Our staff has examined the prospectus disclosures made by a number of target date funds in their registration statements filed with the Commission and has observed that, pursuant to existing requirements, target date fund prospectuses generally disclose:

- A description of the glide path of the target date fund, often presented as a table or graph broken down by asset class, such as equity securities, fixed income securities, and cash and cash equivalents;

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<sup>93</sup> See Items 2, 3, 4, and 9 of Form N-1A [17 CFR 239.15A and 274.11A].

- The significance of specific points along the glide path, such as the target date used in the fund's name and the landing point, and any flexibility retained by the investment adviser to deviate from the glide path; and
- The specific risks attendant to investments in target date funds, such as the risk of loss up to and after the target date, and the risk of loss due to the absence of guarantees associated with the investment.

We believe that these disclosures are material to target date fund investors and required to be disclosed as part of the discussion of a fund's principal investment strategies and principal investment risks. We are, however, concerned that there may be disclosures about target date funds that are important to investors and that are not required by our current prospectus and registration statement line item disclosure requirements, and we request comment on this matter.

We request comment on prospectus disclosure requirements for target date funds and, in particular, on the following issues:

- Generally, Form N-1A, the registration form for mutual funds, does not prescribe separate requirements for different types of funds. Should Form N-1A be amended to provide specific requirements for target date funds? If so, what types of disclosures should be addressed?
- Should target date fund prospectuses and/or statements of additional information be expressly required to disclose the fund's landing point? Should we expressly require disclosure as to whether the target date fund manager is managing the fund "to" the stated target date or "through" that date, e.g., based on life expectancy?

- Should target date fund prospectuses and/or statements of additional information be expressly required to disclose the underlying assumptions that led the target date fund manager to select the fund's current glide path? For example, should a target date fund prospectus or statement of additional information be required to disclose the manager's assumptions, such as assumptions about life expectancy, inflation, savings rate, other investments, retirement and labor income, and withdrawal rates, that were used in construction of its asset allocation glide path? Would this disclosure help an investor and/or the investor's financial adviser to determine whether a particular target date fund is appropriate for the investor? Would this disclosure assist investors by facilitating the ability of third party information providers to publish comparisons across target date funds? Would investors be able to make effective use of this information by themselves? Or would this disclosure confuse and/or overwhelm investors?
- Should a target date fund be expressly required to disclose in its prospectus or statement of additional information the flexibility retained by the target date fund manager to change the glide path in the future? Should a target date fund be expressly required to disclose in its prospectus or statement of additional information the number of times that it has previously changed its glide path and/or the number of times that target date funds in the same complex have previously changed their glide paths and the reasons for those changes?

- Should a target date fund be expressly required to disclose in its prospectus or statement of additional information the latitude it has to deviate from its stated glide path, the circumstances under which it may deviate from its stated glide path, past instances when it has deviated from its stated glide path, and the reasons for any past deviations?
- Should we expressly require disclosure in the prospectus or statement of additional information regarding the use of any commodities, derivatives, or other alternative investments by a target date fund? Should we expressly require disclosure regarding the effect of leverage on a target date fund's asset allocation, whether attributable to borrowing, derivative investments, or other sources?
- If we require new line item disclosures that are specific to target date funds, should these be included in the prospectus or the statement of additional information? If they should be in the prospectus, should they be required to be included in the summary section at the front of the prospectus and in the summary prospectus, if any, that a fund chooses to use under rule 498 under the Securities Act.<sup>94</sup>

### **III. GENERAL REQUEST FOR COMMENTS**

The Commission requests comment on the amendments proposed in this release, whether any further changes to our rules or forms are necessary or appropriate to implement the objectives of our proposed amendments, and on other matters that might affect the proposals contained in this release.

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<sup>94</sup> 17 CFR 230.498.

#### IV. PAPERWORK REDUCTION ACT

Certain provisions of the proposed amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>95</sup> We are submitting the proposed collections of information to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.<sup>96</sup> The titles for the existing collections of information are: (1) “Rule 482 under the Securities Act of 1933 Advertising by an Investment Company as Satisfying Requirements of Section 10”; and (2) “Rule 34b-1 (17 CFR 270.34b-1) under the Investment Company Act of 1940, Sales Literature Deemed to Be Misleading.”<sup>97</sup> An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Rule 482 (OMB Control No. 3235-0565) was adopted pursuant to Section 10(b) of the Securities Act.<sup>98</sup> Rule 34b-1 (OMB Control No. 3235-0346) was adopted pursuant to Section 34(b) of the Investment Company Act.<sup>99</sup> Rules 482 and 34b-1, including the proposed amendments, contain collection of information requirements. Rule 482 permits a registered investment company to advertise information prior to delivery of a statutory prospectus. Rule 34b-1 prescribes the requirements for supplemental sales literature (*i.e.*, sales literature that is preceded or accompanied by the statutory prospectus). Compliance

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<sup>95</sup> 44 U.S.C. 3501, *et seq.*

<sup>96</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>97</sup> Rule 156 does not contain “collection of information” requirements within the meaning of the PRA. The proposed amendments to rule 156 also do not involve a “collection of information.”

<sup>98</sup> 15 U.S.C. 77j(b).

<sup>99</sup> 15 U.S.C. 80a-33(b).

with the rules is mandatory. Responses to the disclosure requirements will not be kept confidential.

We are proposing amendments to rules 482 and 34b-1 that would apply to advertisements and supplemental sales literature that place a more than insubstantial focus on one or more target date funds. Specifically, we are proposing amendments to rules 482 and 34b-1 that would require a target date fund that includes the target date in its name to disclose the target date (or current) asset allocation of the fund immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name in advertisements and supplemental sales literature. The Commission is also proposing amendments to rules 482 and 34b-1 that would require enhanced disclosure in advertisements and supplemental sales literature for a target date fund regarding the fund's glide path and asset allocation at the landing point, as well as the risks and considerations that are important when deciding whether to invest in a target date fund.

The information required by the proposed amendments is primarily for the use and benefit of investors. The amendments that we are proposing in this release are intended to address concerns that have been raised regarding the potential for investor misunderstanding to arise from target date fund names and marketing materials. The additional information that would be required to be disclosed pursuant to the collection of information provisions of the proposed amendments would address these concerns regarding investor protection.

The proposed amendments to rule 482 require: (i) for advertisements relating to a target date fund whose name includes a date, disclosure of the asset allocation of the fund

at the target date (or for advertisements that are submitted for publication or use on or after the target date, a fund's actual asset allocation as of the most recent calendar quarter ended prior to the submission of the advertisement for publication or use); (ii) for print or electronic advertisements relating to a single target date fund, a table, chart, or graph that depicts the actual percentage allocation of the fund among types of investments from the inception of the fund through the most recent calendar quarter ended prior to the submission of the advertisement for publication and the future intended allocations of the fund; (iii) for print or electronic advertisements relating to multiple target date funds with different target dates that all have the same pattern of asset allocations, either separate presentations for each target date fund that meet the requirements of clause (ii) or a single table, chart, or graph that depicts the intended allocations of the funds among types of investments; (iv) for advertisements that relate to a single target date fund and are submitted for publication prior to the landing point or that relate to multiple target date funds with different target dates that all have the same pattern of asset allocations, a statement preceding the table, chart, or graph that explains the table, chart, or graph and provides certain information about the glide path and landing point; (v) enhanced disclosures relating to the landing point in radio and television advertisements that are submitted for use prior to the landing point for funds whose names include a target date; and (vi) statements alerting investors to certain risks and considerations relating to an investment in a target date fund. The proposed amendments to rule 34b-1 would apply the same requirements, other than those described in clause (v), to supplemental sales literature.

The PRA burden estimates for the proposed amendments to rules 482 and 34b-1 are based on the Commission staff's experience with the various types of investment companies registered with the Commission, including PRA burden estimates that the Commission has used for other requirements. The Commission estimates that there are approximately 357 funds that are either a registered management investment company or a separate series of a registered management investment company that would fall within the proposed definition of "target date fund" for purposes of the proposed amendments to rules 482 and 34b-1.<sup>100</sup> We believe that part of the PRA burden will be incurred on an initial one-time basis and that part of the PRA burden will be ongoing.

The Commission estimates that internal marketing personnel and compliance attorneys of a target date fund subject to the proposed amendments would spend, as an initial one time burden in order to comply with the proposed amendments, an average of 15 hours, consisting of: (1) one hour to prepare and review the fund's intended target date (or current) asset allocation disclosure; (2) 10 hours to prepare and review the table, chart, or graph that depicts the glide path of the fund, the statement preceding the table, chart, or graph, and the enhanced disclosures relating to the landing point in radio and television advertisements; and (3) four hours to prepare and review the statement alerting investors to certain risks and considerations relating to an investment in a target date fund. We estimate the initial one-time burden for all target date funds to comply with the proposed amendments to be approximately 5,355 hours.<sup>101</sup> Because the disclosures

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<sup>100</sup> This estimate is based on Commission staff analysis of data obtained from Morningstar Direct. The Commission staff believes that all funds that meet the proposed definition of a target date fund currently use a date in their names and would be subject to all of the proposed amendments to rules 482 and 34b-1.

<sup>101</sup> 357 target date funds x 15 hours = 5,355 hours.

proposed to be required under rules 482 and 34b-1 are the same, we believe that the hour burden associated with initial compliance would not be duplicated under both rules and do not believe that there would be any additional burden associated with rule 34b-1 because the proposed amendments would not affect the level of review needed by funds to comply with rule 34b-1. Therefore, we have assigned the initial one-time burden to rule 482.

We also estimate certain ongoing costs with respect to advertisements and supplemental sales literature associated with the proposed amendments to rules 482 and 34b-1. First, we anticipate that there will be ongoing costs associated with the proposed requirement that a target date fund submitting an advertisement or supplemental sales literature for publication or use on or after the date that is included in the fund's name must disclose, immediately adjacent to the fund's name, the fund's actual asset allocation as of the most recent calendar quarter ended prior to the submission of the advertisement. We estimate that internal marketing personnel and compliance attorneys of a target date fund subject to the proposed amendments would spend an average of one hour per response on an ongoing basis to update the asset allocations disclosed immediately adjacent to the fund's name.

We estimate that 58,368 responses<sup>102</sup> to rule 482 are filed annually by 3,540 registered investment companies offering approximately 16,225 funds, or approximately 3.6 responses per fund annually.<sup>103</sup> Therefore, we estimate that the 357 target date funds

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<sup>102</sup> The estimated number of responses to rule 482 is composed of 58,093 responses filed with the Financial Industry Regulatory Authority, Inc. ("FINRA") and 275 responses filed with the Commission in 2009.

<sup>103</sup>  $58,368 \text{ responses} \div 16,225 \text{ funds} = 3.6 \text{ responses per fund.}$

would file 1,285 responses to rule 482 annually.<sup>104</sup> Of these responses, we estimate that 15% would be responses submitted on or after the date that is included in the fund's name.<sup>105</sup> In the first year, we estimate that the ongoing burden associated with the proposed requirement that a target date fund submitting an advertisement on or after the date that is included in the fund's name must disclose the fund's actual asset allocation as of the most recent calendar quarter ended would be 139 hours.<sup>106</sup> In each subsequent year, we estimate that the ongoing burden associated this requirement would be 193 hours.<sup>107</sup>

With regard to rule 34b-1, we estimate that 11,544<sup>108</sup> responses are filed annually by 3,540 registered investment companies offering approximately 16,225 funds, or approximately 0.7 responses per fund annually.<sup>109</sup> Therefore, we estimate that the 357

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<sup>104</sup> 357 funds x 3.6 responses per fund = 1,285 responses.

<sup>105</sup> Based on Commission staff analysis of data as of March 31, 2010, obtained from Morningstar Direct, 47 target date funds contain a date in the name that is on or before the year 2010. This amounts to approximately 13% of the 357 target date funds (357 target date funds ÷ 47 target date funds = 13%), which we have rounded up for purposes of our estimates to 15%.

<sup>106</sup> Because we have assumed in the first year that one response will not impose any burden beyond the initial one time burden of 15 hours, target date funds submitting an advertisement for publication on or after the date that is included in the fund's name would bear an ongoing burden of 1 hour with respect to the remaining 2.6 responses (357 target date funds x 0.15 x 1 hour x 2.6 responses = 139 hours).

<sup>107</sup> In subsequent years, the ongoing cost burden for target date funds submitting an advertisement for publication on or after the date that is included in the fund's name would equal 193 hours (357 target date funds x 0.15 x 1 hour x 3.6 responses = 193 hours).

<sup>108</sup> The estimated number of responses to rule 34b-1 is composed of 10,904 responses filed with FINRA and 640 responses filed with the Commission in 2009.

<sup>109</sup> 11,544 responses ÷ 16,225 funds = 0.7 responses per fund.

target date funds would file approximately 250 responses to rule 34b-1 annually.<sup>110</sup> Of these responses, we estimate that 15% would be responses submitted on or after the date that is included in the fund's name.<sup>111</sup> Therefore, we estimate that the ongoing annual burden associated with the requirement that a target date fund submitting supplemental sales literature on or after the date that is included in the fund's name must disclose the fund's actual asset allocation as of the most recent calendar quarter ended would be approximately 37 hours.<sup>112</sup>

Second, we further estimate that there will be ongoing costs associated with the requirement that, in advertisements and supplemental sales literature that relate to a single target date fund, the table, chart, or graph must clearly depict the actual percentage allocations among types of investments from the inception of the fund through the most recent calendar quarter ended prior to the submission of the materials for publication and the future intended percentage allocations of the fund. We estimate that internal marketing personnel and compliance attorneys of a target date fund subject to the proposed amendments would spend an average of two hours per response on an ongoing basis for single-fund advertisements and supplemental sales literature to comply with the proposed table, chart, or graph requirement.

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<sup>110</sup> 357 funds x 0.7 responses per fund = 250 responses.

<sup>111</sup> See *supra* note 105.

<sup>112</sup> We estimate that 15% of the 357 target date funds would be required to update the fund's actual asset allocation as of the most recent calendar quarter immediately adjacent to the fund's name and bear an ongoing burden of 1 hour with respect to the 0.7 average annual responses (357 target date funds x 0.15 x 1 hour x 0.7 responses = 37 hours).

We estimate that the 357 target date funds would file 1,285 responses to rule 482 annually.<sup>113</sup> Of these responses, we estimate that 25% would be single fund advertisements and 75% would be multiple fund advertisements.<sup>114</sup> In the first year, we estimate that the ongoing burden associated with the proposed table, chart, or graph requirement for single target date fund responses would be 464 hours.<sup>115</sup> In each subsequent year, we estimate that the ongoing burden associated with the proposed table, chart, or graph requirement for single target date fund advertisements would be 643 hours.<sup>116</sup>

Of the approximately 250 responses to rule 34b-1 annually, we also estimate that 25% would be single fund supplemental sales literature and 75% would be multiple fund supplemental sales literature.<sup>117</sup> We estimate that the ongoing burden associated with the proposed table, chart, or graph requirement for single target date fund supplemental sales literature would be approximately 125 hours.<sup>118</sup>

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<sup>113</sup> 357 funds x 3.6 responses per fund = 1,285 responses.

<sup>114</sup> These estimates are based on the Commission staff's review of a sample of target date fund materials filed with FINRA.

<sup>115</sup> Because we have assumed in the first year that one response will not impose any burden beyond the initial one time burden of 15 hours, each of the 357 target date funds would bear an ongoing burden of 2 hours for single target date fund advertisements with respect to 25% of the remaining 2.6 responses (357 target date funds x 2 hours x 0.25 x 2.6 responses = 464 hours).

<sup>116</sup> In subsequent years, the ongoing cost burden for single target date fund advertisements would equal 643 hours (357 target date funds x 2 hours x 0.25 x 3.6 responses = 643 hours).

<sup>117</sup> These estimates are based on the Commission staff's review of a sample of target date fund materials filed with FINRA.

<sup>118</sup> We estimate 357 target date funds would bear an ongoing burden of 2 hours for single target date fund supplemental sales literature with respect to 25% of the 0.7 average annual responses (357 target date funds x 2 hours x 0.25 x 0.7 responses = 125 hours).

Based on the foregoing estimates, the hour burden associated with the proposed amendments to rule 482 over three years would be approximately 7,630 hours.<sup>119</sup> Because the PRA estimates represent the average burden over a three-year period, we estimate the average annual hour burden for target date funds to comply with the proposed amendments to rule 482 to be approximately 2,543 hours.<sup>120</sup> The PRA burden associated with rule 482 is presently estimated to be 5.16 hours per response, for a total annual hour burden of 301,179 hours.<sup>121</sup> Therefore, we estimate that if the proposed amendments to rule 482 are adopted, the total annual hour burden for all funds to comply with the requirements of rule 482 would be 303,722 hours,<sup>122</sup> or 5.20 hours per response.<sup>123</sup>

The PRA burden associated with rule 34b-1 is presently estimated to be 2.41 hours per response, which, when multiplied by our estimate of 11,544 total annual responses to rule 34b-1, provides a total annual hour burden of 27,821 hours.<sup>124</sup> Therefore, we estimate that if the proposed amendments to rule 34b-1 are adopted, the

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<sup>119</sup> We estimate that the total incremental hour burden associated with the proposed amendments to rule 482 over three years would be 7,630 hours (5,355 hours for initial compliance + 603 hours in year 1 (139 hours + 464 hours) + 836 hours in year 2 (193 hours + 643 hours) + 836 hours in year 3 (193 hours + 643 hours) = 7,630 hours).

<sup>120</sup>  $7,630 \text{ hours} \div 3 \text{ years} = 2,543 \text{ hours}.$

<sup>121</sup>  $58,368 \text{ responses} \times 5.16 \text{ hours per response} = 301,179 \text{ hours}.$

<sup>122</sup>  $301,179 \text{ hours} + 2,543 \text{ hours} = 303,722 \text{ hours}.$

<sup>123</sup>  $303,722 \text{ hours} \div 58,368 \text{ responses} = 5.20 \text{ hours per response}.$

<sup>124</sup>  $11,544 \text{ responses} \times 2.41 \text{ hours per response} = 27,821 \text{ hours}.$

total annual hour burden for all funds to comply with the requirements of rule 34b-1 would be 27,983 hours,<sup>125</sup> or approximately 2.42 hours per response.<sup>126</sup>

We anticipate that target date funds would also incur initial one time external costs, such as the costs of modifying and reformatting layouts and typesetting, and no ongoing external costs.<sup>127</sup> We estimate that these initial external costs would be approximately \$2,900 per target date fund,<sup>128</sup> or \$1,035,300 in the aggregate,<sup>129</sup> which we have assigned to rule 482.

#### Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are to

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<sup>125</sup> 27,821 hours + 37 hours + 125 hours = 27,983 hours per year.

<sup>126</sup> 27,983 hours ÷ 11,544 responses = 2.42 hours per response.

<sup>127</sup> We believe that it is usual and customary for investment companies to periodically update and replace marketing materials. We have proposed a 90-day transition period for the proposed amendments to rules 482 and 34b-1 to minimize the burden on target date funds.

<sup>128</sup> This estimate is based on the estimate of \$2,417 for external costs that we made in 2003 when we last amended rules 482 and 34b-1. See Investment Company Act Release No. 26195 (Sept. 29, 2003) [68 FR 57760, 57771 (Oct. 6, 2003)]. We have adjusted our estimate to account for an increase of 19.4% in the consumer price index between 2003 and 2009, based on Commission staff analysis of data obtained from the Bureau of Labor Statistics.

<sup>129</sup> 357 target date funds x \$2,900 per target date fund = \$1,035,300.

respond, including through the use of automated collection techniques or other forms of information technology. We request comment and supporting empirical data on our burden and cost estimates for the proposed amendments, including the external costs that target date funds may incur.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303, with reference to File No. S7-12-10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-12-10, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE, Washington, DC 20549-0213. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication.

#### **V. COST/BENEFIT ANALYSIS**

The Commission is sensitive to the costs and benefits imposed by its rules. The Commission is proposing amendments to rules 482 and 34b-1 that would apply to advertisements and supplemental sales literature that place a more than insubstantial focus on one or more target date funds. Specifically, the Commission is proposing amendments to rules 482 and 34b-1 that would require a target date fund that includes the target date in its name to disclose the target date (or current) asset allocation of the fund

immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name in advertisements and supplemental sales literature. The Commission is also proposing amendments to rules 482 and 34b-1 that would require enhanced disclosure in advertisements and supplemental sales literature for a target date fund regarding the fund's glide path and asset allocation at the landing point, as well as the risks and considerations that are important when deciding whether to invest in a target date fund. Finally, the Commission is proposing amendments to rule 156 that would provide additional guidance regarding statements in sales literature for target date funds and other investment companies that could be misleading.

**A. Benefits**

While difficult to quantify, we believe the benefits to investors resulting from the proposed amendments would be significant given the approximately \$270 billion in assets held by target date funds registered with the Commission.<sup>130</sup>

The proposed amendments to rules 482 and 34b-1 that would require a target date fund that includes the target date in its name to disclose the target date (or current) asset allocation of the fund immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name in advertisements and supplemental sales literature are intended to convey information about the target date (or current) allocation of the fund's assets and reduce the potential for names that include a target date to contribute to investor misunderstanding of target date funds. For example, if a target date fund remains significantly invested in equity securities at the target date,

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<sup>130</sup> See *supra* note 17 and accompanying text.

the proposed disclosure would help to reduce or eliminate incorrect investor expectations that the fund's assets will be invested in a more conservative manner at that time.

In the case of target date funds, the names are designed to be significant to investors when selecting a fund. The proposed amendments are intended to benefit investors by reducing the potential of target date fund names to confuse or mislead investors regarding the fund's target date (or current) asset allocation.

The proposed amendments to rules 482 and 34b-1 are intended to benefit investors by requiring enhanced disclosure in advertisements and supplemental sales literature to provide investors basic information about the fund's glide path, in order to facilitate more informed investment decisions. Print and electronic marketing materials would be required to include a prominent table, chart, or graph that clearly depicts the percentage allocations of the fund among types of investments over the entire life of the target date fund. The proposed required statement preceding the table, chart, or graph would explain the table, chart, or graph and include the following information: (i) a statement that the fund's asset allocation changes over time; (ii) the landing point (or in the case of a table, chart, or graph for multiple target date funds, the number of years after the target date at which the landing point will be reached), an explanation that the allocation of the fund becomes fixed at the landing point, and the percentage allocations of the fund among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) at the landing point; and (iii) whether, and the extent to which, the intended percentage allocations of the fund among types of investments may be modified without a shareholder vote. The proposed table, chart, or graph requirement would present information regarding the glide path as a graphical illustration, which may

benefit investors by providing the information in a manner that is likely to be more easily understood by investors than if the information were presented in narrative format. The proposed required statement preceding the table, chart, or graph may benefit investors by helping them to better understand the table, chart, or graph.

While the proposed table, chart, or graph requirement would not apply to radio and television advertisements, we propose to require that radio or television advertisements that are submitted for use prior to the landing point, that place a more than insubstantial focus on one or more target date funds, and that use the name of a target date fund that includes a date (including a year) must disclose the landing point, an explanation that the allocation of the fund becomes fixed at the landing point, and the percentage allocations of the fund among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) at the landing point. This disclosure would benefit investors by alerting them that the target date allocation is not the final allocation.

The proposed statement on risks and considerations that are important when deciding whether to invest in a target date fund would benefit investors who review marketing materials for target date funds by providing them with information that will help prevent several types of misunderstandings about target date funds. Target date fund marketing materials would be required to advise an investor to consider, in addition to his or her age or retirement date, other factors, including the investor's risk tolerance, personal circumstances, and complete financial situation. Marketing materials also would be required to advise an investor that an investment in the target date fund is not guaranteed and that it is possible to lose money by investing in the fund, including at and

after the target date. Finally, marketing materials would be required to advise an investor whether, and the extent to which, the intended percentage allocations of a target date fund among types of investments may be modified without a shareholder vote. Better understanding of target date funds may result in investors making better informed decisions in line with their investment goals.

In addition to the benefits discussed above, the proposed amendments to rules 482 and 34b-1 may enhance efficiency by making it easier for investors to make more informed investment decisions. This ability to make more informed investment decisions may also lead to increased competitiveness among target date funds. We also believe that, as a result of investors making better informed investment decisions, companies would be able to allocate resources more efficiently in line with preferences for risk and returns.

We are proposing to amend rule 156 to provide that a statement in investment company sales literature that suggests that securities of an investment company are an appropriate investment could be misleading because of the emphasis it places on a single factor, such as an investor's age or tax bracket, as the basis for determining that the investment is appropriate, or representations, whether express or implied, that investing in the securities is a simple investment plan or that it requires little or no monitoring by the investor. This proposal is intended to reduce the potential for certain types of statements or representations to mislead investors. Marketing materials for target date funds often focus to a significant extent on the purpose for which (i.e., to meet retirement needs) and the investors for whom (i.e., investors of specified ages and retirement dates) the funds are intended. In light of the nature of target date fund marketing materials, and

the concerns that have been raised about those materials, we are proposing to amend rule 156 to address statements that relate to the appropriateness of an investment. While target date funds are the immediate impetus for the proposed amendments to rule 156, the proposed amendments, like the current provisions of rule 156 would, if adopted, apply to all types of investment companies. This reflects our view that certain types of statements or representations have the potential to mislead investors, regardless of the type of investment company that is the subject of these statements.

**B. Costs**

Our proposed amendments to rules 482 and 34b-1 would require a target date fund that includes the target date in its name to disclose the target date (or current) asset allocation of the fund immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name in advertisements and supplemental sales literature. The proposed amendments to rules 482 and 34b-1 would also require enhanced disclosure in advertisements and supplemental sales literature for a target date fund regarding the fund's glide path and asset allocation at the landing point, as well as the risks and considerations that are important when deciding whether to invest in a target date fund.

We believe that a target date fund would not incur significant costs in providing the disclosures required by rules 482 and 34b-1 because that information should be readily available to the fund. We note that many target date funds already provide the required information in their prospectuses, such as a table, chart, or graph depicting the asset allocation over time.<sup>131</sup> Furthermore, Commission staff observed in its review of a

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<sup>131</sup> Based on Commission staff review of registration statements filed with the Commission.

sample of marketing materials that some materials currently contain statements similar to those contained in the proposed amendments (i.e., advising an investor to consider, in addition to age or retirement date, other factors; that an investment in a target date fund is not guaranteed; and that it is possible to lose money by investing in a target date fund). As a result, we believe that the costs associated with the disclosure of the proposed required information will be limited.

The Commission estimates that funds would incur one time initial costs in modifying their current marketing materials to meet the proposed disclosure requirements. For example, funds may have to modify and reformat their layouts and typesetting in order to convert existing marketing materials to meet the enhanced disclosure requirements of the amended rules. The Commission estimates that there are approximately 357 target date funds that would be required to comply with the proposed amendments. Based on our PRA analysis, we estimate that the one time initial costs for each target date fund attributable to the proposed amendments would be approximately \$3,825 in internal costs for marketing personnel and compliance attorneys to prepare and review the revised marketing materials<sup>132</sup> and \$2,900 in external costs for modifying and reformatting layouts, typesetting, and printing for new advertisements.<sup>133</sup> We estimate

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<sup>132</sup> With respect to our initial one time internal burden estimate of 15 hours, we estimate that marketing personnel will spend 10 hours to prepare the revised marketing materials and compliance attorneys will spend 5 hours to review the materials. See supra note 101 and discussion at accompanying paragraph. The hourly wage rate of \$237 for a marketing manager and \$291 for a compliance attorney is based on the salary information from the Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2009, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. Therefore, the internal costs associated with this burden equals \$3,825 per target date fund (10 hours x \$237 per hour + 5 hours x \$291 per hour = \$3,825).

<sup>133</sup> See supra note 128 and accompanying text.

that the aggregate initial one time costs imposed by the proposed amendments would be approximately \$2.4 million.<sup>134</sup>

The Commission also estimates that there will be ongoing costs associated with the proposed requirement that a target date fund submitting an advertisement or supplemental sales literature for publication or use on or after the date that is included in the fund's name must disclose, immediately adjacent to the fund's name, the fund's actual asset allocations as of the most recent calendar quarter ended prior to the submission of the advertisement or supplemental sales literature. Based on our PRA analysis, we estimate that the ongoing cost for each advertisement or supplemental sales literature piece for a target date fund that would be required to disclose the fund's actual asset allocation as of the most recent calendar quarter ended would be approximately \$264 in costs for internal marketing personnel and compliance attorneys to prepare and review the revised marketing materials.<sup>135</sup>

The Commission further estimates that target date funds would incur ongoing costs associated with the requirement that marketing materials that are focused on a single target date fund provide information about the fund's actual and intended asset allocations in the proposed table, chart, or graph. Based on our PRA analysis, we

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<sup>134</sup> \$3,825 in internal costs per fund x 357 target date funds + \$2,900 in external costs per fund x 357 target date funds = \$2,400,825.

<sup>135</sup> With respect to our ongoing internal burden estimate of 1 hour per advertisement or supplemental sales literature piece for a target date fund that would be required to disclose the fund's actual asset allocation as of the most recent calendar quarter ended, we estimate that the marketing personnel will spend 0.5 hours to prepare the revised marketing materials and compliance personnel will spend 0.5 hours to review the marketing materials. For hourly wage rates, see supra note 132. Therefore, the internal costs associated with this burden equal \$264 per response (0.5 hour x \$237 per hour + 0.5 hour x \$291 per hour = \$264).

estimate that the ongoing costs for each single target date fund advertisement or supplemental sales literature piece attributable to the proposed table, chart, or graph requirement would be approximately \$528 in costs for internal marketing personnel and compliance attorneys to prepare and review the revised marketing materials.<sup>136</sup>

We do not anticipate that target date funds will incur any significant ongoing external costs in connection with the proposed amendments. While we anticipate that target date funds will bear external costs (such as the costs of modifying and reformatting layouts, typesetting, and printing for new marketing materials) in complying with the proposed amendments, we believe that these costs would largely be borne as one time costs when target date funds initially comply with the proposed rule and not on an ongoing basis.

In considering the proposed amendments to rules 482 and 34b-1, the Commission was mindful of ways to minimize costs. For example, with respect to the table, chart, or graph requirement for marketing materials that relate to multiple target date funds with different target dates that all have the same pattern of asset allocations, the proposal would permit the materials to include either separate presentations for each fund or a single generic table, chart, or graph illustrating the glide path for all the funds. In addition, our proposal to require target date fund marketing materials to include a prominent table, chart, or graph would not apply to radio and television advertisements because, among other things, we determined that it could result in the imposition of very

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<sup>136</sup> With respect to our ongoing internal burden estimate of 2 hours per single target date fund marketing materials, we estimate that marketing personnel will spend 1 hour to prepare the revised marketing materials and compliance personnel will spend 1 hour to review the marketing materials. For hourly wage rates, see supra note 132. Therefore, the internal costs associated with this burden equal \$528 per response (1 hour x \$237 per hour + 1 hour x \$291 per hour = \$528).

substantial costs for additional advertising time. Our proposal permits more limited disclosure in a radio or television advertisement for a fund whose name includes a target date of the landing point, an explanation that the allocation of the fund becomes fixed at the landing point, and the percentage allocations of the fund among types of investments at the landing point.

Rule 156 is an interpretive rule that provides guidance to investment companies regarding the applicability of the antifraud provisions of the federal securities laws. The proposed amendment to rule 156 would provide additional guidance regarding statements in sales literature for target date funds and other investment companies that could be misleading. Funds may incur some one-time costs in reviewing their marketing materials for consistency with the proposed interpretive guidance set forth in the amendments to rule 156. However, we expect such review to be largely incorporated into the review associated with complying with the proposed amendments to rules 482 and 34b-1. As a result, we do not expect that significant costs would be associated with the review for compliance with rule 156. In addition, because we believe that investment companies already review their sales literature for misleading statements, we believe that the proposed amendment to rule 156 would not impose significant compliance costs on target date funds or other investment companies on an ongoing basis.

We request comment on the nature and amount of our estimates of the costs of the additional disclosure that would be required if our proposals were adopted.

**C. Request for Comments**

We request comments on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the

proposed amendments. Commenters are requested to provide empirical data and other factual support for their views to the extent possible. In particular, we request comment on the following issues:

- Should any adjustments be made to our quantitative estimates of costs?
- If the proposed amendments are adopted, what changes in behavior by either investors or target date fund managers may result, and what would be the associated benefits and costs?
- Are there any additional costs that target date funds would likely incur with respect to their marketing materials in order to comply with the proposed amendments other than those mentioned in the cost-benefit analysis? For example, we have not identified any quantifiable ongoing external costs to comply with the proposed amendments. Are there quantifiable ongoing costs that a target date fund would likely incur to comply with the proposed amendments?

## **VI. CONSIDERATION OF BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION**

Section 23(a)(2)<sup>137</sup> of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>138</sup> requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Further, Section 2(c) of

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<sup>137</sup> 15 U.S.C. 78w(a)(2).

<sup>138</sup> 15 U.S.C. 78a *et seq.*

the Investment Company Act,<sup>139</sup> Section 2(b) of the Securities Act,<sup>140</sup> and Section 3(f) of the Exchange Act<sup>141</sup> require 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.<sup>142</sup>

We are proposing amendments to rule 482 that would apply to advertisements that place a more than insubstantial focus on one or more target date funds. Specifically, we are proposing amendments to rule 482 that would require a target date fund that includes the target date in its name to disclose the target date (or current) asset allocation of the fund immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name in advertisements. We are also proposing amendments to rule 482 that would require enhanced disclosure in advertisements for a target date fund regarding the fund's glide path and asset allocation at the landing point, as well as the risks and considerations that are important when deciding whether to invest in a target date fund. Finally, we are proposing amendments to rule 156 that would provide additional guidance regarding statements in sales literature for target date funds and other investment companies that could be misleading.

The proposed amendments may enhance efficiency by making it easier for investors to make more informed investment decisions. For example, if a target date fund

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<sup>139</sup> 15 U.S.C. 80a-2(c)

<sup>140</sup> 15 U.S.C. 77b(b).

<sup>141</sup> 15 U.S.C. 78c(f).

<sup>142</sup> The Commission is proposing amendments to rule 34b-1 pursuant to authority set forth in Sections 34(b) and 38(a) of the Investment Company Act. For a discussion of the effects of the proposed amendments to rule 34b-1 on efficiency, competition, and capital formation, see Parts IV, V, and VII.

remains significantly invested in equity investments at the target date, the proposed disclosure would help to reduce or eliminate incorrect investor expectations that the fund's assets will be invested in a more conservative manner at that time. The proposed amendments may also enhance efficiency by providing investors with readily available information about certain considerations and risks of the fund and the manner in which the fund's asset allocation may change over time. The proposed amendments to rule 156 regarding investment company sales literature would apply to all investment companies and may enhance efficiency by providing clearer guidance as to what may constitute misleading information in sales literature for target date funds and other investment companies.

We anticipate that improving investors' ability to make informed investment decisions may also lead to increased competitiveness among target date funds. The transparency resulting from the enhanced disclosure in marketing materials may promote competition by promoting better informed decisions by investors who are considering target date funds along with other types of investments. Increased transparency and investor awareness of target date fund asset allocations may also spur further innovation in the design of target date fund asset allocation models by fund sponsors due to enhanced competition. Finally, although target date funds may compete with similar non-investment company products that have similar investment objectives, we do not believe that the proposed amendments will significantly affect the competitiveness of target date funds in comparison with these other products.

With respect to the proposed amendments to rule 156, we believe that the proposed amendments would not impose any burden on competition. We believe that the

proposed amendments may improve investors' ability to make informed investment decisions, which thereby may lead to increased competition among target date funds. We believe that any costs that might be associated with compliance with the proposed amendments would be limited and, therefore, would not impose a burden on competition.

We anticipate that the proposed amendments would have a positive impact on capital formation. As a result of investors making better informed investment decisions, companies would be able to allocate resources more efficiently in line with preferences for risk and return in the economy. We request comment on whether the proposed amendments, if adopted, would affect efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

## **VII. INITIAL REGULATORY FLEXIBILITY ANALYSIS**

This Initial Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.<sup>143</sup> It relates to the Commission's proposed rule amendments under the Securities Act, Exchange Act, and the Investment Company Act to our rules governing investment company advertisements and supplemental sales literature, which are intended to facilitate investor understanding of target date funds and reduce the potential for investors to be confused or misled.

### **A. Reasons for, and Objectives of, Proposed Amendments**

The Commission is proposing amendments to rules 482 and 34b-1 that would apply to advertisements and supplemental sales literature that place a more than insubstantial focus on one or more target date funds. Specifically, the Commission is

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<sup>143</sup> 5 U.S.C. 603 et seq.

proposing amendments to rules 482 and 34b-1 that would require a target date fund that includes the target date in its name to disclose the target date (or current) asset allocation of the fund immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name in advertisements and supplemental sales literature. The Commission is also proposing amendments to rules 482 and 34b-1 that would require enhanced disclosure in advertisements and supplemental sales literature for a target date fund regarding the fund's glide path and asset allocation at the landing point, as well as the risks and considerations that are important when deciding whether to invest in a target date fund. Finally, the Commission is proposing amendments to rule 156 that would provide additional guidance regarding statements in sales literature for target date funds and other investment companies that could be misleading.

The proposed amendments to rules 482 and 34b-1 are intended to help address any potential investor misunderstanding that a target date fund may be invested more conservatively at the target date specified in its name or that every fund with the same target date in its name is managed in the same way. The proposed requirement to disclose the intended asset allocations of a target date fund at the target date (or, for periods on and after the target date, a fund's actual asset allocation as of the most recent calendar quarter) would, in essence, serve to alert investors to the existence of investment risk associated with the fund at and after the target date. The asset allocation may help counterbalance any misimpression that a fund is necessarily conservatively managed at the target date or that all funds with the same target date are similarly managed. The proposed table, chart, or graph requirement and landing point disclosure are intended to

ensure that investors who receive target date fund marketing materials also receive basic information about the fund's glide path. The proposed amendments requiring disclosure of risks and considerations that are important when deciding whether to invest in a target date fund are intended to advise investors who review marketing materials for target date funds that a fund should not be selected based solely on age or retirement date, that a target date fund is not a guaranteed investment, and that a target date fund's stated asset allocation may be subject to change.

The proposed amendments to rule 156 are intended to emphasize the potential for certain statements suggesting that securities of an investment company are an appropriate investment to mislead investors, in the context of target date funds or other investment companies.

#### **B. Legal Basis**

The Commission is proposing amendments to rule 482 pursuant to authority set forth in Sections 5, 10(b), 19(a), and 28 of the Securities Act and Sections 24(g) and 38(a) of the Investment Company Act. The Commission is proposing amendments to rule 34b-1 pursuant to authority set forth in Sections 34(b) and 38(a) of the Investment Company Act. The Commission is proposing amendments to rule 156 pursuant to authority set forth in Section 19(a) of the Securities Act and Sections 10(b) and 23(a) of the Exchange Act.

#### **C. Small Entities Subject to the Rule**

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most

recent fiscal year.<sup>144</sup> Approximately 158 registered investment companies meet this definition, but the Commission estimates that no target date funds meet this definition.<sup>145</sup> The proposed amendments to rules 482 and 34b-1, if adopted, would apply to registered investment companies that are target date funds, and therefore we do not expect that they would affect any small entities. The proposed amendments to rule 156, if adopted, would apply to all investment companies and may affect the 158 registered investment companies that are small entities, as well as investment companies that are small entities, but that are not subject to Investment Company Act registration requirements, including 32 business development companies.<sup>146</sup> Except for business development companies, we do not collect data to determine how many investment companies that are not subject to Investment Company Act registration requirements are small entities. Therefore, we are unable to determine the total number of small entities that would be affected by the proposed amendments to rule 156.

#### **D. Reporting, Recordkeeping, and Other Compliance Requirements**

We are proposing amendments to rules 482 and 34b-1 that would apply to advertisements and supplemental sales literature that place a more than insubstantial

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<sup>144</sup> 17 CFR 230.157; 17 CFR 270.0-10.

<sup>145</sup> Commission staff determined that each target date fund is part of a group of related investment companies that had net assets of more than \$50 million as of the end of its most recent fiscal year. The staff compiled a list of target date funds and aggregate net target date fund assets based on classifications by Morningstar Direct. To the extent that a group of related investment companies had aggregate net target date fund assets of \$50 million or less as reported by Morningstar Direct, the staff reviewed the filings made with the Commission by the other related investment companies within that group to determine the aggregate net assets of the target date funds, together with other related investment companies.

<sup>146</sup> Examples of investment companies not subject to registration under Section 8 of the Investment Company Act include business development companies and employees' security companies.

focus on one or more target date funds. Specifically, we are proposing amendments to rules 482 and 34b-1 that would require a target date fund that includes the target date in its name to disclose the target date (or current) asset allocation of the fund immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the fund's name in advertisements and supplemental sales literature. We are also proposing amendments to rules 482 and 34b-1 that would require enhanced disclosure in advertisements and supplemental sales literature for a target date fund regarding the fund's glide path and asset allocation at the landing point, as well as the risks and considerations that are important when deciding whether to invest in a target date fund.

The proposed amendments to rules 482 and 34b-1, if adopted, would apply to registered investment companies that are target date funds. As noted earlier, the Commission estimates that no target date funds are small entities. Therefore, we do not expect that the proposed amendments to rules 482 and 34b-1 would affect any small entities.

We are also proposing amendments to rule 156 to provide additional guidance regarding statements in sales literature for target date funds and other investment companies that could be misleading. Because the proposed amendment to rule 156 is interpretive and provides guidance as to when sales literature could be misleading, we believe that the proposed amendment would not impose significant reporting, recordkeeping, or other compliance costs on target date funds or other investment companies.

The Commission solicits comment on these estimates and the anticipated effect the proposed amendments would have on small entities.

**E. Duplicative, Overlapping, or Conflicting Federal Rules**

The Commission believes that there are no federal rules that duplicate, overlap, or conflict with the proposed amendments.

**F. Significant Alternatives**

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small issuers. In connection with the proposed 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 proposed amendments for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. The proposed amendments to rules 482 and 34b-1, if adopted, would apply to registered investment companies that are target date funds. As noted earlier, the Commission estimates that no target date funds are small entities. Therefore, we do not expect that the proposed amendments to rules 482 and 34b-1 would affect any small entities.

The proposed amendments to rule 156 would apply to all investment companies, including some that may be small entities, and would provide additional guidance in determining whether statements contained in sales literature are misleading. Different

requirements for investment companies that are small entities may create an increased risk that investors would receive misleading information in sales literature about target date funds or other investment companies that are small entities. Therefore, we believe it is important for the proposed amendments to apply to all investment companies, regardless of size.

We have endeavored through the proposed amendments to minimize the regulatory burden on all investment companies, including small entities, while meeting our regulatory objectives. We have endeavored to clarify, consolidate, and simplify the requirements applicable to all investment companies, including those that are small entities. Finally, we do not consider using performance rather than design standards to be consistent with investor protection in the context of requirements for investment company marketing materials.

#### **G. Request for Comments**

The Commission encourages the submission of written comments with respect to any aspect of this analysis. Comment is specifically requested on the number of small entities that would be subject to the proposed amendments and the likely impact of the proposal on those small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the proposed amendments are adopted and will be placed in the same public file as comments on the proposed amendments themselves.

## VIII. CONSIDERATION OF IMPACT ON THE ECONOMY

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),<sup>147</sup> a rule is “major” if it results or is likely to result in:

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers or individual industries;  
or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a “major rule” for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

## IX. STATUTORY AUTHORITY

The Commission is proposing amendments to rule 156 pursuant to authority set forth in Section 19(a) of the Securities Act [15 U.S.C. 77s(a)] and Sections 10(b) and 23(a) of the Exchange Act [15 U.S.C. 78j(b) and 78w(a)]. The Commission is proposing amendments to rule 482 pursuant to authority set forth in Sections 5, 10(b), 19(a), and 28 of the Securities Act [15 U.S.C. 77e, 77j(b), 77s(a), and 77z-3] and Sections 24(g) and 38(a) of the Investment Company Act [15 U.S.C. 80a-24(g) and 80a-37(a)]. The

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<sup>147</sup> Pub. L. No. 104-21, Title II, 110 Stat. 857 (1996).

Commission is proposing amendments to rule 34b-1 pursuant to authority set forth in Sections 34(b) and 38(a) of the Investment Company Act [15 U.S.C. 80a-33(b) and 80a-37(a)].

**List of Subjects**

**17 CFR Part 230**

Advertising, Investment companies, Reporting and recordkeeping requirements, Securities.

**17 CFR Part 270**

Investment companies, Reporting and recordkeeping requirements, Securities.

**TEXT OF PROPOSED RULE AMENDMENTS**

For the reasons set out in the preamble, the Commission proposes to amend Title 17, Chapter II, of the Code of Federal Regulations as follows.

**PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

1. The authority citation for Part 230 continues to read in part as follows:

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

2. Section 230.156 is amended by adding paragraph (b)(4) to read as follows:

**§ 230.156 Investment company sales literature.**

\* \* \* \* \*

(b) \* \* \*

(4) A statement suggesting that securities of an investment company are an appropriate investment could be misleading because of:

(i) The emphasis it places on a single factor (such as an investor's age or tax bracket) as the basis for determining that the investment is appropriate; or

(ii) Representations, whether express or implied, that investing in the securities is a simple investment plan or requires little or no monitoring by the investor.

\* \* \* \* \*

3. Section 230.482 is amended by:

a. Redesignating paragraphs (b)(5) and (b)(6) as paragraphs (b)(6) and (b)(7);

b. Adding new paragraph (b)(5);

c. In newly redesignated paragraph (b)(6), revising the first and second references "paragraphs (b)(1) through (b)(4)" to read "paragraphs (b)(1) through (b)(4) and paragraph (b)(5)(ii)";

d. In newly redesignated paragraph (b)(6), revising the third reference "paragraphs (b)(1) through (b)(4)" to read "paragraphs (b)(1) through (b)(4) and paragraphs (b)(5)(ii) and (v)"; and

e. Revising the phrase "NASD Regulation, Inc." in the note to paragraph (h) to read "Financial Industry Regulatory Authority, Inc."

The addition reads as follows:

**§ 230.482 Advertising by an investment company as satisfying requirements of Section 10.**

\* \* \* \* \*

(b) \* \* \*

(5) Target date funds.

(i) Definitions. For purposes of this section:

(A) Target Date Fund means an investment company that has an investment objective or strategy of providing varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures that changes over time based on an investor's age, target retirement date, or life expectancy.

(B) Target Date means any date, including a year, that is used in the name of a Target Date Fund or, if no date is used in the name of a Target Date Fund, the date described in the fund's prospectus as the approximate date that an investor is expected to retire or cease purchasing shares of the fund.

(C) Landing Point means the first date, including a year, at which the asset allocation of a Target Date Fund reaches its final asset allocation among types of investments.

(ii) An advertisement that places a more than insubstantial focus on one or more Target Date Funds must include a statement that:

(A) Advises an investor to consider, in addition to age or retirement date, other factors, including the investor's risk tolerance, personal circumstances, and complete financial situation;

(B) Advises an investor that an investment in the Target Date Fund(s) is not guaranteed and that it is possible to lose money by investing in the Target Date Fund(s), including at and after the Target Date; and

(C) Unless disclosed pursuant to paragraph (b)(5)(iv)(C) of this section, advises an investor whether, and the extent to which, the intended percentage allocations

of the Target Date Fund(s) among types of investments may be modified without a shareholder vote.

(iii) An advertisement that places a more than insubstantial focus on one or more Target Date Funds, and that uses the name of a Target Date Fund that includes a date, including a year, must disclose the percentage allocations of the Target Date Fund among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) as follows: (1) an advertisement that is submitted for publication or use prior to the date that is included in the name must disclose the Target Date Fund's intended asset allocation at the date that is included in the name and must clearly indicate that the percentage allocations are as of the date in the name; and (2) an advertisement that is submitted for publication or use on or after the date that is included in the name must disclose the Target Date Fund's actual asset allocation as of the most recent calendar quarter ended prior to the submission of the advertisement for publication or use and must clearly indicate that the percentage allocations are as of that date. This information must appear immediately adjacent to (or, in a radio or television advertisement, immediately following) the first use of the Target Date Fund's name in the advertisement and must be presented in a manner reasonably calculated to draw investor attention to the information.

(iv) A print advertisement or an advertisement delivered through an electronic medium that places a more than insubstantial focus on one or more Target Date Funds must include a prominent table, chart, or graph clearly depicting the percentage allocations of the Target Date Fund(s) among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) over the entire life of the Target

Date Fund(s) at identified periodic intervals that are no longer than five years in duration and at the inception of the Target Date Fund(s), the Target Date, the Landing Point, and, in the case of an advertisement that relates to a single Target Date Fund, as of the most recent calendar quarter ended prior to the submission of the advertisement for publication. If the advertisement relates to a single Target Date Fund, the table, chart, or graph must clearly depict the actual percentage allocations among types of investments from the inception of the Target Date Fund through the most recent calendar quarter ended prior to the submission of the advertisement for publication, clearly depict the future intended percentage allocations among types of investments, and identify the periodic intervals and other required points using specific dates (which may include years, such as 2015 or 2020). If the advertisement relates to multiple Target Date Funds with different Target Dates that all have the same pattern of asset allocations, the advertisement may include separate presentations for each Target Date Fund that meet the requirements of the preceding sentence or may include a single table, chart, or graph that clearly depicts the intended percentage allocations of the Target Date Funds among types of investments and identifies the periodic intervals and other required points using numbers of years before and after the Target Date. If the advertisement (1) relates to a single Target Date Fund and is submitted for publication prior to the Landing Point; or (2) relates to multiple Target Date Funds with different Target Dates that all have the same pattern of asset allocations, the table, chart, or graph must be immediately preceded by a statement explaining the table, chart, or graph that includes the following information:

- (A) The asset allocation changes over time;

(B) The Landing Point (or in the case of a table, chart, or graph for multiple Target Date Funds, the number of years after the Target Date at which the Landing Point will be reached); an explanation that the asset allocation becomes fixed at the Landing Point; and the intended percentage allocations among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) at the Landing Point; and

(C) Whether, and the extent to which, the intended percentage allocations among types of investments may be modified without a shareholder vote.

(v) A radio or television advertisement that is submitted for use prior to the Landing Point and that places a more than insubstantial focus on one or more Target Date Funds, and that uses the name of a Target Date Fund that includes a date (including a year), must include a statement that includes the Landing Point, an explanation that the asset allocation becomes fixed at the Landing Point, and the intended percentage allocations of the fund among types of investments (e.g., equity securities, fixed income securities, and cash and cash equivalents) at the Landing Point.

\* \* \* \* \*

**PART 270 - RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940**

4. The authority citation for Part 270 continues to read in part as follows:

**Authority:** 15 U.S.C. 80a-1 et seq., 80a-34(d), 80a-37, and 80a-39, unless otherwise noted.

\* \* \* \* \*

5. Section 270.34b-1 is amended by:

- a. Removing the language “paragraphs (a) and (b) of” in the introductory text and the note to introductory text;
- b. Revising the references “paragraph (b)(5) of § 230.482 of this chapter” in paragraph (a) and paragraph (b)(1)(i) to read “paragraph (b)(6) of § 230.482 of this chapter”;
- c. Revising the heading to the note following paragraph (b) to read “Note to paragraph (b)”;
- d. Adding paragraph (c) at the end thereof.

The addition reads as follows:

**§ 270.34b-1 Sales literature deemed to be misleading.**

\* \* \* \* \*

(c) Sales literature that places a more than insubstantial focus on one or more Target Date Funds (as defined in paragraph (b)(5)(i)(A) of § 230.482 of this chapter) must contain the information required by paragraphs (b)(5)(ii), (iii), and (iv) of § 230.482 of this chapter, presented in the manner required by those paragraphs and by paragraph (b)(6) of § 230.482 of this chapter.

By the Commission.

  
Elizabeth M. Murphy  
Secretary

Dated: June 16, 2010

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

June 17, 2010

IN THE MATTER OF

Aphton Corp.,  
Apollo International of Delaware, Inc.,  
Applewoods, Inc.,  
Applied Nanoscience, Inc.,  
Aquacell Technologies, Inc.  
(n/k/a Greencore Technology, Inc.),  
Aquagenix, Inc.,  
Aquapro Corp.,  
Asconi Corp.,  
Asia Electronics Holding Co., Inc.,  
Asian Star Development, Inc.  
Associated Golf Management, Inc.  
(n/k/a Delta Mining &  
Exploration Corp.),  
Avalon Borden Companies, Inc.,  
Avasoft, Inc.,  
Aviation Holdings Group, Inc., and  
Azur Holdings, Inc.

ORDER OF SUSPENSION  
OF TRADING

File No. 500-1

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Aphton Corp. because it has not filed any periodic reports since the period ended December 31, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Apollo International of Delaware, Inc. because it has not filed any periodic reports since the period ended September 30, 1998.

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“AVBD”) 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. Aviation Holdings Group, Inc. (CIK No. 1051254) is a delinquent Delaware corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Aviation 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 over \$1.67 million for the prior nine months. As of June 8, 2010, the company’s stock (symbol “AHGIQ”) 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).

8. Azur Holdings, Inc. (CIK No. 785544) is a void Delaware corporation located in Fort Lauderdale, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Azur 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, 2006, which reported a net loss of over \$5.86 million for the prior six months. As of June 8, 2010, the company’s stock (symbol “AZHI”) 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

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

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

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

### III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any corporate names of any Respondents.

#### 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any 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

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

*Chairman Schapiro  
not participating*

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62306 / June 17, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13941

In the Matter of

ADVANCED MATERIALS  
GROUP, INC.,

Respondent.

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

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 Advanced Materials Group, Inc. ("AMG" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 12(j) of the Securities Exchange Act of 1934, Making Findings, and Revoking Registration of Securities ("Order"), as set forth below.

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### III.

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

A. AMG (File No. 0-16401) is a Nevada corporation whose headquarters were in Dallas, Texas during the relevant period. AMG's common stock is registered with the Commission under Section 12(g) of the Exchange Act and was quoted during the relevant period on the OTCBB. AMG manufactured and marketed foam and other flexible material products until July 2, 2009, when it filed Chapter 11 bankruptcy.

B. AMG has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission in that it has not filed an Annual Report on Form 10-K since February 27, 2009 or periodic or quarterly reports on Form 10-Q for any fiscal period subsequent to its fiscal quarter ending February 28, 2009.

### IV.

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

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

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

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

By the Commission.

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. 62309 / June 17, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13943

In the Matter of	:	
	:	<b>ORDER INSTITUTING</b>
	:	<b>ADMINISTRATIVE</b>
Applied Nanoscience, Inc.,	:	<b>PROCEEDINGS AND NOTICE</b>
Aquacell Technologies, Inc.	:	<b>OF HEARING PURSUANT TO</b>
(n/k/a Greencore Technology, Inc.),	:	<b>SECTION 12(j) OF THE</b>
Aquacell Water, Inc.	:	<b>SECURITIES EXCHANGE ACT</b>
(n/k/a Believing Today, Inc.),	:	<b>OF 1934</b>
Aquapro Corp.,	:	
Asia Electronics Holding Co., Inc.,	:	
Asian Star Development, Inc.,	:	
Associated Golf Management, Inc.	:	
(n/k/a Delta Mining &	:	
Exploration Corp.), and	:	
Avasoft, Inc.,	:	
	:	
Respondents.	:	
	:	

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Applied Nanoscience, Inc., Aquacell Technologies, Inc. (n/k/a Greencore Technology, Inc.), Aquacell Water, Inc. (n/k/a Believing Today, Inc.), Aquapro Corp., Asia Electronics Holding Co., Inc., Asian Star Development, Inc., Associated Golf Management, Inc. (n/k/a Delta Mining & Exploration Corp.), and Avasoft, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

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## A. RESPONDENTS

1. Applied Nanoscience, Inc. (CIK No. 1423846) is a Nevada corporation located in Carlsbad, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Applied Nanoscience is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10 registration statement on February 11, 2008, which reported a net loss of over \$3.6 million since the company's June 4, 2004 inception to September 30, 2007. As of June 8, 2010, the company's stock (symbol "APNN") was quoted on the Pink Sheets, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Aquacell Technologies, Inc. (n/k/a Greencore Technology, Inc.) (CIK No. 1114655) is a void Delaware corporation located in Rancho Cucamonga, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Aquacell Technologies 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 June 30, 2008, which was materially deficient but reported a net loss of over \$4.28 million for the prior twelve months. As of June 8, 2010, the company's stock (symbol "AQUA") 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. Aquacell Water, Inc. (n/k/a Believing Today, Inc.) (CIK No. 1348104) is a void Delaware corporation located in Palm Desert, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Aquacell Water 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, 2008, which was materially deficient but reported a net loss of \$265,000 for the prior three months. As of June 8, 2010, the company's stock (symbol "BLTY") was traded on the over-the-counter markets.

4. Aquapro Corp. (CIK No. 1023367) is a dissolved Tennessee corporation located in Phoenix, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Aquapro 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, 2002, which reported a net loss of over \$2.17 million for the prior three months. As of June 8, 2010, the company's stock (symbol "AQRO") was quoted on the Pink Sheets, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Asia Electronics Holding Co., Inc. (CIK No. 1041651) is a British Virgin Islands corporation located in Road Town, Tortola, British Virgin Islands with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Asia Electronics 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, 1997. As of June 8, 2010, the company's stock (symbol "AEHZF") was quoted on the Pink Sheets, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Asian Star Development, Inc. (CIK No. 1046883) is a Nevada corporation located in Hong Kong, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Asian Star is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2002, which reported a net loss of \$125,155 for the prior nine months. As of June 8, 2010, the company's stock (symbol "ASDV") 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).

7. Associated Golf Management, Inc. (n/k/a Delta Mining & Exploration Corp.) (CIK No. 1090553) is a Nevada corporation located in Temple Terrace, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Associated Golf is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB/A registration statement on February 8, 2000, which reported a net loss of \$252,676 for the six months ended June 30, 1999. As of June 8, 2010, the company's stock (symbol "DMXC") was quoted on the Pink Sheets, had eleven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Avasoft, Inc. (CIK No. 789878) is a dissolved Nevada corporation located in Rocklin, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Avasoft 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, 2007, which reported a net loss of \$4.94 million for the prior nine months. As of June 8, 2010, the company's stock (symbol "AVAF") 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).

## B. DELINQUENT PERIODIC FILINGS

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

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

11. 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 registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

### 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any 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

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

Chairman Schapiro and  
Commissioner Walter  
not participating

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 62315 / June 17, 2010

Admin. Proc. File No. 3-13733

In the Matter of the Application of

MANUEL P. ASENSIO  
c/o Mill Rock Investment Advisors  
747 Third Avenue, 25<sup>th</sup> Floor  
New York, NY 10017

For Review of Disciplinary Action Taken by

FINRA

ORDER GRANTING  
MOTION TO DISMISS  
APPLICATION FOR  
REVIEW

Manuel P. Asensio, formerly a registered representative associated with Asensio Brokerage Services, Inc. ("ABSI" or the "Firm"), a former NASD member firm, has filed a series of motions. He asks, among other things, that the Commission consider his appeal of both a July 2006 NASD<sup>1</sup> disciplinary decision that barred Asensio from associating with any member firm (the "2006 Bar Decision"),<sup>2</sup> and an August 2008 FINRA decision that denied the application of FINRA member firm ISI Capital, LLC ("ISI"), seeking permission for Asensio to associate notwithstanding the bar (the "2008 Eligibility Denial Decision"). Asensio has requested that the Commission "cancel" his "bar and/or MC-400 denial or deny [his] petition in the form of a final ruling or other decision that will assure [his] right to pursue legal redress in an appropriate U.S.

<sup>1</sup> On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517, 517. Because the disciplinary action here was instituted before that date, we continue to use the designation NASD.

<sup>2</sup> NASD also fined ABSI \$20,000.

District Court," as well as grant various other relief discussed in Section III below. NASD filed a motion to dismiss Asensio's application for review on the grounds that it is untimely and that "extraordinary circumstances" do not exist for granting Asensio's late appeal. For the reasons discussed below, we have determined to grant NASD's motion and dismiss Asensio's application.

## I.

### A. 2006 Bar Decision

#### 1. Background

Between August 2002 and January 2003, entities affiliated with Asensio published six investment research reports about Polymedica Corporation ("Polymedica") on the website [www.asensio.com](http://www.asensio.com). NASD began an investigation to determine whether such reports contained misleading facts and omitted required information in violation of NASD Conduct Rule 2711.<sup>3</sup>

On February 11, 2003, NASD's Department of Enforcement ("Enforcement") sent Asensio and ABSI separate requests for information pursuant to NASD Procedural Rule 8210.<sup>4</sup> Enforcement requested that Asensio individually provide brokerage account statements for all his accounts between 2002 and 2003, and provide certain information about Asensio & Company, Inc. ("A&C").<sup>5</sup> The ABSI letter requested that the Firm provide information about, among other things, A&C, materials showing ABSI's compliance with NASD Conduct Rule 2711(h) and (I), and the Polymedica research reports dated from August 2002 through January 2003.

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<sup>3</sup> NASD Conduct Rule 2711 seeks "to improve the objectivity of research and provide investors with more useful and reliable information when making investment decisions" and "to restore investor confidence in a process that is critical to the equities markets." NASD Notice to Members 02-39.

Rule 2711(h) requires that a member firm disclose within its research reports, among other things, the meaning of each rating used in its rating system, the percentage of "buy," "hold/neutral," or "sell" ratings issued by the firm, and a line-graph price chart showing the price changes relative to the firm's recommendations for securities for which the member firm has assigned a rating for at least one year. The required disclosures must be clear and comprehensive. Conduct Rule 2711(i) requires that member firms "adopt and implement written supervisory procedures reasonably designed to ensure that the member and its employees comply with the provisions of this rule . . . ."

<sup>4</sup> Rule 8210 requires members and associated persons to provide information if requested by NASD as part of an investigation, complaint, examination, or proceeding.

<sup>5</sup> A&C was not an NASD member firm. Asensio was A&C's chairman, president, and chief executive officer. A&C owned 100% of ABSI.

Asensio and ABSI responded to Enforcement's requests in two separate letters, both signed by Asensio, dated February 25, 2003. Asensio provided copies of ABSI's and A&C's brokerage account statements and informed Enforcement that he owned "73.76% of" A&C and also owned "a super-voting preferred that gives him 90% voting control." However, he did not provide copies of his personal monthly brokerage statements. He also refused to provide copies of certain requested Polymedica research reports, asserting that A&C and its reports were "exempt from NASD regulation," as A&C was not a member firm. He further asserted that ABSI had not prepared or distributed the Polymedica research reports.

On March 12, 2003, Enforcement sent follow-up letters to Asensio and ABSI reiterating its initial request to ABSI for the Polymedica research reports. Enforcement notified Asensio that "[a]s an associated person with an ownership interest in Asensio & Co., you are required to provide information in your possession or under your control, even if it relates to a non-member entity." Enforcement also asked how ABSI defined "institutional investor" and whether ABSI had any such investors as clients.

Asensio responded with two letters dated March 25, 2003, one in his individual capacity and the other as an ABSI associated person. Contrary to his statement in the February 25, 2003 letter, Asensio wrote that he "ha[d] no ownership interest in [A&C]." He further asserted that he did not "possess or control any of [A&C]'s property." He reiterated that A&C was not a NASD member firm nor was it associated with a member firm. In the letter from ABSI, Asensio stated that ABSI "does not conduct, publish, distribute or market any research." He represented that the Firm had an unspecified number of "institutional investor clients," and referred NASD to a dictionary for the definition of institutional investor.

On April 9, 2003, Asensio appeared with counsel at an on-the-record interview ("OTR"), pursuant to NASD Rule 8210. The OTR was contentious. Asensio told Enforcement that he would only answer those questions that are "directly related to my activities that are regulated by" NASD and would decline to answer questions that he viewed as outside of NASD's jurisdiction. He also stated that the whole proceeding was "a fraudulent, corrupt, intentional attempt to discredit my firm, keep me from doing my work and cost [sic] me harm." While Asensio answered some of Enforcement's questions at the OTR, including some about A&C, he refused to answer several other questions about A&C and [www.asensio.com](http://www.asensio.com).<sup>6</sup>

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<sup>6</sup> During the OTR, Asensio accused Enforcement's attorney of "staring at" him in a manner that was "offensive and disconcerting" and "making faces" and "mocking" him during the OTR by his "staring into my eyes without blinking." He asserted that the Enforcement attorney was "subject[ing] [Asensio] to this kind of harassment." Asensio protested several of the questions asked of him, accusing Enforcement of being "hostile," "crooks," and "corrupt regulators." He also claimed that certain evidence offered by Enforcement about which he was questioned was "provided to [Enforcement] by the corrupt politicians and corrupt lawyers that

(continued...)

After approximately two hours of questioning, Asensio informed Enforcement staff that he would not answer any further questions. At Asensio's counsel's request, Asensio left the interview room. Counsel and Enforcement staff then agreed to terminate the interview and to have Asensio answer the staff's outstanding questions in writing by the end of April.

In mid-May, Enforcement wrote to Asensio's attorney that NASD had not received either the information requested in its March 12 letter or responses to the outstanding questions from the OTR. Enforcement also informed counsel that it "intended to request more documents and information," but that it did not wish to do so "if Mr. Asensio ha[d] no intention of providing responses." Accordingly, Enforcement requested an immediate response as to whether Asensio would provide the outstanding information. On May 16, 2003, Asensio responded, writing that his attorney did not represent him and that he had no knowledge of any agreement reached between the attorney and Enforcement about his providing written answers. On May 29, 2003, Enforcement sent Asensio a letter enclosing the portion of the OTR transcript reflecting the agreement with counsel, reiterating earlier requests for information that had not yet been provided, and requesting additional information.

In letters dated June 20, 2003, Asensio responded to certain of Enforcement's information requests for himself, and an ABSI employee responded for the Firm.<sup>7</sup> Asensio and ABSI stated that A&C was the author of the Polymedica investment reports in question but that A&C "is a non-member firm." They did not respond to Enforcement's inquiries concerning the bases for certain representations made in the investment reports nor to questions concerning the reports' compliance with NASD rules.

## 2. Disciplinary Proceeding

On February 6, 2004, Enforcement filed an amended complaint against Asensio and ABSI.<sup>8</sup> Asensio and ABSI denied the allegations and raised several affirmative defenses, including that Asensio and ABSI did not write or publish the Polymedica reports and that NASD lacked subject matter jurisdiction to bring this proceeding against them. Asensio and ABSI also

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<sup>6</sup> (...continued)

are involved in the securities corruption." He asserted that Enforcement was "harassing" him with its questions and maintained that Enforcement had requested his attendance at the OTR "to play . . . little childish games."

<sup>7</sup> Further "corrected" answers from the ABSI employee were provided in a letter dated June 23, 2003.

<sup>8</sup> The amended complaint alleged that ABSI and Asensio had issued investment reports that failed to comply with NASD disclosure requirements and made unwarranted or misleading statements and that Asensio had failed or refused to comply with Enforcement's requests for information and documents.

filed counterclaims and a counter complaint against Enforcement, alleging, among other matters, that Enforcement had acted improperly in entering into a consent agreement with Asensio and ABSI in an earlier disciplinary proceeding and that Enforcement was "acting as agents of the 'criminal' element in the securities industry" by proceeding against them.<sup>9</sup> The counterclaims and counter complaint were stricken by an NASD Hearing Officer on March 31, 2004 on the grounds that NASD's "Code of Procedure does not permit counterclaims against the Department of Enforcement, and the Hearing Panel lacks jurisdiction to grant the relief Respondent Asensio seeks."

An evidentiary hearing was held before an NASD Hearing Panel on September 21, 2004. At this hearing, Asensio represented himself and ABSI, without counsel. During the hearing, Asensio testified on his own behalf and offered ten exhibits, all of which were admitted into evidence, and was able to cross-examine NASD's witnesses.

In January 2005, the Hearing Panel found that Asensio and ABSI were liable on all three counts. The Hearing Panel barred Asensio from associating with any member firm in any capacity for his failure to provide information requested by NASD staff pursuant to NASD Rule 8210.<sup>10</sup>

On January 28, 2005, Asensio and ABSI appealed the Hearing Panel's decision to the National Adjudicatory Committee ("NAC") and subsequently retained counsel to represent them on appeal. At the hearing before a NAC Subcommittee, Asensio's and ABSI's counsel advised the Subcommittee that they were "not raising any issues with respect to procedure, due process or things like that" and noted that Asensio "had a full opportunity for a hearing [before the Hearing Panel]."

On July 28, 2006, the NAC issued the 2006 Bar Decision. The NAC affirmed the Hearing Panel's findings, except as to the finding that the research reports failed to disclose the

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<sup>9</sup> The counterclaims requested, among other relief, the dismissal of all charges brought by Enforcement, as well as an order vacating an earlier disciplinary decision and sanction. The counterclaims did not identify the factual basis for Enforcement's alleged improper actions. Asensio and ABSI also asserted that NASD had provided "support[]" to "extensive fraudulent stock promotion schemes and fraudulent activity" engaged in by certain specified individuals. They further claimed that the "illegal activities of the NASD and these individuals were obstructed and publicized by Asensio and Asensio-NY's research." They did not, however, provide any specifics in their counterclaims of NASD's alleged support or illegal activities.

<sup>10</sup> The Hearing Panel fined ABSI \$20,000 for its failure to comply with Conduct Rules 2711(h) and 2210. In addition, the Hearing Panel ordered Asensio and ABSI jointly and severally to pay costs in the amount of \$3,147.16. The Hearing Panel noted that, if it were not imposing a bar against Asensio for his violations of Procedural Rule 8210, it would have fined Asensio \$20,000 and suspended him for sixty days for his violations of Conduct Rule 2711(h).

price chart required by Rule 2711(h)(6), and affirmed all of the sanctions imposed. Specifically at issue here, the NAC affirmed the Hearing Panel's finding that Asensio had willfully failed to provide information requested by Enforcement in violation of Rule 8210 and the bar imposed by the Hearing Panel for this violation. The NAC noted in this regard that Asensio did not dispute that he violated Rule 8210 and emphasized that, despite repeated requests, Asensio failed to answer a number of requests for information about the Polymedica reports.

In its letter accompanying the 2006 Bar Decision, NASD advised Asensio and ABSI that they could appeal to the Commission within thirty days of their receipt of the decision. Asensio's counsel filed a timely appeal on his behalf with the Commission. However, on September 7, 2006, Asensio's attorney requested that this appeal be withdrawn. The Commission issued an order granting the request on September 11, 2006.

#### **B. 2008 Eligibility Denial Decision**

On September 12, 2007, ISI, an NASD member firm, submitted an application on Form MC-400 to permit Asensio to associate with ISI as a general securities representative.<sup>11</sup> ISI proposed that Asensio would be subject to a heightened level of supervision beyond that generally applied to other securities professionals at the firm. NASD's Department of Member Regulation ("Member Regulation") recommended that ISI's application be denied.

On March 6, 2008, NASD held a hearing on ISI's application, at which ISI and Asensio were represented by counsel. Asensio testified that he now recognized that he had made a "horrible" mistake in not providing all of the information requested by Enforcement with respect to the Polymedica reports. Asensio acknowledged that he had violated Rule 8210 by not providing Enforcement with the information it requested and that this violation was "most serious" and "grave." He further regretted that his behavior during the investigation had been "ugly." Asensio admitted he had "looked at FINRA members as being part of the cabal that was out to get me." He had mistakenly believed that NASD was "protecting and helping" Polymedica's questionable activities, and was helping other companies that were the subjects of his research reports to bring suit against Asensio. He also conceded that he had dealt poorly with the stress caused by the numerous lawsuits and the subsequent NASD investigation.<sup>12</sup> Asensio assured the Hearing Panel that he had become "more aware of how important it is to train

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<sup>11</sup> A person who, like Asensio, has been barred by NASD is subject to a statutory disqualification. Securities Exchange Act of 1934 Section 3(a)(39)(A), 15 U.S.C. § 78c(a)(39)(A). A statutorily disqualified person is not eligible to associate with an NASD member firm without the consent of NASD. NASD By-Laws, Art. III, §§ 3(b) and (d). An NASD member firm wishing to employ someone with a statutory disqualification must apply to NASD for permission to continue operating notwithstanding such employment. *Id.* § 3(d).

<sup>12</sup> Asensio also testified that he was under additional stress caring for his mother who had been severely injured in an accident.

yourself to comply with regulations, to comply with authority, to not respond in an aggressive fashion" and that he now realized that NASD "was on my side -- because at the end of the day, [NASD] is investor protection."<sup>13</sup>

On August 12, 2008, the NAC issued the 2008 Eligibility Denial Decision, denying ISI's application.<sup>14</sup> The NAC observed that precedent required a barred applicant to make an "extremely strong showing" for the NAC to find that approval of an application for re-entry would serve the public interest.<sup>15</sup>

The NAC found that Asensio's misconduct leading to the 2006 Bar Decision was serious. It noted that the 2006 Bar Decision found that Asensio knowingly failed to respond to numerous NASD requests for information. The NAC also found that this misconduct was "further compounded" by Asensio's admission at the hearing on the ISI application that "he had lied under oath during the [2006 hearing] when he denied that he was involved in the writing or posting of the Polymedica research reports," which "purposefully impeded" NASD's investigation of the inadequacy of the Polymedica research reports and their "potential damaging effect on the investing public." Moreover, Asensio acknowledged at the MC-400 hearing that he chose to refuse to comply with Enforcement's requests for information. This showed, the NAC concluded, that Asensio "did everything within his power to obstruct [NASD]'s attempts to gather information concerning potentially misleading research reports" and "demonstrated a wanton disregard for FINRA's regulatory authority."<sup>16</sup>

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<sup>13</sup> Asensio stated that he now had a different, and positive, view of NASD. NASD, Asensio emphasized, is "an organization that is necessary and . . . without it, there is no order." He noted that with NASD, "[t]here is . . . at least [an] attempt at fairness and [an] attempt at protecting investors, an attempt at giving an individual who needs capital a fair chance to raise it ahead of an individual who is just a flimflam artist."

<sup>14</sup> Pursuant to NASD Procedural Rule 9524(a)(10), the Hearing Panel submitted its written recommendation to the NASD Statutory Disqualification Committee. The Statutory Disqualification Committee considered the Hearing Panel's recommendation and presented a written recommendation to the NAC, in accordance with NASD Rule 9524(b)(1).

<sup>15</sup> Citing, *e.g.*, *Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992) ("In NASD proceedings . . . , the burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment."); *M.J. Coen*, 47 S.E.C. 558, 561 (1981) ("[A]ny member wishing to employ such a [statutorily disqualified] person . . . must 'demonstrate why the application should be granted.'") (quoting NASD Manual ¶ 1113(c), p. 1067).

<sup>16</sup> The NAC pointed out that Rule 8210 is NASD's "primary means" of obtaining information from members and associated persons in investigations. Quoting our opinion in

(continued...)

The NAC also noted that Asensio had been barred very recently and had been the subject of three additional regulatory actions.<sup>17</sup> Given Asensio's "extensive and lengthy history of proven lack of compliance" with NASD rules, the NAC gave little weight to Asensio's arguments regarding his purported reformation of character and newly found respect for regulatory authority. The NAC also expressed concern that ISI's proposed supervision plan was "fragmented" and "d[id] not place the primary daily responsibility for Asensio squarely in the hands of one capable and available supervisor." It further observed that Asensio was used to being in charge of operations "and not one who submits willingly to the authority of others."

The letter accompanying the 2008 Eligibility Denial Decision advised ISI and Asensio that they had a right to appeal the denial to the Commission and that if they chose to appeal, they were required to file the appeal within thirty days of their receipt of the decision. Neither ISI nor Asensio sought Commission review within that period. By letters dated December 9, 2009 and January 4, 2010, Asensio filed the instant appeals.

## II.

Exchange Act Section 19(d)(2) directs that any associated person aggrieved by an NASD final disciplinary sanction or denial of association may file an application for review with the Commission "within thirty days" after the date notice of the final sanction determination was filed with the Commission and received by the aggrieved person, "or within such longer period as [the Commission] may determine."<sup>18</sup> Our Rule of Practice 420(b) provides that an applicant "must" file an application for review with us "within 30 days after the notice of the determination is filed with the Commission and received by the aggrieved person applying for review." The

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<sup>16</sup> (...continued)

*Jonathan Garret Ornstein*, 51 S.E.C. 135, 141 (1992) (internal quotations omitted), the NAC declared that, "[t]o allow associated persons to flout [Rule 8210] would subvert the NASD's ability to carry out its regulatory responsibilities." The NAC stated that, consistent with this policy, it would not disturb Asensio's bar in the absence of the requisite strong showing of exceptional circumstances, which it did not find in ISI's application.

<sup>17</sup> In 1994, FINRA issued a letter of Acceptance, Waiver and Consent ("AWC") to Asensio and his firm for failing to obtain an amendment to the firm's restriction agreement. In 1998, FINRA issued an AWC finding that Asensio and ABSI had failed in 1996 and 1997 to develop and maintain a written training plan and a continuing and current education plan for the firm's registered persons. In 2000, FINRA accepted another AWC from Asensio and ABSI for, among other things, short selling, trade reporting, advertising, and supervision violations. For the 2000 violations, FINRA imposed a \$75,000 joint and several fine, required the firm to retain an independent consultant, and required Asensio to requalify by examination as a general securities principal.

<sup>18</sup> 15 U.S.C. § 78s(d)(2).

rule further directs that we "will not extend this 30-day period, absent a showing of extraordinary circumstances [and that] [t]his rule is the exclusive remedy for seeking an extension of the 30-day period."<sup>19</sup>

Here, Asensio filed these applications for review of the 2006 Bar Decision more than three years after the final sanction determination, and the 2008 Eligibility Denial Decision more than eighteen months after it had become the final decision of NASD, both well after the applicable thirty-day deadlines. Asensio concedes that his filings are not timely. Thus, the issue for our determination is whether Asensio has shown the "extraordinary circumstances" that would permit us to extend the thirty-day period for filing an application for review.

As we have recently observed in *PennMont Securities*:<sup>20</sup>

Courts have recognized that strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief. As we have repeatedly stated, "parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed." For this reason, the "extraordinary circumstances" exception is to be narrowly construed and applied only in limited circumstances. To do otherwise would thwart the very clear policies of finality and certainty underlying the thirty-day filing deadline set forth in Exchange Act Section 19(d) and Rule of Practice 420(b).

(internal citations omitted). In *PennMont*, we concluded that an extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for an applicant's failure timely to file was beyond the control of the applicant. We further noted that our decisions have rejected applications for review where applicants did not act promptly in pursuing their appeals.<sup>21</sup>

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<sup>19</sup> 17 C.F.R. § 201.420(b).

<sup>20</sup> Exchange Act Rel. No. 619671 (Apr. 23, 2010), \_\_\_ SEC Docket \_\_\_, \_\_\_ (footnotes omitted; quoting *Edward J. Jakubik, Jr.*, Exchange Act Rel. No. 61541 (Feb. 18, 2010) 97 SEC Docket 25437, 25400 (citation omitted)).

<sup>21</sup> *Id.*, \_\_\_ SEC Docket at \_\_\_ n.26 (citing *Robert M. Ryerson*, Exchange Act Rel. No. 57839 (May 20, 2008), 93 SEC Docket 6058, 6064 (dismissing petition for review where, among other things, NASD "did not cause the fourteen-month delay between the issuance of the [underlying] opinion and the filing of the petition before [the Commission]," but rather the delay "resulted from [applicant's] deliberate choice not to appeal. . ."); *Larry A. Saylor*, Exchange Act Rel. No. 51949 (June 30, 2005), 85 SEC Docket 3118, 3124-25 (dismissing application for review citing "[applicant's] thirty-two year delay in filing an appeal of NASD action taken after a proceeding in which he participated, and of which he admits being apprised immediately"); *but*

(continued...)

Asensio maintains that the "principal extraordinary circumstance in this case is the exercise of bias" by NASD and its staff in instituting the 2006 disciplinary proceeding against him and in denying his request to associate with ISI. This bias, Asensio asserts, derives from Asensio's "actions to reveal stock fraud," including "deficiencies in listings oversight at the American Stock Exchange . . . , which was owned by [NASD] from 1998 to 2004." He charges that NASD conducted a "bad-faith investigation" of him that involved "unanswerable requests for information . . . and abuse of [NASD]'s regulatory discretion in pursuing disciplinary sanctions related to such bad faith investigation."<sup>22</sup>

We recently rejected a similar attempt to claim that alleged "serious issues of alleged prosecutorial misconduct" at an earlier NASD disciplinary proceeding constituted "extraordinary circumstances" excusing the late filing of an appeal. In *Edward J. Jakubik, Jr.*, we held that the applicant's assertions "fail[ed] to present the kind of circumstances required to justify an extension of the appeal filing deadline, particularly given the extreme delay in the filing of his appeal."<sup>23</sup> Moreover, unlike Jakubik, who was *pro se* during his disciplinary proceeding, Asensio was represented by counsel during the investigation and appeal to the NAC in the 2006 disciplinary proceeding and throughout the 2008 MC-400 proceeding.

Asensio states that he delayed in filing these appeals "because of the time required to conduct discovery related to understanding the extent of [NASD]'s violation of the [Exchange] Act and the ways in which [NASD] violated the Act specifically in this case." However, he does not contend, and the record does not show, that he was prevented from conducting ample discovery or proffering evidence in support of his various claims during the disciplinary proceeding or the MC-400 proceeding. Moreover, Asensio's assertions of NASD's bias, conflict of interest and abuse of discretion, such as a purported lack of whistleblower protections, rely on facts that Asensio demonstrably knew at the time of the earlier proceedings.<sup>24</sup>

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<sup>21</sup> (...continued)

see *David L. Turpinseed*, 48 S.E.C. 689, 689 n.1 (1987) (accepting application for review filed twenty days late by exercising "the discretion granted us by Section 19(d)(2) of the Securities Exchange Act" prior to enactment of Rule 420(b)).

<sup>22</sup> Similarly, he asserts that NASD "punished" him "for a violation that [NASD] created by making unanswerable, overly burdensome requests for information pursuant to [NASD] Rule 8210 under threat of disciplinary sanction, *disproportionate to any alleged underlying violation*" (emphasis in original).

<sup>23</sup> *Jakubik*, 97 SEC Docket at 25444.

<sup>24</sup> For example, Asensio asserts, as an example of NASD's alleged bias and conflict of interest that NASD had taken actions against him because of an investment report he wrote in  
(continued...)

Asensio also claims that there were procedural defects in the 2006 disciplinary proceeding: (a) the Hearing Officer's denial of his request for "a separation of the hearing on the issue of jurisdiction over the subject matter of the proceeding and the alleged [NASD] Rule 8210 violation;" (b) the denial of his counterclaim and discovery requests; (c) the requirement that he testify about his efforts to restructure A&C and ABSI "without the benefit of testimony from the corporate, litigation, trust and tax attorneys that assisted in the execution of the [r]eorganization;" and (d) Enforcement's decision to seek a bar after discussing lesser sanctions during settlement negotiations.<sup>25</sup> He further objects to NASD's decision to bar him as being unjustified by the record and inconsistent with NASD's sanction guidelines.

We have held that adherence by a self-regulatory organization ("SRO") to its procedures rebuts a claim of "extraordinary circumstances."<sup>26</sup> However, before the NAC on appeal of the Hearing Panel's bar decision, Asensio's counsel declined to challenge the Hearing Panel procedures and agreed that Asensio "had a full opportunity for a hearing." We also note that in both proceedings here, Asensio had notice, was permitted to present evidence, was able to examine witnesses, was given notice of the findings, and was informed of his appeal rights. Moreover, during the appeal to the NAC in the 2006 disciplinary proceeding, his counsel declined to challenge the Hearing Panel's procedures and agreed that Asensio "had a full opportunity for a hearing."

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<sup>24</sup> (...continued)

2000 critical of a public company that purportedly led to a Congressional investigation into deficiencies in listings oversight at the AMEX, which was then owned by NASD.

Asensio also claims that NASD investigated him after he had reported on irregularities in the activities of another public company, which he asserts resulted in the "instigation of a Congressional investigation beginning in 2000 into deficiencies in listings oversight at the AMEX, owned by [NASD] from 1998 to 2004, while [NASD] and the Commission failed to take such steps." He also notes the high compensation paid by NASD to a senior official who had previously been the subject of a Commission legal proceeding while that official was employed by the AMEX, a proceeding that, he claims, came about only because of his reporting on "deficiencies in listing oversight at the AMEX, owned by [NASD] from 1998 to 2004" and the subsequent Congressional inquiry.

<sup>25</sup> Asensio asserts that an Enforcement staff attorney took a harder line on the terms of a proposed settlement after Asensio chose not to respond to the NASD's offer until the evidentiary hearing.

<sup>26</sup> *Warren B. Minton, Jr.*, 55 S.E.C. 1170, 1176-77 (2002) (quoting *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1099 (1998)).

Asensio claims that his decision not to appeal the 2006 Bar Decision "arose from the view that the Commission generally grants too much deference to [NASD]'s determinations in the appeal process and focuses too narrowly on procedural issues to allow for a fair and proper review of substantive issues." However, Asensio in fact filed a timely appeal of the 2006 Bar Decision but then chose to withdraw that appeal. He cannot now seek, years after the fact, to undo that earlier decision. To permit such a late appeal now would defeat the central purpose of the rule in assuring finality of disciplinary proceedings and allowing parties to rely upon the decisions made in these proceedings.

Asensio also asserts that there is "considerable discretion afforded to [NASD] by the SEC in MC-400 applications."<sup>27</sup> Asensio claims that the Commission's "policy of allowing [NASD] to operate with vague and incomplete rules" facilitates "blatant conflicts-of-interest with [NASD] staff, which conflicts go unquestioned by the Commission staff."<sup>28</sup> He also faults the review function of the Courts of Appeals which, he asserts, grants "judicial deference . . . to [NASD] and the SEC [that] can indeed be absolute" (internal quotation omitted).

Contrary to these assertions, our review of these proceedings is governed by statute and precedent. Exchange Act Section 19(e) and caselaw require that we sustain NASD's disciplinary action if the record shows by a preponderance of the evidence that the applicant engaged in the violative conduct that NASD found and that NASD applied its rules in a manner consistent with the purposes of the Exchange Act.<sup>29</sup> Appeals from denials of requests to associate are governed by Exchange Act Section 19(f), which requires that we dismiss such an appeal if we find that (1) the specific grounds on which NASD based its denial exist in fact, (2) NASD's action was in accordance with its rules, and (3) NASD's rules were applied in a manner consistent with the

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<sup>27</sup> Asensio also suggests that there is "[a] predisposition of the Commission's staff towards [NASD] sanctions of the type in this case" and speculates that Commission staff members have prejudged his appeal. Asensio cites a letter he received in November 2009 from our Division of Trading and Markets. As discussed in Section III.D below, the letter was a response from the staff regarding Asensio's inquiries about NASD procedures. It did not purport to express the views of the Commission.

<sup>28</sup> See, e.g., *supra* note 24. One of Asensio's filings on the issue of bias includes a request made to the Director of our Division of Enforcement in a letter to the Director dated April 5, 2010. There, Asensio asserted that the Division's purported "failure" to contact him or follow up on evidence he furnished to the Division purporting to show "specific and serious violations of securities laws" by NASD is "evidence of the Commission's wrongful bias in favor of, and deference to, [NASD]." However, this letter is another variation of his collateral attack on NASD's actions at issue in this appeal.

<sup>29</sup> 15 U.S.C. § 78s(e); *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982). Section 19(e)(2) directs that we review NASD sanctions to determine whether they are excessive or oppressive or a burden on competition.

purposes of the Exchange Act.<sup>30</sup> We have stated that, under Section 19(f), we consider other misconduct in which the applicant may have engaged, the nature and disciplinary history of a prospective employer, and the supervision to be accorded the applicant.<sup>31</sup>

Asensio argues that the consolidation of NASD and NYSE regulatory functions in 2007 constitutes extraordinary circumstances because it created an NASD monopoly as "the sole primary decider of who may be allowed to associate with" a broker-dealer. Asensio suggests various reasons why, as a result, NASD's sanctions violate various provisions of the Exchange Act and the U.S. Constitution. He argues that the "full extent of [NASD]'s violation of the Act and the U.S. Constitution could not have been known to the Applicant at the time that [NASD] imposed the sanction on Applicant, in part because [NASD]'s monopolization did not exist to the same degree . . . prior to the noted formation of FINRA on July 30, 2007." However, Asensio offers no reason why these claims could not have been raised in connection with the 2008 Eligibility Denial Decision, at which he was represented by counsel and which was after the consolidation of NASD and the NYSE. Nor does he explain why, in connection with a possible appeal of the 2006 Bar Decision, he did not "promptly arrange[] for the filing of the appeal as soon as reasonably practicable" after the consolidation in 2007.<sup>32</sup> In any event, his arguments are without merit.

Asensio asserts that NASD's alleged "monopolization of membership decisions for self-regulatory organizations makes a[n] [NASD] bar sanction for all effects and purposes a bar

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<sup>30</sup> 15 U.S.C. § 78s(f).

<sup>31</sup> *Paul Edward Van Dusen*, 47 S.E.C. 668, 671 (1981). See also *Harry M. Richardson*, Exchange Act Rel. No. 51236 (Feb. 22, 2005), 84 SEC Docket 3485, 3488-89 (noting that relevant factors in reviewing association application include "misconduct in which a statutorily disqualified person may have engaged since the misconduct that gave rise to the statutory disqualification, the nature and disciplinary history of a prospective employer, and . . . the proposed supervisory structure to which the statutorily disqualified person would be subject"). *Accord Timothy P. Pedregen, Jr.*, Exchange Act Rel. No. 61791 (Mar. 26, 2010), \_\_\_ SEC Docket \_\_\_, \_\_\_ (holding that relevant factors include "the recency of the [proposed associate's] conviction" and the inadequacy of the proposed supervision).

Asensio filed a motion on June 7, 2010 requesting that the Commission issue an order "compelling [NASD] to provide precise and adequate guidance on what terms would be acceptable for [Asensio]'s readmission to [NASD] and remedy of [his] bar sanction via [NASD's] Membership Continuance Application . . . process." In connection with this motion, Asensio has advised us that a new application has been filed with NASD by Asensio & Company, Inc. to permit Asensio to associate. As noted, standards for reviewing such applications exist and have been enunciated by us in numerous cases. Accordingly, we deny Asensio's motion.

<sup>32</sup> See *PennMont*, \_\_\_ SEC Docket at \_\_\_.

sanction imposed by the Commission *de facto*." Asensio contends that, under SRO rules established since the consolidation of NASD and NYSE, any application for Asensio's association submitted by a broker-dealer to any SRO "would be evaluated solely by [NASD], and no other independent body in the first instance." He claims that any appeal of NASD's determination to the Commission "would involve the Commission's consideration of [NASD]'s reasoning without a hearing [as required under Exchange Act Section 15(b)(6) and] would not involve an independent consideration of whether [Asensio] is fit to associate . . ."

Even if NASD were the only SRO currently evaluating applications to associate with broker-dealers, this would not convert NASD's bar of Asensio into a *de facto* Commission bar. Congress, by enacting Exchange Act Section 15A(b)(7), gave any registered securities association the separate power to discipline members and associated persons with sanctions including, where "fitting," a bar, without regard to whether that association is the only SRO with such disciplinary authority or with authority over decisions to permit individuals to associate but subject to Commission and ultimately judicial review.<sup>33</sup>

Asensio also contends, without further explanation or analysis, that "[t]he current self-regulatory regime in the administration of [sanctions administered prior to the NASD merger with the NYSE] . . . violates the Appointments Clause of the U.S. Constitution." We understand him to claim that the violative appointments are NASD appointments. Constitutionally protected appointments, however, are those that are "conferred by the appointment of a government."<sup>34</sup> As Asensio himself concedes in a different pleading, NASD "executives and board are not appointed by the U.S. President, nor are they appointed by any other governmental body." As discussed above, Asensio does not explain why he did not raise these issues in the MC-400 proceeding or, in connection with the 2006 Bar Decision, promptly after the 2007 consolidation.

Asensio contends that the underlying facts did not support NASD's decisions and that NASD acted in the manner it did because of its animus towards Asensio. However, because we

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<sup>33</sup> Exchange Act §§ 19(e), 25(a), 15 U.S.C. §§ 78s(e); 78y(a). In addition, nothing prevents the future creation of another SRO.

Asensio, noting that the U.S. Court of Appeals for the D.C. Circuit in *Victor Teicher v. SEC*, 177 F.3d 1016 (1999) disapproved of the Commission imposing "collateral bars," contends that, by permitting NASD to impose a bar without "an opportunity for Commission review, hearing and determination," the Commission has, in effect, imposed a collateral bar on him. A collateral bar against a broker-dealer associate is a bar imposed "outside the broker-dealer branch of the securities industry." *Id.* at 1019. No such bar was imposed on Asensio.

<sup>34</sup> *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868).

have declined to accept jurisdiction to review Asensio's application for review, we will not consider the merits of these proceedings.<sup>35</sup>

Accordingly, we grant NASD's motion to dismiss Asensio's application for review and we deny Asensio's motions requesting that we deny NASD's motion.

### III.

To date, Asensio has filed in connection with this proceeding, in addition to his opposition to NASD's motion to dismiss, more than thirty motions and requests. A complete listing is attached hereto as Exhibit A and incorporated by reference herein. We find that these are cumulative and may be grouped into categories. We discuss them below.

#### A. Motions to Adduce Evidence

Pursuant to our Rule of Practice 452, we permit new evidence to be adduced if the moving party "show[s] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."<sup>36</sup>

##### 1. Documents Attached as Exhibits to Asensio's Filings

Asensio seeks to adduce as additional evidence documents attached as exhibits to his filings.<sup>37</sup> Certain of these exhibits predate the 2006 Bar Decision and the 2008 Eligibility Denial Decision, but Asensio has offered no explanation for why these were not adduced before NASD

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<sup>35</sup> See *Minton*, 55 S.E.C. at 1178 (holding that Commission will "not consider the merits of the allegations concerning rule violations" when it declines to accept jurisdiction) (quoting *Van Alostyne*, 53 S.E.C. at 1100, n.20). Moreover, to the extent that Asensio's motions seek to have us make factual determinations based on new evidence and theories that he did not present in the proceedings below, we decline to do so. Similarly, we deny Asensio's motion requesting that we initiate an "independent investigation of [NASD]'s bad faith investigations of him and of [NASD]'s acts of bias and prejudice against him."

<sup>36</sup> 17 C.F.R. § 201.452.

<sup>37</sup> Generally speaking, these documents include a number of articles from various publications and extensive correspondence among Asensio, NASD staff, Commission staff, and various members of Congress pertaining generally to Asensio's efforts to have his bar revoked and/or the denial of his MC-400 application reversed. He contends that his exhibits support his position that "extraordinary circumstances" exist and "allow for further determinations of fact concerning instances of conflicts-of-interest and bias by [NASD] towards the Applicant and improper ex parte communications in this review."

in those earlier proceedings.<sup>38</sup> Other exhibits post-date the NASD proceedings, but Asensio has not adequately explained their materiality to determinations made by NASD at earlier points in time. Nevertheless, as a discretionary matter, we have determined to admit all the documents Asensio seeks to adduce.

## 2. Motions to Compel Production by NASD

Asensio seeks to compel NASD to produce unspecified records of other investigations NASD initiated against Asensio, which "would provide further evidence of [NASD]'s bias, bad-faith, and abuse of regulatory discretion." He requests that NASD be ordered to produce all of its records "related to all investigations" that it undertook involving Asensio, and "all documents containing requests for information pursuant to [NASD Procedural] Rule 8210 sent to [Asensio] prior to the investigation underlying the sanction in this proceeding."

We reject Asensio's requests to compel NASD to produce additional evidence. Asensio, who was represented by counsel in much of the investigation, part of the disciplinary proceeding, and all of the MC-400 proceeding, had ample opportunity during those proceedings to request all such documents but did not do so.<sup>39</sup>

Moreover, Asensio has failed to identify the other investigations that he claims NASD has initiated against him. He has also not identified the Rule 8210 requests for information that were not included in the record for the 2006 Bar Decision or explained why, if they were sent to

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<sup>38</sup> For example, he seeks to introduce an excerpt of a brief that he had previously presented to the NAC and which is already a part of the record.

<sup>39</sup> As the U.S. Court of Appeals for the Second Circuit observed:

Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised. Moreover, like other administrative exhaustion requirements, the SEC's promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review. It also provides SROs with the opportunity to correct their own errors prior to review by the Commission. The SEC's exhaustion requirement thus promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations.

Asensio, he does not have access to these requests.<sup>40</sup> We therefore deny Asensio's motions asking us to compel NASD to produce documents.

**B. Motions to Recuse Chairman Schapiro and Commissioner Walter and to Require Written Assurances from Other Commissioners**

Asensio has filed motions requesting the recusal of Chairman Schapiro and Commissioner Walter on account of their previous senior positions at NASD and their purported actions during that tenure. In a similar vein, he filed a "Motion To Consider Compliance With Executive Order No. 13490 In Support Od [sic] Request For Recusal of Chairman Schapiro."<sup>41</sup> Neither the Chairman nor Commissioner Walter has participated in this proceeding. Accordingly, we deny these motions as moot.

Asensio has also moved that the other Commissioners who were not formerly employed by NASD "make written statements that their determination in this proceeding will not be swayed by [Asensio]'s filing of evidence of bad acts by Chairman Schapiro, or by [Asensio] asking for the recusal of these Commissioners on the basis of that their former employment as [NASD] executives presents a direct and material conflict of interest and potential for bias and prejudice." Asensio asserts that this written statement is required because of "the adverse impact on their judgment implied in their collegiality with [NASD] that [Asensio] has shown to have conflicts against him" and the need for the commissioners to show that they have not been "swayed or biased."

Asensio's request for written statements is without merit. Asensio does not claim, and has provided no evidence, that the participating Commissioners have any actual bias against him, rather he argues the Commissioners' judgment *may* somehow be adversely impacted. Acceptance of this contention "would undermine the strong presumption of 'honesty and integrity' accorded the Commission and its members in performing the Commission's diverse functions."<sup>42</sup> As the U.S. Court of Appeals for the D.C. Circuit observed in *Blinder, Robinson &*

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<sup>40</sup> We note further that Asensio's requests for NASD production are generally very broadly drafted. Asensio is "not entitled to go on a fishing expedition in the hope that something might turn up to aid his defense." *John Montelbano*, 56 S.E.C. 76, 100 (2003).

<sup>41</sup> Executive Order No. 13490 requires that presidential appointees "will not for a period of 2 years from the date of [their] appointment participate in any particular matter involving specific parties that is directly and substantially related to [their] former employer."

<sup>42</sup> *Jean-Paul Bolduc*, Exchange Act Rel. No. 43884 (Jan. 25, 2001), \_\_\_ SEC Docket \_\_\_, \_\_\_, quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). As the U.S. Court of Appeals noted in *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1106-07 (D.C. Cir. 1988), "[t]o give credence to [such] dark suspicion of bias notwithstanding this carefully crafted structure would

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*Co. v. SEC*, "[i]t would be a strange rule indeed that inferred bias on such a tenuous basis, and then presumed that the bias spread contagion-like to infect Commissioners."<sup>43</sup> Moreover, to accept such a theory would "manifest profound disrespect for Congress' deliberately structuring agencies as (typically) multi-member bodies, with staggered terms and with requirements that the President appoint a certain number of members from the political party other than his own."<sup>44</sup> Accordingly, we also deny Asensio's motion for written assurances by the commissioners who were not formerly employed by NASD.

### C. Motions to Determine that Asensio's Work Aided Investor Protection

Asensio requests that we make a factual determination that "his securities-related work has been of material value in aiding investor protection." Asensio cites examples of inquiries he conducted which, he believes, led to regulatory action or adoption of new regulations.<sup>45</sup>

Asensio raised this argument before NASD in support of the application to associate with ISI. He asserts that NASD erred in its 2008 Eligibility Decision by not giving his pro-investor activities any weight. Asensio's renewal of this contention is a collateral attack on the 2008 Eligibility Decision. As we discussed above, Asensio could have raised this issue in connection with a timely filed appeal of that matter, and because his contention is both untimely and a collateral attack on the 2008 Eligibility Decision, we will not consider the merits of that decision.<sup>46</sup>

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<sup>42</sup> (...continued)

flout what Justice White, in writing for the [Supreme] Court in *Withrow [v. Larkin]*, called 'a presumption of honesty and integrity' on the part of those who serve in office."

<sup>43</sup> *Blinder, Robinson & Co., supra.*

<sup>44</sup> *Id.*

<sup>45</sup> According to Asensio, "[t]he most pertinent example" is his "action to spur and assist Congressional action on deficiencies in listing standards oversight at the American Stock Exchange." Among other examples cited by Asensio, he claims that his investigation of an issuer "led to the discovery of conflicts-of-interest at a prominent mutual fund company . . . which resulted in the SEC and the New York Attorney General taking action against [the mutual fund company], the creation of an investor education program and remedial changes" at the company.

<sup>46</sup> To the extent his support for his "pro-investor" activities include matters that post-date the 2008 Eligibility Decision, they were not part of the record before NASD and thus are not material to his application to appeal that decision.

**D. Motions Requesting Review of FINRA Policies Pursuant to Rule of Practice 430**

Asensio also asks that we review certain NASD policies pursuant to our Rule of Practice 430, "or such other form of review that the Commission may deem appropriate extrinsic to Rule 420 of the Commission's Rules of Practice." Our Rule of Practice 430<sup>47</sup> provides that any person aggrieved by a Commission action made pursuant to delegated authority enumerated in that Rule may seek review of the action in accordance with the provisions of this Rule. Asensio explains that he was dissatisfied by written responses he received from the Chief Counsel and Associate Director of our Division of Trading and Markets (the "Chief Counsel"), dated July 23, 2009 and November 17, 2009 in response to inquiries concerning NASD's readmission process for statutorily disqualified individuals and the Commission's oversight of this process.

As an initial matter, he asserts that he had given notice of his intention to file a petition under our Rule of Practice 430 to have these matters reviewed by us. He claims that we "created the application for a Rule 420 review using three (3) letters related to [his] request for a Rule 430 review" and that in choosing to treat his application as a Rule 420 review, we did so knowing that the deadlines for filing reviews of the 2006 Bar Decision and 2008 Eligibility Decision had passed and that such reviews could only be considered upon a showing of "extraordinary circumstances." We accepted his December 9, 2009 and two January 4, 2010 letters as an appeal under Rule 420 because he requested that we "cancel [his NASD] bar and or MC 400 denial or deny [his] petition in the form of a final ruling or other decision that will assure [his] right to pursue legal redress" in court. We also note that the only proceeding through which the Commission may take such an action is an appeal of NASD's actions pursuant to Rule 420. By letter to the Office of the Secretary dated January 14, 2010, Asensio stated, "I confirm that I will proceed with seeking a review by the Commission pursuant to Rule 420 of the Commission's Rules of Practice."

Asensio's application under Rule 430 is inapposite. The Chief Counsel merely summarized the NASD's analysis in the 2006 Bar Decision and 2008 Eligibility Decision, and described certain legal authorities and procedures relating to Asensio's disciplinary action, his MC-400 application, and his desire to have those actions by NASD reversed by the Commission. The letter does not take action and does not purport to exercise authority delegated by us to the Division. In any event, the views embodied in the correspondence are staff opinions and are not

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17 C.F.R. § 201.430.

binding on the Commission.<sup>48</sup> We therefore deny Asensio's motions requesting our review of certain NASD policies pursuant to Rule of Practice 430.<sup>49</sup>

### **E. Request for Review of Commission's Oversight of NASD**

Asensio has requested that we conduct a "broader review" of our oversight of NASD "including the considerable discretion afforded to [NASD] by the Commission in consideration[] of MC-400 applications and in sanctions related to [NASD] Rule 8210," as well as NASD's "fail[ure] to comply with its own sanction guidelines." Asensio contends that such a review is warranted because of the "misconduct" committed by NASD in its investigation of, and proceedings involving, him. Asensio maintains that, in order to "assure [NASD]'s compliance with the securities laws, the Commission should allow for a full review of the merits and issues of laws evidenced in this case," as the traditional "judicial deference" of NASD's actions "may avert a justified review should the Commission dismiss the application in this proceeding."<sup>50</sup>

Our review in this proceeding is limited to Asensio's application for review. Under Exchange Act Section 19(d)(1),<sup>51</sup> our review powers are limited to disciplinary sanctions, prohibitions or limitations of access to services, bars from association, and denials of membership or participation.

The Office of the Secretary has acknowledged Asensio's request "that the Commission conduct rulemaking to require [NASD] to propose new rules aimed at improving provisions for investor protection in [NASD] rules," assigned his petition a file number, and referred it to the

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<sup>48</sup> See *George Salloum*, 52 S.E.C. 208, 217 n.40 (1995) (alleged verbal consent by our staff to allow trader and syndicate manager's continued association with broker dealer was not binding on the Commission, and so did not limit our ability to prosecute or sanction him).

<sup>49</sup> In connection with his request for a Rule 430 review, Asensio requests that, if we do not proceed with the Rule 430 review, we conduct a "merits-based review . . . pursuant to Commission Rule of Practice 420." For the reasons stated in granting NASD's motion to dismiss, we are not conducting a merits-based review under Rule 420.

<sup>50</sup> Asensio contends that, if the Commission were to conduct a merits review, it could inquire into, among other matters, "potential acts of bias" [by NASD] against him related to improper conduct engaged in by a former chairman and CEO of then-NASD subsidiary, the American Stock Exchange, and other senior NASD officials, including the current Commission chairman, and the current chairman and CEO of NASD. In this regard, Asensio notes that the Commission recently settled an administrative proceeding against that person. These arguments appear to be an extension of his charges of NASD bias against him in connection with the 2006 Bar Decision and the 2008 Eligibility Denial Decision and are addressed earlier.

<sup>51</sup> 15 U.S.C. § 78s(d)(1).

appropriate division of the Commission. We also note that Asensio has directly raised these concerns with members of the staff.

**F. Motion to Strike NASD Filing as Untimely**

Asensio moves to strike NASD's reply brief in support of its motion to dismiss because Rule of Practice 154(b) requires reply briefs to be filed "within three days after service of the opposition."<sup>52</sup> Asensio notes that NASD's reply brief was filed on February 2, 2010, eight calendar days after Asensio served his opposition brief.

Rule of Practice 160 governs how time is computed under our Rules of Practice.<sup>53</sup> Rule 160(a) states that "the day of the . . . event . . . from which the designated period of time begins to run shall not be included" and that "[i]ntermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed for service by mail in paragraph (b) of this rule."<sup>54</sup> Rule 160(b) provides that, if service is "made by mail," as it was here, "three days shall be added to the prescribed period for response."<sup>55</sup>

Asensio served his opposition brief, entitled "Motion to Deny Motions Made by Financial Industry Regulatory Authority to Dismiss and Strike, or, in the alternative, to Define Accepted Application or Accept a New Application; and Motion to Stay Consideration of Motions made by FINRA until such Definition or New Application has been Made," by mail on January 25, 2010.<sup>56</sup> Pursuant to the above rules, NASD's deadline for filing its reply brief is calculated from January 25. We exclude January 25 (the date of service) and January 30 and 31, 2010 (the intermediate Saturday and Sunday), and add three days for service by mail. NASD's reply brief was thus timely filed. Accordingly, we deny Asensio's motion to strike NASD's reply brief.

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<sup>52</sup> 17 C.F.R. § 201.154(b).

<sup>53</sup> 17 C.F.R. § 201.160.

<sup>54</sup> *Id.* (a).

<sup>55</sup> *Id.* (b).

<sup>56</sup> Asensio also served his opposition brief by fax but that was not a sufficient means of service. Our Rule of Practice 150, 17 C.F.R. § 201.150, provides that facsimile service is permitted only when certain conditions have been met, including that "the persons so serving each other have provided the Commission and the parties with notice of the facsimile machine telephone number to be used and the hours of facsimile machine operation." 17 C.F.R. § 201.150(c)(4)(i). The record does not show that these conditions were met. We also note that it appears from our docket that the fax transmission was received here on January 26. Excluding the January 26 and the intermediate weekend, NASD's brief was due February 2.

**G. Motion to Allow Asensio to Pursue Claims Against NASD in Civil Court**

Asensio has requested that, in the event that we dismiss his application for review, we issue an order allowing him to "Pursue Claims against [NASD] and its Officers for Damages and To Vacate [NASD]'s bar and/or MC 400 denial in Civil Court." He contends that this would be the only way for him to "clear his name, recover monetary damages and punitive penalty from [NASD] and the individuals who caused him harm, or have the right to file a new member application at [NASD] or an MC 400 individually or as part of a new member application." Asensio's request is beyond the scope of this proceeding and outside our jurisdiction under Exchange Act Section 19. Accordingly, we deny this motion.<sup>57</sup>

\* \* \* \* \*

Accordingly, it is hereby ORDERED that NASD's motion to dismiss the application for review filed by Manuel P. Asensio be, and it hereby is, GRANTED; and it is further

ORDERED that Asensio's motions, identified in Exhibit A to this Order, seeking to adduce specific exhibits attached to his filings, are GRANTED.

To the extent these motions seek other relief, and as to Asensio's other motions and requests, identified in Exhibit A to this Order, we hereby DENY them for the reasons discussed above.<sup>58</sup>

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

*Florence E. Harmon*  
 By: **Florence E. Harmon**  
**Deputy Secretary**

Elizabeth M. Murphy  
 Secretary

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<sup>57</sup> On May 1 and 2, 2010, Asensio sent e-mails to our Office of the Secretary that were also directed to FINRA. These e-mails appear to refer to a proposed settlement and a new application for Asensio to associate notwithstanding his bar. These matters are not before us in this proceeding. We also note that the e-mail filings do not comply with our Rules of Practice 150 (Service of Papers by Parties), 151 (Filing of Papers with Commission), or 152 (Filing of Papers; Form), 17 C.F.R. §§ 201.150-152.

<sup>58</sup> We have considered all of the contentions advanced by the parties. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed in this order.

**EXHIBIT A**

## Post 1/4/2010 Filings Submitted by Asensio Through 6/7/2010<sup>1</sup>

1. Email dated January 11, 2010 from Manuel Asensio to Robert Cook, Director of Trading and Markets, SEC, Attaching Letter dated January 11, 2010, from Manuel Asensio to Florence Harmon, Deputy Secretary, SEC
2. Letter dated January 14, 2010 from Manuel Asensio to David Becker, General Counsel, SEC
3. Certified Notice of Filing of Documents Attached and/or Referenced in Letters dated December 9, 2009, January 4, 2010 and January 4, 2010 Accepted as an Application for Review by the Commission (1-14-2010) (with exhibits)
4. Email dated January 19, 2010 from Manuel Asensio to David Becker, General Counsel, SEC
5. Second Notice of Filing of Additional Documents Concerning Commission Action and/or Decision to Deny Actions, Deny Review and Decision Concerning the Investigation and/or Enforcement Action Against FINRA in Letters dated December 9, 2009, January 4, 2010 and January 4, 2010 (Including Attachments and Letter Referred to Therein) Accepted as an Application for Review by the Commission on January 6, 2010 (1-20-2010)
6. Letter dated January 20, 2010 from Manuel Asensio to Elizabeth Murphy, Secretary, SEC
7. Motion to Deny Motions Made by Financial Industry Regulatory Authority to Dismiss and Strike, or, in the alternative, to Define Accepted Application or Accept a New Application; and Motion to Stay Consideration of Motions made by FINRA until such Definition or New Application has been Made (1-25-2010) (with exhibit)
8. Notice of Filing of Request for Recusal of Commission Chairman and Commissioner Walter in Letter Dated January 26, 2010 (with Appendix) and Letter Dated January 4, 2010 (1-26-2010)
9. Notice of Filing Motion of Manuel P. Asensio (I) for Determination of Fact Concerning Specific Instances of Bias by the Financial Industry Regulatory Authority, Inc. ("FINRA");

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<sup>1</sup> Some of the filings listed here are denominated as a "Reply" to an NASD filing but, in fact, make a request of some kind; we are treating these filings as motions. In addition, some documents filed by Asensio denominated as "Motions" are actually requests that the Commission deny some motion filed by NASD. We are treating these filings as oppositions to the relevant NASD motions. Finally, some of Asensio's filings listed here were directed to offices other than the Office of the Secretary, but because they either relate directly to this matter, or make requests pertaining to this matter, they have been included in the record, and in this Exhibit A.

(II) for Leave to Adduce Additional Evidence; and (III) to Compel FINRA to Produce Additional Documents Related to Bias to be Included in the Record (2-2-2010) (with exhibits)

10. Motion of Manuel P. Asensio for Consideration of Extraordinary Circumstances Contained in Letters Accepted as an Application and in Supporting Documents Filed January 14, 2010, and Second Motion for Leave to Adduce Additional Evidence (2-9-2010) (with exhibit)

11. Motion of Manuel P. Asensio to Strike from the Record "Reply of FINRA to Asensio's Opposition to FINRA's Motion to Dismiss, to Stay Briefing Schedule, and to Strike" (2-9-2010)

12. Motion Entering Grievances under Rule 420(A)(III), Claim for Damages, and Seeking Order Allowing Applicant to Pursue Claims Against FINRA and its Officers for Damages and to Vacate FINRA's Bar and MC-400 Denial in Civil Court (2-12-2010) (with exhibits)

13. Reply to FINRA's Opposition to Asensio's Motion for "Fact Finding" and to Compel Production of Documents (2-23-2010)

14. Reply to FINRA's Opposition to Motion for Consideration of Extraordinary Circumstances (2-26-2010)

15. Motion for Determination that FINRA's American Stock Exchange Ownership Evidences a Conflict-of-Interest Towards the Applicant and Support Extraordinary Circumstances (2-26-2010) (with exhibits)

16. Motion for Determination of Fact that the Applicant's Securities-Related Work Aided the Public Interest and Investor Protection and that FINRA's MC400 Decision Evidences Bias (3-1-2010) (with exhibit)

17. Notice of Filing of Record of Request for Commission Review of Certain FINRA Policies pursuant to Rule 430 of the Commission's Rules of Practice or Such Other Form of Review Extrinsic to Rule of Practice 420 that the Commission May Deem Appropriate (3-1-2010)

18. Motion to Extend 30 Day Period in Rule 420 Based on Extraordinary Circumstances Surrounding Jurisdictional Dispute and Settlement Offer (3-3-2010)

19. Motion for Review Under Commission Rule of Practice 430 or in the Alternative in Support of a Merits-Based Review Under Commission Rule of Practice 420 Based on a Showing of Extraordinary Circumstances (3-3-2010) (with exhibits)

20. Motion for Leave to Adduce Additional Evidence Concerning Instances of Improper Ex Parte Communications and Bias and for Order Summarily Vacating Bar in Accordance to Applicant's Petition in this Proceeding (3-5-2010)

21. Reply to "Opposition of FINRA to (1) Asensio's Motion for Determination that FINRA's American Stock Exchange Ownership Evidences a Conflict of Interest, (2) Asensio's Motion for Determination of Fact that the Applicant's Securities-Related Work Aided the Public Interest and Investor Protection, (3) Asensio's Motion to Extend 30 Day Period in Rule 420, and (4) Asensio's Motion for Review under Commission Rule of Practice 430 (3-9-2010)
22. Motion for Recusal of Commissioners Who Formerly Worked as FINRA Executives (3-12-2010)
23. Motion for Finding that Evidence of Recurring FINRA Conduct that is Counter to Investor Protection along with Evidence that the Applicant's Membership Will Benefit Investors Requires a Review Under Its Plenary Authority over FINRA Sanctions and Membership Application Decisions (3-15-2010)
24. Motion of Applicant for Consideration of Bias from other FINRA Members due to Applicant's Short-Selling Activities (3-15-2010)
25. Motion for Finding that FINRA's Statutory Disqualification Application ("MC400") Process is Futile as a Remedy for Applicant's Grievances due to FINRA's "Unreasoned Decisionmaking" and "Considerable Discretion" Evident in Applicant's MC400 (3-16-2010)
26. Motion to Consider Issues Created by FINRA's Unprecedented Actions and the Applicant's Special Circumstances as a Unique Member in Deciding Whether to Use the Commission's Plenary Authority Over FINRA Sanctions to Allow a Review of a Bar Past the Time Limitations Contained in Rule 420 and Rule 421 of the Commission's Rules of Practice (3-19-2010) (with exhibits)
27. Motion to Compel Review of FINRA Sanction under Commission's Plenary Authority and Investigate Improper Ex Parte Communication with FINRA or Communication Otherwise Deferential to FINRA (3-22-2010)
28. Motion for Consideration of the Commission's Bias Against Short Sellers, Further Evidence of FINRA's Bias Against the Applicant, and Instances of Misconduct by FINRA Executives Collectively Justifying a Commission Review, and for Leave to Adduce Additional Evidence (3-30-2010) (with exhibits)
29. Motion for Consideration of Commission's Deference to FINRA Executives' Lying and Jurisdictional Misrepresentations as Evidence in Support of Applicant's Claims and Justification for Review, and for Leave to Adduce Additional Evidence (3-31-2010) (with exhibits)
30. Filing of Documents Adduced as Exhibits in Previously Filed Motions of Applicant, Bearing Bates-Stamp Numbers 238 through 348 (3-31-2010)

31. Notice of Filing of Second Request to the Director of the Commission's Division of Enforcement to Commence Investigation of FINRA's Violation of Securities Laws that Resulted in the Applicant's Bar and MC400 Denial (4-5-2010) (with exhibit)
32. Motion for Order Finding that Richard Ketchum's Specific and Direct Conflicts-of-Interest Adversely Affect the Legality of FINRA's Investigation and Claims Against the Applicant and Requires a Review of the Applicant's Sanction and Membership Denial Notwithstanding Their Dates (4-9-2010)
33. Motion for Order Allowing for De Novo Review at the U.S. Court of Appeals Based Upon Commission's Deference to FINRA and "Unreasoned Decisionmaking" With Respect to the Extraordinary Circumstances Requirement of Commission Rule of Practice 420 (4-12-2010) (with exhibits)
34. Notice of Filing of Letter to Certain Commissioners Dated April 14, 2010 and Attached Summary of Issues Presented in Applicant's Pleadings (4-14-2010)
35. Motion for Consideration of Further Evidence of FINRA's Extraordinary Bias and the Applicant's Extraordinary Record of FINRA Rule 8210 Compliance Justifying a Commission Review or Order Vacating Applicant's Bar Sanction, and Supporting Applicant's Motion to Compel Production of Additional Documents by FINRA (4-19-2010)
36. Motion to Vacate FINRA Sanction Based on the Sanction's Specific Violation of the Securities Exchange Act of 1934 and the U.S. Constitution or to Conduct an Alternate Form of Review (4-29-2010) (with exhibits)
37. Motion for Independent Investigation of FINRA Executives' Bias and for Written Assurances by Commissioners Not Formerly Employed by FINRA (4-29-2010)
38. Motion to Consider Compliance with Executive Order No. 13490 in Support of Request for Recusal of Chairman Schapiro (5-12-2010) (with exhibit)
39. Motion for Consideration of Potential for Wrongful Conduct by Commission Officials Against Applicant in Support of Applicant's Claims of Bias, Prejudgment, and Extraordinary Circumstances, and Motion for Leave to Adduce Additional Evidence (6/1/2010) (with exhibits)
40. Motion for Order to Compel FINRA to Provide Precise and Adequate Guidance on Readmission Based Upon a Finding That FINRA has Rendered its Readmission Process Futile and Injurious for Applicant (6-7-2010) (with exhibits)

## SECURITIES AND EXCHANGE COMMISSION

[Release No. PA-43; File No. S7 - 13 -10]

**Privacy Act of 1974:** Systems of Records.

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Notice to revise a system of records.

**SUMMARY:** In accordance with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the Securities and Exchange Commission (“Commission” or “SEC”) proposes to revise a Privacy Act system of records: “Information Pertaining or Relevant to SEC Registrants and Their Activities (SEC-55)”, originally published in the Federal Register Volume 74, Number 139 on Wednesday, July 22, 2009.

**DATES:** The proposed changes will become effective [insert date that is 40 days after publication in the Federal Register] unless further notice is given. The Commission will publish a new notice if the effective date is delayed to review comments or if changes are made based on comments received. To be assured of consideration, comments should be received on or before [insert date that is 30 days after publication in the Federal Register].

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

### Electronic Comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-13-10 on the subject line.

### Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities

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and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-13-10. 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/other.shtml>). Comments are available for Web site viewing and printing 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:** Barbara A. Stance, Chief Privacy Officer, Office of Information Technology, 202-551-7209.

**SUPPLEMENTARY INFORMATION:** The Commission proposes to revise a system of records: "Information Pertaining or Relevant to SEC Registrants and Their Activities (SEC-55)". This system of records is being amended to revise five routine uses, consolidate five routine uses into two new routine uses, and add four additional routine uses.

The Commission has submitted a report of the revised system of records to the appropriate Congressional committees and to the Director of the Office of Management and Budget ("OMB") as required by 5 U.S.C. 552a(r) (Privacy Act of 1974) and guidelines issued by OMB on December 12, 2000 (65 FR 77677).

Accordingly, the Commission is altering the system of records to read as follows:

**SEC-55**

**SYSTEM NAME:**

Information Pertaining or Relevant to SEC Registrants and Their Activities.

**SYSTEM LOCATION:**

Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

Records also are maintained in the SEC's Regional Offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Records concern individuals associated with entities or persons that are registered with the SEC as brokers-dealers, investment advisers, investment companies, self-regulatory organizations, clearing agencies, nationally recognized statistical rating organizations, and transfer agents (individually, a "Registrant;" collectively, "Registrants"). Records may also concern persons, directly or indirectly, with whom Registrants or their affiliates have client relations or business arrangements.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records may contain information relating to the business activities and transactions of Registrants and their associated persons, as well as their compliance with provisions of the federal securities laws and with rules of self-regulatory organizations and clearing agencies. Records may also contain information regarding the business activities and transactions of individuals or entities with whom Registrants have client relations or business arrangements.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

15 U.S.C. 78a et seq., 80a-1 et seq., and 80b-1 et seq.

**PURPOSE(S):**

1. For use by authorized SEC personnel in connection with their official functions including, but not limited to, the conduct of examinations for compliance with federal securities laws, investigations into possible violations of the federal securities laws, and other matters relating to the SEC's regulatory and law enforcement functions.
2. To maintain continuity within the SEC as to each Registrant and to provide SEC staff with the background and results of earlier examinations of Registrants, as well as an insight into current industry practices or possible regulatory compliance issues.
3. To conduct lawful relational searches or analysis or filtering of data in matters relating to the SEC's examination, regulatory, or law enforcement functions.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To appropriate agencies, entities, and persons when (a) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the SEC has determined that, as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the SEC or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with

the SEC's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

2. To other federal, state, local, or foreign law enforcement agencies; securities self-regulatory organizations; and foreign financial regulatory authorities to assist in or coordinate regulatory or law enforcement activities with the SEC.
3. To national securities exchanges and national securities associations that are registered with the SEC, the Municipal Securities Rulemaking Board; the Securities Investor Protection Corporation; the Public Company Accounting Oversight Board; the federal banking authorities, including, but not limited to, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation; state securities regulatory agencies or organizations; or regulatory authorities of a foreign government in connection with their regulatory or enforcement responsibilities.
4. By SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities laws.
5. In any proceeding where the federal securities laws are in issue or in which the Commission, or past or present members of its staff, is a party or otherwise involved in an official capacity.
6. In connection with proceedings by the Commission pursuant to Rule 102(e) of its Rules of Practice, 17 CFR 201.102(e).
7. To a bar association, state accountancy board, or other federal, state, local, or foreign licensing or oversight authority; or professional association or self-regulatory authority to the extent that it performs similar functions (including the Public

Company Accounting Oversight Board) for investigations or possible disciplinary action.

8. To a federal, state, local, tribal, foreign, or international agency, if necessary to obtain information relevant to the SEC's decision concerning the hiring or retention of an employee; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefit.
9. To a federal, state, local, tribal, foreign, or international agency in response to its request for information concerning the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation of an employee; the letting of a contract; or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.
10. To produce summary descriptive statistics and analytical studies, as a data source for management information, in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies; may also be used to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act.
11. To any trustee, receiver, master, special counsel, or other individual or entity that is appointed by a court of competent jurisdiction, or as a result of an agreement between the parties in connection with litigation or administrative proceedings involving allegations of violations of the federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)) or

pursuant to the Commission's Rules of Practice, 17 CFR 201.100 – 900 or the Commission's Rules of Fair Fund and Disgorgement Plans, 17 CFR 201.1100-1106, or otherwise, where such trustee, receiver, master, special counsel, or other individual or entity is specifically designated to perform particular functions with respect to, or as a result of, the pending action or proceeding or in connection with the administration and enforcement by the Commission of the federal securities laws or the Commission's Rules of Practice or the Rules of Fair Fund and Disgorgement Plans.

12. To any persons during the course of any inquiry, examination, or investigation conducted by the SEC's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.
13. To interns, grantees, experts, contractors, and others who have been engaged by the Commission to assist in the performance of a service related to this system of records and who need access to the records for the purpose of assisting the Commission in the efficient administration of its programs, including by performing clerical, stenographic, or data analysis functions, or by reproduction of records by electronic or other means. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.
14. In reports published by the Commission pursuant to authority granted in the federal securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), which authority shall include, but not

be limited to, section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)).

15. To members of advisory committees that are created by the Commission or by Congress to render advice and recommendations to the Commission or to Congress, to be used solely in connection with their official designated functions.
16. To any person who is or has agreed to be subject to the Commission's Rules of Conduct, 17 CFR 200.735-1 to 200.735-18, and who assists in the investigation by the Commission of possible violations of the federal securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), in the preparation or conduct of enforcement actions brought by the Commission for such violations, or otherwise in connection with the Commission's enforcement or regulatory functions under the federal securities laws.
17. To a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.
18. To members of Congress, the press, and the public in response to inquiries relating to particular Registrants and their activities, and other matters under the Commission's jurisdiction.
19. To prepare and publish information relating to violations of the federal securities laws as provided in 15 U.S.C. 78c(a)(47)), as amended.
20. To respond to subpoenas in any litigation or other proceeding.
21. To a trustee in bankruptcy.
22. To members of Congress, the General Accountability Office, or others charged with

monitoring the work of the Commission or conducting records management inspections.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records are maintained in electronic format and paper form. Electronic records are stored in computerized databases. Records stored on other electronic media (*e.g.*, magnetic disk, tape, optical disk) and in paper form are stored in locked file rooms or file cabinets.

**RETRIEVABILITY:**

Information is indexed by name of the Registrant or by certain SEC identification numbers. Information regarding individuals may be obtained through the use of cross-reference methodology or some form of personal identifier. Access for inquiry purposes is generally via a computer terminal.

**SAFEGUARDS:**

Records are safeguarded in a secured environment. Buildings where records are stored have security cameras and 24-hour security guard service. Access is limited to those personnel whose official duties require access. Computerized records are safeguarded through use of access codes and information technology security. Contractors and other recipients providing services to the Commission shall be required to comply with the Privacy Act and applicable agency rules and regulations issued under the Act.

**RETENTION AND DISPOSAL:**

These records will be maintained until they become inactive, at which time they will be

retired or destroyed in accordance with records schedules of the United States Securities and Exchange Commission and as approved by the National Archives and Records Administration.

**SYSTEM MANAGER(S) AND ADDRESS:**

Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312-2413.

**NOTIFICATION PROCEDURE:**

All requests to determine whether this system of records contains a record pertaining to the requesting individual may be directed to the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5100.

**RECORD ACCESS PROCEDURES:**

Persons wishing to obtain information on the procedures for gaining access to or contesting the contents of these records may contact the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5100.

**CONTESTING RECORD PROCEDURES:**

See Record Access Procedures above.

**RECORD SOURCE CATEGORIES:**

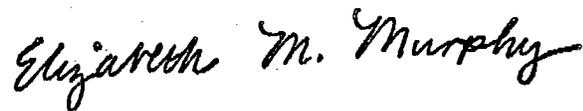
Record sources include filings made by Registrants; information obtained through examinations or investigations of Registrants and their activities; information contained in SEC staff correspondence with Registrants; information received from other federal, state, local, foreign, or other regulatory organizations or law enforcement agencies;

complaint information received by the SEC via letters, telephone calls, emails or any other form of communication; and data obtained from third-party sources.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

By the Commission.



Elizabeth M. Murphy  
Secretary

Date: June 17, 2010

Chairman Schapiro  
not participating

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 62324 / June 18, 2010

Admin. Proc. File No. 3-12659r

In the Matter of the Application of  
  
MICHAEL FREDERICK SIEGEL  
c/o George C. Freeman, III  
Barrasso Usdin Kupperman Freeman & Sarver, LLC  
909 Poydras Street, Suite 2400  
New Orleans, Louisiana 70112  
  
For Review of Disciplinary Action Taken by  
  
NASD

ORDER SETTING ASIDE RESTITUTION

On October 6, 2008, we issued an opinion finding that Michael Frederick Siegel engaged in private securities transactions without providing prior written notice to his firm in violation of NASD Conduct Rules 3040 and 2110, and that Siegel made unsuitable recommendations to two couples in violation of NASD Conduct Rules 2310 and 2110.<sup>1</sup> The conduct at issue occurred in 1997. We fined Siegel a total of \$30,000, ordered him to serve consecutively two six-month suspensions in all capacities, ordered restitution to the customers at issue in the amount of \$400,300, and assessed costs of \$7,958.05. In analyzing whether an award of restitution was in the public interest, we, like NASD, applied Sanction Guidelines Principle Five, which states in relevant part that "[a]djudicators may order restitution when an identifiable person, member firm

<sup>1</sup> *Michael Frederick Siegel*, Securities Exchange Act Rel. No. 58737 (Oct. 6, 2008), 94 SEC Docket 10501.

On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because NASD initiated the original disciplinary action, we will continue to use the designation NASD.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940  
Rel. No. 3040 / June 18, 2010

Admin. Proc. File No. 3-9599

In the Matter of

JOHN GARDNER BLACK  
1446 Centre Line Road  
Warriors Mark, Pennsylvania 16877

ORDER DENYING  
RECONSIDERATION

John Gardner Black seeks reconsideration of an April 2010 Commission order (the "April Order")<sup>1</sup> denying in part his petition to vacate a 1998 settlement with the Commission (the "Settled Order")<sup>2</sup> which, among other things, barred Black from associating with any broker, dealer, municipal securities dealer, investment adviser, or investment company.<sup>3</sup> For the reasons discussed below, we have determined to deny Black's motion.<sup>4</sup>

<sup>1</sup> *John Gardner Black*, Investment Advisers Act Rel. No. 3015 (Apr. 13, 2010), SEC Docket \_\_\_\_\_. Although the April Order denied Black's request to vacate the entire Settled Order, it did vacate the broker, dealer, and municipal securities dealer bars that had been imposed "in light of precedent issued subsequent to the Settled Order" regarding so-called "collateral bars." See *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (vacating collateral bar).

<sup>2</sup> *John Gardner Black*, Investment Advisers Act Rel. No. 1720 (May 4, 1998), 67 SEC Docket 357.

<sup>3</sup> The April Order also declined to vacate the Settled Order's registration revocation of Devon Capital Management ("Devon"), an investment advisory firm which Black controlled. Although Black makes no specific reference to Devon in his current motion (other than in the caption and his discussion of the facts), it is not clear whether his request includes Devon. To the extent that Devon requests reconsideration of the April Order, its request is also denied as not meeting the requirements set by our Rules of Practice. See 17 C.F.R. § 201.470(b) (requiring that the reconsideration motion "specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought").

<sup>4</sup> Our Rule of Practice 470(b), 17 C.F.R. § 201.470(b), provides that "[n]o response to a motion for reconsideration shall be filed unless requested by the Commission." We did not  
(continued...)

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

June 22, 2010

IN THE MATTER OF

Green Energy Resources, Inc.

File No. 500-1

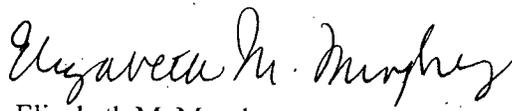
**ORDER OF SUSPENSION  
OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Green Energy Resources, Inc. ("Green Energy") because of questions regarding the accuracy of statements by Green Energy in press releases concerning, among other things, the company's involvement in the Gulf of Mexico oil spill cleanup effort.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Green Energy.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT June 22, 2010 through 11:59 p.m. EDT, on July 6, 2010.

By the Commission.

  
Elizabeth M. Murphy  
Secretary

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**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 62367 / June 23, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13947**

**In the Matter of**

**PHILLIP WINDOM**  
**OFFILL, JR., Esq.**

**Respondent.**

**ORDER OF FORTHWITH SUSPENSION**  
**PURSUANT TO RULE 102(e)(2) OF THE**  
**COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Phillip Offill, Jr. ("Offill") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. 200.102(e)(2)].<sup>1</sup>

II.

The Commission finds that:

1. Offill is an attorney formerly admitted to practice in Texas.

2. On March 12, 2009, a grand jury in the Eastern District of Virginia indicted Offill, alleging one count of conspiracy to commit securities registration violations, securities fraud and wire fraud (18 U.S.C. 371) and nine additional counts of wire fraud (18 U.S.C. 1343 and 1342). The indictment alleged that Offill knowingly and willingly conspired with others to commit offenses, including (i) securities registration violations by selling securities where no registration statement was in effect for such securities in violation of federal securities laws; and (ii) securities fraud by, among other things, making untrue statements of material facts and omitting to state material facts necessary to make the statements, in the light of the circumstances under which they were made, not misleading in connection with the purchase and sale of securities. In addition, the indictment alleged that Offill committed, and conspired to commit, wire fraud by

<sup>1</sup>Rule 102(e)(2) provides in pertinent part: "Any attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as a[] . . . professional or expert has been revoked or suspended in any State . . . shall be forthwith suspended from appearing or practicing before the Commission."

having devised a scheme and artifice to defraud and obtain money and property from investors by means of materially false and fraudulent pretenses, representations, and promises, and knowingly and willingly transmitting and causing to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice.

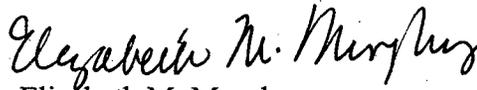
3. On January 28, 2010, after a jury trial, Offill was found guilty on all counts.

4. On April 26, 2010, a judgment was entered by the district court against Offill sentencing him to 96 months in federal prison, a term of three years of supervised release, and the payment of \$30,110.90 in restitution. In addition, the court issued a preliminary order of forfeiture, entering a personal money judgment against Offill in the amount of \$4,838,986, and decreeing that such judgment be partially satisfied by the forfeiture of certain substitute assets.

### III.

In view of the foregoing, the Commission finds that Offill is an attorney who has been convicted of a felony involving moral turpitude within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice. Accordingly, it is ORDERED, that Phillip Windom Offill, Jr. is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

  
Elizabeth M. Murphy  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 62364 / June 23, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13946

In the Matter of

Channel America Television Network, Inc.,  
EquiMed, Inc.,  
Kore Holdings, Inc.,  
Robotic Vision Systems, Inc.  
(n/k/a Acuity Cimatrix, Inc.),  
Security Investments Group, Inc.,  
Shared Technologies Cellular, Inc.,  
Shimoda Resources Holdings, Inc.,  
Tri Star Holdings, Inc.  
(f/k/a Silver Star Foods, Inc.), and  
V-One 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 Channel America Television Network, Inc., EquiMed, Inc., Kore Holdings, Inc., Robotic Vision Systems, Inc. (n/k/a Acuity Cimatrix, Inc.), Security Investments Group, Inc., Shared Technologies Cellular, Inc., Shimoda Resources Holdings, Inc., Tri Star Holdings, Inc. (f/k/a Silver Star Foods, Inc.), and V-One Corp.

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## II.

After an investigation, the Division of Enforcement alleges that:

### A. RESPONDENTS

1. Channel America Television Network, Inc. ("CATN")<sup>1</sup> (CIK No. 833850) is a void Delaware corporation located in Darien, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CATN 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, 1994, which reported a net loss of \$1,545,213 for the prior year. As of June 17, 2010, the common stock of CATN was quoted on the Pink Sheets operated by Pink OTC Markets Inc. ("Pink Sheets"), had two market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. EquiMed, Inc. ("EQMDF") (CIK No. 892493) is a St. Kitts and Nevis corporation located in State College, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EQMDF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1997. On February 4, 2000, EQMDF was the subject of an involuntary Chapter 7 petition in the U.S. Bankruptcy Court for the District of Maryland, which was still pending as of June 17, 2010. As of June 17, 2010, the common stock of EQMDF 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).

3. Kore Holdings, Inc. ("KORHQ") (CIK No. 1101137) is a revoked Nevada corporation located in Potomac, Maryland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). KORHQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended September 30, 2005, which reported a net loss of \$120,888 for the year. On April 7, 2010, KORHQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Maryland, which was still pending as of June 17, 2010. As of June 17, 2010, the common stock of KORHQ 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. Robotic Vision Systems, Inc. (n/k/a Acuity Cimatrix, Inc.) ("RVSIQ") (CIK No. 225868) is a forfeited Delaware corporation located in Nashua, New Hampshire with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RVSIQ 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, 2004, which reported a net loss of \$11,460,000 for the prior nine months. On November 19, 2004, RVSIQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Hampshire, which was converted to Chapter 7, and was still pending as of June 17, 2010. On March 24, 2005, RVSIQ changed its name in the records of the Delaware Secretary of State to Acuity Cimatrix, Inc. but failed to report that change to the Commission on Form 8-K or record it in the Commission's EDGAR

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<sup>1</sup>The short form of each issuer's name is also its stock symbol.

database, as required by Commission rules. As of June 17, 2010, the common stock of RVSQ was quoted on the Pink Sheets, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Security Investments Group, Inc. ("SSLN") (CIK No. 88547) is a void Delaware corporation located in Vineland, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SSLN 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 expenses of \$27,000 for the prior nine months. As of June 17, 2010, the common stock of SSLN 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).

6. Shared Technologies Cellular, Inc. ("STCL") (CIK No. 933583) is a void Delaware corporation located in Hartford, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). STCL 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 \$7,820,000 for the prior nine months. On September 28, 2001, STCL filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Connecticut, which was converted to Chapter 7, and was still pending as of June 17, 2010. As of June 17, 2010, the common stock of STCL 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. Shimoda Resources Holdings, Inc. ("SHRH") (CIK No. 1116196) is a revoked Nevada corporation located in Wilton, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SHRH 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 August 31, 2003. As of June 17, 2010, the common stock of SHRH 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).

8. TriStar Holdings, Inc. (f/k/a Silver Star Foods, Inc.) ("SSTF") (CIK No. 1046862) is a New York corporation located in Linden, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SSTF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2003, which reported a net loss of \$409,790 for the prior year. On September 1, 2005, SSTF filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of New York, which was converted to Chapter 7, and was still pending as of June 17, 2010. On August 10, 2004, SSTF changed its name in the Commission's EDGAR database from Silver Star Foods, Inc. to Tri Star Holdings, Inc. As of June 17, 2010, the common stock of SSTF was quoted on the Pink Sheets, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

9. V-One Corp. ("VNECQ") (CIK No. 1008946) is a forfeited Delaware corporation located in Rockville, Maryland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VNECQ 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, 2004, which reported a net loss of \$3,159,335 for the prior nine months. On March 11, 2005, VNECQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Maryland, which was terminated on March 24, 2008. As of June 17, 2010, the common stock of VNECQ 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

10. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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 hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

### 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any 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 permitted by the Commission Rules of Practice.

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

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

By the Commission.

Elizabeth M. Murphy  
Secretary

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

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**June 23, 2010**

**In the Matter of**

**Channel America Television Network, Inc.,  
EquiMed, Inc.,  
Kore Holdings, Inc.,  
Robotic Vision Systems, Inc.  
(n/k/a Acuity Cimatrix, Inc.),  
Security Investments Group, Inc.,  
Shared Technologies Cellular, Inc.,  
Shimoda Resources Holdings, Inc.,  
Tri Star Holdings, Inc.  
(f/k/a Silver Star Foods, Inc.), and  
V-One Corp.,**

**File No. 500-1**

**ORDER OF SUSPENSION OF  
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Channel America Television Network, Inc. because it has not filed any periodic reports since the period ended December 31, 1994.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of EquiMed, Inc. because it has not filed any periodic reports since the period ended September 30, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Kore Holdings, Inc. 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 Robotic Vision Systems, Inc. (n/k/a Acuity Cimatrix, Inc.) because it has not filed any periodic reports since the period ended June 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Security Investments Group, Inc. because it has not filed any periodic reports since the period ended September 30, 1995.

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

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Tri Star Holdings, Inc. (f/k/a Silver Star Foods, Inc.) because it has not filed any periodic reports since the period ended December 31, 2003.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of V-One Corp. because it has not filed any periodic reports since the period ended September 30, 2004.

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 June 23, 2010, through 11:59 p.m. EDT on July 7, 2010.

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. 62362 / June 23, 2010

ADMINISTRATIVE PROCEEDING  
File No. 3-13945

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In the Matter of

SSE Telecom, Inc.,  
Strategic Alliance Group, Inc.,  
Stratasec, Inc.,  
Superfly Advertising, Inc.  
(f/k/a Morlex, Inc.),  
SVI Media, Inc.,  
Symons International Group, Inc.,  
Synergy Renewable Resources,  
Inc., and  
Syntech International, Inc.  
(n/k/a Avalon Technology  
Group, Inc.),

Respondents.

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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 SSE Telecom, Inc., Strategic Alliance Group, Inc., Stratasec, Inc., Superfly Advertising, Inc. (f/k/a Morlex, Inc.), SVI Media, Inc., Symons International Group, Inc., Synergy Renewable Resources, Inc., and Syntech International, Inc. (n/k/a Avalon Technology Group, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. SSE Telecom, Inc. (CIK No. 808220) is a void Delaware corporation located in Fremont, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SSE Telecom 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 30, 2000, which reported a net loss of \$700,000 for the prior three months. As of June 21, 2010, the company's stock (symbol "SSET") was quoted on the Pink Sheets operated by Pink Sheets OTC Markets, Inc. ("Pink Sheets"), had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Strategic Alliance Group, Inc. (n/k/a CruiseCam International, Inc.) (CIK No. 737455) is a Florida corporation located in Farmington Hills, Michigan with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Strategic Alliance is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2005, which reported a net loss of \$296,742 for the prior three months. As of June 21, 2010, the company's stock (symbol "CCMCD") was quoted on the Pink Sheets, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Stratesec, Inc. (CIK No. 1037453) is a void Delaware corporation located in Chantilly, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Stratesec is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2003, which reported a net loss of \$687,264 for the prior three months. As of June 21, 2010, the company's stock (symbol "SFTC") 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).

4. Superfly Advertising, Inc. (f/k/a Morlex, Inc.) (CIK No. 795568) is a delinquent Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Superfly is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB/A for the period ended December 31, 2007, which failed to include required financial statements. The company's Form 10-QSB for the period ended September 30, 2007 reported a net loss of \$123,049 since the company's January 1, 2000 inception. As of June 21, 2010, the company's stock (symbol "SPFL") 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. SVI Media, Inc. (CIK No. 1285206) is a revoked Nevada corporation located in Peoria, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SVI Media 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, 2007, which reported a net loss of over \$9.14 million for the prior nine months. On April 30, 2008, the company announced that it had agreed to sell all of its assets. As of June 21, 2010, the company's stock (symbol "SVIA") 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).

6. Symons International Group, Inc. (CIK No. 1013698) is an Indiana corporation located in Indianapolis, Indiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Symons 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 over \$5 million for the prior three months. As of June 21, 2010, the company's stock (symbol "SIGC") 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. Synergy Renewable Resources, Inc. (CIK No. 778208) is a British Columbia corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Synergy 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, 1996, which reported a net loss of over \$2.61 million for the prior twelve months. As of June 21, 2010, the company's stock (symbol "SRRIF") 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).

8. Syntech International, Inc. (n/k/a Avalon Technology Group, Inc.) (CIK No. 351940) is a Delaware corporation located in Fort Worth, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Syntech 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, 1994, which reported a net loss of over \$1.23 million for the prior nine months. The company ceased on operations on September 30, 1995. As of June 21, 2010, the company's stock (symbol "AVLN") 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

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

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

11. 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 registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

### 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any 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

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

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**June 23, 2010**

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**IN THE MATTER OF**

**SSE Telecom, Inc.,**  
**Strategic Alliance Group, Inc.,**  
**(n/k/a CruiseCam International, Inc.),**  
**Stratasec, Inc.,**  
**Superfly Advertising, Inc.**  
**(f/k/a Morlex, Inc.),**  
**SVI Media, Inc.,**  
**Symons International Group, Inc.,**  
**Synergy Renewable Resources, Inc., and**  
**Syntech International, Inc.**  
**(n/k/a Avalon Technology Group, Inc.)**

**File No. 500-1**

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**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 SSE Telecom, 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 Strategic Alliance Group, Inc. (n/k/a CruiseCam International, Inc.) because it has not filed any periodic reports since the period ended December 31, 2005.

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

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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 Superfly Advertising, Inc. (f/k/a Morlex, Inc.) because it has not filed any periodic reports since the period ended December 31, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of SVI Media, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Symons International Group, 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 Synergy Renewable Resources, Inc. because it has not filed any periodic reports since the period ended December 31, 1996.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Syntech International, Inc. (n/k/a Avalon Technology Group, Inc.) because it has not filed any periodic reports since the period ended September 30, 1994.

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 June 23, 2010, through 11:59 p.m. EDT on July 7, 2010.

By the Commission.

Elizabeth M. Murphy  
Secretary

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

Chairman Schapiro and  
Commissioner Paredes  
not participating

SECURITIES AND EXCHANGE COMMISSION  
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 62374 / June 24, 2010

Admin. Proc. File No. 3-12988r

In the Matter of the Application of

LUIS MIGUEL CESPEDES

27542 Gable Street  
Capistrano Beach, California 92624

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

OPINION OF THE COMMISSION ON REMAND

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY  
PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade  
Unsuitable Recommendations

Former registered representative made unsuitable investment recommendations to customers. *Held*, on remand, after consideration of hearing transcript previously not included in the record certified by registered securities association, the sanctions imposed by registered securities association are *sustained*.

APPEARANCES:

*Luis Miguel Cespedes, pro se.*

*Danielle I. Schanz, for FINRA, on behalf of NYSE Regulation, Inc.*

Mandate issued: December 11, 2009

Briefs received: March 1, 2010

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## I.

On February 13, 2009, we issued an opinion sustaining findings by NYSE Regulation, Inc. (the "NYSE")<sup>1</sup> that Luis Miguel Cespedes, formerly a registered representative associated with Financial Industry Regulatory Authority member firm A.G. Edwards and Sons, Inc., made unsuitable investment recommendations of high concentrations of technology sector securities, the majority of which were unit investment trusts ("UITs"), to fourteen of his brokerage customers (the "February 2009 Opinion").<sup>2</sup> In the February 2009 Opinion, we found that "Cespedes's recommendations that [his] customers invest with significant concentrations in the technology sector, often using margin to purchase the securities in their accounts, were unsuitable and inconsistent with just and equitable principles of trade," in violation of NYSE Rule 476(a)(6).<sup>3</sup> We further found that the sanctions the NYSE imposed for Cespedes's violations (a censure and a ten-year bar from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization) were neither excessive nor oppressive and were consistent with the public interest.

The February 2009 Opinion found that:

Cespedes recommended that all of the customers at issue invest the majority, and in many cases all, of their account values in the technology sector. Many of the customers were of an advanced age and already retired or about to retire. At least one customer was forced to return to work at a low-paying job to pay for her living expenses. Many of the customers had relatively modest incomes and net worth and relied significantly on Cespedes to provide investment recommendations suitable to their life situations and needs. Cespedes failed to explain adequately to these inexperienced customers the significant risk of loss

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<sup>1</sup> On July 26, 2007, the Commission approved proposed rule changes in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation were transferred to NASD, and the expanded NASD changed its name to the Financial Industry Regulatory Authority, or FINRA. See Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the underlying proceeding in this matter was initiated by NYSE Regulation, we use the designation "NYSE" in this opinion.

<sup>2</sup> *Luis Miguel Cespedes*, Exchange Act Rel. No. 59404 (Feb. 13, 2009), 95 SEC Docket 14272.

<sup>3</sup> NYSE Rule 476(a)(6) provides that members and their employees can be disciplined for conduct that is "inconsistent with just and equitable principles of trade."

that his recommendations of highly concentrated technology sector portfolios entailed.<sup>4</sup>

The February 2009 Opinion further found that Cespedes's violations were aggravated by Cespedes's attempts to intimidate two witnesses and to persuade one of his customers "that they were on the same side and encourag[e] [the customer] to obtain money from the firm."<sup>5</sup>

Cespedes sought review of the February 2009 Opinion in the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"). In connection with Cespedes's appeal to the D.C. Circuit, Commission staff noted that the record the NYSE certified in connection with Cespedes's initial appeal to the Commission did not include the transcript of a hearing session (the "Missing Hearing Transcript") held before the NYSE hearing board on February 6, 2007, one of seven hearing sessions in Cespedes's NYSE disciplinary proceeding. In addition, the record index, provided by the NYSE to both Cespedes's then-counsel and the NYSE counsel, as well as to the Commission, did not include the Missing Hearing Transcript on the list of record items, and neither Cespedes nor the NYSE noted the absence of the Missing Hearing Transcript from the certified record.

In an August 14, 2009 Motion to Remand (the "Motion to Remand"), the Commission requested that the D.C. Circuit remand Cespedes's appeal to the Commission "to 1) direct the NYSE to supplement the record with the [Missing Hearing Transcript]; and 2) allow the parties to submit briefs on what effect, if any, the testimony should have on the Commission's sanction determination." On December 11, 2009, the D.C. Circuit issued a Mandate (the "Mandate") granting the Motion to Remand "for proceedings consistent with the motion." On January 7, 2010, the NYSE filed a Revised Index and Supplementation of the Certified Record, including the Missing Hearing Transcript. We base our findings on an independent review of the record.

## II.

The only testimony in the Missing Hearing Transcript is that of two witnesses called by Cespedes.<sup>6</sup> The first character witness, John P, was the chairman of a charitable organization on whose board of directors Cespedes served. John P testified that Cespedes assisted the organization with fundraising activities, but that John P and Cespedes did not have any social, business, or investment relationship beyond their work with the organization. On cross-

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<sup>4</sup> *Cespedes*, 95 SEC Docket at 14287.

<sup>5</sup> *Id.* at 14287-88.

<sup>6</sup> The Missing Hearing Transcript also included closing and sanctions arguments by counsel, which we need not address because those arguments did not include testimony and are not evidence.

examination, John P acknowledged that he was unaware of the nature of the NYSE's charges against Cespedes.

The second character witness, Travis A, was the branch manager at the firm where Cespedes was employed at the time of the hearing. Travis A testified that he was aware of the NYSE's charges when Cespedes joined his firm. Travis A further stated that Cespedes was under "heightened supervision" at his new firm, had received no customer complaints at the new firm, and that Cespedes was particularly conscientious about obtaining "letters of explanation from clients, disclosure agreements from clients, where they're not really required by the industry, but we now as a practice get lots of disclosure from the clients simply because we have seen what can happen when you don't." On cross-examination, Travis A testified that he had no knowledge of the specifics of the NYSE's charges against Cespedes and stated, "I didn't get to see what was going on in the accounts" at issue in this proceeding.

### III.

In setting forth the bases for our finding that the NYSE's sanctions were appropriate, we stated in the February 2009 Opinion:

Given Cespedes's conduct and his attempts to prevent detection of his conduct and to influence prospective witnesses in this proceeding, a ten-year bar will have the remedial effect of protecting the investing public from harm by preventing Cespedes from continuing to invest customer funds without adequate consideration of the customer's age, financial situation, and needs. The sanction will also deter other registered representatives from making similarly unsuitable recommendations in customer accounts in the future.<sup>7</sup>

Cespedes mentions neither witness's testimony in his brief on remand. The testimony of John P and Travis A does not address any of the bases for our finding in the February 2009 Opinion that the sanctions the NYSE imposed were appropriate. Neither witness testified or had knowledge of Cespedes's conduct in making recommendations in the customer accounts at issue. The witnesses also had no knowledge about the aggravating factors cited in the sanction analysis. Further, neither witness provided any information that would contradict our finding about the deterrent effect of the sanctions.

In addition to the issues identified in the February 2009 Opinion, we are concerned that Cespedes's continued employment in the industry could provide opportunity for future violations. As we stated in the February 2009 Opinion,

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<sup>7</sup> *Cespedes*, 95 SEC Docket at 14289 (citing *SEC v. PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (stating that "general deterrence" may be "considered as part of the overall remedial inquiry," quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005))).

Cespedes fails to recognize the wrongfulness of his conduct. Although Cespedes knew that his customers lacked investment experience and, based on their financial situations and needs, could not afford to suffer the losses to which his recommendations made them susceptible, he continues to suggest that he merely fulfilled the wishes of the customers by following an aggressive, risky investment strategy in all of their accounts.<sup>8</sup>

Cespedes is not currently employed at the firm where Travis A served as his branch manager or at any other firm. Therefore, Travis A's testimony that the new firm was providing additional supervision over Cespedes does not allay our concerns. Further, Travis A's testimony contained few specifics about the nature of that supervision, and we question whether it would have addressed the particular dangers posed by Cespedes since Travis A had no knowledge of Cespedes's violative conduct. Given the concerns about Cespedes's conduct expressed in the February 2009 Opinion, Cespedes's efforts at continued employment as a registered representative support our finding that the ten-year bar was an appropriate sanction. Therefore, we reaffirm our sanction analysis in the February 2009 Opinion and our determination that the sanctions imposed by the NYSE were appropriate.

Although we asked the parties to limit their briefs to what impact the testimony in the Missing Hearing Transcript might have on our sanction analysis, Cespedes more broadly argues: 1) that the NYSE's proceeding was unfair; 2) that the testimony of his customers before the NYSE was dishonest and that the evidence cited by the NYSE with respect to customer investment experience and losses was inaccurate; 3) that the NYSE illegally admitted taped telephone conversations between Cespedes and customer James J and that these tapes were altered; and 4) that the NYSE's expert witness provided flawed testimony about the suitability of UITs. None of these arguments relate to the testimony in the Missing Hearing Transcript, and therefore they are beyond the scope of the Mandate and our Order Scheduling Briefs on Remand. Further, Cespedes did not raise many of these arguments in his initial appeal and waived his right to seek reconsideration of the matters he did raise when he chose not to file a timely motion for reconsideration pursuant to Rule 470 of our Rules of Practice.<sup>9</sup> The February 2009 Opinion constitutes our decision with respect to Cespedes's liability as well as the sanctions, and we reaffirm our findings in that opinion in their entirety here. Cespedes has waived his right to raise now any arguments not raised in his initial appeal to us,<sup>10</sup> and his new arguments do not depend on newly discovered evidence or an intervening change in the governing law and are not,

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<sup>8</sup> *Id.* at 14287.

<sup>9</sup> 17 C.F.R. § 201.470.

<sup>10</sup> *Nw. Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument in a second appeal . . .").

therefore, within an exception to the law of the case doctrine.<sup>11</sup> Nevertheless, certain issues he raises bear addressing specifically.

### **Fairness of Proceeding**

Cespedes argues that the NYSE's proceeding was biased against him, and he broadly alleges that the proceedings violated unspecified rights.<sup>12</sup> The February 2009 Opinion states, "Cespedes has not argued that the Hearing Board itself was biased, nor does our independent review of the record find any support for such a notion,"<sup>13</sup> and we found that "the NYSE applied its rules in a manner consistent with the purposes of the Exchange Act."<sup>14</sup> Further, our *de novo* review of the record cured whatever bias, if any, may have existed below.<sup>15</sup>

### **Credibility of Evidence Supporting Findings**

Cespedes did not, in his initial appeal, challenge the accuracy or truthfulness of the customers who testified during his hearing. In any event, we conducted an independent review of the record, and our February 2009 Opinion determined that the record evidence supported the NYSE's findings and the sanctions it imposed.<sup>16</sup>

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<sup>11</sup> Compare *Key v. Sullivan*, 925 F.2d 1056, 1060 (7<sup>th</sup> Cir. 1991) (exceptions to law of the case doctrine).

<sup>12</sup> Cespedes's arguments are not clear, but he makes broad statements such as, "The NYSE became a for-profit corporation and is not a government agency, and I don't understand how they can get away with violating my rights. I look forward to challenging the tactics that were used in a real court of law that follows the laws and does not make a mockery of the justice system."

<sup>13</sup> *Cespedes*, 95 SEC Docket at 14284.

<sup>14</sup> *Id.* at 14279.

<sup>15</sup> *Guy P. Riordan*, Exchange Act Rel. No. 61153 (Dec. 11, 2009), 97 SEC Docket 23445, 23473 n.82 (citing *Robert Bruce Orkin*, 51 S.E.C. 336, 344 (1993) (stating that "our *de novo* review of this matter cures whatever bias or disregard of precedent or evidence, if any, that may have existed below"), *aff'd*, 31 F.3d 1056 (11<sup>th</sup> Cir. 1994)).

<sup>16</sup> The February 2009 Opinion noted that the "NYSE expressly found each of the testifying witnesses to have testified credibly. Credibility determinations of an initial fact finder are entitled to considerable weight," citing *Joseph Abbondante*, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 209 n.21 (citing *Laurie Jones Canady*, 54 S.E.C. 65, 78 n.23 (1999) (citing *Anthony Tricarico*, 51 S.E.C. 457, 460 (1993)), *petition denied*, 230 F.3d 362

(continued...)

Cespedes also makes new arguments related to customer accounts other than the fourteen that were the basis of the February 2009 Opinion. Specifically, he complains that "the NYSE used bullying tactics to subpoena information from AG Edwards in order to impeach [a Cespedes customer] and we were not provided those documents for review until just prior to their introduction at the hearing to which my attorney objected but was overruled," and that the parents of customers Antonina and Maria G did not lose money in their accounts. Since Cespedes's conduct with respect to these customers' accounts did not form the basis of our February 2009 Opinion, these arguments are irrelevant.

Cespedes also disputes the accuracy of the calculations of customer losses and Cespedes's commissions that the NYSE cited in support of its argument before the Hearing Board that Cespedes should be ordered to pay restitution. The NYSE Hearing Board, however, did not order Cespedes to pay restitution, and therefore this issue is not part of this appeal.

#### **Admissibility of Taped Telephone Conversations**

Cespedes argues that the NYSE "violat[ed] [Cespedes's] rights as a resident of California by illegally admitting phone conversations that were doctored and altered." In his initial appeal, Cespedes contended only that it was a violation of California law for the NYSE to admit the transcripts of the taped telephone conversations. Based on the analysis set forth in the February 2009 Opinion, we found that "the NYSE's determination to admit the audiotape and written transcripts was appropriate."<sup>17</sup>

Cespedes did not argue in his initial appeal that the tapes had been altered. In fact, the February 2009 Opinion noted "Cespedes does not dispute the authenticity of the tape and transcripts."<sup>18</sup> He has thus waived his right to make this argument. Further, Cespedes does not specifically challenge the accuracy of the transcript portions that we quoted and relied on in reaching our conclusion in the February 2009 Opinion that the tapes "exhibit bad faith and [are] an aggravating factor in our sanctions analysis."<sup>19</sup>

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<sup>16</sup> (...continued)  
(D.C. Cir. 2000)), *petition denied*, 209 Fed.Appx. 6 (2d Cir. 2006) (unpublished). *Cespedes*, 95 SEC Docket at 14280 n.15.

<sup>17</sup> *Cespedes*, 95 SEC Docket at 14288-89.

<sup>18</sup> *Id.* at 14288.

<sup>19</sup> *Id.* at 14289.

### Expert Witness Testimony

On remand, Cespedes disputes the testimony of the NYSE's expert witness regarding the suitability of UITs for the customers at issue. In his initial appeal, Cespedes argued that the expert witness was biased and had an insufficient basis for his opinion. We previously rejected those arguments. The February 2009 Opinion also states, "The record supports the Hearing Board's determination that Cespedes's recommendations were incompatible with his customers' financial situations and needs, even without [the expert witness's] testimony."<sup>20</sup> Further, the basis of our finding that Cespedes's recommendations were unsuitable was not that Cespedes recommended UITs, but rather that he recommended "that these customers invest with significant concentrations in the technology sector, often using margin to purchase the securities in their accounts."<sup>21</sup>

\* \* \* \*

Accordingly, after reviewing the Missing Hearing Transcript, we reaffirm our determinations in the February 2009 Opinion that the sanctions imposed on Cespedes by the NYSE are neither excessive nor oppressive and are consistent with the public interest, and we sustain them.<sup>22</sup>

An appropriate order will issue.

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

  
By: Florence E. Harmon  
Deputy Secretary

Elizabeth M. Murphy  
Secretary

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<sup>20</sup> *Id.* at 14284.

<sup>21</sup> *Id.* at 14282-83.

<sup>22</sup> We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 62374 / June 24, 2010

Admin. Proc. File No. 3-12988r

In the Matter of the Application of

LUIS MIGUEL CESPEDES

27542 Gable Street  
Capistrano Beach, CA 92924

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES  
ASSOCIATION

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

ORDERED that the disciplinary action taken by NYSE Regulation, Inc. against Luis Miguel Céspedes be, and it hereby is, *sustained*.

By the Commission.



By: Florence E. Harmon  
Deputy Secretary

Elizabeth M. Murphy  
Secretary

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 62372 / June 24, 2010**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 3146 / June 24, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13948**

**In the Matter of**

**FEI-FEI CATHERINE FANG,**  
**CPA,**

**Respondent.**

**ORDER INSTITUTING PUBLIC  
ADMINISTRATIVE PROCEEDINGS  
PURSUANT TO RULE 102(e) OF THE  
COMMISSION'S RULES OF PRACTICE,  
MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted against Fei-Fei Catherine Fang, CPA ("Respondent") pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.<sup>1</sup>

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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<sup>1</sup> Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>2</sup> that:

#### RESPONDENT

1. Respondent is a certified public accountant licensed by the state of Texas. During the periods at issue here, she was a sole proprietor in Fei-Fei Catherine Fang, CPA, an accounting firm located in Dallas, Texas and registered with the Public Company Accounting Oversight Board ("PCAOB").

2. From September 14, 2005 through July 2009, Respondent served as the independent auditor for Advanced Materials Group, Inc. ("AMG"), a manufacturing company headquartered in Garland, Texas whose common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and quoted on the OTC Pink Sheets. AMG filed Chapter 11 bankruptcy proceedings on July 2, 2009.

3. Respondent audited AMG's financial statements for the fiscal years ended November 30, 2005 through November 30, 2008, which were included in annual reports on Form 10-KSB AMG filed with the Commission. For each of these years, Respondent provided AMG with an unqualified audit opinion.

4. She also reviewed AMG's quarterly financial statements for fiscal years 2006 through 2008 and for the fiscal quarter ended February 28, 2009, which were included in quarterly reports on Forms 10-QSB and 10-Q AMG filed with the Commission.

5. Before auditing AMG's November 30, 2005 financial statements, Respondent had no audit experience, and she had no other audit clients besides AMG before 2009.

#### FACTS

##### The Fraudulent Scheme

6. From at least the fiscal quarter ended May 31, 2008 through the fiscal quarter ended February 28, 2009, AMG's former chief financial officer orchestrated a fraudulent scheme to inflate AMG's earnings and accounts receivable. With the aid of a former AMG accounting manager, the former chief financial officer caused AMG to record sizable fictitious sales in AMG's sales journal, normally at or near quarter end. When these false sales were recorded, AMG's accounting system generated invoices to customers. These invoices merely described the sales as "miscellaneous charges" and were unsupported by purchase orders or shipping documents.

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<sup>2</sup> 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.

7. The fictitious sales were many times larger than AMG's usual sales, which typically ranged from a few hundred to a few thousand dollars in amount. In contrast, the false sales were in the range of \$100,000 to \$200,000 or more. The false sales were listed in receivables aging reports included in Respondent's audit work papers and were conspicuous in both their amount and grouping at quarter ends.

8. As part of the scheme, the former chief financial officer directed the former accounting manager to create credit memos to reverse the sales in the next quarter, before the invoices became delinquent. These credit memos were reflected in AMG's sales journal and were conspicuous in amount and grouping.

9. The net effect of these false accounting entries was to materially inflate AMG's sales and earnings in the periods they were recorded. Specifically, AMG's sales for the fiscal year ended November 30, 2008 were overstated by approximately \$1.7 million, or 16.2%, which resulted in an earnings overstatement of 122.7%. The scheme had a similar impact on AMG's quarterly results, as reflected in the following table:

Quarter Ended	Net Sales as Originally Reported	Net Sales as Corrected	Percentage Overstated	Earnings Originally Reported	Earnings as Corrected	Percentage Overstated
May 31, 2008	\$2,791,466	\$2,246,966	24.2%	\$30,502	(\$513,998)	106%
August 31, 2008	\$3,216,863	\$2,615,697	23%	\$120,573	(\$480,593)	125%
February 28, 2009	\$2,689,190	\$2,522,590	6.6%	\$27,738	(\$138,862)	120%

10. AMG's accounts receivable were also materially overstated in these periods. At each balance sheet date between May 31, 2008 and February 28, 2009, AMG's receivables were overstated by 29.1%, 26.3%, 22.1% and 7.4%, respectively.

11. The former chief financial officer used the inflated accounts receivable to obtain greater borrowings under AMG's bank line of credit. AMG's credit limit under this line was directly tied to the balance of its accounts receivable, which was a central component of the borrowing base calculation under this line. Between May 31, 2008 and February 28, 2009, AMG increased borrowing under its line of credit from \$1,499,282 to \$2,459,000.

12. The former chief financial officer used the additional borrowings in substantial part to pay large, unauthorized personal expenses he charged to an AMG credit card. Among other things, he used the AMG credit card to remodel his house; to vacation in Florida, New Mexico and France; to buy professional hockey season tickets; to join a country club; and to pay property taxes on his home. The former chief financial officer also used funds drawn from the line of credit to pay for an interest in an executive jet service, which he used for extensive personal travel. In total, the former chief financial officer spent \$688,352 of AMG's funds for unauthorized personal expenses.

### Respondent's Unreasonable Conduct

13. While auditing and reviewing AMG's financial statements for the fiscal year ended November 30, 2005 through the fiscal quarter ended February 28, 2009, Respondent repeatedly failed to perform in accordance with applicable professional standards. First, Respondent did not possess adequate technical training or proficiency as an auditor. *See PCAOB Standards and Related Rules*, AU § 210. Before Respondent audited AMG's November 30, 2005 financial statements, she had no auditing experience. On that and subsequent audits of AMG's financial statements, Respondent was the only auditor on the engagement but failed adequately to maintain and update her technical training and to acquire relevant audit experience.

14. Respondent failed to adequately plan the audits, obtain an understanding of internal controls, and develop audit procedures responsive to identified risks. *See PCAOB Standards and Related Rules*, AU §§ 311 and 319. Among other things, Respondent did not understand AMG's system of internal controls or competently identify audit risks. For instance, with respect to her audit of AMG's November 30, 2008 financial statements, Respondent did not consider accounts receivable to be an area of heightened audit risk even though receivables had increased 75% from 2007 to 2008, represented 44% of total assets, and were central to the company's borrowings under its line of credit, which had increased by 77% compared to the previous year. Respondent also followed a generic audit program, purchased off the internet, but failed to adjust audit procedures to account for risks or circumstances unique to AMG.

15. Respondent also failed to exercise professional skepticism or obtain sufficient competent evidential matter with respect to the company's large, unusual quarter end sales. *See PCAOB Standards and Related Rules*, AU §§ 230.07 and 326. She merely relied on the former accounting manager's verbal representations that he had been too busy to invoice customers before then. This explanation, however, was inconsistent with the receivables aging report in her audit work papers, which showed small invoices prepared daily for these customers throughout the quarter.

16. In addition, Respondent failed to perform confirmation procedures in accordance with *PCAOB Standards and Rules* AU § 330. Among other things, she improperly allowed AMG management to control her confirmation of accounts receivable. *See PCAOB Standards and Rules* AU § 330.28. Respondent gave the former chief financial officer and former accounting manager blank confirmations to send to AMG's largest customers, and relied on them to mail the confirmations to customers. Accordingly, Respondent did not know that confirmations were not mailed to AMG's two largest customers or that the confirmation responses she ostensibly received from these customers had been falsified by someone at AMG.

17. Respondent also failed to evaluate exceptions noted on confirmation responses in connection with her audit of the November 30, 2008 financial statements. For instance, Respondent accepted the former accounting manager's verbal explanation of a \$323,000 exception noted on a returned confirmation without performing any other procedures. Respondent should have performed additional procedures with respect to this confirmation to obtain the evidence necessary to reduce audit risk to an acceptably low level. Obtaining representations from

management is not a substitute for obtaining competent evidence, and an auditor may not accept less than persuasive evidence merely because she believes management is honest. See *PCAOB Standards and Rules* AU §§ 333.02, 230.09.

18. Respondent did not otherwise competently test sales or receivables. For example, although Respondent examined certain invoices to determine if the year-end sales cutoff was accurate, she relied on the former accounting manager to select the invoices. She did not examine AMG's sales journal to select her own sample of invoices, although her audit program called for her to do so, and she only skimmed the receivables aging report in her work papers without noticing details. Had Respondent examined the sales journal and aging report to select her own sample, she would have noted the large quarter end sales and discovered the false invoices, with their vague descriptions and lack of supporting documentation.

19. Similarly, Respondent's audit program called for her to complete certain steps to test collectability of receivables, including the examination of credit memos. Respondent examined certain credit memos, but relied on the former accounting manager to select them. Had Respondent examined the sales journal to select a sample of credit memos, she would have discovered the large credit memos that reversed the false invoices.

20. Respondent also failed to properly consider the risk of misstatements due to fraud in AMG's November 30, 2008 financial statements, as required by *PCAOB Standards and Rules* AU § 316. Respondent's work papers from this engagement do not indicate that she did anything to assess the risks of fraud other than ask the former chief financial officer, former accounting manager and an accounting clerk whether they knew of any fraud. She did not otherwise consider or assess any fraud risk factors including, for example, the recurrence of unusually large quarter end sales; the rapid growth of AMG's accounts receivable during 2008, which outpaced sales growth; the company's liquidity position and increased borrowings under the line of credit, which were linked to its accounts receivable balance; and the potential for management override given the extremely small size of AMG's accounting staff. See *PCAOB Standards and Rules* AU §§ 316.08, 316.19 and 316.57.

21. Finally, Respondent failed to conduct her quarterly reviews in accordance with professional standards. *PCAOB Standards and Rules* AU § 722 establishes standards and provides guidance on the nature, timing, and extent of the procedures to be performed by an independent accountant when conducting a review of interim financial information. A review of interim financial information consists principally of performing analytical procedures and making inquiries of persons responsible for accounting and financial matters. A review includes obtaining sufficient knowledge of an entity's business and its internal controls as it relates to the preparation of both annual and interim financial information to identify types of material misstatements and consider the likelihood of their occurrence. The specific inquiries made and analytical procedures performed in conducting a review should be influenced by the auditor's knowledge of the entity's business and internal control environment. See *PCAOB Standards and Rules* AU § 722.15.

22. Procedures that an accountant should perform when conducting a review of interim financial statements are enumerated in *PCAOB Standards and Rules* AU § 722.18.

Although Respondent performed some of the required analytical procedures and some of the required inquiries, she failed to inquire about many significant transactions recognized at the end of interim periods or about significant journal entries and other adjustments. Additionally, for the inquiries Respondent made, she failed to consider the reasonableness and consistency of management's responses to her inquiries in light of the results of other review procedures and her knowledge of AMG's business and its internal control. See *PCAOB Standards and Rules AU § 722.17*. For instance, AMG's receivables aging report for the fiscal quarters ended May 31, 2008, August 31, 2008 and February 28, 2009, which Respondent by her own account only "skimmed," reflected large and unusual quarter end sales. Respondent did not inquire about or perform other procedures with respect to most of these transactions. As for the few about which she did inquire, she simply accepted the former accounting manager's explanation that he had been too busy to invoice the customers before quarter end and had merely aggregated smaller invoices into one. This explanation was inconsistent with other information in Respondent's work papers, such as the receivables aging report, which reflected that the former accounting manager issued small invoices to customers on a daily basis throughout the quarter. Similarly, AMG's general ledgers for the fiscal quarters ended May 31, 2008, August 31, 2008 and February 28, 2009, reflected large quarter end sales that increased sales and accounts receivable, followed by corresponding credits recorded immediately after quarter end that reversed these sales and accounts receivable. These sales and credits were conspicuous in both amount and grouping. Respondent, however, did not review AMG's general ledger. Had she done so, she would have seen these suspicious transactions and extended her interim review procedures, in accordance with *PCAOB Standards and Rules AU § 722.22*.

#### **Violations**

Rule 102(e)(1)(ii) of the Commission's Rules of Practice provide that the Commission may temporarily or permanently deny an accountant the privilege of appearing or practicing before it if it finds, after notice and opportunity for hearing, that the accountant engaged in "improper professional conduct." In relevant part, Rule 102(e)(1)(iv) define "improper professional conduct" to include "[r]epeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, which indicate a lack of competence to practice before the Commission."

#### **Findings**

Based on the foregoing, the Commission finds that Respondent engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanction agreed to in Respondent's Offer. Accordingly, it is hereby ORDERED, effective immediately, that Respondent is denied the privilege of appearing or practicing before the Commission as an accountant.

By the Commission.

Elizabeth M. Murphy  
Secretary

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



purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 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

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

### III.

1. Frank, age 53, resides in Blooming Grove, New York. He is and has been an attorney licensed to practice in the State of New York. Frank provided advice to entities regarding compliance with the federal securities laws. In addition, Frank represented two defendants in connection with at least one civil injunctive action brought by the Commission.

2. On June 4, 2010 the Commission filed a complaint against Frank in SEC v. Frank, (Civil Action No. 10-cv-04452). On June 10, 2010, the court entered an order permanently enjoining Frank, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) thereunder.

3. The Commission's complaint alleged, among other things, that Frank, in violation of federal securities laws and in connection with the sale of \$2.278 million of securities to approximately 13 investors, promised investors that he, acting as their escrow agent, would pool their funds with other investor funds in a non-depletion account held in Switzerland where the funds would be leveraged to produce promised returns of between 10%-15%. The Complaint further alleged that instead of pooling investor funds in a non-depletion account in Switzerland, the funds were transferred to bank accounts in Hong Kong or used to pay promised interest payments to investors. These funds were never returned to investors.

IV.

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

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

Frank is suspended from appearing or practicing before the Commission as an attorney.

By the Commission.

*Elizabeth M. Murphy*  
Elizabeth M. Murphy  
Secretary

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 62388 / June 28, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13950**

**In the Matter of**

**Aris Industries, Inc.,  
Bene Io, Inc.,  
China Mineral Acquisition Corp.,  
Commodore Separation Technologies, Inc.,  
Food Integrated Technologies, Inc.,  
Gap Instrument Corp.,  
Skysat Communications Network Corp.,  
URT Industries, Inc., and  
Vicon Fiber Optics 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 Aris Industries, Inc., Bene Io, Inc., China Mineral Acquisition Corp., Commodore Separation Technologies, Inc., Food Integrated Technologies, Inc., Gap Instrument Corp., Skysat Communications Network Corp., URT Industries, Inc., and Vicon Fiber Optics Corp.

**II.**

After an investigation, the Division of Enforcement alleges that:

**A. RESPONDENTS**

1. Aris Industries, Inc. ("AISIQ")<sup>1</sup> (CIK No. 100979) is a dissolved New York corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AISIQ is delinquent in its periodic filings

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<sup>1</sup>The short form of each issuer's name is also its stock symbol.

with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2004, which reported a net loss of \$4,726,000 for the prior six months. On October 15, 2004, AISIQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, which was closed on August 20, 2008. As of June 23, 2010, the common stock of AISIQ was quoted on the Pink Sheets operated by Pink OTC Markets Inc. ("Pink Sheets"), had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Bene Io, Inc. ("BNIO") (CIK No. 1055176) 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). BNIO 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 \$2,407,000 for the prior three months. As of June 23, 2010, the common stock of BNIO 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. China Mineral Acquisition Corp. ("CMAQ") (CIK No. 1288633) 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). CMAQ 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, 2006, which reported a net loss of \$202,541 for the period from inception on March 30, 2004 to June 30, 2006. As of January 26, 2010, the common stock of CMAQ was traded on the over-the-counter markets.

4. Commodore Separation Technologies, Inc. ("CXOT") (CIK No. 1022381) 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). CXOT 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, 2004, which reported a net loss of \$276,000 for the prior six months. As of June 23, 2010, the common stock of CXOT was quoted on the Pink Sheets, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Food Integrated Technologies, Inc. ("FITT") (CIK No. 888952) 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). FITT 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, 1997, which reported a net loss of \$56,910 for the prior three months. As of June 23, 2010, the common stock of FITT 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. Gap Instrument Corp. ("GAPN") (CIK No. 39910) is a dissolved New York corporation located in Yaphank, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GAPN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended September 30, 1997, which reported a net loss of \$301,074 for the prior year. As

of June 23, 2010, the common stock of GAPN 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).

7. Skysat Communications Network Corp. ("SKATA") (CIK No. 919374) 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). SKATA 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, 1997, which reported a net loss of \$1,074,221 for the prior nine months. As of June 23, 2010, the common stock of SKATA 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).

8. URT Industries, Inc. ("UR TSA") (CIK No. 101461) is a dissolved Florida corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). UR TSA 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 April 1, 2000, which reported a net loss of \$772,029 for the prior year. As of June 23, 2010, the common stock of UR TSA was traded on the over-the-counter markets.

9. Vicon Fiber Optics Corp. ("VFOX") (CIK No. 718396) is a void Delaware corporation located in Pelham Manor, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VFOX 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 \$102,677 for the prior nine months. As of June 23, 2010, the common stock of VFOX 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).

#### B. DELINQUENT PERIODIC FILINGS

10. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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 hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

### 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any 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 permitted by the Commission Rules of Practice.

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule

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

By the Commission.

*Elizabeth M. Murphy*  
Elizabeth M. Murphy  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

June 28, 2010

**In the Matter of**

**Aris Industries, Inc.,  
Bene Io, Inc.,  
Commodore Separation Technologies, Inc.,  
Food Integrated Technologies, Inc.,  
Gap Instrument Corp.,  
Skysat Communications Network Corp., and  
Vicon Fiber Optics Corp.,**

**File No. 500-1**

**ORDER OF SUSPENSION OF  
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Aris Industries, Inc. because it has not filed any periodic reports since the period ended June 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Bene Io, Inc. because it has not filed any periodic reports since the period ended September 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Commodore Separation Technologies, Inc. because it has not filed any periodic reports since the period ended June 30, 2004.

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

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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 Gap Instrument Corp. because it has not filed any periodic reports since the period ended September 30, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Skysat Communications Network Corp. because it has not filed any periodic reports since the period ended September 30, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Vicon Fiber Optics Corp. because it has not filed any periodic reports since the period ended September 30, 2003.

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 June 28, 2010, through 11:59 p.m. EDT on July 12, 2010.

By the Commission.

*Elizabeth M. Murphy*  
Elizabeth M. Murphy  
Secretary

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 62390 / June 28, 2010**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 3042 / June 28, 2010**

**INVESTMENT COMPANY ACT OF 1940**  
**Release No. 29334 / June 28, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13951**

**In the Matter of**

**DAVID D. HEPWORTH,**

**Respondent.**

**ORDER INSTITUTING ADMINISTRATIVE  
AND CEASE-AND-DESIST PROCEEDINGS  
PURSUANT TO SECTION 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934,  
SECTIONS 203(f) AND 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**

**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 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 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 David D. Hepworth ("Hepworth" 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 21C of the Securities

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Exchange Act of 1934, Sections 203(f) and 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 ("Order"), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### Summary

1. These proceedings involve the misappropriation of approximately \$650,000 in investor funds by Hepworth, the former Chief Compliance Officer of Interfund Capital Corp. ("Interfund"), a Commission-registered investment adviser located in Ketchum, Idaho. From August 2007 to May 2009, Hepworth misappropriated money from investors in a private fund that Interfund managed in order to pay personal and business expenses. During this period, Interfund, aided and abetted by Hepworth, failed to maintain proper custody of client funds and securities.

#### Respondent

2. **David D. Hepworth**, age 52, is a resident of Swampscott, Massachusetts. Hepworth was Interfund's Chief Compliance Officer and was in charge of its day-to-day activities, including providing investment advisory services to a private pooled investment vehicle that it managed (the "Fund"). Through Interfund, Hepworth was compensated for these services, and was therefore an investment adviser under Section 202(a)(11) of the Advisers Act. He was never registered in any capacity with any state or with the Commission. Interfund terminated Hepworth's employment in July 2009.

#### Other Relevant Entity

3. **Interfund Capital Corp.**, a Delaware corporation based in Ketchum, Idaho, registered with the Commission as an investment adviser in June 2008. During the time it operated, Hepworth's spouse served as Interfund's President. Interfund ceased operations in July 2009, withdrew its investment adviser registration with the Commission in November 2009, and subsequently dissolved. While it was registered with the Commission, Interfund had approximately \$30 million in assets under management. From September 2003 to July 2009, Interfund provided investment advisory services to the Fund, which raised approximately \$6.3 million from 13 investors. The Fund has since liquidated.

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<sup>1</sup> 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.

## Facts and Violations

4. In 2003, Hepworth and Interfund's President formed the Fund to manage investments for a small number of friends. In addition to providing investment advice to the Fund, Hepworth was in charge of the daily administration of Interfund and the Fund, supervising their bookkeeper and interacting with broker-dealers. Both Hepworth and Interfund's President had signatory authority over the Fund's bank and brokerage accounts.

5. In mid 2007, Interfund began to expand its business and hired additional employees. As payroll and other expenses grew, Hepworth took a total of approximately \$376,000 in Fund assets on three separate occasions and used them to pay Interfund and personal expenses. On at least one of these occasions, the funds came from the proceeds of the sale of securities owned by the Fund. The use of Fund assets to pay for Interfund and personal expenses was contrary to the Fund's limited partnership agreement and private placement memorandum.

6. In addition to diverting Fund assets for Interfund's and his personal use, Hepworth misused Fund assets to over-pay two investors who requested redemptions in August 2007 and January 2009. Instead of admitting to the investors how poorly the Fund had performed, Hepworth caused the Fund to pay the investors a total of approximately \$274,000 more than was in their capital accounts at the time. Hepworth instructed the Fund's bookkeeper to deduct the overpayments from the capital accounts of his family members who were also Fund investors. Although Hepworth had signatory authority over some of these family accounts, he did not have signatory authority over others.

7. Hepworth's conduct went undiscovered in part because the Fund stopped providing account statements to Fund investors for a period of time beginning in 2007. Furthermore, the Fund's financial statements were only audited and distributed to investors in 2004, after its first year of operation. At no time did Fund investors receive account statements showing the Fund's securities and cash positions and transactions.

8. In July 2009, Hepworth disclosed his actions to Interfund's President. Interfund terminated Hepworth's employment and reported Hepworth's conduct to the Commission's staff. Hepworth and Interfund's President then borrowed money to reimburse investors for nearly all of their losses.

9. As a result of the conduct described above, Hepworth willfully violated 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.

10. As a result of the conduct described above, Hepworth willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser.

11. As a result of the conduct described above, Hepworth willfully aided and abetted and caused Interfund's violations of Section 206(4) of the Advisers Act, which prohibits investment advisers from engaging in acts, practices or courses of business which are fraudulent, deceptive or manipulative, as defined by rules and regulations thereunder, and Rule 206(4)-2 thereunder, which requires that an investment adviser maintain each client's funds in bank accounts containing only those client funds, notify its clients about the place and manner in which their funds are maintained, and have client funds and securities verified by an independent public accountant at least once a year without prior notice to the investment adviser.

#### Civil Penalty

12. Hepworth has submitted a sworn Statement of Financial Condition dated January 10, 2010 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's Offer.

Accordingly, pursuant to Section 21C of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Hepworth cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-2 promulgated thereunder;

B. Respondent Hepworth be, and hereby is barred from association with any investment adviser, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

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 him, 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 Respondent's sworn representations in his Statement of Financial Condition dated January 10, 2010 and other documents submitted to the Commission, the Commission is not imposing a penalty against him; and

E. 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*  
Elizabeth M. Murphy  
Secretary



## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III 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. Hozie, age 51, passed the Uniform CPA exam in Illinois, but has never been licensed as a CPA in any state. He served as an executive vice president and the chief financial officer of American Home Mortgage from March 2002 until June 2008.

2. American Home Mortgage Investment Corp. ("AHM" or "the Company") is a Maryland corporation headquartered in Melville, New York. In 2006, AHM was one of the nation's largest home mortgage lenders. AHM's common and preferred stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"). However, the NYSE filed Forms 25 delisting and deregistering AHM's securities from Section 12(b) of the Exchange Act as of September 17, 2007. Upon delisting, AHM's common stock was deemed registered pursuant to Section 12(g) of the Exchange Act based on its 537 common stock holders of record (as reported in AHM's 2006 Form 10-K) and the fact that its total assets for 2004, 2005 and 2006 exceeded \$10 million. Through the first quarter of 2007, AHM filed periodic reports, including Forms 10-K and 10-Q, with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder. Since May 10, 2007, the Company has not filed any required periodic reports. On August 6, 2007, AHM and its direct and indirect subsidiaries filed for bankruptcy protection. The Bankruptcy Court confirmed AHM's liquidating bankruptcy plan on February 23, 2009. Thus, the Company will ultimately cease to exist.

3. On April 28, 2009 the Commission filed a complaint against Hozie in SEC v. Strauss, et al. (09 Civ. 4150) (S.D.N.Y.). Hozie consented to a settlement of this matter. On June 7, 2010, the court entered an order permanently restraining and enjoining Hozie from direct or indirect violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 13(b)(5) of the Securities Exchange Act and Rules 10b-5, 13a-14, 13b2-1 and 13b2-2 thereunder and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-11 and 13a-13 thereunder. Hozie was also ordered to pay a \$225,000 civil money penalty and \$1 of disgorgement.

4. The Commission's complaint alleged, among other things, that Hozie fraudulently understated AHM's first quarter 2007 loan loss reserves by tens of millions of dollars, converting the Company's loss into a fictional profit. The complaint further alleges that Hozie made misleading disclosures concerning the Company's financial condition including misrepresenting the Company's liquidity and failing to adequately disclose the riskiness of the mortgages American Home Mortgage originated and held. The complaint further alleges that Hozie misled American Home Mortgage's auditor about the adequacy of the reserves, among other violations.

#### IV.

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

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

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

B. After five years from the date of this Order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission as an accountant provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission as 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 provided that his state CPA license or certificate is current and he has resolved all other disciplinary issues with the applicable state board 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